LAW·COMMISSION

Report No. 9

Company Law Reform and Restatement

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LAW·COMMISSION

Report No. 9

Company Law Reform and Restatement

June 1989
Wellington, New Zealand

The Law Commission was established by the Law Commission Act 1985 to promote the systematic review, reform and development of the law of New Zealand. It is also to advise on ways in which the law can be made as understandable and accessible as practicable.

The Commissioners are:

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1 June 1989

Dear Minister

I am pleased to submit to you Report No. 9 of the Law Commission, *Company Law: Reform and Restatement.*

The report proposes a basic law governing the creation, operation and termination of all companies. It recommends to you a draft Companies Act (comprising much of the Report) which, with two associated measures, would replace the 1955 Act and have substantially the same scope.

The associated measures are first the proposed Personal Property Securities Act recommended in our Report No. 8 and designed to replace Part IV of the 1955 Act relating to company charges, and second the proposed amendment to the Property Law Act 1952 set out in this Report and designed to replace Part VII of the 1955 Act relating to receivers. The separate form of these proposed measures is explained by the fact that they are not limited to companies.

The draft Companies Act also includes provisions relating to the liquidation of companies—a matter which is of course also covered by the present Act and must be dealt with in the law. Your reference to the Law Commission mentioned that the Department of Justice was conducting a review of the law and

practice of company liquidations and individual insolvency. Since that review has not been completed, we have thought it better to make suggestions for company liquidations rather than to put forward an incomplete legislative scheme.

The draft Companies Act and its associated measures maintain the distinction at present in the law between the basic company law and securities law, the law which governs those corporate bodies and individuals who offer securities to the public.

That is a useful distinction which we have not wanted to disturb.

Securities law is one part of the wider law relating to companies that has recently been and still is under review by a number of different agencies. The background of current activity underscores the public importance of the company in our commercial and legal systems. It has also reminded us in our work that if needed reforms are to be coherent, it is important for the underpinning legislation to be clearly based on enduring policy. We have sought in this Report to provide that underpinning.

Accordingly, we commend the draft legislation contained in this report—and that in our Report No. 8—to you for introduction in Parliament.

Yours sincerely

K J Keith
Deputy President

The Right Honourable Geoffrey Palmer MP
Deputy Prime Minister and Minister of Justice

PREFACE

1 This Report is a response to a reference given to the Law Commission by the Minister of Justice on 5 September 1986. The text of the reference is as follows

> The Law Commission is asked to examine and review the law relating to bodies incorporated under the Companies Act 1955, and to report on the form and content of a new Companies Act.
>
> The continuing work of the Securities Commission in the fields of takeovers, insider trading and company accounts will form part of this overall inquiry. Also related to this reference is the review being conducted by the Department of Justice of the law and practice of company liquidations and individual insolvency.

2 Following the reference, the Law Commission published a discussion paper on company law in December 1987 (Law Commission, Preliminary Paper No. 5) and a discussion paper on personal properties securities in May 1988 (Law Commission, Preliminary Paper No. 6). The submissions received in response have been thorough and thoughtful. We have benefited enormously from them in developing our proposals. In addition, a number of people generously gave of their time to comment upon drafts, make suggestions and generally act as

sounding boards for ideas. Their participation has greatly improved our proposals. Those who responded to the discussion papers and those who gave special assistance to us are acknowledged in Appendix A to this Report.

3 Review of the Companies Act 1955 is only part of the law reform process affecting company law which is currently under way. The work of the Securities Commission on insider trading and company takeovers has been or is being implemented in legislation which applies to companies which are listed on the Stock Exchange. The Securities Commission is also expected shortly to report upon reform of the law relating to company accounts. The Committee of Inquiry into the Sharemarket has confirmed the need for overhaul of the Securities Act 1978 and the Sharebrokers Act 1908, which particularly affect publicly listed companies. Investigation of companies at risk has been the subject of recent legislation to replace the Companies (Special Investigations) Act 1958. The Crimes Bill before Parliament has provisions dealing with fraud arising out of company activity. And the Minister of Justice has recently announced that a Serious Fraud Office is to be established largely to police serious corporate crime.

4 These initiatives underscore the significance of the company in our legal system and the need for the law to adapt to meet changing circumstances. They emphasise as well the importance of clear definition of the scope and policy of the basic law of companies, if overall reform is to be consistent and properly co-ordinated.

5 The Report is in the form of draft legislation with explanatory commentary. In providing a draft Act, the Law Commission has followed similar exercises in other jurisdictions, most notably Ghana and Canada. Reducing ideas to draft legislation helps to ensure that proposals are properly thought through. They make the Report a less lengthy document than would have been the case if proposals had been generally described. But the scope of a companies statute is huge and the draft Act is itself a substantial document.

6 There are two problems with a report in the form of a draft Act: reading legislation does not grip most people, particularly when the legislation is as lengthy as this draft Act; and the

policy issues may not be sufficiently apparent from the text of the draft Act, even to those who are expert in the field.

7 The format of the Report attempts to overcome these problems by providing both a detailed commentary to be read with the particular provisions of the draft Act, and introductory chapters which summarise the principal recommendations and the major policy themes in the proposals. The introduction and commentary summarise our reasoning. We have not attempted to write a treatise on company law and its reform. Given the size of the topic, such a project would have required a report of formidable length and involved a great deal more time. We also think it is unnecessary. The essence of the Report and our proposals is the draft Act.

8 The introductory material is divided into three chapters. Chapter I outlines the main policy approach. Chapter II sets out the principal recommendations of the Law Commission. Chapter III explores the general issues and themes of the reforms and may be of more interest to those familiar with the current law.

9 The commentary is contained in Chapter IV. The proposed new Companies Act makes up Chapter V. (A comparative table relating this to the 1955 Act is included as Appendix B.) And the proposed Property Law Amendment Act dealing with receiverships together with an explanatory commentary makes up Chapter VI.

I
Introduction

OUTLINE OF SIGNIFICANT REFORMS

10 The most significant reforms proposed are

- enactment of a new Companies Act to replace the 1955 Act
- abolition of the concepts of par value and nominal capital as part of a reform of the rules about share capital and the maintenance of capital
- the enabling of companies to buy their own shares and finance the acquisition of their shares (in reversal of the current law), subject to protections for shareholders and creditors
- redefinition of the distribution of power within the company by direct operation of statute rather than by a deemed contract
- expression in the statute of a standard form of company constitution which will apply unless expressly varied by the company constitutional documents
- a fuller restatement in the statute of the duties and powers of directors
- recognition of the circumstances in which the interests of existing shareholders need special protection

- a comprehensive system for protection of minority shareholders including
  - dissentient rights to buy-out where class rights are affected
  - improved standing to enforce through the Courts obligations owed to the company and directly to shareholders
- greatly simplified liquidation rules
- requirements for experience and independence in those conducting liquidations and receiverships
- restatement of the law relating to receiverships in the Property Law Act 1952
- removal of the law relating to company charges from the Companies Act and its incorporation in a comprehensive Personal Property Securities Act, as recommended in the Law Commission's Report No. 8.

THE SCOPE OF COMPANY LAW

11 In New Zealand, as in other economies based on private ownership, the company form remains the major legal mechanism for economic development. The reason for its significance is the efficiency and flexibility of the company as a system for organising aggregation and use of capital.

12 Despite the importance of the company, company statutes such as our Companies Act 1955 are relatively unexciting. Inevitably they are largely technical. Company laws are in large part enabling in that they provide the processes for the creation of companies, their operation and termination.

13 Thus the Companies Act 1955 deals with

- *Incorporation* The Act sets up a system for incorporation by registration under the supervision of the Registrar of Companies.
- *The internal organisation of the company* The Act covers
  - the form and effect of the memorandum and articles of association

- the rights of membership in the company
- how the company can act
- share capital and debentures
- the registration of charges created by companies
- management and administration of the company (including the holding of meetings, reports to shareholders, accounts and audit, inspection of the company's records, the powers and liabilities of directors and authorisation of reconstruction of the company)

• *The winding up of the company.*

14 To the extent that the 1955 Act regulates company activity, the regulation is designed to protect shareholders and creditors against abuse of the company form, rather than to achieve more general social objectives.

15 While this Report proposes major reform, it accepts that the general scope of the 1955 Act is the proper scope for a Companies Act.

16 The draft Act contained in this Report therefore lays down a basic law which allows companies to be set up, provides for their termination and sets out the processes for their internal organisation between formation and termination. It regulates company activity only to the extent necessary to protect against abuse of the company form. The concern of the draft Act is therefore with what may be called a "core" Companies Act.

17 A core company law is only part of the wider law which applies to companies. In the reform, we endorse and build on the distinction in our current law between securities law and company law (discussed further in paragraphs 130-134 below). Much less than one percent of companies raise capital from the public (the exact number is not known but listed companies acount for only 209 of the approximately 150,000 New Zealand registered companies). For those companies, investor confidence and protection is principally safeguarded in other ways.

18 The reform proposals contained in this Report are put forward on the basis that the additional safeguards imposed in

the public interest under the Securities Act 1978 will be superimposed upon companies which offer securities to the public. The role of the Stock Exchange in regulating those companies is also significant. Both the Securities Act 1978 and the role of the Stock Exchange are under review. We consider that substantial reform of both the Securities Act and the Sharebrokers Act 1908 is required and that a comprehensive review should include

- examination of the extent to which diversity in company form should be restricted in the case of companies which offer securities to the public
- reassessment of the enforcement agency charged with securing compliance with securities law.

19 In accepting that internal regulation is the proper focus of a Companies Act, we have also taken the view that a Companies Act is not the appropriate vehicle for imposition of general social reforms such as a requirement of worker participation in management or the imposition of environmental goals upon companies. These matters should be pursued through specific legislation imposed upon all employers and business enterprises.

POLICIES FOR COMPANY LAW

20 The Law Commission has prepared this Report on the premise that a good system of company law should

- provide a simple and cheap method of incorporation and company organisation which is flexible enough to meet the needs of diverse organisations
- clearly identify the duties and powers within the corporate structure in an Act designed for use by directors and shareholders and not just lawyers and accountants
- provide for better accessibility to company law by setting up the Act as the statement of first recourse in identifying rights and duties within the company
- ensure that regulation to prevent abuse is appropriate (that is to say, directed at the abuse of corporate structure or limited liability) and is commensurate with the

risk of abuse so as not to frustrate the economic and social benefits of the company form

- maintain and build upon a distinction between the aims of company law and securities law: company law being concerned with the incidents, benefits and abuses of the corporate form; securities law having a wider concern with the integrity and efficiency of capital markets.

21 All Companies Acts are concerned with striking a balance between enabling use of the company form and regulating to prevent its abuse. Striking such a balance is a matter of judgment on which views will differ. The proposals made in this Report strike the balance the Law Commission considers to be appropriate for New Zealand conditions. They have been tested against overseas experience with more modern statutes, and against local experience with the 1955 Act. And we have sought to make sure that proposals for reform are tested against principle.

22 A major concern has been to ensure that the balance struck does not undermine the economic and social benefits of company form. These benefits are derived from five main characteristics

(a) Recognition of the company as an entity distinct from all its shareholders (legal personality). The achievement of legal personality has meant that a company can have continuity and perpetual succession despite the death or departure of individual investors. The financial standing of individual investors need not affect the enterprise or other investors. Legal personality has made possible enterprises of a scale unthinkable if constrained by human life or the financial resources of individual shareholders.

(b) The flexibility and adaptability of the company form. This has meant that the company has been an appropriate vehicle for enterprises which differ enormously: the corner dairy and the major industrial conglomerate and widely differing enterprises in between.

(c) Ease of transferability of investor interest. Transferability of investor interests is facilitated by their division into units of property, called shares. The share identifies a bundle of legal rights which vary greatly. Usually they include rights to the residual assets on winding up, to dividend payments and to vote on matters reserved to the shareholders. Transferability of these rights facilitates aggregation of capital because investors do not have to discount their investment for lack of liquidity. The benefits of transferability may be excluded or restricted by the company constitution, or may be largely circumscribed where there is no ready market for the disposal of the rights. But ready transferability of shares is a preferable option to more wasteful and disruptive methods of achieving liquidity (such as dissolution and buy-outs) and it is an essential precondition of organised stock markets, through which most large enterprises raise capital.

(d) Limited liability for investors. Not all companies have limited liability but its availability is a main explanation for the success of the company form. Since its establishment in 1855, its social benefit has been proved: every jurisdiction operating along capitalist lines has adopted limited liability. Although it is often cut down by contractual arrangements between creditors and the owners of small companies, it remains fundamental to our system of company law. The Law Commission proposes no reassessment of its place. It is important to appreciate that the benefits of limited liability lie not only in the limitation of risk to individual investors (which is an incentive for aggregation of capital) but also in enabling risk-taking. The taking of business risks is central to the success and social utility of the company.

(e) Specialised management, separate from ownership. While small companies do not usually require specialised management, it has been critical in the

efficient use of capital by larger companies. Separation of management from ownership, especially in large organisations, means that directors must be entrusted with wide discretionary powers to make business judgments in diverse and often unforseeable circumstances.

23 These five characteristics are essential to our system of company law. They confer economic and social benefits. They also carry the risk of abuse. In particular, outsiders are at risk when dealing with the company because of its separate legal status; creditors are at risk from limited liability; shareholders are at risk from abuses of power by directors. Company law is largely concerned with containing the risk of abuse within acceptable bounds while not undermining the substantial benefits for investors and for society in general which these five characteristics provide.

24 In our review, we have been concerned to test existing regulation and proposals for reform against the characteristics, the benefits they confer and the abuses they give rise to. In some cases, reform proposals are prompted by an assessment that the balance in existing legislation or in judge-made law has been wrongly struck. In other cases, reform proposals directed at known abuses have had to be tempered in order not to defeat the benefits.

THE NEED FOR REFORM

25 Applying these policies, the Law Commission has come to the conclusion that New Zealand company law is in need of thorough overhaul.

26 The present Act gives rise to four main concerns

- a need for more accessible and intelligible law.
  Under the present system, the powers and duties within a particular company require knowledge and understanding of the memorandum and articles of the company, the Act and the case law (in which some of the most important company law rules are to be found).

- the fact that some significant rules of company law are based on policies which have become outdated or are out of step with modern practice
- the extent to which the system of the Act has been overtaken by or overlaps other legislation, most importantly the Securities Act 1978
- a perception in the community that our system of company law has been unequal to the task of preventing abuse.

27 These concerns are discussed further below. The major reforms proposed in this Report to deal with them are incompatible with the structure of the present Act. They include the proposals for simplification of the Act and the restatement in it of the major rules of company law at present found in the case law; substantial overhaul of the notion of share capital (with abandonment of concepts of nominal capital and par value); reassessment of the distribution of power within the company and the position of and remedies available to minority shareholders; and streamlining of the registration system to provide both a more useful method of registration and a better public service.

28 Thus the Law Commission believes that selective amendment of the 1955 Act is not sufficient, and that that Act should be replaced.

THE OPPORTUNITY

29 The New Zealand Companies Act was passed in 1955. At that time it was an almost exact copy of the United Kingdom Act of 1948. The following of English precedent has been a tradition of New Zealand company law since the first Act of 1860. With United Kingdom company law now increasingly influenced by European law, it no longer provides an obvious model for us.

30 Although the 1955 Act has been substantially amended over the last 30 years, it is now out of step with the more recent company statutes of the United Kingdom, Australia and Canada.

31 The last review of the New Zealand Companies Act was by the Macarthur Committee, which reported in 1973. That Committee did not attempt any reappraisal of the Act against fundamental principle, but rather concentrated on the strains then apparent in it. The main sources of the Macarthur Report were the United Kingdom Jenkins Committee Report of 1962 (Cmd 1749) and the Australian Uniform Companies Act of 1961. Both have long since been superseded by further reform in the United Kingdom and Australia. To the extent that the Macarthur Report remains unimplemented, it no longer provides a blueprint for systematic reform and is based on a number of assumptions now out of date.

32 We owe a special debt to the pioneering work in company law reform of the Canadian Dickerson Committee which reported in 1971. It recommended sweeping changes. The Canadian statutes which have followed it during the last 10 years have provided us with working models for reform.

33 The present reference has provided the opportunity to reappraise the basic principles of company law and their application. We have come to the conclusion that substantial change is required. Although the proposals made may seem revolutionary to some, they generally have working models in Canada and the United States. But the crucial elements of the company as we have always known it are confirmed in the reforms proposed. Deadwood has been pruned away but the essential elements of the company remain. They have been distilled from the existing legislation and the case law and restated in the draft statute to make them more accessible and useful.

IMPACT OF OTHER INITIATIVES AND EVENTS

Securities Law Review

34 Reform of any statute does not take place in a vacuum. Mention has already been made in the Preface of the reviews of securities law which are under way. Although the objectives of securities laws are, in our system, separate from company law objectives, they do have significant impact upon the operation of many companies. While we consider that maintaining a

distinction in the legislation between companies and securities law is desirable as permitting better focus, some overlap of the running of each system is to be expected. In a small country like ours, functional purity cannot be pushed too far without duplication and waste of resources.

35 In the draft Act, public enforcement of company law obligations is vested in the Attorney-General. If, as a result of the overhaul of the Securities Act, a permanent enforcement agency is established for securities law enforcement, it may be considered sensible to give that agency also the public enforcement powers conferred under the Companies Act. We do not make recommendations about securities law enforcement reform because it is outside the scope of our reference. But we record that our consultation for this Report showed considerable dissatisfaction with the present system of enforcement through the Registrar of Companies and the Securities Commission. Both the Registrar and the Securities Commission have important functions other than enforcement: the Registrar is responsible for the registration system and is also the Official Assignee; the Securities Commission has substantial law reform functions. We suggest that when enforcement is reviewed, consideration should be given to providing a single focus for any enforcement agency.

Harmonisation

36 Commercial law reform in New Zealand must take into account the 1988 memorandum of understanding executed between the Attorneys-General of Australia and New Zealand aimed at harmonisation of business laws.

37 Harmonisation under ANZCERTA (Australia and New Zealand Closer Economic Relations—Trade Agreement) seeks the creation of an environment conducive to the growth of trade in goods and services. Much of company law has little impact on trans-Tasman trade. Where it has, as for example in the law relating to company insolvency, we have been particularly conscious of the ANZCERTA implications. In other areas, where the effect on trade is not as clear, we have still approached the review on the basis that conformity is, in the area of business law, desirable.

38 For the reasons more fully set out in paragraphs 145-153 below, the Law Commission believes that the present Australian legislation does not provide an acceptable model for company law reform. It is outdated and dense in form. While we do not see harmonisation as requiring replication of the law in detail, the difference between what we propose and the existing Australian system goes well beyond detail. To follow the Australian companies legislation would preclude the major reforms proposed in this report of abolition of par value and nominal capital and the introduction of a better and more principled system of director accountability and shareholder remedy. It is the view of the Law Commission that there is little point in bringing in a new Companies Act if it does not achieve these reforms.

39 Australian company law is, moreover, in a state of flux. Proposals for substantive reform are under consideration but have largely stalled while current initiatives to have Australian company legislation consolidated in a Federal statute are pursued. A consolidating Bill was introduced in May 1988 and at the time of this Report has just been referred back to the House from the Senate.

40 The responses to the discussion paper generally opposed following Australian company law. They pointed out that the advantages of harmonisation of core company law were less important than harmonisation of trading law and the laws relating to capital markets. Core company law was seen as more appropriately a domestic matter.

41 In the core company reform, the Law Commission recommends that the reform proposed should proceed now, even though the result will be that New Zealand core company law will be quite different from the existing Australian legislation and the Bill currently being considered by the Australian Parliament. We believe that the draft Act is a substantial advance on both the existing New Zealand legislation and the existing and proposed Australian legislation. We would expect that harmonisation of New Zealand and Australian company laws in the future might work from the base provided by the Act proposed in this Report.

42 In the case of company insolvency, the benefits of harmonisation are more evident and we have generally sought to follow Australian reform initiatives, although the draft Act contains many differences from the Australian proposals.

October 1987

43 In the aftermath of the slump in the New Zealand stock market in October 1987, there has been widespread comment that the severity of the downturn in investor confidence was contributed to by ineffective legislation. That perception has weighed with us as a factor properly to be taken into account in law reform but we have been concerned that expectations of what company law reform can achieve should be realistic.

44 Much of the criticism levelled at our laws seems more appropriately directed at the Securities Act 1978 and the Sharebrokers Act 1908, rather than at the Companies Act. Some of the more extreme criticisms are misconceived or exaggerated. Our laws are not as lax as some would suggest, although their impact is not easily understood because they are only in part statutory. Although out of date, they cover very much the same ground as their counterparts in the United Kingdom, Australia and Canada.

45 The draft statute does propose substantial reform to the law relating to directors' duties and their enforcement. To the extent that these aspects of our laws have been a cause of public concern in the aftermath of the events of October 1987, the draft Act addresses them.

46 While not ignoring recent experience of the operation of our existing laws and the critical public comment on them, we have been particularly concerned to test proposals for reform against enduring principle in order to strike a balance which provides sufficient protection against abuse without unacceptably eroding the benefits of use of the company form. The draft statute has been developed as a package, referable to general objectives in overall reform.

EXPECTATIONS FOR REFORM

47 In developing its proposals, the Law Commission has kept in mind the warning of another body charged with company law reform. The Jenkins Committee, which reported in the United Kingdom in 1962, expressed the caution that company law

> is not a field of legislation in which finality is to be expected. The law here falls to be applied to a growing and changing subject matter . . .

48 The Law Commission does not expect that the proposals made in the Report, if implemented, will meet all changing circumstances. Those who use the company form are adept at discovering ways around inconvenient legislation. Very often that circumstance will itself prompt a reappraisal of the law as being out of step with commercial reality. In other cases, if there is clear abuse of those the statute is supposed to protect, amendment will be appropriate.

49 What we have tried to do in our proposals is to set up a structure in the legislation which is referable to clear policy objectives. At present, many of the policies of the law in the area of company regulation are difficult to articulate. In those circumstances, tack-on amendment has often served to confuse the position and make the legislation impenetrable. It is hoped that the policies of the draft Act are apparent and that, if enacted, future amendment will be able to be tested against and made consistent with them.

TIMING AND TRANSITION

50 Thorough overhaul of the present Act is a matter of urgency. In particular, the existing law relating to directors' duties and shareholder protection is unsatisfactory. Further review of the laws affecting New Zealand companies, most notably the Securities Act 1978, is also urgent. Unless the future direction of basic company law is settled, there is a danger that other reforms will be delayed or will be carried on in a piecemeal way without a principled foundation.

51 For reasons canvassed in Chapter I and paragraphs 145-153, the reforms should proceed despite the fact that they diverge from current and proposed Australian legislation and are in advance of Australian reform.

52 There is little difficulty in applying to existing companies much of what is contained in the Report. The standards of conduct for directors, for example, are important reforms which it is appropriate to apply to existing companies. Similarly, the imposition of a solvency test before distributions can be made to shareholders can be applied directly to all existing companies.

53 The perfection of the reforms which remove restrictions on the capacity of companies will require a period of adjustment. This will enable those companies which wish to continue restrictions on their powers to confirm them by reregistration. We propose a period of three years for this adjustment.

54 Of more difficulty is the application of the reforms suggested for share capital and the company constitutional arrangements. Imposition of the presumptive constitutional arrangements could have serious consequences for vested rights. Automatic application of the new Act would have complex consequences. It would be extremely difficult to devise transitional provisions which would operate fairly in all circumstances.

55 Our preferred solution is to require reregistration of all companies within a period of three years.

56 We have concluded that the Companies Act 1955 is no longer suitable for the circumstances of New Zealand companies. Having made that assessment, it seems to us to be undesirable not to apply the new system to all companies and instead to carry on two systems. Such a result seems to us to be costly and confusing.

57 The Canadian reformers have faced this issue before us. They concluded that it was necessary for the new Act to be a single system after a period of adjustment. We agree with the Institute of Law Research and Reform of Alberta (Report No 36, "Proposals for a New Alberta Business Corporations Act" at page 165) that

On the whole, we think that the bullet should be bitten, and that each company should be required to file a new constitutional document. We recognise that such a requirement will impose cost on each company and that it will impose upon each company the need to do additional paper work and go through additional procedures, none of which will appear relevant to the day to day functioning of companies which appear to be operating satisfactorily under the Companies Act. Our reasons for recommending such an imposition are, firstly, that the interest of the commercial community and of the public generally will be served by the introduction of the proposed ABCA, and, secondly, that the one-time cost of filing new documents is a lesser evil than the long-term costs of trying to live indefinitely with constitutional documents which do not fit in with the legislation. The cost of the proposed ABCA should, in our view, be recognised, accepted, and met.

58 A substantial advantage in "biting the bullet" now for New Zealand is that reregistration also provides an opportunity to clean out the register and get it into better shape to facilitate computerisation. We envisage that under the draft Act many companies will not adopt constitutions which vary the standard provisions in the Act and that those which do so will have very much shorter constitutions than the standard articles of association currently provide. We are of the view that the registration system can be made much more useful for the future if this opportunity is now taken.

59 It will, of course, be necessary to set up a process by which those whose rights might be affected by a change to the company constitution are able to participate in the decision and can seek relief where their class rights would be affected. It is difficult to know in how many companies such a process would be required.

60 We have not tried to draft transitional provisions because it has seemed to us that until the policy direction is set, the exercise is wasteful. What we envisage, however, is that the transitional provisions would be by amendment to the 1955 Companies Act.

61 The transitional provisions should require the company within three years of the coming into effect of the draft Act to file with the Registrar an application for registration and any constitutional document to be adopted.

62 Shareholders should be required to vote by special majority on the application for registration and the form of the constitution, if any. Where the constitution proposed would have the effect of altering class rights, dissentient shareholders should have the right to apply to the Court under section 209 of the Companies Act 1955 for relief. The Court should expressly have the power to alter the constitution where it thinks fit.

63 The only sensible sanction for failure to register within the time specified is liquidation, on application of any shareholder, creditor or the Registrar. That may seem extremely harsh, but if we are not to operate two parallel systems of company law, it is difficult to avoid. Deeming provisions which would apply the standard constitution under the new Act are not an option because they may well cut across vested rights in a manner that is wholly unacceptable.

64 As to timing, we are of the view that a long period of time is simply an incentive to procrastination. For that reason, we consider that a period of three years will enable everyone affected to have sufficient time to adjust.

65 The new Act will, of course, apply immediately to all new companies. We think its provisions relating to director duties and accountability and the solvency test for distributions should also be imposed upon all existing companies at the time it comes into force.

II

Principal Recommendations

THE FORM AND SCOPE OF THE LEGISLATION

66 There should be a new Act to replace the Companies Act 1955.

67 The new Companies Act should be concerned with the formation, operation and termination of all companies. It should contain the basic law applicable by reason of shared principle to all companies. Legal requirements not derived from those shared principles or applicable only to some companies (for example, to listed companies) should be imposed through specific legislation and rules superimposed upon the general company law base.

68 The new Act should maintain and build upon the present distinction in New Zealand law between the Companies Act and the Securities Act. The recommendations for company law reform postulate the existence of an adequate and effective securities law.

69 The purpose of the new Act should be to facilitate the use, and minimise the possibilities of abuse, of the company form. It should not seek to achieve other social objectives, such as worker participation in management or environmental protection. As appropriate, these should be implemented by other specific legislation.

CLASSIFICATION OF COMPANIES

70 The present classification of companies into private and public companies should be abolished. It should not be replaced by a distinction between closely-held and other companies.

71 It is unnecessary to maintain separate classification in the Act for

- companies limited by guarantee
- unlimited liability companies
- no-liability companies

because all these forms can be catered for under the draft Act by adaptation of the constitution of the particular company.

72 The existing special provisions for mining companies should be dropped; and those for insurance companies should be removed from the Companies Act and relocated in legislation concerned with insurance industry regulation.

COVERAGE OF ACT

73 Matters currently covered in the Companies Act 1955 which are not referable to the use and abuse of company form should be removed from a new Companies Act and be dealt with in other legislation.

74 In particular

- the law relating to company charges (Part IV of the Companies Act 1955) should be contained in a new Personal Property Securities Act, as recommended in Law Commission Report No 8
- the law relating to receivers and managers (Part VII of the 1955 Act) should be contained in an amendment to the Property Law Act 1952 as recommended later in the Report
- if the provisions in the 1955 Act relating to partnership (section 456) are to be retained, they should be re-enacted in the Partnership Act 1908.

INCORPORATION

75 The one-person company should be explicitly recognised by permitting one shareholder and one director.

76 Company constitutions should be simplified by providing for a standard constitution in the statute so that only variations from it need be contained in a constitutional document. The division between the memorandum and articles of association of the company should be abandoned.

77 The system of allocation of company names should be streamlined both by providing a default name system by allocation and by restricting the discretion of the Registrar to refuse registration of names selected. Names would have to be selected in good faith for the purpose of identifying companies. Protection against undesirable names would be given by retention of a power to remove names from the register.

78 The discretion of the Registrar in incorporation should be restricted to ensuring compliance with the forms prescribed, rather than substantive compliance with the Act.

79 The initial statutory meeting should be abolished.

THE COMPANY CONSTITUTION

80 There should be a statutory standard constitution for all companies which would apply except in so far as expressly supplanted for a particular company by a written document. The overall constitution would operate in place of the present system of memorandum and articles.

81 The standard constitution, and any modification of it, should confer rights directly and not, as the 1955 Act provides, by deeming the constitutional documents to be a contract.

82 The standard constitution should

- confer powers of management upon the directors
- provide for only one class of shares with each share having an equal right to
  - vote
  - receive distributions

- receive the net assets of the company prior to removal from the register

• confer voting rights upon shareholders in respect of

- election of directors
- change of the constitution
- approval of mergers and sale of major assets.

83 Companies should be free to vary this allocation of power, so that they can be structured to meet particular aims and circumstances. (For example, closely-held companies may provide for shareholder management rather than director management or may, by creation of different classes of shares, entrench veto rights or the right to appoint directors.) Such variety is necessary if the law is to be responsive to the complex and diverse circumstances of individual enterprises. However, there should be mandatory overriding requirements for the protection of creditors and minority shareholders. The mandatory requirements imposed by the draft Act include the directors' duties, the solvency test, restrictions on director delegation and voting procedures where shareholder rights are affected. (The scope of the optional company constitutional document is described below at paragraphs 164-183.)

SHARE CAPITAL

84 The arbitrary and misleading concepts of nominal capital and par value should be abandoned. Instead more direct safeguards should be introduced for creditor and shareholder protection. In particular, the draft Act would

• require adequacy of consideration on issue of shares

• impose a solvency test to be satisfied before the company can make distributions to its shareholders

• require equal treatment of shareholders in issue of shares and distributions except where the constitution of the company expressly authorises otherwise

• permit company share repurchase and allow companies to assist in the purchase of their shares, subject to safeguards for solvency and shareholder protection

- abandon the terminology of "ordinary shares" and "preference shares" and permit diversity in the share structure of the company where the company's constitution varies the normal incidents attached to shares.

MANAGEMENT OF THE COMPANY

85 Where the management of the company is given to the directors (as it will be under the standard constitution), shareholders should be protected against abuse by

- providing for the matters the directors must take into account before exercising any general powers of management
- imposing particular duties when directors exercise powers which have direct effect upon the shareholders' proprietary interests or where directors have a conflict of interest
- providing for shareholder determination wherever class rights (rights to vote or to share in distributions) are affected or there is a fundamental change to the company (by merger or by sale or acquisition of a major asset) and for the dissentient minority to require that they be bought out in such cases, unless the company constitution expressly excludes it
- giving a remedy to shareholders and creditors seeking to prevent a proposed breach of the company constitution or the Act
- providing for liability of directors to the company and to shareholders for breach of duties owed to them
- providing for liability of directors upon insolvency, where the directors have been in breach of duties imposed as a protection for solvency
- providing for more effective remedies for breach of duty.

86 More effective enforcement of the obligations under the company constitution and the Act should be secured by

- giving all shareholders standing, with leave of the Court, to bring a derivative action on behalf of the company
- removing the power of the general meeting to ratify director wrongdoing
- recognising the circumstances in which shareholders have standing to bring actions for duties owed directly to them and to require compliance with the constitution
- providing for Court supervised funding by the company of derivative actions brought on its behalf
- providing for the Attorney-General to have standing to bring derivative actions on behalf of the company or representative actions on behalf of shareholders
- providing for better rights of inspection and investigation of company records by shareholders and the Attorney-General
- providing a procedure for injunctive relief for shareholders and creditors to restrain proposed action in breach of the company constitution or the Act.

87 The duties of directors should in most cases be owed to the company itself. In some cases, however, the draft Act explicitly recognises duties owed to existing shareholders. The explicit recognition of the interests of existing shareholders is intended as a rejection of the equation of the company with its "collective shareholders".

88 The company should be empowered to purchase insurance against liability of directors for negligence, provided the cost of such insurance is disclosed to shareholders annually in the same manner as payments to directors. The prohibition on indemnity by the company or for purchase of insurance in cases of dishonesty should be continued.

89 Significant new features of the system proposed include

- an emphasis on class rights, being the rights to vote and to receive distributions both during the life of the company and prior to its removal from the register

  Class rights should include (unless the constitution expressly provides otherwise) the right not to

be diluted by the creation of equally ranking shares (protected against by shareholder pre-emptive rights on issue) and the right to participate on a pro rata basis in company share repurchase.

- voting by affected interest groups for alteration of class rights, so that those affected vote together
- a buy-out requirement where a change to class rights or a fundamental change to the company is passed by a special majority, so that dissentient shareholders who voted against the change can seek to have their shares purchased (subject to safeguards for the company)
- a requirement of shareholder approval of major transactions (those transactions which result either in the acquisition of assets equivalent to the greater part of the assets of the company before the acquisition or which amount to the disposition of the whole or the greater part of the assets of the company)

  They require shareholder approval in the manner of a change to the constitution and trigger dissentient rights (the right of the minority to be bought out, see paragraphs 202-207).

90 In the case of alteration to the constitution, alteration of class rights or major transactions, the majority required for shareholder approval should be a special majority of 75 percent of those entitled to vote.

91 Directors should be permitted to delegate powers of management but must monitor and supervise those to whom powers are delegated.

92 Directors should be under a duty to maintain company information in confidence. Directors who use such information without company approval and without paying adequate value to the company for the information should be liable for any loss suffered by the company. Where the confidential information materially affects the value of the company's shares, the directors should be liable to any shareholder they deal with for the difference between the value given and the actual value.

93 Nominee directors should be permitted to disclose confidential information to their nominating shareholder only

where the relationship is disclosed to shareholders. Nominating shareholders who make use of the confidential information should be liable to the company or to any shareholder dealing with the nominating shareholder in the same manner as if the nominating shareholder were a director.

94 Where the company constitution confers powers of management upon shareholders and not directors, they should be subject to the same general duties imposed upon directors in exercising powers of management. However, shareholders exercising the voting rights reserved to them under the standard constitution should be seen to be exercising proprietary rights and may act in their own interests.

COMPANY ADMINISTRATION

95 All existing companies should have the capacity of natural persons unless, within three years, they file a constitution containing restrictions upon their powers. Third parties should not be affected by any restriction upon the powers of a company unless they have actual knowledge of that restriction.

96 Companies should not be required to have a seal.

97 Subject to variation by the constitution, the Act should provide that obligations which bind the company may be entered into by the sole director or two or more directors of the company or by any person acting on behalf of it.

98 Companies should not have to issue share certificates (although subject to their constitution they may do so), but must provide a statement of a shareholder's rights whenever reasonably requested to do so.

99 Telephone meetings of shareholders and directors should be provided for, and resolutions in place of meetings should be permitted where all entitled to take part in the meeting consent in writing.

100 There should be provision for annual shareholder meetings. Shareholders exercising 5 percent of the voting rights in the company or the Court, on application by any shareholder, should be able to call special meetings. Shareholders should be

given improved rights to have proposals included in the agenda for the next meeting of the company.

101 The legislation should no longer require the company to have a secretary.

ACCOUNTS AND AUDIT

102 The Eighth Schedule to the 1955 Act, which provides for the form of company accounts, should not be re-enacted. The primary obligation should be upon directors to ensure that the financial statements of the company give a true and fair view of its affairs. Without limiting that primary obligation, financial statements should be required to comply with any regulations made under the Act. (This should facilitate legislative adoption from time to time of accounting standards should that be thought desirable.) Compliance with any such regulations should not, however, absolve the directors from their primary responsibility.

103 Companies should continue to be required to prepare balance sheets and profit and loss accounts, as at each balance date of the company. They should also be required to prepare statements of cash flow.

104 Audit should be required in any accounting period if requested by a shareholder or director of a company or at any time where ordered by the Court for cause. (It is envisaged that all companies which offer securities to the public will be required under the Securities Act to have audited accounts.)

DISCLOSURE BY COMPANIES

105 Shareholders should have better rights to information about the company. The draft Act provides for

- an annual report which includes the financial statements of the company, any auditor's report, a statement of any change in accounting policies, a description of any changes to the company's business, disclosures of director interest and charitable or political donations

- a special report containing relevant information where the company is subject to an offer to acquire 20 percent or more of its shares
- specific notification of certain actions taken by the directors required to be notified to shareholders under the draft Act (as, for example, on selective repurchase of shares).

106 The company should be required to make an annual return to the Registrar of Companies confirming or amending the information that must be maintained on the register. The present requirement for public companies to make disclosure of their annual financial accounts should be discontinued. (In the case of publicly listed companies, public disclosure of their annual accounts will, it is envisaged, be required under the Securities Act and the Stock Exchange Listing Requirements.)

107 The company should be required to maintain and make available for public inspection

- its constitution (to the extent that the standard provisions of the Act are modified)
- its share register.

108 In addition, the company must make available for inspection by shareholders

- minutes of all shareholder meetings and resolutions
- copies of all written communications with shareholders for the preceding three years
- the interests register of the company (recording director notification of conflict of interest and dealing in shares).

COMPANY RECONSTRUCTION

109 The present provisions of the 1955 Act requiring Court supervision of company reconstructions should be retained only as a backstop. In normal cases, the company should be able to reconstruct itself by special shareholder vote with dissentient right safeguards where class rights are affected or the

reconstruction involves a major transaction. Where the creditors are affected, their approval will have to be obtained under the provisions of the draft Act relating to compromises.

110 The existing section 208 should not be re-enacted in a Companies Act. If it is thought desirable to retain a power of compulsory acquisition for takeovers, that should be provided for in takeovers legislation.

COMPROMISES WITH CREDITORS

111 Compromises with creditors approved by a special majority of classes of creditors should continue to be binding on all but the involvement of the Court should be modified to a review role.

RECEIVERS

112 The bulk of the statutory provisions relating to receiverships should apply therefore to non-company businesses as well as companies and should be restated and relocated in the Property Law Act 1952.

113 In general, the qualifications and sanctions applicable to receivers should mirror those applicable to liquidators, including a requirement that appointees be independent and experienced.

VOLUNTARY ADMINISTRATION

114 A system of voluntary administration of companies in or apprehending financial difficulty is desirable but may be best addressed in the review of insolvency law being undertaken within the Department of Justice. The question of preferential claims in insolvency affects personal as well as corporate insolvency and should be addressed in that review.

LIQUIDATIONS

115 The present rules on winding up of companies are unnecessarily complicated. They should be simplified and streamlined. The new rules should

- require independence and experience in those appointed as liquidators
- provide one set of rules for all liquidations (voluntary or court-ordered)
- require minimal mandatory Court involvement in liquidations.

116 Other features of a new liquidation regime would include new rules about monopoly suppliers, voidable transactions and defaults by liquidators.

117 We recommend the setting up of an assetless companies fund on a trial basis. Draft legislation for such a system is included. The fund would be under the control of a supervisory board to provide funding of investigation and proceedings to benefit creditors or shareholders of companies where there are insufficient assets to permit a liquidator to do so otherwise.

REMOVAL FROM REGISTER

118 The termination of the existence of a company should be by removal from the register either after a liquidation has been completed or where the Registrar is otherwise satisfied that the company is defunct (as where, for example, it has paid off all creditors, ceased trading and has distributed all its assets).

ROLE OF THE REGISTRAR OF COMPANIES

119 The investigative and enforcement powers of the Registrar of Companies under Part I of the 1955 Act should not be continued in a new Act. The function of the Registrar of Companies under the Act should be to provide an efficient system of incorporation and public disclosure.

120 In a core Companies Act, enforcement and investigation should normally be for the shareholders affected, but the Attorney-General should have a supplementary role where the public interest is affected. In abnormal circumstances, the provisions of the Corporations (Investigations and Management) Act 1989 will be available. The vesting of the investigation and enforcement powers in the Attorney-General should be reassessed when enforcement of the Securities Act 1978 is reviewed.

III

Major Themes and Issues

THE NEED FOR MORE ACCESSIBLE AND INTELLIGIBLE LAW

121 The Law Commission, by its statute, has an obligation to advise the Minister of Justice on ways in which the law of New Zealand can be made as understandable and accessible as is practicable. We are required to have regard to the desirability of simplifying the expression and content of the law, as far as that is practicable.

122 In the conduct of the review, we have been aware that the need to simplify expression and content of company law is itself a major goal for reform. So too is the need to make company law more accessible and usable by collecting together in the statute the main rules. The 1955 Act, besides being complex and dense in form, contains only part of the law relating to company regulation. Some of the major company rules are not contained in legislation at all but have to be discerned from the case law, which in many important respects is difficult and unclear.

123 We have worked on the principle that those needing to know what their rights and obligations are should not be driven immediately to seek legal advice. The Companies Act should be the statement of first recourse. Directors and shareholders

and not simply their professional expert advisers should be able to use it.

124 If intelligibility and accessibility are goals, it is inefficient and unacceptable that standards imposed upon all companies (as in the case of directors' fiduciary duties) should not be referred to in the statute.

125 The draft Act is, as far as possible, in simple language. In a few cases we have not been able to avoid the use of technical words in order to achieve precise legal effect.

126 The structure of the draft Act has been planned to give an initial map of the matters fundamental to the company before the more detailed provisions are addressed. Matters of administration of the register and of the company have been placed towards the end of the Act or in schedules so that the essential elements of the working company can more readily be appreciated. We have tried to collect together all the rules affecting particular subjects in separate parts, with cross-referencing to other parts where the source of the substantive rule is to be found. Although some duplication is inevitable in such an approach, we think it will aid those who need to find out promptly what their rights and obligations are.

THE NEED TO REASSESS POLICY

127 Some of the assumptions of principle on which the law (as found both in the legislation and in the cases) is based are now outmoded or misapplied. For example, the line of authority which identifies the company with the collective shareholders predates the decision of the House of Lords in *Salomon v Salomon & Co Ltd* [1897] AC 22 but has not been systematically reassessed. Similarly, admitting "future shareholders" as an element to be taken into account in determining the best interests of the company (as was done in *Greenhalgh v Arderne Cinemas Ltd* [1947] 1 All ER 512) has implications for traditional theories which have not entirely been worked through. Majority control of a company's right to litigate, enshrined in the rule in *Foss v Harbottle* (1843) 2 Hare 461, has not been reassessed in the light of director independence in matters of management from the general meeting (*Quin & Axtens Ltd v*

Salmon [1909] AC 442). There are tensions also between lines of authority to the effect that the voting of shares is a property right which can be exercised in the self-interest of each shareholder and indications that the law is developing a concept of fiduciary duty of majority shareholders to the minority. Whether these cases can be reconciled or whether any of them (and if so which) are wrong is a matter of debate.

128 These are matters of central importance to the system of checks and balances imposed by company law. They have practical impact every day on New Zealand companies. Legislative statement of basic principles and their consistent application is an important theme of the Report.

MATCHING THE STATUTE WITH PRACTICAL EXPERIENCE

129 Many assumptions of company law need to be tested against practical experience. We have considered it important, for example, to take stock of the efficacy of the rules developed as a protection of capital against the experience of recent years with such developments as the $2 company and the wide authorisations given to directors by shareholders. The impact of recent legislative reforms, most notably the 1983 reforms removing the necessity for companies to have objects and the impact of section 209 on the traditional duties and remedies available in internal company disputes, challenge some venerable assumptions about the rights of shareholders, the curative role of the general meeting, the question of Court supervision and remedy and the standards against which breaches of duty are to be measured.

THE IMPACT OF THE SECURITIES ACT 1978

130 The Companies Act 1955, and in particular the crude distinction it draws between private and public companies, was conceived long before the Securities Act 1978 and has required reassessment in its light.

131 We have viewed the draft Companies Act as being mainly concerned with the constitutional rights and duties of

shareholders and directors under a significantly consensual regime. Provided that minimum standards set by the Act are met, the Act should be flexible enough to permit diversity in corporate structure.

132 The Securities Act 1978 is concerned with the public interest in the integrity of the securities market. It is concerned not only with actual shareholders but with potential shareholders and security investors. The public interest in the integrity of public securities markets justifies the imposition of higher standards of disclosure and less flexibility than is desirable for core company law, applying to all companies. Companies which offer securities to the public will have to comply with the additional standards imposed under the Securities Act 1978. Those that do not will have greater flexibility to order their affairs and greater privacy.

133 The distinction between the scope of the two Acts has implications in particular for the amount of public disclosure suggested in a revised Companies Act, for the distinction between private companies and public companies, and for the extent and situation of powers of enforcement in a public agency.

134 There are areas of overlapping concern between company law and securities law. While, for example, a comprehensive code for takeovers and for the prohibition of insider trading requires regulation of conduct and parties outside the traditional ambit of company law, these topics are also the concern of company law to the extent that they arise out of abuse of power within the corporate body. It is for this reason that the draft Companies Act contains statements of the duties owed to shareholders by directors of offeree companies in takeovers and general duties of directors who deal in their company's shares. Those duties are designed to protect shareholders from abuse of director power. Such abuse is a concern in all companies, whether or not they offer securities to the public and are subject to the Securities Act. But the proposals made in the draft Act are made in the expectation that companies subject to securities market regulation will have additional and more onerous standards imposed upon them.

ROLE OF THE COURT

135 We have taken account of the need in reviewing the Companies Act to reassess the role of the Courts. Under the present Companies Act, the Court is required to perform a number of routine functions which are not essentially adjudicative. They include the role of the Court in company compromises and in authorising inspection of company records. In the draft Act Court intervention is generally required only where there is a dispute.

136 Outside the somewhat specialised area of liquidation the Court has three functions under the draft Act

- imposing penalties for transgression of the procedural requirements of the Act
- granting remedies to dissentient minorities in cases of fundamental change or in cases of unfair treatment
- determining civil claims for breach of the Act or constitution.

137 Original jurisdiction in the draft Act is vested in the District Court. The remedial and adjudicative functions, and powers ancilliary to them (such as inspection of company records), are vested concurrently in the High Court and the District Court. The division of responsibility follows the recommendation of the Law Commission in its report on Court structure (Report No 7). That would mean that all matters would start in the District Court but could be removed to the High Court by reason of their complexity or importance. We have considered whether to retain the exercise exclusively by the High Court for jurisdiction which is substantially supervisory, in the same manner that the supervisory jurisdiction of the Court under the Judicature Amendment Act 1972 is reserved to the High Court. We have come to the conclusion that the jurisdiction conferred upon the Court under the draft Act does not easily divide in that manner. Civil liability in many cases may result in the Court having wide remedial powers under the draft Act which are consistent with a supervisory jurisdiction.

138 The role of the Court in determining disputes among shareholders, directors and the company is essentially supervisory. The Courts are not called upon to second-guess what the directors or the majority have decided upon as being in the best interests of the company, as long as the decision is made on reasonable grounds. That is the approach that has been regularly applied by the Courts in company law cases. It is similar to the jurisdiction the Courts are accustomed to exercise under the Judicature Amendment Act 1972, which applies not only to administrative bodies but to certain functions of incorporated bodies (including companies). In the United States, the supervisory nature of the Court's jurisdiction is known as the "Business Judgment Rule", around which much jurisprudence has developed. But a similar policy has resulted in very much the same judicial role in the United Kingdom, Australia and New Zealand.

139 The Law Commission agrees that it is proper to permit a substantial area of discretion to those who manage a company and who must be entrusted with discretionary powers. The test for intervention, where a decision is made in good faith, is one of reasonableness. No more precise test is practicable.

140 In the case of conflict of interest transactions, an alternative to the supervisory jurisdiction of the Courts is a role for a disinterested majority of directors or shareholders. This is not an option we have favoured. The reasons are the difficulty of determining disinterestedness, the frequent identification of majority shareholders with management (even where they would not be tainted themselves with the strict conflict of interest) and the belief that the assessment of what is reasonable or in good faith is a proper function of the Court.

141 The efficacy of shareholder check upon directors has been doubted by a number of commentators. In Australia, the National Companies and Securities Commission must be notified of many actions taken by company management. In particular circumstances it must give its consent to proposed action, and in other cases it has standing to object to the Courts.

142 No submissions received in response to the discussion paper suggested a role for a regulatory agency in approving company actions. The time delays such a course would impose

upon company activity and the costs to the community in maintaining such a system do not seem to us to be justified for all companies. Moreover, such a system runs counter to the basis upon which the Court's supervisory jurisdiction has traditionally been exercised by permitting substitution of the discretion of the regulator for the discretion of the directors. A review of the Securities Act 1978 may consider whether there should be an extension to the powers and rights of intervention of the Commission in company decision-making in cases where companies offer securities to the public. But a consent procedure for all companies in areas of company decision-making seems to us to be unwarranted and too intrusive.

143 We are of the view that the Courts are the appropriate objective decision-making body in cases of action taken to remedy corporate wrongs and in cases of supervision of company action for reasonableness. These are functions commonly exercised in our legal system by Courts.

144 We have been conscious of the fact that recourse to the Courts for breach of duties owed to the company and to shareholders is unacceptably difficult and expensive under our present system. The draft Act substantially modifies procedural restraints upon shareholder access to the Courts and introduces a number of mechanisms including reverse onus of proof, requirements that directors give reasons for their actions, funding for litigation and better disclosure to improve the access of minorities to impartial assessment by the Courts. Although it is outside the scope of this Report, we consider that further consideration should be given to providing in the Rules of Court a summary procedure to enable speedier access to the Courts in enforcing the provisions of the Companies Act.

HARMONISATION WITH AUSTRALIAN LAW

145 In the Commission's view there is little point in bringing in a new Companies Act if it does not address the principal reforms of abolition of par value and nominal capital and the introduction of a better and more principled system of director accountability and shareholder remedy.

146 Reform of par value and nominal capital has been mooted in Australia, the United Kingdom and New Zealand for many years. It makes sense. The consequences of reform will be maintenance of capital upon lines which are purposive. The tests of solvency proposed, involving both a balance sheet and "equity" limb, are designed to give creditors more real protection than the formalistic accounting conventions in current use. Australian company law is still based on the traditional system of nominal capital and par value. The proposals made within this Report therefore represent a departure from the current Australian legislation.

147 The importance of reforming our system of director accountability and shareholder remedy has already been discussed. The current Australian legislation, although an improvement on the New Zealand 1955 Act, is not much of an advance upon our existing system. Its adoption would certainly not address many of the present major deficiencies. Thus, although the Australian National Companies Code provides, in section 222, a legislative statement of the duties of officers of a corporation to act honestly and with care, that statement is not an adequate identification of the duties owed by directors. Its enforcement by criminal sanction is contrary to our proposals to secure director accountability and has been criticised in Australia. Above all, the Australian Code does not attempt a reappraisal of directors' duties and powers and a reassessment of the distribution of power within the company such as is proposed in this Report.

148 Because we believe the two reforms of capital maintenance and director accountability are the main initiatives justifying introduction of new companies legislation, the existing Australian legislation cannot be regarded as a model for New Zealand reform. There are, in addition, a number of other criticisms which can be made of the Australian legislation:

- adoption of the Australian system would require reassessment of our present distinction between companies and securities legislation

  The distinction is well understood in New Zealand, permits better focus for legislative objectives and is one which the Law Commission has built upon in its proposals for reform.

- the Australian Code is complex and difficult legislation
  Adoption of something like it would run counter to a major aim of the reform—to make company law intelligible to non-lawyers. The submissions we received in response to the discussion paper expressed concern about the form of the Australian legislation.

149 Australian company law is, moreover, in a state of flux. A number of the suggestions made for reform in this Report (for example, to permit company share repurchase) are the subject of reform proposals in Australia. The eventual shape of those reforms is still not clear. There is at present before the Australian Parliament a bill to consolidate Australian company law into a Federal Act. It does not greatly alter the existing code but simply seeks to re-enact it as a comprehensive national company system. It faces major constitutional objection. Company law reform is likely to wait upon the outcome of achieving a Federal statute.

150 There is little to be gained from moving our company law into line with the Australian legislation, if the future direction of that legislation is not clear. In those circumstances it has seemed preferable to concentrate upon getting our own system into better shape. We are conscious of the experience of the United Kingdom in implementing integration of its company laws with those of the European Community: Professor Gower has suggested that the poor shape of United Kingdom companies law has meant that it has had little positive effect upon EEC directions (LCB Gower, *Principles of Modern Company Law,* 4th ed p 56).

151 The responses to the discussion paper indicated that very few regard integration of core company law as being a priority for trans-Tasman legal harmonisation. In the case of insolvency law there are good reasons for New Zealand to follow the direction taken by the Australian Law Reform Commission in its recent Report. Similarly, when review of the New Zealand Securities Act is undertaken there may be compelling reasons why growing integration of securities markets makes harmonisation a substantial priority.

152 The benefits of harmonisation of core company law are less easy to assess. No one has suggested to us a single register for companies. Australian and New Zealand companies can readily register as overseas companies in the other jurisdiction. It is difficult to see how divergence in core company law would affect trans-Tasman trade. In the case of companies which seek listing on each other's Stock Exchanges, the securities laws of the other jurisdiction and the listing requirements of the local Stock Exchange will simply be superimposed upon the underpinning company law.

153 For all these reasons, the reform proposals made in the draft Act should be pursued, even though they will mean that New Zealand's core company law is in form quite different from the current Australian legislation. Harmonisation has never been taken to mean that the legislation in both countries must be identical. Although there will be a substantial difference in form if the Law Commission's recommendations are accepted, the essential elements of the company law of both jurisdictions will remain comparable. The reform proposals made in this Report are in large measure a reassessment of form according to enduring principle which is common to both Australian and New Zealand company law tradition.

ALLOCATION OF POWER WITHIN THE COMPANY

154 Under the 1955 Act, the distribution of power among the organs of the company, that is to say the shareholders and the directors, is left to the articles of the company. The system is given statutory recognition by section 34 of the Act which provides that, subject to the provisions of the Act

> . . .the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been executed as a deed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles.

155 This somewhat enigmatic section describes an unusual contract. As the statutory platform for identification of allocation of responsibility and duties within the company, it is

entirely unsatisfactory. It does not assist in making the obligations in a particular context easy to understand. It creates the fiction of a contractual regime which is then overlaid by statutory provisions which impose obligations and powers outside the "contract", including the power to alter the contract without the consent of all.

156 Section 34 descends directly from the United Kingdom Act of 1856. It marked the transition between the old deed of settlement constitution and the modern constitution based on memorandum and articles. In its present form, section 34 is an anachronism which is misleading. Through the popularity of Table A articles (the standard articles contained in the 1955 Act), powers of management are usually conferred upon directors. The Law Commission believes that the intelligibility of company law would be greatly assisted by the adoption of the Table A standard provision as a statutory presumption. Director management would therefore be conferred by statute directly, except where the constitution makes express provision for another arrangement.

157 Moreover, section 34 on its own terms is quite unsatisfactory. As has been said of its equivalent provision in the 1948 United Kingdom Companies Act, it

> ... has been so overlaid with judicial interpretation that, on any count, it no longer means what it says. (L C B Gower, *Principles of Modern Company Law*, 4th ed p 320)

158 The ambit of section 34 is uncertain. In particular, its relationship with the principle of shareholder majority rule undermines the extent to which the contract it purports to confirm can be enforced by the shareholders deemed to be parties to it.

159 The draft Act sets out a system of allocation of power within the company. That system is expressed as presumptive only, enabling greater flexibilty to be achieved where that is desired. Mandatory provisions of the Act (such as the duties imposed upon directors and application of the solvency test for distributions) cannot of course be excluded by the constitutional document. The procedure for alteration of shareholder rights in section 88 is a mandatory minimum standard (more

stringent requirements can be set), but the rights are generally subject to the constitutional documents (see paragraphs 164–183).

160 The decision-making organs of the company are the shareholders on the one hand and the directors on the other. What is proposed in the draft Act is to confirm by statutory presumption the normal provision that powers of management are to be exercised by the directors. The powers reserved to the shareholders are powers to make decisions affecting their proprietary rights.

161 The system proposed confers upon directors an original statutory jurisdiction to manage, unless it is excluded. In those circumstances no residual power of decision remains to the general meeting. For that reason, the draft Act makes explicit provision for shareholders to pass at meetings non-binding resolutions relating to the directors' powers of management.

162 The Law Commission has considered whether the shareholders acting by unanimous resolution should be able to exercise any of the powers of the company. The Canadian statutes make such provision. We have concluded that an explicit power in these terms is generally undesirable as cutting across the allocation of power in the constitution. The interests of shareholders and the company do not entirely coincide. The system of the draft Act for protection of creditors by imposing duties on directors could be undermined by a general power in the shareholders to exercise the directors' powers (the type of difficulty is referred to in paragraph 210). In the case of closely-held companies, the company constitution can provide for unanimous shareholder resolution, if that is thought desirable. In those circumstances, however, the draft Act will impose directors' duties upon the shareholders.

163 Where unanimous shareholder resolution is effective as a waiver of rights, it will be available as a matter of general law. Express provision for it is unnecessary. Where the board is in a state of deadlock, we consider that the Act will provide sufficient machinery to enable appointment of directors (if necessary by the Court under section 117(3) or relief on the application of an affected shareholder under section 135).

THE SCOPE OF THE CONSTITUTIONAL DOCUMENT

164 Under Part 4 of the draft Act, a company may (but need not) adopt a constitutional document. If a company does not adopt a constitutional document, it is governed entirely by the provisions of the Act.

165 A constitution may set out rights attached to shares where they differ from the rights set out in section 26(2). If shares are to be non-transferable, the constitution must say so (section 29).

166 The constitution may make provision for more shares than have been issued or may place restrictions on shares which can be issued by directors under section 33.

167 As section 36 makes explicit, the constitution may exclude or limit pre-emptive rights or, under section 37, may permit the issue of shares other than in accordance with pre-emptive rights.

168 The board's ability to authorise distributions to shareholders can be restricted by the constitution (section 42).

169 A company may only acquire its own shares under section 49 if the constitution expressly permits it to do so. Acquisitions must be pro rata, unless non-pro rata acquisitions are expressly permitted by the constitution (section 50 (1) (b) (ii)) and the procedure set out in section 51 is followed.

170 The constitution may set out circumstances in which the board is entitled to refuse or delay registration of a share transfer (section 63 (4) (c)).

171 The constitution may reserve powers to the shareholders and specify the manner in which they are to be exercised, although the powers to approve alteration to the constitution, a major transaction, an amalgamation or voluntary dissolution must be exercised by special resolution, whatever the terms of the constitutional document.

172 The constitution may set out procedures for alteration of shareholder rights which are more stringent than those in the Act. Where it does so, the procedures adopted cannot be

amended or altered without interest group approval under section 88.

173 The constitution may expressly confer management powers on shareholders or other persons (section 98), although where it does so they will be subject to the duties imposed by the Act upon directors (section 80). The constitution may expressly permit certain types of major transaction without the shareholder approval generally required under section 99, and subsequent dissentient rights.

174 Under section 100 the general delegation of powers by the board which is permitted may be restricted by the constitution. Section 100 sets out the powers the board may not delegate.

175 While interested directors are not generally forbidden to vote on the board, the constitution may provide a stricter rule (section 111). In the case of companies which are trusts, such a provision would be usual.

176 The constitution may make provision for the appointment and removal of directors, other than the usual rule for appointment and removal by ordinary resolution of shareholders (sections 117 to 120).

177 Proceedings of the board may be regulated by the company constitution rather than the provisions of the Second Schedule to the Act (section 123).

178 The constitution may impose restrictions on remuneration and other benefits to directors (section 124).

179 If a company is to be able to indemnify or insure directors or employees in respect of costs incurred in successfully defending proceedings brought by the company, the constitution must expressly authorise such indemnity or insurance (section 125).

180 The usual procedures by which companies can enter into contracts may be varied by the constitution (section 140).

181 The constitution may require the appointment of auditors (section 167) and may vary the manner of appointment (section 169) although shareholder right to require an audit in

each accounting period, and upon cause to apply to the Court at any time, cannot be taken away by the constitution.

182 The procedure prescribed for meetings of shareholders cannot be varied by the constitution. We have thought it sensible to impose a standard system in this connection so that there is less scope for confusion.

183 In addition, anything not expressly referred to in the draft Act can be dealt with in the constitution to enable specialisation of companies. In particular, the company constitution may specify limitations on its powers and this will be particularly important for charities.

DIRECTORS' DUTIES: WHAT ARE THEY AND TO WHOM ARE THEY OWED?

184 The present law relating to the duties of directors is inaccessible, unclear and extremely difficult to enforce. Its reform is a matter of urgency.

185 The powers entrusted to directors have never been untrammelled. Courts have always insisted that directors exercise their powers in good faith, in the best interests of the company and for the purpose for which they were conferred. And directors will be liable if they act without proper care, although the standards of care applied by the Courts have not usually been high.

186 These duties are not contained in the 1955 Act. They have to be gleaned from a large volume of complex case law. In the discussion paper, the Law Commission suggested that it was time to distil the general principles from the cases and express them in the statute, to make them more accessible. Such a statement of general principle was recommended by the Macarthur Committee and has been adopted by the Canadian and Australian Acts. The response to the discussion paper indicated overwhelming support for similar reform.

187 In addition to the common law duties, the Act currently contains some statements, negatively expressed, which impose liabilities on directors to creditors and minority shareholders

in cases of reckless trading and minority oppression respectively (the current sections 320 and 209). The Law Commission is of the view that it is more helpful for directors who wish to know what their responsibilities are to have these obligations expressed positively as statements of general duty.

188 The current law in this area suffers from confusion as to whether "the best interests of the company", which is the concept which underlies director accountability, requires assessment of "the company" as the collective shareholders or as the enterprise itself.

189 The notion that "the company" can be equated with the collective shareholders is derived from the old joint stock company concept which predates the perfection of corporate personality through the case law. Since it has been held that the collective shareholders include future shareholders, identification of the company with the enterprise may have been largely achieved in law. The uncertainty does, however, mean that there is considerable scope for directors to rationalise decisions which are against the interests of existing shareholders.

190 We have not thought it necessary to be dogmatic about these questions of theory. We have preferred instead to regard the issue as principally directed at the right to remedy. The draft Act therefore identifies those areas where existing shareholders may have their proprietary interests affected by management decisions, which can then be justified in the name of the continuing enterprise or future shareholders. The concern arises particularly where decisions affect class rights (that is to say, the rights to distributions and voting); in cases of fundamental change to the organisation (through acquisition or sale of a major asset or restructuring of the company); in repurchase of the company's shares and in the provision of financial assistance to purchase shares. In all these cases the draft Act provides for special duties or rights to participate in the decision imposed as a protection for existing shareholders and gives them the right to enforce the duties directly.

191 The draft Act recognises a number of powers exercised by directors where shareholder interest is particularly at risk. They include the powers to

- issue shares

- refuse registration of transfer of shares
- make distributions to shareholders
- repurchase the company's shares
- assist in the financing or acquisition of the company's shares.

192 These are areas where the interests of the shareholders do not completely coincide with the interests of the company. Shareholder interest needs special protection because the management powers impinge upon exercise of the residual proprietary rights of the shareholders and their constitutional position in the company's scheme. The draft Act imposes particular duties upon directors exercising these powers, to protect the shareholders affected. Significant protections are the requirement in section 39 that before issue of shares the board must resolve that the consideration and terms are fair and reasonable to the company and existing shareholders, and the provision in section 36 that shareholders have pre-emptive rights to share issue, unless pre-emptive rights are expressly excluded by the constitution. These measures are designed to reform the position at common law where the Courts refused to consider the adequacy of consideration on share issue, thus permitting stock-watering (*Re Wragg Ltd* [1897] 1 Ch 796) and held that the creation of equally-ranking shares affected only "enjoyment" of rights and not the class rights of shares, thus permitting dilution (*White* v *Bristol Aeroplane* Co [1953] Ch 65).

193 Apart from these particular duties, the draft Act imposes general duties in relation to all actions of directors. These restate the common law basic duties of good faith and care and also clarify and reform the general duties of directors in relation to company confidential information, dealing in company shares, and self-interested transactions. In the case of self-interested transactions, the case law has proved too strict and has been modified by articles and statute with results which are unsatisfactory; the law relating to company confidential information is unclear and its application to nominee directors and their nominating shareholders urgently requires reform; and the law relating to director dealing in shares has been plagued by ambiguities as to the circumstances in which the directors owe duties directly to shareholders. The draft Act

- requires self-interested transactions to be disclosed to shareholders and to be fair to the company
- treats nominating shareholders as directors where they receive company confidential information through their nominee and where they deal with the company
- requires directors to maintain in confidence company confidential information
- provides for the liability of directors to those with whom they deal in the company's shares when in possession of confidential price-sensitive information

The Securities Amendment Act 1988 covers similar ground, but only in relation to companies whose securities are publicly offered.

194 We appreciate that if directors are given competing responsibilities, accountability becomes extremely difficult: one interest can be played off against another. The draft Act therefore sets up a hierarchy which subordinates duty to other interests (for example, to existing shareholders, employees and to creditors) to the directors' fundamental duty to act in the best interests of the company. The hierarchy makes explicit the equation of "the company" with the enterprise itself.

195 The hierarchy of duties set up by the draft Act is, it should be emphasised, for the purposes of company law only. It does not preclude the imposition of direct and primary obligation to other interests through other Acts. Obligations to employees, for example, which might be thought to go beyond the best interests of the company, should be imposed directly through employment legislation.

THE ROLE OF SHAREHOLDERS

196 The Law Commission has not attempted to extend the concept of "shareholder democracy" to enable a greater role for decision-making by the general meeting. Indeed, a number of powers of the company which at present require the approval of shareholders in general meeting (most notably the powers to reduce capital and approve the issue of shares through setting nominal capital) can be exercised in the draft Act by the directors.

197 We have formed the view that it is necessary to acknowledge that

- the general meeting has not historically operated to protect shareholders from director abuse of their powers of management but rather has often been used as a cypher by directors to absolve themselves of responsibility
- there are more effective methods for the protection of shareholders from abuse of management powers than the general meeting.

198 Shareholders exercise discipline over director management in a number of ways

- they can vote their shares to remove directors
- they can sell their shares
- they can use the general meeting as a forum for questioning director management
- they can dissent and require buy-out in matters of fundamental change or variation of their class rights
- they can apply to the Court for inspection of company records and to enforce breaches of the Act or constitution
- they can hold directors liable for any breaches of duty owed directly to them as shareholders or can bring derivative action in the name of the company to enforce duties owed directly to the company
- they can seek the relief of the Court where unfairly treated, even though there has been no breach of the Act or the constitution.

199 All of these are important shareholder checks upon director management. The draft Act is designed to ensure that they are not restricted.

200 For this reason, the draft Act provides presumptively for removal of directors by ordinary resolution and for free transferability of shares. Where transfer of shares is refused, directors must give reasons for the refusal.

201 In the case of use of the general meeting as a platform for questioning management, the draft Act provides that all shareholders (whether or not entitled to vote) may attend and be heard at any general meeting of the company and may vote upon a non-binding resolution relating to the management of the company. Under the draft Act, shareholders have enhanced powers to require resolutions to be put to the next meeting of the company. Although the power to requisition special meetings is, in line with other jurisdictions, proposed to be limited to those holding 5 percent of the voting shares of the company (at present the Act provides for 200 shareholders or those exercising 10 percent of the voting rights), any shareholder can apply to the Court for an order directing the calling of a special meeting where cause is shown.

202 The right to buy-out is new. It is to a certain extent foreshadowed in the remedies available to the Court under the existing section 209, where the Court can require the company or other shareholders to purchase the shares of any shareholder unfairly prejudiced by the conduct of the company. But the draft Act will confer the right to such a remedy upon a dissentient shareholder where there is an alteration of class rights or a fundamental change to the company, whether or not the action taken by the company is unfairly prejudicial to the shareholder.

203 While the buy-out procedure is not available in Australia or in the United Kingdom, it has long been a feature of United States corporation statutes (first occurring in Ohio in 1851) and has been a feature of the Canadian statutes introduced following the Dickerson Committee Report in 1971. It is designed to ensure that in the case of fundamental change to the nature of the enterprise and to the class rights enjoyed by the shareholder, a dissenting minority shareholder does not inevitably have to accept the majority decision. The shareholder will instead have the option of leaving the company.

204 We think that the buy-out right is a more useful remedy and obviates the need for the sort of minority shareholder protection provided by section 208 of the 1955 Act. Shareholders at present entitled to require acquisition of their shares

under section 208 have more ample rights to buy-out under the draft Act.

205 The risk of director manipulation of buy-out rights, for example by promoting unreasonable amendments to the constitution, is protected against in the draft Act by the general duties which attach to the actions of directors and the oppression remedies.

206 The buy-out provision recognises not only that there is a level of change to which it is unreasonable to require shareholders to submit but also that in many cases the presence of a disgruntled minority shareholder will be of little benefit to the company itself.

207 The buy-out remedy is especially important in the case of companies where there is no ready market for the shares. In contrast to the North American appraisal remedies, the company can apply to the Court for relief where buy-out would be unfair to it. This provision is designed to protect against minority oppression of the majority. In such cases, the Court is given wide powers equivalent to those available to the minority in cases of oppression to achieve a fair result.

208 The draft Act does not seek to protect minority shareholders by requiring more decision-making to be taken by the general meeting. The Law Commission considers that the range of duties and remedies provided by the draft Act provides a much more effective method for protection of minority shareholders.

209 There are, moreover, difficulties in ensuring that minority shareholders are not oppressed by a complacent or interested majority in general meeting. If more power over company action was given to shareholders, elaborate rules would need to be devised to ensure that

- shareholders have sufficient information to make informed judgments upon matters referred to them
- interested shareholders are disqualified from voting.

210 The greater the role for the general meeting in management of the company, the greater the need to develop a concept of fiduciary duty owed by the majority to the minority. This is

a developing area of law which, carried too far, may undermine the concept of the share as property and may make company decision-making and enforcement of obligation procedurally complex. (As L S Sealy has pointed out, assessing the good faith of a board of directors is one thing; assessing the good faith of a majority of shareholders, perhaps running into the hundreds, is quite another thing. (L S Sealy "Directors' 'Wider' (Responsibilities—Problems Conceptual, Practical and Procedural" (1987) 13 MULR 164.))

211 It is for reasons such as this that the standard constitution entrusts the management of the company to the directors and reserves shareholders' decision-making for matters which directly impact upon their property interests. In exercising their votes on these property matters, shareholders are entitled to act in their own self-interest because they are not exercising powers entrusted to them for the benefit of others (the basis of the fiduciary duties imposed upon directors). This is explicitly recognised by section 80.

212 It should be noted that, for the purposes of use of company confidential information, self-dealing and insider trading, a majority shareholder with an appointed director on the board is treated as if a director and so to that extent is subject to fiduciary duties (section 96). Similarly, where the constitution of a company confers management powers upon shareholders, the exercise of those powers will be subject to the duties imposed upon directors (section 80).

213 The powers which are presumptively reserved by the draft Act to shareholders and which may be exercised by them in their own self-interest are

- appointment of directors
- amendment of the constitution
- alteration of class rights (which includes a change to the manner prescribed for alteration of class rights)
- fundamental change to the company by merger or sale or acquisition of the greater part of its undertaking, or liquidation or removal from the register.

CREDITORS

214 Creditors are protected in the draft Act by a number of provisions. In particular

- all company distributions are subject to compliance with a solvency test (section 42)

  The solvency test is one of the pivotal provisions in the Act. It is designed as a substantial protection for creditors. It comprises an "assets over liabilities" limb based on "realisable" assets and a second limb requiring ability to pay debts as they fall due.

- directors are liable if they take unreasonable risk with the solvency of the company or where they trade knowing the company to be insolvent (section 105)

  This provision restricts the scope of the existing section 320, which is considered to go too far in undermining the position of the company as a vehicle for the taking of business risk.

- directors are empowered to take into account the interests of creditors to an extent not inconsisent with their fundamental duty to act in the best interests of the company (section 103)
- the fundamental duty to act in the best interests of the company acts as a limit upon gratuitous disposal of company property and inadequate value in exchange for property (section 101, and in relation to financial assistance section 58)
- where the solvency test is breached and distributions made from the company, directors will be personally liable for distributions and payments made.

215 Creditors will have standing to restrain a proposed action by the company or its directors in breach of its constitution or the Act (section 126). But a creditor cannot claim damages for breach of the Act while the company is solvent. Upon insolvency, the statutory regime imposed for the orderly realisation of the assets of failed companies will prevent an individual claim.

216 The Law Commission considers that these protections are as far as the Companies Act should go in protecting the

interests of creditors. It is, of course, always open to a creditor to contract for higher protection.

217 In particular, we are of the view that it is wrong in principle to impose fiduciary duties upon directors which are owed directly to creditors of the company. Any such extension of directors' duties would unacceptably dilute the scheme of director accountability under the draft Act.

218 We have tried to set up a hierarchy of the interests directors should take into account in exercising their powers. The interests of creditors are a relevant consideration but are subject to the fundamental duty to act in the best interests of the company and the duty to act for the benefit of existing shareholders. (See sections 101–103.)

219 Directors owe a specific duty to the company not to take unreasonable risks of breaching the solvency test (section 105). Where that duty is breached, liability is owed to the company and may be enforced by the company or by a shareholder suing derivatively or, after insolvency, by the liquidator. Creditors will not have standing to obtain a remedy for breaches of the solvency duties owed to the company. To provide such a remedy would be to undermine the statutory system for liquidations. On the other hand, the draft Act makes it quite clear (by its recognition of the company as an entity distinct from its shareholders) that breach of the solvency duties owed to the company cannot be ratified even by unanimous shareholder resolution, because the shareholder interest does not wholly equate with the interests of the company.

220 This is an area of law which has recently been considered in New Zealand and Australia in *Nicholson v Permakraft (NZ) Limited* [1985] 1 NZLR 242 and *Kinsela v Russell Kinsela Pty Limited* 1986 4 CLC 215. The draft Act is consistent with these cases but in so far as they may suggest that in cases of near insolvency creditors are owed and can enforce duties directly against directors, the draft Act would depart from them.

221 For similar reasons, we do not favour extension of the shareholders' oppression remedy to creditors. The matter was raised for discussion in Preliminary Paper No 5 and was generally opposed.

222 The draft Act would set the duties owed by directors to the company in cases of near insolvency at the standard of unreasonable risk provided for in section 105.

MINIMUM CAPITAL

223 The subject of a statutory minimum capital, whether paid up or not, arises whenever company reform is under discussion. The Macarthur Committee was of the view that the imposition of a minimum capital of not less than $2,000 would provide some deterrent for the formation of grossly undercapitalised companies. The Jenkins Committee favoured a statutory minimum paid-up capital in principle, but came

> reluctantly . . . to the conclusion that its purpose would be too easy to evade and we cannot, therefore, recommend it. (At paragraph 27.)

224 The New Zealand Society of Accountants urged us to reconsider the question both because it would prevent at least to some extent undercapitalisation in cases where the scale of the enterprise meant that the application of limited liability was not of social benefit, and also because it seemed to the Society that such a provision would do something to stem the proliferation of companies on the register.

225 The imposition of minimum capital does not provide any protection against undercapitalisation. What is an appropriate minimum capital for an enterprise depends upon what it does. If a substantial minimum capital requirement were imposed, it would penalise small traders without recognising the actual risk in a particular case. If the standard were set at a low level, it may be questioned whether it would be of any use.

226 The Law Commission considers that the dangers of undercapitalisation are better faced up to by imposing obligations upon directors who incur liabilities in the name of the company in such circumstances. The duties imposed upon directors in the draft Act in section 105 are an attempt to face up to this problem directly.

227 Recourse to corporate form by individual traders in small businesses has long been accepted by the law. The popularity of company form for small business has been particularly pronounced in New Zealand. We propose, in fact, to carry this to its conclusion by permitting one-person companies with single directors. It is a well-known fact of commercial life in New Zealand that small traders may incorporate and that the commercial community has accepted the spread of risk effected by the ability to obtain limited liability. (In many cases, of course, the proprietors of such a company are required to guarantee its debts so that the benefit of limited liability and the consequences of undercapitalisation are reduced.)

228 We consider that it is not appropriate for New Zealand conditions to impose an arbitrary and ineffective penalty upon small businesses wishing to incorporate. The aim of cleaning up the register has no application to operating companies, however small.

PRIVATE COMPANIES

229 The draft Act abandons the distinction between private and public companies. None of the submissions received in response to the discussion paper in which the existing classification was questioned favoured its retention.

230 The Securities Act 1978 now makes the distinction drawn on the basis of ability to issue prospectuses unnecessary. And the proposals made in this Report to enable all companies to have one director only, to act by written resolution without the need for meetings, to make loans to directors, to resolve not to appoint an auditor and to remove the requirement for public companies to file their annual accounts with the Registrar, largely remove the basis for the present distinction.

231 At present, private companies are exempt from the statutory provision for shareholder removal of directors. That seems an undesirable exemption and the Law Commission does not propose to continue it. It will, of course, be open to all companies to structure their voting arrangements to achieve director entrenchment, where that is appropriate to the circumstances of a closely-held company.

CLOSELY-HELD CORPORATIONS

232 While the Law Commission had little difficulty in concluding that the present distinction between private companies and public companies was arbitrary and unnecessary, it considered seriously whether the distinction should be replaced by a division in the Act between provisions applying to closely-held companies and others. Closely-held companies are expressly provided for in the United States. The Australian Federal Government in 1988 introduced a Close Corporations Bill.

233 The main objectives of any close corporation law are to provide flexibility, particularly in relation to

- control of share transfer (the identity of particular shareholders in an enterprise being of greater significance in such companies)
- management structure (most closely-held corporations depart from the model in which the directors manage the company)
- informality in operation both in management and shareholder decision-making
- security of tenure in management or employment
- ease of dissolution (to permit realisation of investment in circumstances where sale of shares is not realistic)
- control over fundamental change.

234 The Law Commission considers that the draft Act provides the flexibility required by shareholders of closely-held corporations in all these circumstances. In all of them, the presumptions of the draft Act can explicitly be replaced by the constitution of the particular company. The only structural requirement that the company cannot opt out of is the need for at least one director. It seems to the Law Commission that this requirement is hardly onerous enough to justify the provision of a different system for closely-held corporations.

235 In terms of the operation of the company, the principle of director management can be displaced by the constitution. The provisions relating to director and shareholder meetings explicitly provide for resolutions to be valid if signed by all entitled to participate, whether or not a formal meeting has

been held. And the Act provides for telephone meetings which may be especially suited to the circumstances of closely-held corporations. Security of tenure in management or employment is permitted by the ability to structure the voting arrangements attached to shares, to achieve the end sought. The constitution can provide for the dissolution of the company or repurchase to facilitate shareholder exit and, to the extent that more control is required than the control stipulated for fundamental change, that extra control can be imposed by the constitution, for instance by allocation of voting rights through classes of shares or by a requirement of unanimity.

236 The Australian Close Corporations Bill would not achieve anything that could not be achieved under the draft Act, with the exception of its dropping of the requirement for directors. It is, in fact, more restrictive than the arrangements that would be possible under the draft Act in that it

- prohibits corporate shareholders
- restricts membership to 10
- prohibits share classes
- assumes active participation by all members in management and imposes fiduciary duties upon them.

237 An advantage of moving to a closely-held corporations statute is that it provides a structure which can be applied directly without the need for the design of a constitution to suit the special circumstances of the company. On the other hand, if there is a demand for standard constitutions for closely-held corporations, they will be readily available. It is, moreover, a feature of closely-held corporations in other jurisdictions that they are extremely diverse. The flexibility required of statutes catering for them means that tailor-made constitutions may generally be necessary in any event.

238 We have considered also the benefits of harmonisation with Australian law, should the Australian reform proposal proceed. We have come to the conclusion that in the case of closely-held corporations there is little benefit to be obtained from harmonisation because the nature of closely-held corporations is such that they are less likely to have trans-Tasman trade or securities concerns.

239 In all, the Law Commission has concluded that if the draft Act is acceptable in its present form, there is no need to make separate provision for closely-held corporations in New Zealand. The submissions we received in response to Preliminary Paper No 5 did not support adoption of such a system.

240 We pointed out that the power to place additional requirements upon companies whose shares are publicly traded makes imposition of extra regulations in core company law unnecessary. The desirability of flexibility in company form applies beyond companies which are closely-held. If the draft Act were considered to provide more flexibility than is desirable for core company law, then it would be necessary to reconsider the arguments for a closely-held corporations Act.

241 The provisions of the draft Act apply to all companies. While the company constitution can greatly vary the rights attached to shares, that in itself is in conformity with a basic policy of the Act and does not undercut its principles. Those principles apply equally to companies which are widely-held as well as to those which are closely-held. A general statute removes the need to make arbitrary definitions of what is a closely-held company. Where standard form constitutions are thought to be desirable in the public interest, they can be imposed by the Securities Act or by the Stock Exchange Listing Requirements.

COMPANY CLASSIFICATION

242 At present, the Companies Act 1955 classifies companies into

- companies limited by shares
- companies limited by guarantee
- unlimited companies
- no liability companies.

243 According to the records of the Registrar of Companies, the number of companies in the categories not limited by shares are

- limited by guarantee—96
- no liability—8

- unlimited liability—36.

244 We wrote to all those companies asking for their views as to the continuation of the particular categories and the advantages they saw in them. We received 25 responses from companies limited by guarantee, seven responses from no liability companies and 17 responses from companies with unlimited liability.

245 Companies limited by guarantee may be formed with or without share capital (Tables C and D of the 1955 Act).

246 It appears that all but one of the responding companies which were limited by guarantee were without share capital.

247 Although many respondents cited advantages of the form under the existing Act, they were not in general concerned as long as these advantages continue to be available without separate classification. So, for example, the ease of resignation from the company, which was cited to us as an advantage, can be achieved under the draft Act if the company is permitted to buy its own shares. Shareholders' liability can be limited to a specified amount, achieving the same effect as the liability limited by guarantee.

248 The main concern seems to be that there should be available a corporate form which

- does not distribute profits to members, and
- does not distribute the assets to members on its termination.

249 Both results can be achieved under the draft Act by the company constitution which permits shares to be designed to remove these vital rights. (section 26).

250 Only mining companies are permitted to be registered as no liability companies under the 1955 Act. With the abolition of par value, they can be formed and operate under the draft Act.

251 Unlimited liability companies are mainly used by professional organisations which are not permitted to have limited liability. Only three were not formed by accountants and solicitors.

252 Of the three companies which were not formed by professional firms

- one was formed as an unlimited liability company because there were tax advantages and because it could reduce its share capital without the need for Court approval
- one used the form to permit greater flexibility regarding its capital.

Both of these results can be achieved under the draft Act and neither of these companies in those circumstances favoured its retention. One company, AA Mutual Insurance Company, opposed abolition of the form because it "... emphasises the mutual nature of the enterprise".

253 The effect of unlimited liability can be achieved by the constitution under the draft Act (section 73). The name of an unlimited liability company would not contain the word "limited" (section 17).

254 The imposition of share structure upon companies limited by guarantee (which number only 96) is not sufficiently onerous to justify the procedural complexity of maintaining a separate system for them.

255 We have concluded that the present classification is unnecessary. The effect of limitation by guarantee, unlimited liability and no liability can be achieved by the constitution without the need for separate classification in the Act.

FLAT AND OFFICE-OWNING COMPANIES

256 The proposals made in this Report have implications for flat and office-owning companies. At present, these are covered by the Companies Amendment Act 1964. The form is subject to a number of disadvantages. For example,

- registration of an occupation licence does not confer a fully indefeasible title under the land transfer system
- the power to alter company articles can, in the circumstances of these companies, interfere with vested property rights

- enforcement of rights is hampered by the rule in *Foss v Harbottle*
- flat-owning companies provide a less attractive form of security for loans
- shares in a flat-owning or office-owning company are less saleable than other interests in real property because of the discretionary bars to transfer permitted to companies
- flat and office-owning companies have experienced problems in relation to insurance (a problem, however, also shared by properties subject to the Unit Titles Act 1972)
- the costs of formation and administration of the company may be disproportionate
- there are unresolved problems connected with the distinction in law between licences and leases.

257 We have approached a number of law firms to try to assess the demand for retention of flat and office-owning companies and suggestions for their treatment in the reform. We have been unable to ascertain from Commercial Affairs Division or the Land Transfer Office how many flat or office owning companies there are or how many have registered licences.

258 From the responses it appears that the advantages of the company form over unit titles are

- the ability to exercise control over the entry of new property owners
- the lack of attraction for lenders, which is seen as an advantage by some because it restricts the risk of lender participation in the company where there is default
- there is doubt whether a unit title body corporate can carry on the business of property ownership for profit

  If that is so, the Companies Act is the only appropriate vehicle to enable owners to hold both occupation rights and investment interests in the same property.

259 Most of those we consulted suggested that the present system of flat and office-owning companies should be repealed.

They did not believe, however, that transition problems could be overcome by compulsory conversion of existing companies to the unit title system. There were suggestions that the whole area of joint interests in property needs a wider reform which would retain some elements of the existing Act.

260 There would be considerable difficulty in adapting the existing system to the draft Act proposed in this reform. In particular

- occupation rights would probably have to be classified as rights attached to shares with the consequences provided for in the draft Act
- in order to permit return of capital, the distribution definition in the draft Act would have to be modified
- the liquidation provisions in the draft Act would require modification
- the self-dealing provisions in the draft Act would have to be modified in their application to flat-owning companies because directors of flat-owning companies are usually flat owners
- the financial assistance provisions of the draft Act would require adaptation for the purposes of flat-owning companies
- the registration of licence provisions are completely out of place in the draft Act and would have to be transferred to the Land Transfer Act 1952.

261 We are of the view that flat-owning companies should be principally regulated in the Land Transfer Act 1952. It is quite clear that the 1964 Act cannot simply be repealed. Compulsory conversion to a unit title system would be expensive and would not entirely meet the needs served by flat-owning companies. We recommend that, during the transition period for implementation of the draft Act, the future of flat-owning companies should be considered in a general review of the land statutes, including the Unit Titles Act.

CO-OPERATIVE COMPANIES

262 There are presently four statutes by which special status and privileges are extended to co-operative companies: Co-operative Dairy Companies Act 1949; Co-operative Companies Act 1956; Co-operative Freezing Companies Act 1960; and Co-operative Forestry Companies Act 1978.

263 Those statutes do not provide a vehicle for incorporation of co-operative companies, but rather provide for registration as a co-operative company of any company incorporated under the Companies Act 1955 (or any of its predecessors) where the company is otherwise entitled to that registration.

264 Until recently, co-operative companies had certain tax privileges. The other main advantage of registration under one of the co-operative company statutes is the ability to "surrender" some of the shares in the company. This gives the co-operative company the flexibility it requires to cope with the changes in shareholding arising from movements in and out of the relevant industry.

265 The draft Act would permit a company to purchase its own shares. We are of the view that the draft Act could be used, with a suitable constitution, to achieve the same effect as the surrender provisions of the various co-operative company statutes.

266 Co-operative companies often have large memberships and a desire to exclude outsiders to the relevant industry from holding shares in the company. Special articles are often used (and are required in the case of co-operative dairy companies and co-operative forestry companies) relating to the distribution of income received by the company in respect of the produce supplied by its members.

267 We are of the view that companies could be structured under the proposed Act to achieve these results.

268 A main feature of the special statute is the protection of the word "co-operative" in the name of a company. The introduction of the ability of a company to purchase its own shares will enable other forms of co-operative enterprise to employ the company form. These organisations should not be denied

use of the word "co-operative" in their names. The "good faith" and "undesirable" provisions regarding company names in the proposed Act will protect against unwarranted use of the word "co-operative".

269 Overall, repeal of the special co-operative company statutes is desirable as the proposed Act would render them unnecessary. The possibility of repeal was not expressly stated in the discussion paper and submissions did not focus on that possibility. The Law Commission has not subsequently sought submissions on this, and thus recommends that these statutes not be repealed without further consultation with the interested parties.

MINING COMPANIES

270 The reason for special provision in the Companies Act relating to mining companies, and the history of their special treatment, is to be found in the judgment of Smith J in *In Re the Hartley and Riley Consolidated Gold-Dredging Co Ltd (No. 2)* [1933] NZLR 336.

271 The object of Part XIV of the 1955 Act which deals with mining companies appears to be to foster investment in speculative mining ventures. The key provision is the ability to attract funds without imposing any additional liability on the shareholder.

272 The Macarthur Committee recommended repeal of Part XIV but retention of the ability to incorporate with no liability. The ability to form companies with no liability was to be confined to mining companies.

273 We wrote to the mining companies we were able to identify from the records of the Registrar of Companies about retention of special provisions for them. Those who responded did not urge the retention of Part XIV, if no liability was still available.

274 The draft Act, by removing the requirement for par value, enables all companies to achieve no liability status. All the other provisions of Part XIV of the 1955 Act can be adopted by inclusion in the constitution of the company.

275 For these reasons the draft Act does not continue the special provisions for mining companies contained in Part XIV of the 1955 Act.

PARTS IX AND X OF THE COMPANIES ACT 1955

276 Parts IX and X of the Companies Act 1955 set up processes for the application of the 1955 Act to companies formed or registered under former Acts and companies capable of being registered under the Act.

277 The Parts are largely carry-over transitional provisions which would be cleaned out if reregistration under Part 10 of the new Act is required of all companies. That seems to us to be a desirable reform in itself.

278 Sections 367 and 369 (which deal with obsolete formal classifications) are not worth retaining.

279 We have been advised by the Registrar of Companies that the last time the registration procedures for companies not formed or registered under previous Acts was used was in 1929 (under the previous Companies Act).

280 While there may be some companies still in existence which are not registered, we are of the view that it is wholly reasonable to require them to reregister as part of the transitional arrangements for bringing in a new Companies Act.

A BUSINESS CORPORATIONS ACT

281 In the discussion paper, we raised the question whether the Act should be available only to companies set up to make profit. In that case, a separate statute would be devised for non-profit companies. The responses received to the discussion paper favoured the retention of a single statute applying to both types of company. That is the New Zealand system and appears well accepted.

282 The North American statutes are "business corporations" statutes. The benefit of such specialisation is that it permits assumption of shared purpose to a certain extent. A

profit purpose is at least a measure against which the best interests of the company can be weighed. Interestingly enough, however, none of the statutes we have seen impose a profit-maximising purpose on companies and, indeed, very often it would be misleading to assume such a purpose.

283 The Law Commission has concluded that for New Zealand circumstances a statute covering both business and other companies is appropriate. The standard constitution in the draft Act does, of course, envisage a business enterprise in which profits are distributed to shareholders. Companies formed for charitable purposes will have to opt out of the standard form by their constitution. For example, a charitable company (which, with the elimination of companies limited by guarantee, will be required to adopt a share structure) may provide for its directors to hold all the shares in the company and provide that the shares do not carry any rights to distribution.

SOCIAL PURPOSES

284 In the discussion paper, the Law Commission indicated that it was not attracted to the view that wider social purposes should be imposed upon companies through the Companies Act. We quoted the view that

> ... the problems of regulating business as to protection, distribution, competition, monopoly, labour relations and undue concentration of wealth are not properly to be dealt with by corporation laws, ... but by specific statutes. (H W Ballantine, *Law of Corporations*, Chicago (Rev ed 1946) p 42)

285 The responses we received agreed. In particular, the inclusion of a provision such as is found in section 4 of the State-Owned Enterprises Act 1986 (which requires state-owned enterprises to act in a socially responsible manner) was opposed by a number of respondents and none supported the inclusion in the Companies Act of the imposition of a system for worker participation in management.

286 The Law Commission has come to the conclusion that such social objectives should be imposed by particular statutes

(see paragraph 19 above). We have thought it proper, however, to acknowledge in the Act the ability of directors to take into account the interests of employees, to the extent that their interests are not inconsistent with the fundamental duty of the directors to further the best interests of the company. Such specific provision is made in the 1955 Act (in relation to the capacity of a company) and is thought necessary to overcome the doubts raised by cases such as *Parke v Daily News Ltd* [1962] Ch 927.

OFFICERS AND SECRETARY

287 The draft Act does not attempt to provide a structure for the operation of a company below the level of directors. That is a deliberate decision based upon our belief that the directors are the organ of the company responsible for its management and that to provide for management functions below the level of directors in the Act would be to undermine director responsibility and accountability. The directors are given power to delegate, but retain the obligation to set up safe management systems and to monitor those to whom they delegate their powers.

288 It is for these reasons that the draft Act does not deal with the office of company secretary or, indeed, with any other officer of the company. Although the 1955 Act explicitly recognises the company secretary, it does not allocate to the secretary any responsibility or duties. Most respondents to the discussion paper agreed that it was unnecessary for the statute to provide for the office of company secretary.

289 In the case of the one-person company, which is permitted by the draft Act, such an officer is a formality that we would not wish to impose. In the case of larger companies, it was suggested to us that the Act should create a role for the company secretary in providing information to the shareholders, independently of the directors. On this suggestion, the company secretary would perform a function as a sort of tribune of the shareholders.

290 The Law Commission considers that this suggestion is impractical, as running counter to the reality in which the

company secretary is often an employee in the management hierarchy of the company. It also, in our view, undermines the primary responsibility of the directors.

291 For the purpose of imposing liability in circumstances where company confidential information is abused, the draft Act refers to "employees" of the company. We have thought it undesirable to perpetuate reference in the current Act to "officers" both because the definition is extraordinarily imprecise and because the mischief addressed is the same where powers are delegated to and abused by an employee who would not fall within the definition.

292 The primary responsibility for ensuring that the powers conferred upon them are exercised properly should attach to the directors. Where they delegate, they remain responsible to ensure that safe systems, including in appropriate cases perhaps employment contracts which impose duties of loyalty and care upon employees, are set up.

UNUSUALLY LARGE COMPANIES

293 Section 471 of the 1955 Act permits the Governor General by Order in Council to waive a number of provisions of the Act "where he considers it necessary by reason of the unusually large number of shareholders". The provisions which can be modified are

- convening of extraordinary general meeting on requisition (section 136 (1) (a))
- articles prescribing the time for receipt of proxies (section 140 (3))
- circulation of members' resolutions, etc, on requisition (section 144 (2) (b))
- investigation of the company's affairs on the application of members (section 168 (1) (a))
- statement as to remuneration of directors which is required to be furnished to shareholders on demand (section 196 (1) (a)).

294 We have come to the conclusion that this provision should not be repeated in the draft Act. The draft Act permits

great flexibility in company form. The company is given a great deal of freedom to regulate by its constitution its own procedure. The mandatory requirements of the Act are minimum standards which we think should be applied to all companies. We do not consider that there is any justification for their modification in relation to unusually large companies.

TAKEOVERS

295 The reference to the Law Commission acknowledges "the continuing work of the Securities Commission" in takeovers. The Securities Commission reported to the Minister of Justice on the subject of company takeovers in its Report of October 1988. The present Report is made against the background that the Minister of Justice has announced that the recommendations of the Securities Commission have been accepted and will be implemented in legislation.

296 However, the Securities Commission's proposals are for a code applicable only to companies offering securities to the public. The Law Commission has therefore been concerned to determine whether the Companies Act should contain provisions in relation to takeovers which are applicable to all companies. It has formed the view that some provision in the Companies Act is required.

297 Our concern has been to prevent abuses which arise out of use of the corporate form. The draft Act does not duplicate the takeover code proposed by the Securities Commission, which is concerned in part with regulation of conduct outside the company structure. Regulation of the conduct of the offeror in relation to offeree shareholders is a matter of securities law policy. But the conduct of offeror directors in takeovers may adversely affect their own shareholders. And shareholders of offeree companies are particularly vulnerable to abuses or omissions by directors of the offeree company. These aspects of takeover law, it seems to us, are the proper subject of company law regulation because they arise out of the separation of ownership and control and the fiduciary duties upon directors which result. The concern is the same whether or not the shares in the company are publicly traded.

298 Shareholders in offeror companies have traditionally not been well served in takeover regulation. The draft Act protects them by

- requiring class vote and dissentient rights wherever class rights are affected by the takeover proposal
- requiring special majority and dissentient rights wherever the proposal amounts to sale or acquisition of assets equivalent to a greater part of the assets of the acquiring company.

299 Under the draft Act there is no equivalent provision to section 208 of the 1955 Act. Section 208 may be invoked in takeovers to enable compulsory acquisition or compulsory purchase of a remaining 10 percent minority after the takeover. The policy of the section in protecting minority shareholders from being locked in is more effectively met in the draft Act by the buy-out provisions where class rights are affected or the takeover amounts to a reconstruction or involves a major transaction.

300 So far as the section permits ownership to be perfected compulsorily this is not a policy we consider the draft Act should adopt. The ownership of a company is not a topic that the basic law relating to company structure and internal organisation can address. Many companies will be set up on the basis of the existence of small minority shareholdings. The circumstance of a triggering transaction or contract (such as is provided by section 208) does not, it seems to us, alter expectations in the ownership of the company. If it is considered efficient and in the public interest to require a mechanism achieving compulsory acquisition to rationalise ownership of companies, then we consider such a provision should be included in takeover legislation where the policy in the provision can be clearly referable to the goals of takeover law.

301 Under the draft Act, offeree shareholders will be entitled under section 178 to look to their directors for

- information as to whether the directors are in possession of material information which would mean the price offered for the shares is clearly inadequate
- details of any benefits obtained by the directors from the offeror company, directly or indirectly

- any interest of the directors of the offeree company in the offeror company.

302 A particular concern in takeovers is the ability of directors of offeree companies to use their powers of management to defeat bids. The defensive devices resorted to in recent years are described in the Securities Commission Report. They are the concern of core company law because they often amount to abuses of fiduciary duty. They have the effect of undermining one of the most important disciplines shareholders possess over directors, the power to sell. And they arise in circumstances where the directors inevitably have a conflict of interest.

303 The Law Commission has considered whether it is practicable to introduce a provision, similar to those to be found in Rules 21 and 22 of the United Kingdom Stock Exchange Listing Rules, which prohibit the use of certain powers by directors during the course of an offer or when one is imminent. The powers which cause particular concern are those relating to the creation of shares and options, sale or acquisition of significant assets and repurchase of shares.

304 We have come to the conclusion that it is not appropriate to prohibit director use of these powers during takeover because

- such a prohibition would prevent legitimate action in the best interests of the company
- there is substantial difficulty in defining "takeover" for the purposes of such a prohibition.

305 We consider that the provisions in the draft Act which

- establish the best interests of the company as the fundamental duty of directors in the exercise of any power (including powers to dispose of or acquire company assets and to issue shares)
- require the directors to treat existing shareholders fairly
- presume pre-emptive rights for existing shareholders to new distributions of shares
- require shareholder consent and dissentient rights where major transactions are entered into

- require benefit to existing shareholders in share repurchases not pro rata and in financial assistance in the purchase of shares
- permit ready access to remedy for breach

provide a framework within which directors seeking improperly to entrench themselves against takeovers can be held to account.

306 The Law Commission agrees with the assessment of the Securities Commission that the Companies Amendment Act 1963 should be repealed. It is an unsatisfactory piece of legislation which is more appropriately the subject of securities law regulation in any event.

LIQUIDATION

307 Legislation which establishes and governs the operations of companies must also provide for their demise, and the ascertainment and adjustment of entitlements associated with that demise. Companies can come to an end because their purpose is spent or because those in control are in a state of deadlock, as well as in the more common situation of insolvency. A very substantial portion of the Companies Act 1955 is devoted to the liquidation or winding up of companies. Part VI (sections 210 to 341) deals with winding up of companies registered under the Act, and Part XI (sections 387 to 394) deals with winding up of unregistered companies.

308 The Minister's terms of reference to the Law Commission mentioned that the Department of Justice was engaged in a review of company liquidations as part of a wider review of the law of insolvency. But the assumption that the Department's work on insolvency would be completed in advance of or at the same time as the Commission's overall work, and in close liaison with the Commission, has not come about. Recognising this, and because company law reform was seen to call for an essentially new statute, the Law Commission formed the view that it would be wholly unsatisfactory to replicate or tinker with the existing legislation on this subject alone in an otherwise rewritten draft Act. Moreover, the proposals for

change in other areas of company law could not properly be tied in with the existing winding up provisions in the 1955 Act.

309 The Australian Law Reform Commission completed a major review of insolvency law when it produced its final report on insolvency reform at the end of 1988. At almost the same time a discussion paper prepared by our Department of Justice addressed the earlier Australian Law Reform Commission discussion paper proposals but did not respond to the points made in the New Zealand Society of Accountants' critique of the same paper. The Australian report has been widely applauded as a comprehensive and coherent study of the law and practice of insolvency and the direction and detail of reform in Australia. Given the quality of the report and the present emphasis on the harmonisation of trans-Tasman commercial laws, the Law Commission has gratefully drawn upon the work of the ALRC for much of the insolvency-related part of the proposed new Companies Act. Nevertheless, as will be seen from Part 14 and the relevant commentary in Chapter 4, there are differences between Australian and New Zealand practice and inter-related law and the Law Commission's proposals do not simply replicate those of the ALRC.

RECEIVERSHIPS

310 Part VII of the 1955 Act contains provisions dealing with receivers appointed in relation to the assets of companies. This is important in the company law context as it may involve a change of management. But, the appointment of receivers is not limited to corporate assets and the Law Commission has taken the opportunity of this review of the 1955 Act to consider receiverships in a wider context, and transfer relevant rules to the Property Law Act 1952. At some later stage a new Receivers Act may be appropriate. The present recommendations are described in some detail in Chapter 6.

ROLE OF THE REGISTRAR OF COMPANIES

311 The Macarthur Committee, in its interim Report of August 1971, recommended that the role of the Registrar

extend beyond maintenance of the register. It recommended that the Registrar be given powers to police the Act and, in particular, to investigate, detect and prosecute offenders for breaches of the Act and for fraud.

312 In accordance with the recommendations of the Macarthur Committee, the powers of the Registrar under Part I of the 1955 Act have been greatly extended. Recent legislation, most notably the Corporations (Investigation and Management) Act 1989 and the Companies Amendment Act 1988, has continued to give the Registrar wide powers of enforcement.

313 We have recommended that the investigative and enforcement powers under Part I of the 1955 Act should not be continued. We have retained and expanded the powers of shareholders to obtain information and inspection, at present found in sections 168 and 169 of the 1955 Act.

314 It should be acknowledged that in recent years in New Zealand, most investigation has been undertaken not under the provisions of sections 168 and 169, but by the Registrar under the powers conferred upon that position in section 9A in Part I of the Act. Until the events which followed the 1987 stock market collapse, the powers of the Registrar appear to have been used almost exclusively in cases of insolvency, as an aid to his or her role as Official Assignee. (This information has been informally given by officials of the Department of Justice. We have been unable to obtain any statistics from the Department as to the use of the Registrar's powers under Part I of the Act.)

315 We have formed the view that in a core company Act where shareholder enforcement is the norm, the powers proposed in the draft Act under sections 134 and 135 are sufficient. In extraordinary circumstances, the Corporations (Investigation and Management) Act 1989 confers extremely wide powers of investigation and inspection.

316 The Law Commission accepts that a public agency should be empowered to investigate and have standing to remedy breaches of the Act in cases where the public interest is involved. For this reason, the draft Act proposes that the Attorney-General should have standing to obtain inspection and

enforce obligations in the same manner as a shareholder. The Attorney-General has been designated as a convenient recipient of these powers (which can then be delegated) pending reorganisation of the agencies charged with company and securities law enforcement.

317 It is important to remember that the enhanced powers given to the Registrar at the recommendation of the Macarthur Committee predate the Securities Act and the setting up of the Securities Commission.

318 While state agency enforcement is a legitimate backstop to the remedies provided to shareholders under the draft Companies Act, that backstop is designed to be exercised in the public interest. In the normal course the enforcement of their private interests will be a matter for the shareholders affected. Where the company offers securities to the public, the state has a more direct interest in ensuring compliance with the laws set up partly to maintain investor confidence in organised capital markets. For that reason, state enforcement of securities law is more important in the scheme of the Securities Act than it is in the scheme of the Companies Act.

319 The Law Commission has been anxious not to pre-empt reassessment of the form of enforcement which may be devised in a review of the Securities Act. It sees the residual role for state enforcement in the core Companies Act being most appropriately entrusted to the agency charged with enforcement of securities laws, following review of the Securities Act.

320 We suggest also that is is preferable for agencies wherever possible to have distinct functions. It permits better focus. It will allow the Registrar to concentrate on the task of providing an efficient public service in the registration of companies and the disclosure of information. We would prefer for that reason to see the registration function and the enforcement function separated in any event. Such a separation of functions was generally supported by the submissions received in response to Preliminary Paper No 5. We have been impressed by the registration system we have seen in operation in Ontario which maintains such a distinction. Similar distinctions are maintained in Alberta and British Columbia.

321 The draft Act therefore proposes that the enforcement powers of the Registrar should be limited to maintenance of the register.

IV

Commentary on Draft Companies Act

PART 1

Preliminary

322 The draft Act would replace the Companies Act 1955. We considered whether we should move to a different title for the new Act, to emphasise its reforming function. Because it is intended as the core Companies Act we have preferred to stay with the title that has historically applied to the statute governing New Zealand companies.

323 Following recent legislative practice, the draft Act includes a purpose section. It is designed to underscore the fact that company law recognises the economic and social value of the limited liability company in permitting the aggregation of capital and the taking of business risks. The Act aims to strike a balance in protection of shareholder and creditor interests which does not undermine the position of the company as a mechanism for harnessing capital and spreading economic risk.

324 The definitions contained in *section 3* apply throughout the Act, unless excluded by specific provision or the context. In some cases where the definition is fundamental to a particular part only of the Act, we have preferred to include the definition in that Part, but with a cross-reference in the definitions section, for ease of use. Examples are to be found in the definition of director, contained in section 96, and the definitions

relating to group accounts, which are set out in Part 10 of the draft Act.

325 In some cases, the definitions may seem, taken out of context, extremely wide (an example is the definition of "distribution"). They need to be viewed in the sections which apply them. For this reason, where elaboration is required, we have discussed the definitions as they arise in the draft Act, rather than treating them in isolation as a commentary to section 3.

326 Some definitions, however, are more conveniently dealt with in this section of the Commentary because they apply generally.

327 The definition of "Court" reflects the division of work referred to in paragraph 130. The District Court is given exclusive jurisdiction in the enforcement of the penalty provisions of the Act, and has concurrent jurisdiction with the High Court in relation to shareholder and creditor enforcement and ancillary powers.

328 The definitions of "registration day" and "working day" are designed to make explicit the treatment of days of the week and holidays for the purposes of reckoning the time limits in the Act.

329 The definition of "related company" in section 3(2) is discussed in the commentary on director dealing in shares. For the purposes of company accounts, share repurchase and the incurring of indebtedness, other definitions of "subsidiaries" and "cross-holdings" are used.

330 The solvency test set out in section 3(3) is pivotal to the scheme of the Act. It applies to all transactions which transfer wealth from the company to the prejudice of creditors and, where some shareholders only receive benefit, to the prejudice of non-participating shareholders. The test is designed to be a substantial constraint in such circumstances because they are those in which limited liability and management power are most open to abuse.

331 The test is a two-pronged one to ensure both "balance sheet" solvency and "cash-flow" solvency. It recognises that measuring current assets against current liabilities may not be

sufficient to establish solvency. The test ensures that decisions are based on cash-flow analysis showing that known obligations of the company can reasonably be expected to be satisfied during the time they will fall due.

332 The solvency test is applied in the draft Act to all distributions, including share repurchase as well as dividends. At present, the law relating to dividends is entirely to be found in the cases.

333 The draft Act follows United States precedent in using the concept of "realisable value" in the assets over liabilities limb of the test. The Canadian reliance upon a concept of "stated value" (being the sum of all value received on issue of shares) seems to us simply to reinstate under a different name the concept of nominal capital for the purposes of distributions and is insufficient protection for creditors at risk. We realise that in making a determination whether to make a distribution in marginal cases the directors will not be able to rely upon the historic values of assets in their accounts. We think in those marginal cases it would be wrong to permit the accounts to be sheltered behind to the prejudice of creditors. In those circumstances prudent directors will require reassessment of the value of the company's assets. The test is designed to be a purposive one for the protection of creditors.

PART 2

Incorporation

334 The essential characteristics of a company are set out at *sections 5 to 9*. These sections are designed as a useful overview of matters dealt with in separate parts of the Act. The draft Act does not continue the historic division of the company constitution into memorandum and articles of association, but simply requires a constitution.

335 Every company will have a name, a constitution, one or more shares, one or more shareholders and one or more directors.

336 The name is required to identify the company. It may be a registered name or an assigned name (a number name given to the company by the Registrar for the purposes of identification in circumstances where a registered name is not available or not sought).

337 The company constitution, as is made explicit in Part 4 of the draft Act, effectively comprises the standard constitution set out in the Act, unless and to the extent that it is specifically excluded.

338 While it is possible to devise a company structure without necessarily providing for shares, shareholders or directors, we have considered that there is little to be gained from such

sophistication in the Act because the imposition of such structures is well understood and can readily be adapted to achieve specific objectives for the company. For example, the company constitution can appoint the shareholders, or indeed name individuals as directors. Companies at present without share structure can readily be given one, through allocation of one share to the directors or each of them. Unlimited liability or no liability or liability up to a certain amount can all be provided for in allocating rights and obligations under the constitution to shares.

339 *Section 6* deals with the essential powers of the company. It is designed to ensure that there are no power vacuums in a company. Except where the constitution limits the power (for example, by providing that a director is not removable or that some provision in the constitution cannot be altered), it is essential that someone should have the power to do each of the things listed in section 6. Normally, all the powers listed will be exercised by the shareholders. The standard constitution provided by the Act provides for that and provides that all shares carry an equal right to vote on these matters (section 26). In some companies, however, the constitution may expressly confer some or all of these powers upon a named person or body, rather than through the mechanism of attaching the rights to a particular class of shares and issuing the shares to the person named.

340 Where at any time there is no person entitled to exercise one of the essential powers of the company, that is a ground for its liquidation pursuant to section 203.

341 Separate personality is one of the essential components of the company and has been critical to its success. *Section 7* makes explicit recognition of this feature.

342 *Section 8* extends and completes the reform introduced in 1983 by section 15A of the Companies Act 1955. It deals with the problems associated both with the ultra vires doctrine and the constructive notice doctrine as applied by the case law to company objects and the consequences for third parties of their infringement.

343 The ultra vires doctrine meant that acts taken by a company outside those expressly or impliedly authorised by its objects clause were void, because the company lacked legal capacity to enter into them.

344 This restriction upon company activity was designed for the protection of shareholder expectations, but has been for many years a protection available mainly in theory because from a very early stage companies commonly appropriated to themselves objects of such breadth that they were illusory standards against which to measure company action or director conduct. The reforms of 1983 simply bowed to reality in permitting companies to have the powers of natural persons and removed a source of much problem for third parties dealing with the company.

345 The reforms to the doctrine of ultra vires effected by the Amendment Act of 1983 were extended in relation to constructive notice in 1985. Even so, the result has not been, as was intended, to abolish the ultra vires doctrine and problems of constructive notice associated with it.

346 In the first place, the extension of the capacity of companies to include all powers of natural persons was applied only to companies formed after 1984 or those which changed their memorandum and articles to take advantage of the provision. We would perfect this reform by enabling companies to reregister any limitation on their powers within the transition period. Those that do not do that will have the powers of natural persons. The reforms of the 1980s have been substantially undermined by the failure to require all companies to face up to the change. In Australia and Canada similar reforms were either applied directly to all companies or required reregistration within a certain period.

347 Other difficulties associated with the ultra vires reforms are the continuing suggestions of restriction upon capacity contained in section 16A(2) of the 1955 Act and the continuation through section 18C of a form of constructive knowledge which continues to place at risk third parties dealing with a company which has restrictions on its objects. The draft Act deals with these concerns in section 8(2) by expressly providing that transactions in contravention of the constitution are not

invalid. A third party under the draft Act will not have constructive notice through registration of the constitution (draft Act, section 143), and the company cannot assert any invalidity against a third party, unless the third party "has or ought to have by virtue of his position with or relationship to the company knowledge to the contrary" (draft Act, section 142(1)). We have some doubts as to whether knowledge by relationship is a sufficiently precise concept for business law. In particular, there may be difficulties with forgotten knowledge and knowledge within a corporation. While actual knowledge does not seem to us to be sufficient because it would allow a third party to be wilfully "blind", we have considered requiring the knowledge to be "in the transaction" in order to provide a more workable test. This is a particularly difficult area and in the end we have not felt justified from departing from such a recently enacted test. But we think its application should be kept under review.

348 It should be noted that section 8 does not reenact the list of powers expressed in section 15A(1) of the 1955 Act as among those possessed by a company. We have considered that list to be unnecessary. Section 15A(1)(g) of the 1955 Act is a legislative reversal of *Parke v Daily News Ltd* [1962] 1 Ch 927 which held that ex gratia payments to employees upon a company ceasing business were ultra vires the company. We do not think it necessary to make explicit reference to the powers of the company in such circumstances because we believe it is quite clear from section 8 of the draft Act that donations of all kinds are within the capacity of the company. (To the extent, of course, that they exceed "the best interests of the company" they will not be within the powers of management conferred upon directors.)

349 Authority to bind is dealt with in *section 9* and in Part 9 of the draft Act. These provisions are a statement of the rule in *Royal British Bank v Turquand* (1856) E&B 327; 119 ER 886. By that decision, an outsider dealing with the company is entitled to assume that the company's internal procedures have been properly complied with and that persons acting on its behalf do so with its authority. The section follows Canadian precedents (see section 19 of the Ontario Business Corporations Act 1982). It is largely a restatement of the common law,

including normal agency principles, but makes it explicit that the position is not affected by forgery unless the third party has actual knowledge of the fraud. Constructive notice of the company constitution by reason of its registration will not affect the ability of the third party to rely upon the authority of the agent contracting on behalf of the company, but the third party is not protected in cases of actual knowledge. In this, the draft Act follows the existing provision of section 18C and the Canadian models.

350 The method of incorporation of companies is set out at *sections 10 to 12* of the draft Act.

351 The present law is altered by *section 10* to enable one person to incorporate a company. This provision anticipates the change referred to in *section 11* which would permit all companies to have one shareholder. At present, private companies can incorporate with the minimum of two shareholders, and public companies with the minimum of seven.

352 This change was suggested in our discussion paper and was generally supported. The recognition of the one-person company makes explicit what is already permitted by the law through use of sham holders of shares and some meaningless ritual. The legality of what is in effect a one-person company has been recognised at least since the decision of the House of Lords in *Salomon v Salomon & Co Ltd* [1897] AC 22. The insistence of the statute on additional shareholders provides no protection to creditors from abuse of limited liability and the draft Act will result in a more direct and less wasteful legislative scheme.

353 The information required to be registered under the draft Act on incorporation is simply the information required for identification of the company and those responsible under the Act, directors and incorporators. This streamlines the process of registration. It also makes it clear that the Registrar is obliged to expedite registration on the basis of compliance with the formal requirements of the Act. This changes the implication of the present law that the function of the Registrar extends beyond checking for form and involves ensuring compliance with the substantial provisions of the Act.

354 *Sections 13 to 15* provide the process for reregistration of existing companies under the new Act and for the effect of registration. The proposed system (which will involve an amendment to the 1955 Act for the period of transition) is described in paragraphs 52–65 above.

PART 3

Company Names

355 Selection and authorisation of names for companies has traditionally been a source of delay in registration. The proposals made in the draft Act are designed to overcome those delays. They provide for an "assigned" (number) name to be applied by the Registrar where no name is registered *(section 16)*. The applicant for registration of a name must cause a search to be undertaken and make a statement that the name

- is adopted in good faith for the purpose of identifying the company and
- is readily distinguishable from other names in registers and directories he or she is required to search (the Registrar can prescribe what registers and directories are to be searched).

356 This procedure is designed to come up with a speedy system for registration of name which will allow the Registrar to presume that the name sought is appropriate.

357 Once the application is properly completed, the power of the Registrar to decline to register the name is limited to circumstances where the name is identical with one in the registers required to be searched, or where the use of any word in the name infringes any enactment.

358 That limited discretion is consciously adopted as a means to ensure that registration of companies is not delayed by administrative consideration of name desirability, and that effort and resources are not unnecessarily devoted to the topic by the Registrar.

359 Once the name is registered, it may be removed pursuant to *section 20* if the Registrar has reasonable grounds to believe that the name is undesirable. It is envisaged that the existing case law on the term "undesirable" in this context will continue to apply. In that case, the company will have a right of appeal.

360 We have considered whether the vexed question of company names should not be dealt with by simply proscribing identical names, on the basis that for company law purposes all that is required of a name is that it identifies the company. Restrictions on the use of business names would then be a matter for the common law or a specific statute. We raised this suggestion for consideration in the discussion paper.

361 We have concluded that there is a substantial demand for and a public interest in name protection and in avoiding names that are confusing or otherwise undesirable. This calls for more protection than would be given in a system which simply prohibited identical names.

362 *Section 21,* continues the present requirement that companies must use their full name in correspondence and documents but drops the requirement that the company's name must be conspicuously displayed in every place where it carries on business. The rationale for that rule, which has been in all our Companies Acts and is derived from early English models, is that it is important for those dealing with a limited liability company to know that they are doing so. This provision dates from a time when companies were relatively uncommon in business and were viewed with suspicion. The ubiquity of the company and its use by small business means that red flag provisions of this sort are no longer called for. The requirement is an anachronism, it serves little useful purpose and even the small costs of compliance are not justified. Our own impression is that the current provision is not widely observed in any event.

PART 4

Company Constitution

363 The draft Act sets up a system which is, like the 1955 Act, partly enabling and partly regulatory. Under the 1955 Act, by the device of Table A articles, the Act provided a model constitution for companies. In the draft Act, we have thought it preferable to state the major rules of company organisation in the Act itself. In some cases these rules are mandatory as, for example, the limits on the powers to make distributions and the directors' duties. In other cases they are permissive, for example, in the use of telephone communication for meetings. But many of the provisions of the Act state a model or standard which can be varied by the constitutional document of the company. The standard provisions will be part of the company's constitution to the extent that they are not excluded. (An outline of the scope of company constitutions is given above at paragraphs 164–183.)

364 If a company, operating under the standard constitution, seeks to modify it, it will have to comply with the procedure for alteration of the constitution (section 24).

365 The draft Act gives companies considerable flexibility to devise a structure suitable for their circumstances. A premise of the draft Act is that shareholders cannot claim prejudice if they knowingly join a company whose constitution restricts the

rights attached to their shares. Once a shareholder has joined a company on the basis of the constitution, however, he or she is protected from change except in accordance with the constitution and the Act (which is hostile to changes which affect shareholder expectations, particularly in relation to class rights).

366 For this reason, the constitutional document (where the company has one) occupies a significant place in the scheme of the draft Act. It is a statement of deviations from the normal consequences of shareholding which are set out in the standard constitution provided by the Act.

367 We expect that in the case of companies listed on the New Zealand Stock Exchange, the listing requirements may restrict departure from the standard constitution, particularly in relation to the rights attaching to shares which are publicly traded.

368 By *section 24*, alterations of the constitution are required to be made by special resolution. This provision is subject to the constitution which may prescribe its own system although, where the change affects shareholder rights, section 88 is mandatory and cannot be excluded. Special resolutions require a 75 percent majority of those entitled to vote, which carries on the existing provision. Where the alteration of the constitution affects the shareholder rights defined in section 88 (the rights to vote and to distributions, pre-emptive rights and observation of procedures for alteration of rights) then the change requires a special majority of the interest group affected. The dissentient minority in such cases will have rights under section 81 to require that their shares be bought out.

369 This scheme represents a policy that the rules of the company in so far as they affect fundamental rights attaching to shares are to be entrenched. It is always open to a company to structure the rights of shareholders so as to reduce the control that the shareholders can exercise. If shareholders enter the company on that basis, they will not have been misled. If the company seeks to change the rules of the game, the shareholder will be protected.

370 Where the statutory standard constitution is not displaced by *section 26*, a share will carry

- an equal right to vote and to distributions
- rights of pre-emption on issue of shares
- rights to be treated pro rata with other shareholders on share repurchase.

PART 5

Shares

371 *Section 26* sets out the normal range of rights which may be attached to a share, depending upon the company constitution. These rights are the more common ones but it is provided that any other right, privilege, limitation or condition may be imposed under the constitution.

372 Subsection (2) sets out the rights which attach to a share in a company under the statutory standard constitution. If the constitution is silent about the rights attached to shares, they will carry all the rights set out in this subsection. These are the rights to vote on all matters required by the standard constitution to be reserved to shareholders: appointment of directors and auditors, alteration of constitution, approval of major transactions, approval of amalgamation and approval of voluntary liquidation of the company. Shares also carry the rights to share equally in dividends and distribution of assets upon dissolution.

373 These are the residual proprietary rights and in voting on the matters reserved to them by this section the shareholders may act in their own self-interest and are not subject to fiduciary duties to other shareholders or to the company (section 80).

374 *Section 27* emphasises the wide range of interests covered by the description "share" in the draft Act. It draws no distinction between preference and ordinary shares and explicitly recognises that shares may have no voting rights.

375 One of the most significant changes to the present law which would be effected by the draft Act is the abolition of the concept of par value for shares and the consequential abandonment of the concept of nominal capital: *section 28.*

376 By section 14(4) of the Companies Act 1955, every company limited by shares must state, in its memorandum of association, its nominal or authorised share capital and its division into shares of a fixed amount. The fixed amount attached to each share is its "par value". These concepts have been central to the system of company law we inherited from the nineteenth century English models. They are the foundation on which the law relating to dividends and other distributions is based. The concept of par value was an attempt to ensure that no return to shareholders is made from a company except out of net assets which exceed the capital raised from shareholders. The theory was that the capital raised on issue of shares was a cushion of solvency for the trading activities of the company.

377 Par value was also seen as a protection for shareholders against stock-watering: additional authorised shares had to be issued at the same par value as the shares already issued.

378 These expectations have never been realised. The capital raised by shares usually bears no relationship to the capital employed by the company and thus is not an effective solvency cushion. The par value of a company's shares is often a fraction of the issue price and so does not in practice operate as a protection against stock-watering. Worse, instead of providing the protection originally envisaged, the concepts of nominal capital and par value have given rise to unproductive complexity in accounting, substantial formality in management of capital (through, for example, the prohibition against companies acquiring their own shares) and have masked the true capital of the undertaking and the relationship to it of such indications of corporate health as dividends. They misrepresent the share as a measure of value rather than a fractional interest in the net assets of the enterprise. They make it impossible to describe

the difference between book assets and liabilities of a company by the word "capital". They have led to confusion between legal concepts of capital and accounting concepts of capital.

379 Nominal capital and par value are not required in the United States or Canada. In the United Kingdom they are retained, although both the Gedge Committee (Cmd 9112) which reported in 1952 and the Jenkins Committee (Cmnd 1749) which reported in 1962 recommended that the Companies Act be amended to permit the issue of shares with no par value.

380 In our discussion paper, we proposed that par value be abolished. The submissions we received in response to that proposal were decisively in favour of it.

381 We have concluded that no useful function is served by the par value concept. Moreover, it is arbitrary and misleading. Its abolition would mean that financial accounts can be greatly simplified (share premium accounts and "reserves" are concepts that will no longer be required), the rules relating to payments of dividends and other distributions can be made purposive and give a real protection for creditors through imposition of a solvency test applied to the real circumstances of the company, and the way is open for a more sensible approach to issues such as company share repurchase.

382 The Law Commission does not propose that the concept of nominal capital be replaced by a concept of "stated capital" (being the proceeds actually received by a company on share issue) for the purposes of distributions. Instead, it proposes a solvency test, described at paragraphs 330–333, which it considers to be a significant improvement for the protection of creditors.

383 The Gedge Committee in the United Kingdom suggested that no par value should apply only to ordinary shares and not to preference shares. The Jenkins Committee, reporting 10 years later, however, suggested that no par value should be applied to preference shares as well as ordinary shares. We raised the point for discussion in Preliminary Paper No 5 and suggested that if par value were abolished for ordinary shares, there seemed to be no good reason to retain it for redeemable

shares and preference shares. The respondents to the discussion paper did not dispute that conclusion and we have therefore implemented it in section 28. It is, of course, possible, without using the concept of "par value", to specify a redemption or liquidation value in a preference or redeemable share, or the manner in which the value will be determined. The distinctive features of preference or redeemable shares will therefore remain.

384 We have considered whether the concepts of par value should be made optional or done away with altogether. Par value is optional in five Canadian provinces (the other four having compulsory no par value shares) and in most states of the United States. Professor Gower in *Principles of Modern Company Law* (4th ed) 1979, at p 238, argues that no par shares should be made compulsory. So did the Alberta Law Reform Commission and the Dickerson Committee in Canada. We have concluded that to retain par value as an option would be unacceptably complicated and would serve no useful purpose.

385 *Section 29* of the draft Act provides that, unless otherwise specified in the constitution of the company, a share is transferable. As is indicated in paragraph 148, the Law Commission considers that transferability of shareholder interest is one of the substantial benefits of company form and it is regarded as one of the significant disciplines shareholders exert over director management. The policy of the Act is to protect it unless clearly excluded by the company constitution. It is for this reason that the standard constitution makes shares transferable and section 63 requires the board to register transfers promptly unless the constitution permits refusal or delay and the board gives its reasons for not registering the transfer promptly. There will of course be some types of company, for example family companies and similar closely-held companies, where restrictions on the transfer of shares will be appropriate. And companies wishing to confine membership to particular groups, for example dairy farmers, will also need the power to transfer shares circumscribed. The company's constitution can provide for this.

386 *Section 30* deals with share options. It is designed to ensure that directors do not circumvent the prohibitions on issue of shares, distributions, repurchase and financial assistance by entering into share option agreements.

387 The draft Act contains detailed provisions as to the issue of shares. It is in relation to issue of shares that shareholders are most at risk in the enjoyment of their class rights in the company. Creation of shares ranking ahead of or equally with the shareholders' shares can substantially erode class rights. The common law has provided insufficient protection against such dilution (see, for example, *White* v *Bristol Aeroplane Co* [1953] Ch 65) and the draft Act would change the law.

388 Shares can be issued

- under the company constitution pursuant to *section 32* (there must be at least one share in this category), or
- by the company pursuant to *section 33.*

389 Shares can be issued at any time by the board of directors where the company constitution has made provision for them and they have not yet been issued. In all other cases, shares will be issued by the board under *section 34.* The share description of any such shares is registered as part of the constitution because it forms part of the structure of the company.

390 The protections of the draft Act apply to share issues authorised by the board. In those cases, unless the constitution provides otherwise, existing shareholders have pre-emptive rights which require shares to be offered to them in a way which preserves their relative distribution and voting rights. They must be given a fair and reasonable opportunity to accept any such offer. This is a major change but one that is foreshadowed by Stock Exchange practice. It was raised in PP5 and generally supported.

391 Where the constitution of the company excludes pre-emptive rights, the shareholder buys in that knowledge and in that case takes the risk of dilution of rights. Change to the constitution after a shareholder has bought shares to remove pre-emptive rights is subject to safeguards for alteration of class rights which include rights to buy-out (see paragraph 202 and *section 37 (3)*).

392 Where shares are issued wrongfully, in breach of the pre-emptive rights provisions, the draft Act provides that the issue is itself valid but the non-compliance is deemed to be unfairly prejudicial conduct which permits shareholders affected to seek relief from the Court under section 135. Under that provision, the Court can make any order that seems to it to be appropriate, including repurchase of the shares of the shareholder affected, issue of further shares or payment of compensation.

393 *Section 38* confirms that shares can be issued for a consideration other than cash. Section 60 (3) of the 1955 Act, which permits exchange of property other than cash for shares by the device of an exchange of cheques, will no longer be necessary and has been dropped.

394 Section 38 extends the present law in permitting shares to be issued in consideration for contracts for future services. There are difficulties in putting a value on such contracts. But the overall duty of directors to ensure that their powers are exercised with care and good faith in the best interests of the company should provide sufficient protection in these cases. Future services often have value as real as other forms of property. And there may be considerable benefits to a company if it is able to recognise that fact.

395 *Section 39* protects the company from a share issue for inadequate consideration. At present, the only protection is the requirement that shares cannot be issued at a discount on par value. As pointed out above at paragraph 378, par value often has little relation to the real value of the share. As a result, shares may be issued to effect a substantial distribution or transfer of wealth from existing shareholders. Section 39 gives considerably greater protection. It provides not only that the consideration must be fair and reasonable to the company and existing shareholders, but also that the terms of the issue may not erode the nominal consideration (as, for example, where deferred payment affects the real value received by the company). The section reforms the common law which has traditionally been reluctant to look at adequancy of value on issue, despite the stock-watering effect of inadequate consideration

(see *In re Wragg Ltd* [1897] 1 Ch 779, *Re White Star Line* [1938] Ch 458.)

396 *Section 40* makes it clear that shares cannot be issued to increase the liability of a shareholder unless the shareholder consents in writing. The provision is necessary if limited liability is not to be defeated.

397 *Section 41* clarifies the point of time at which a share is issued. A share is issued, if under the constitution, on registration of the constitution and in other cases upon entry of the shareholder's name on the share register. It is at this date that the shareholder becomes entitled to the rights conferred by the share. The position of purchasers is protected by the duty to register transfers and other safeguards contained in sections 68 and 69.

398 A distribution under *section 42* can only be made if the solvency test is satisfied.

399 The definition of distribution, contained in section 3, is extremely wide and includes any transfer of property to a shareholder in respect of any share. Share issues are excluded because the requirement of fair value ensures that the company's position is not prejudiced and raising capital when the company is in difficulty should not be discouraged. (Potential investors will be protected by other legislation and the general law if misled in such circumstances.)

400 The solvency test in relation to distributions reflects two goals: avoidance of prejudice to creditors; and avoidance of prejudice to higher ranking shareholders with fixed entitlements, for example in preference shares.

401 The company must have sufficient funds to be able to meet its debts to outside creditors as they fall due and its realisable assets must exceed its liabilities, including contingent liabilities. The test is designed to be a rigorous one, as is discussed above in paragraph 333.

402 Shareholders with fixed entitlements cannot be prejudiced by distributions to shares which rank after them. For this purpose, therefore, the fixed entitlement is treated as if it were a debt.

403 Discrimination in payment of dividends between shareholders of the same class is prohibited. This provision does not apply to distributions in the form of repurchase or financial assistance *(section 43)* because those types of distribution will often need to be discriminatory, and specific safeguards are imposed for shareholder protection in relation to them.

404 *Section 44* makes provision for options which permit shareholders to choose between a dividend or shares. Because the value of shares may fluctuate, the provisions requiring equality of treatment of shareholders cannot strictly be met without a mechanism such as is provided by section 44.

405 The definition of distributions is wide enough to cover discounts to shareholders. These are a common form of transfer of benefit which we would not wish to inhibit, provided they are not abused. There is also some doubt as to whether discounts can ever operate with equal effect for all shareholders. In those circumstances, *section 45* makes it clear that discounts can be authorised by the board if fair and reasonable to the company and all shareholders, and are available on the same terms to all shareholders. Creditors are protected by a requirement that the scheme cannot be approved or continued if there are doubts as to solvency.

406 Where distributions are made in breach of the solvency test, *section 46* provides that they may be recovered from shareholders, except where they have acted in good faith and altered their position in reliance on the distribution. To the extent of shortfall in recovery from shareholders, they can be recovered from directors if the procedural requirements were breached or the directors had no reasonable grounds for being satisfied as to the solvency test.

407 *Section 48* replaces the rule that a subsidiary may not hold shares in its holding company. The present rule is easily circumvented and fails to achieve the intended goal of preventing circular holdings through which assets can be stripped to the detriment of shareholders in either company. In this section, it is the company which is prohibited from taking steps to acquire cross-holdings where the solvency test would not be met, not the directors. Each director owes a duty to the company of which he or she is director to take reasonable steps to

ensure compliance with the cross-holding rule. The limiting of the directors' responsibilty to taking reasonable steps is deliberate to ensure that inadvertent infringement through low levels of cross-holding will not impose liability. At such levels, no steps would reasonably be required to check solvency. But the larger the transaction in relation to the company concerned, the greater the steps that ought to be taken. This is therefore a duty which increases with the magnitude of the transaction. Where the directors have not taken reasonable steps, they will be personally liable.

408 *Section 49* is an important policy departure from the existing law.

409 The principle that a company cannot hold its own shares was established in *Trevor v Whitworth* [1887] 12 App Cas 409. Statutory exemptions are provided under the current legislation in relation to redeemable shares.

410 There are two reasons for refusing to permit a company to buy its own shares. The first is that the repurchase is a distribution of wealth to shareholders which may prejudice creditors. The second is that the power to repurchase can be used to prejudice shareholder interests. Share repurchase has long been permitted in the United States and has been allowed in Canada since the implementation of the Dickerson Committee reforms. It is permitted in the United Kingdom, subject to elaborate safeguards, and there are proposals for reform in Australia which would permit repurchase including a Federal Bill introduced in 1988 following a report of the Company and Securities Law Review Committee to the Ministerial Council in September 1987.

411 We have taken the view that creditors are sufficiently protected from the dangers of share repurchase by treating repurchase as a distribution subject to the solvency test. That test, as is explained above at paragraph 333, is designed as a significant check upon distributions in cases where there is doubt as to solvency. The requirement that the realisable net worth of the company is used for the "balance sheet" limb of the test should ensure close review of the company's financial position before a repurchase decision is made if the directors are not to be personally at risk.

412 The more difficult problem in permitting share repurchase has been the provision of a system which protects shareholders.

413 Shareholders may be at risk if the power is used

- to discriminate amongst shareholders by selective purchase
- for insider trading, the company being the ultimate "insider"
- to manipulate the market price of the shares
- to manipulate company control
- to pay "green-mail" or as a defence to a takeover.

414 On the other hand, permitting companies to purchase their shares gives them more flexibility to organise their capital, enables easier exit for dissentient shareholders or, in cases where there is no ready or appropriate buyer for shares (particularly in closely-held companies), may represent in many cases a prudent investment and in others may be a sensible way to return surplus resources to shareholders. And, as has been noted by the Australian Committee in respect of that country, New Zealand companies competing with companies from other jurisdictions which permit repurchase may be at a disadvantage if that tool is not available to them.

415 Both the United Kingdom legislation and the Australian law reform proposals rely upon procedural safeguards, involving shareholder approval, sunset provisions and limits upon the extent of the repurchase permitted.

416 We have considered both the Australian bill and the Report which preceded it. The bill departs from the Report in a number of respects. It has been much criticised in Australia.

417 In the discussion paper, we indicated a preference for the North American approach to repurchase which, instead of imposing procedural impediments and requiring shareholder participation, relies substantially upon the general fiduciary duties of directors.

418 The reaction we had to the discussion paper proposal was generally in favour of the Canadian approach.

419 Our own policy conclusions (as to which see, for example, paragraphs 196–213) do not favour the use of the general meeting as a safeguard against the abuse of shareholder interest and we do not like the complexity of the United Kingdom Act or the proposed Australian Bill. Our solution therefore is closer to the North American model, although we have proposed what we consider to be some important safeguards. Where the solvency test is met, shares can be purchased if the repurchase offer is pro rata to all shareholders.

420 Shares can be repurchased selectively where all the shareholders consent.

421 Shares can be repurchased selectively in other circumstances only where

- the constitution permits selective repurchase and
- the procedure set out in section 51 is followed.

422 *Section 51* requires the directors to resolve that the selective acquisition is in the interests not only of the company (in application of the fundamental duty of directors) but is of benefit to the remaining shareholders and in terms which are fair and reasonable to them. Before the offer is made, disclosure must be given to shareholders who will have 10 working days to apply to the Court for an order restraining the acquisition. The terms of the disclosure are covered by *section 52.*

423 Shareholders selling to the company are protected from the company making use of inside information to achieve an unfair price, by the provisions of *section 50 (2) (c). Section 53* requires cancellation of shares repurchased. This avoids the complication of "treasury" shares; but where the constitution is not affected, the share can be re-issued without the need to comply with sections 33 and 34. Pre-emptive rights and restrictions on issue will still apply.

424 These safeguards should ensure that the interests of non-participating shareholders are sufficiently protected without imposing too much procedural complexity.

425 Redemption of shares at the option of the company is treated by *section 55* as a repurchase. Redemption at the option of the shareholder, or on a fixed date, converts the shareholder into an ordinary unsecured creditor on the date of redemption,

but the sum payable may be recovered if the solvency test was breached at the time payment was made.

426 Associated with the relaxation of the restriction on share repurchase, is the *section 58* relaxation of section 62 of the Companies Act 1955, which makes it unlawful for the company to give financial assistance for the purpose of the purchase of its own shares.

427 Again, we have considered that creditor protection is sufficiently met by the imposition of a solvency test. Shareholder protection is provided by the requirement that financial assistance can only be given if considered by the board to be in the best interests of the company and of benefit to shareholders not receiving the assistance, and is fair and reasonable to them.

428 While the restriction on providing financial assistance is lifted under the draft Act, the concerns that prompted section 62 of the 1955 Act are still reflected in the provisions made in the draft at sections 58 and 59. The procedure to be followed is similar to that required on repurchase. The directors must put information before the shareholders who may apply to the Court to restrain the assistance. That information includes certification by the directors that the giving of financial assistance is in the best interests of the company and is of benefit to those shareholders not receiving the assistance and the terms and conditions of the assistance are fair and reasonable to those shareholders not receiving the assistance.

429 The draft Act extends the present exemption for financial assistance by lending institutions to all transactions which are in the normal course of business and subject to usual terms and conditions and in which the company receives fair value. The scope of the section is extremely wide. In the United Kingdom the words "in connection with" have been dropped. We prefer to retain them so that avoidance of the section is more difficult, but think it realistic to exempt unexceptional business transactions where fair value for the company is obtained so that uncertainty is restricted. But the present exemption in section 62 of the 1955 Act for employee share purchase schemes has been dropped. We consider the employee share purchase exemption has proved to be open to serious abuse and is not

warranted. Financial assistance can still be given to such schemes, subject to the essential safeguards in the draft Act.

430 Shareholders and creditors will have an opportunity to restrain the giving of assistance and directors will be liable where they act without reasonable grounds for believing that the transaction is in the best interests of the company and benefits existing shareholders. Shareholders affected can apply to the court for relief under section 135.

431 *Section 61* makes it clear that a contract in contravention of the financial assistance provisions is not for that reason invalid although the court will have wide remedial powers under section 135. The contract may be enforced by the company or a lender for value in good faith without notice of the contravention, without affecting the liability of any person for loss suffered as a result. This strikes what we consider to be a practical result and removes much commercial uncertainty from the present operation of section 62. The liability of any person as a constructive trustee is not affected and the transaction itself will not be invalid.

432 *Section 62* provides for a statement of shareholder rights. These statements are intended to replace the share certificates required by section 90 of the 1955 Act. At present, share certificates are prima facie evidence of the title of members to the shares. The draft Act provides instead for a document which is not a title document at all but simply provides information to the shareholder. No person other than the shareholder is entitled to rely on the statement (section 62 (3)). Specific provision is made under section 71 for share certificates for security purposes. The certificates issued under that section are not evidence of title, in the manner of the 1955 share certificates, but are analagous to a caveat on the register: while share certificates are outstanding, no transfers of shares covered by them can be registered.

433 In the discussion paper, we suggested that the share certificate was devised in a more leisurely age and observed that the existing legislation predates modern recording methods. They are not usually issued by private companies.

434 Transfer of shares is dealt with in *section 63*. The methods of share transfer for listed companies have recently been considered by the Committee of Inquiry into the Sharemarket. It viewed the statutory requirements of share certificates and the legal requirements for transfers of shares to be signed by transferor and transferee as barriers to improved operational efficiency of the share market, which should be removed. We have been concerned to ensure that our proposals do not cut across sensible options for further reform, while they meet the objective of providing a reliable system for accurately recording share ownership and the rights and liabilities attaching to shares. Such a system requires a permanent record which is accessible and continuous, and safe methods of updating the information.

435 The provisions of the draft Act

- impose on the company the responsibility to keep complete accurate and up to date records of shares issued, their ownership and the rights attaching to them
- require the company to provide realistic access to the information by providing, on request, statements of shareholder rights and by maintaining registers available for inspection.

436 Statements of shareholder rights are more informative to a shareholder than share certificates because they explain the shareholder's entitlements and relative position in the share structure of the company.

437 Under *section 71* share certificates can be obtained where required to be pledged as security for a loan. This section represents a halfway house until the whole question of securities transfers is reviewed. One of the options that will then need to be considered is whether New Zealand should introduce a comprehensive system similar to the United States Uniform Commercial Code, Article 8. That sort of inquiry goes far beyond the scope of the review of the Companies Act 1955.

438 It is common practice in New Zealand for lending institutions to require share certificates to be deposited as security for loans. If there is a need for share certificates to be used in this way, then we think it can be accommodated without

requiring the company to have a register of interests or issuing certificates which represent, or are evidence of title to, shares. Under the proposals, where a share certificate is issued, the company will not be able to register a transfer until it is produced.

439 Transfer of shares is effected by registration. No share certificate is required to effect transfer, simply a form of transfer signed by the owner and the transferee. The Committee of Inquiry into the Sharemarket questioned the need for transfers to be signed by transferor and transferee. Some formal requirement is, however, necessary in a system where legal ownership derives from registration and may entail the imposition of liability. Although the matter will obviously have to be considered further in the review of the Stock Exchange and the Securities Act, it seems to us that the special needs of the Stock Exchange can be dealt with by trust arrangements without affecting the underlying company registration system which confers legal title.

440 The transferee is required to sign a share transfer so that any liabilities attached to the shares are not imposed on unsuspecting transferees.

441 Under section 63, the board is required to register transfers forthwith, unless the board is permitted by the Act or the constitution to refuse or delay transfer. Where transfer is refused or delayed, the board must give the reasons in full. The Act permits refusal or delay where sums are due in respect of shares sought to be transferred; the constitution of a company may permit the board to refuse or delay transfer in a number of circumstances, and in the case of closely-held companies may prohibit transfer without unanimous shareholder agreement altogether.

442 Under the standard constitution contained in the draft Act, the owner of a share has the right to transfer it. This was the position at common law (*Re Smith Knight* (1868) 4 Ch App 20), but has been seriously eroded by a common provision in the articles of association giving the directors a discretion to refuse registration of share transfer.

443 The power to refuse registration of transfer has provoked a great deal of litigation. If the directors refuse to register a transfer, the vendor of the shares is regarded in law as the trustee for the purchaser. Upon a successful challenge to the directors' discretion, rectification of the share register will be ordered under section 124 of the Companies Act 1955.

444 The power to refuse registration of transfer must be exercised in good faith and for proper purpose in the best interests of the company. This, of course, is the general fiduciary duty of directors in exercising any of their powers. Such powers have been strictly construed against the directors in recognition of the importance of transferability to the purposes of company law and the principle of shareholder control of director management.

445 In Australia, section 186 of the Companies Code permits a Court to make any order it thinks fit where registration has been refused without just cause. Although the practical operation of this section is as yet unclear, it has been argued that section 186 requires the directors to disclose reasons as well as the grounds for refusal (Ford, *Principles of Company Law*, (4th ed) 1986, p 220).

446 In the United States, the common law requires all restrictions on transfer to be reasonable. What is reasonable will depend upon all the circumstances of the case, including the size of the corporation, the degree of the restraint and the time the restriction is to continue in effect. The Model Business Corporations Act requires any restriction on transferability to be noted conspicuously on the share certificate.

447 Under the Canada Business Corporations Act, any restriction on transfer must also be conspicuously noted on the share certificates. There is no requirement that the restriction be reasonable.

448 The Macarthur Committee noted that the power to refuse registration, though subject to abuse, was firmly entrenched in New Zealand and was in some cases justified. It recommended no change to the existing law, noting that as between transferor and transferee, the transferees could protect themselves by making the sale conditional upon registration.

449 Section 63 (5) permits the board of directors to refuse registration of transfer where sums are owing in respect of shares. This is required to protect the company.

450 Apart from that exception, the policy of the draft Act is against restrictions on share transfer because of the scope it gives for management abuse (particularly to frustrate changes in control of the company) and because it undermines a concept central to the utility of the company form and to shareholder control, through the power to sell. We have therefore adapted from the Australian and United States systems the requirement to give reasons. The power to refuse transfer can only be used where specifically conferred and for the purposes specified. It will, of course, be subject to the general fundamental duties of directors to act in the best interests of the company and in good faith. The statement of shareholder rights must contain a warning of restrictions on transfer imposed by the constitution.

451 The share register determines legal title. The company is entitled to rely upon it in treating the registered owner as the person entitled to vote, receive dividends and so on. The share register is not, of course, evidence of beneficial entitlement.

452 The draft Act makes no provision for bearer shares or share warrants. These are provided for by section 93 of the 1955 Act. The Macarthur Committee regarded section 93 as "an obsolete provision". It noted that share warrants have been abolished in Australia and have been criticised in other jurisdictions. We propose their abolition here. They are open to abuse and indeed are an obvious device to avoid recent amendments to the Securities Act designed to discourage nominee shareholding.

453 *Section 68* of the draft Act is an important provision. It makes each director responsible for taking reasonable steps to ensure that the share register is properly kept and that share transfers are promptly entered on the register. This duty gives rise to personal liability to shareholders and the Court is given power pursuant to *section 69* to rectify the share register and to provide for compensation. Compensation may be payable at Court order not only by the company but by the directors. This changes the existing provisions.

454 *Section 70* carries on the provision currently to be found in the present Act that trusts are not to be entered on the register. The exceptions to it, which in the 1955 Act appear as sections 125A and 125B, now appear in the draft Act under "Liability of Shareholders" as sections 74 and 75.

455 *Section 71* sets out a mechanism for the use of shares as security. Where a certificate is issued for these purposes, the shares may then not be transferred without the certificate, or evidence of its loss or destruction, being produced, accompanied by an indemnity to the company.

PART 6

Shareholders and their Rights and Obligations

456 This part of the draft Act draws together the provisions setting out the rights and obligations of shareholders. It covers

- definition of shareholders
- liability of shareholders
- powers reserved to shareholders
- minority buy-out rights
- interest groups
- meetings of shareholders.

457 The position of shareholders in the policy scheme of the Act is discussed above in paragraphs 196–213.

458 Shareholders are defined by *section 72* as those who are either named in the constitution as shareholders or who are registered on the share register.

459 *Section 73* is crucial to the scheme of the Act. It limits the shareholder's liability to that expressly provided for in the constitution. The shareholder is not liable for any obligations of the company simply by being a shareholder.

460 The draft Act is flexible enough to allow companies to achieve no-liability or the position of companies now limited by guarantee.

461 An exception to the general limitation is made in the case of any distributions made in breach of the solvency test, which are recoverable under section 46.

462 Section 73 (4) makes it clear that a person who enters into a contract with a company for the issue of shares remains liable on that contract even if he or she parts with the shares. The person who acquires the shares does not become liable on the contract. Conversely, where a share carries a liability (for example, for calls), that liability attaches to the holder for the time being, and prior holders escape liability whether or not the liability arose while they were shareholders. It should be noted that the company can prevent a holder of a share in respect of which a liability has arisen from escaping liability by transferring the share, because section 63 permits the board to refuse or delay registration of a transfer where there is an outstanding liability.

463 The provisions of section 73 recognise the liability of shareholders under section 80 (where they exercise directors' powers).

464 *Sections 74 and 75* simplify and extend the reform recommended by the Macarthur Committee and introduced in sections 125A and 125B of the 1955 Act in 1982. Instead of trustees and assignees being registered as such, the liability of trustees and assignees is in all cases limited to the assets held by them as trustee or assignee. This means that where a shareholder with limited assets dies, his or her personal representative does not become liable beyond the assets held as trustee for the deceased shareholder. Similarly, where a shareholder becomes bankrupt, the assignee is liable to the company only for the funds held by him or her on behalf of the bankrupt shareholder. In this way the company does not gain a windfall, and personal representatives and assignees are spared an unfair burden.

465 *Sections 77 and 78* carry on the existing distinction between ordinary resolutions and special resolutions.

466 Special resolutions are required by the standard constitution contained in the Act (section 78)

- to approve any alteration to the constitution (including a reconstruction of the company)
- to approve a major transaction
- to approve an amalgamation
- to approve the liquidation of the company.

467 Decisions made by special resolution can be rescinded only by special resolution, otherwise the company remains bound by them.

468 *Section 79* is new. Since the Act confers exclusive powers of management on the directors of the company (subject to explicit variation by the constitution), it is arguable that shareholders do not have any rights in general meeting to pass resolutions affecting the management of the company. We think they should and that they should be able to call management to account. Such resolutions will, of course, under the standard constitution not be binding on the directors but their persuasive and monitory effect may be considerable. Section 79 makes it explicit that any shareholder can discuss the management of a company at a general meeting and can vote on non-binding resolutions relating to the management of the company.

469 *Section 80* is new and gives effect to the policy discussed in paragraph 211. Shareholders exercising the proprietary rights presumptively given to them by the draft Act may act in their own interests. But where the constitution of the company confers powers of management or other directors' powers upon shareholders, they are subject to the directors' duties contained in sections 101 to 107.

470 *Section 81* confers the minority buy-out rights which are another important new feature in the draft Act. Their place is described in paragraphs 202–207 above.

471 Buy-out rights are available to shareholders who voted against alterations to the constitution affecting the shareholders' rights, and fundamental changes to the company (through amalgamation, transactions involving major assets or removal of restrictions on company powers).

472 In Canada and the United States, buy-out provisions are the subject of lengthy procedures for appraisal. In the draft Act, the procedure provided is more straightforward.

473 A minority shareholder may require his or her shares to be purchased by the company. The board must either then purchase them, arrange for their purchase by another buyer, obtain exemption from buy-out from the Court, or have the special resolution rescinded.

474 Disputes about buy-out purchase price are resolved by arbitration. The company has to nominate a price it considers to be fair and reasonable. If that is not acceptable, the matter is referred, with strict time limits, to arbitration. The price nominated by the company must be paid on an interim basis to the shareholder at the time the matter is referred to arbitration.

475 Where a third party is introduced as purchaser by the company, the same provisions apply except that the company remains obliged to indemnify the shareholder if the intended purchaser fails to pay for the shares *(section 84 (3)).*

476 A company may seek exemption from buy-out on the grounds set out in *section 85,* and must seek an exemption if the board considers that the purchase would render the company insolvent, under *section 86.* Where either section is invoked, the Court can adjust the rights of the company, the majority shareholders and the minority shareholders to achieve a fair result.

477 *Section 87* is an important departure from the 1955 Act. In the first place, the groups which vote on alteration of rights attached to shares are interest groups, rather than classes. That means that where two or more classes have identical rights in relation to a matter affected by a proposal, they vote together, rather than separately. Voting groups will often be larger than one class.

478 *Sections 87 and 88* also make it clear that the interests which give rise to the voting groups are interests arising directly out of shares. Shareholder identity of interest which is not directly derived from shares is not relevant. This removes some doubt in New Zealand arising from recent case law.

479 We consider that requiring interest group vote on particular issues rather than class vote is logical. It does mean that members of particular classes may have less control over a company decision but this is compensated for by their right to buy-out, which may be a more effective brake on alteration of shareholder rights than any voting requirement.

480 It has seemed to us that the issue of whether or not a particular action should be pursued by the company, where shareholder vote is required, is more appropriately dealt with by vote of all shareholders affected than on the basis of classes which may have no real relevance to determination of the particular issue.

481 A further change is that in the existing legislation under the present Act class rights approval procedure can be modified or excluded. Under the draft Act it cannot. The essential rights attaching to shares cannot be altered without interest group approval and by special resolution of that interest group.

482 A further significant change is to be found in section 88(3) which abrogates the distinction established by case law between action which affects rights, and action which merely affects the enjoyment of those rights. (See, for example, *Greenhalgh v Arderne Cinemas Ltd* [1946] 1 All ER 512; *White v Bristol Aeroplane Co* [1953] Ch 65.) In the draft Act, dilution of voting or distribution rights is deemed to affect the rights attached to existing shares, unless such dilution is expressly authorised by the constitution so that the shareholders bought in that knowledge.

483 Section 88(4) confers buy-out rights on shareholders in the context of interest group voting.

484 *Section 89* deals with the consequences of the failure to seek interest group approval. Invalidity is not automatic, but the conduct is deemed to be unfairly prejudicial to the members of the interest group and the Court has wide powers to adjust the matter.

485 *Section 90* deals with annual meetings of shareholders. It alters the existing law. All shareholders, whatever class of shares they hold, are entitled to attend the annual meeting, and so to receive notice of it and to receive the annual report of the

company. That does not mean that they have any particular voting rights, however.

486 *Section 91* sets out the manner in which meetings to exercise shareholder powers may be called. The present provisions are changed to require a request by 50 percent of the shareholders entitled to vote rather than 10 percent of a fixed number which is wholly arbitrary. Any shareholder can apply to the Court where there is cause to call a meeting (section 93; and see discussion in paragraph 201 above).

487 *Section 92* permits a resolution in lieu of a meeting where the resolution is signed by all shareholders entitled to vote at the meeting. This is designed to enable closely-held companies or single shareholder companies to operate with a minimum of formality.

488 *Section 93* provides a procedure for the Court to call meetings where it is impracticable for shareholders to do so. A new provision permits the Court on the application of a director, shareholder or creditor to make an order calling a meeting if it is in the interests of the company to do so. This provision in part is designed to make sure that shareholders unable to obtain the support of 5 percent of the shareholders for the calling of a meeting in circumstances where it is desirable to do so can seek the assistance of the Court.

489 *Section 94* is mandatory. It applies a regime for shareholder meetings set out in the First Schedule.

490 *Section 95* does away with the present system by which the share register is closed before a meeting of the company. It seems to us wholly unnecessary for the register to be closed and instead we have provided a system for the fixing of a date at which the shareholders entitled to vote will be determined.

PART 7

Directors and their Powers and Duties

491 The place of the directors in the scheme of the Act has already been discussed in paragraphs 184–195 above.

492 Directors are defined in *section 96* as the persons occupying the position, by whatever name called. This adopts the existing provision of the 1955 Act. The section contains other definitions to be used in particular contexts. Section 96(1)(b) adopts the provision currently to be found in section 2 of the 1955 Act. Where the entire board is controlled, the person controlling the board is deemed to be a director. Subparagraphs (c) and (d) are new. Delegates are treated as directors for the purposes of the liability sections of the draft Act. In the case of use of company information or opportunity and insider trading, the person who controls a single director of the board and an employee receiving confidential information, is treated for the purposes of liability as if a director.

493 The treatment of a nominating shareholder as if he or she were a director for the purpose of use of company confidential information and insider trading is extremely important in the scheme of the Act. It is designed to face up to the real problem caused by nominee directors. The nominee director is permitted to pass on confidential information to his or her nominating shareholder if so authorised by the company constitution,

but the use of that information by the nominating shareholder is restricted in the same manner as if it were used by the director. That is to say, duties of loyalty and good faith will be imposed upon nominating shareholders because they derive information through the director they control.

494 In situations where we see shareholder interest as being particularly at risk, the draft Act requires directors to certify compliance with the Act. This has the advantage of providing a formal focus for director determination and in resolving problems of proof where director action is challenged. They are a significant feature of the draft Act.

495 *Section 97* recognises the reality that, although duties are imposed upon individual directors, powers will normally be exercised by the board as a whole.

496 *Section 98* is a pivotal section in the scheme of the Act. It confers the power of management directly upon the directors, rather than derivatively from the shareholders through the memorandum and articles (as is the present position), except to the extent that the constitution of the company provides otherwise.

497 Transactions entered into by the directors in exercise of their power of management are subject to the general duties set out in *sections 101 to 107.* The fundamental duty to act in the best interests of the company means that transactions entered into by the directors must be of adequate benefit to the company. That will apply to both transactions for value and ex gratia payments, such as charitable donations. It is clear that the company has the capacity to make donations (see paragraph 348 above) but the directors' powers are not unlimited. They are subject to the constraint of the best interests of the company and benefit to existing shareholders.

498 Under *section 99,* the directors' general powers of management are restricted in the case of major transactions, where shareholder approval and dissentient rights are provided for unless the constitution of the company expressly provides otherwise. A "major transaction" is defined to mean the sale or acquisition of assets equivalent to the greater part of the company's undertaking before the acquisition takes place.

499 The provision is based on the view that some dealings have such far-reaching effects that they should be referred to shareholders. Shareholders should not find that massive transactions have transformed the company they invested in without warning. Clearly, unless the constitution of a company restricts its activities, all shareholders will have to accept a large measure of change. Normally that may be achieved over some time, permitting the shareholder who does not like the direction the company is taking to leave or to exercise his rights to call management to account. What we are concerned about is abrupt and substantial change which transforms the nature of the enterprise. We think that recent experience in New Zealand has demonstrated that such transformation is a problem that should be faced up to and that it has often operated to the detriment of the company and the shareholders.

500 A further reason which has weighed with us in proposing this change is the use of management powers to buy and sell company assets as a defence in takeovers. A "poison pill" involving the sale of the greater part of the undertaking of the company or acquisition of assets which would transform the company will have to go to shareholders for their approval. The section applies to contingent and conditional agreements.

501 We have considered whether the definition of major transaction should be set at a lower level than a transaction affecting the greater part of the undertaking of the company. In particular, some of us and those we have consulted would prefer to see the level set at 20 percent of the assets comprising the undertaking of the company. Any level is to a certain extent arbitrary. In the end, we have concluded that there are substantial difficulties in arriving at a satisfactory definition if a percentage formula is used. Moreover, setting the level at a figure lower than 50 percent may impede company activity unacceptably, particularly given the impact not only of the delay in obtaining shareholder approval but also affect the buy-out rights which are triggered by the substantial transaction provisions.

502 We have considered whether the substantial transaction provision should be subject to an exemption for transactions "in the ordinary course of business". We have concluded that

they should not because of the imprecision of such a test and the possibilities of abuse. We are of the view that if a transaction is of such a magnitude that it would be caught by section 99, the section should apply and shareholders be given an opportunity to determine it, whether or not it can be said to be in the ordinary course of business. A property speculating company, for example, with all its assets in one property, should not be able to sell that property without reference to the shareholders.

503 *Section 100* is new in that it reserves to the board powers which may not be delegated. All other powers may be delegated but the section makes it clear that the board is not absolved from responsibility by delegating its duties unless it supervises the delegate, and has reason to believe that delegates will exercise the powers delegated in conformity with the directors' duties.

504 The hierarchy of responsibilities imposed upon directors under *sections 101 to 107* has been discussed above at paragraphs 184–196. They are largely new (although the 1955 Act contains an equivalent to the responsibility set out in section 105 for trading while insolvent). The draft Act attempts to draw together all the duties at present found either in the common law or scattered in disparate parts of the 1955 Act (for example, the existing section 209 and section 320).

505 Collecting the duties together has the additional advantage of permitting them to be assessed for consistency. Directors must of necessity be entrusted with wide discretionary powers. Where they have competing responsibilities, accountability becomes extremely difficult: one interest can be played off against another. The draft Act sets up a hierarchy which subordinates duty to competing interests to the directors' duty to act in the best interests of the company. This hierarchy, it should be emphasised, is in the context of company law only. It does not preclude the imposition of direct and overriding obligations to other interests through other Acts.

506 Section 101 recognises as the fundamental duty of every director the fiduciary duties imposed by the common law.

507 In addition to duties of good faith and reasonable belief in the best interests of the company, the case law frequently has recourse to the concept of "proper purpose". The concept of proper purpose was originally derived from the case law on powers and today arguably there is a lack of underpinning objects against which the powers could be assessed. On the other hand, recent cases seem to use "proper purpose" to impose an objective standard where the good faith of directors is accepted.

508 We are not purporting to alter the common law and some of us have had some misgivings about dropping reference to "proper purpose" from the statute. In the end, however, we have concluded that specific reference is not necessary. "Proper purpose" has been used in modern cases where powers are exercised by directors to defeat shareholders' proprietary interests—in particular, the powers to issue shares and to refuse transfer of shares. We have faced up to these areas of concern directly by imposing duties upon directors in the interests of existing shareholders. An objective element has been introduced into the fundamental duty by requiring that the belief that action is in the best interests of the company must be "on reasonable grounds".

509 "Good faith" is an equitable concept which requires more than "honesty". Dishonesty is a matter for the general criminal law, which is one of the reasons why the draft Act does not (as the Australian Act does) back up directors' duties by criminal sanction. Another reason, of course, to avoid relying on the criminal law as the principal sanction is that it makes investigations more prolonged and difficult by raising the standard.

510 *Section 102* is new and states positively the duty negatively expressed in section 209 of the 1955 Act, which provides a remedy where a shareholder is treated in a way "oppressive, unfairly discriminatory, or unfairly prejudicial".

511 The duty is expressly made subject to the fundamental duty to act in the best interests of the company. Where the duties clash, and the fundamental duty prevails, an affected shareholder can still apply to the Court for relief under the

minority oppression provision. In those circumstances, however, the directors will not be in breach of their duties.

512 The wording of section 102 is also designed to underscore an important policy determination in the draft Act: "the company" is the enterprise itself and may be contrasted with "existing shareholders".

513 *Section 103* permits the directors to take into account the interests of creditors and employees. It operates both to empower and to limit because the section is expressly subject to section 101. It is permissive only and therefore would not permit an extension of dicta in recent cases which suggest that the directors owe fiduciary duties directly to creditors (see paragraph 220).

514 *Section 104* is made necessary by the removal of section 34 of the 1955 Act. It makes it clear that directors must comply with the constitution and the Act and they may be liable if they act or agree to the company acting in a manner that contravenes either.

515 *Section 105* is a restatement of the duty currently to be found in the winding up provisions of the 1955 Act at section 320. We have thought it more helpful to include the duty in the part of the Act relating to directors because it applies to actions taken before insolvency, even though the director may not be held liable until after insolvency.

516 In the course of restating the liability of directors for reckless trading as part of their general duties during a company's life, we have concluded that section 320 goes too far towards inhibiting the use of the company form as the vehicle for the taking of business risk. A company may be legitimately formed to embark on a speculative or very risky venture, or may undertake such a venture later. The chance of failure—and the prize for success—may be high. Indeed success may greatly benefit the community. Section 2 of the draft Act recognises this as an important function of the limited liability company. Section 105 of the draft Act therefore imposes personal liability only where the directors have "unreasonably" risked insolvency. That will depend on the circumstances.

517 The duties of directors under section 105 are owed to the company. Section 105 describes a minimum standard. After that standard has been met, the directors may take into account the interests of creditors in exercising their functions so long as it is consistent with their fundamental duty to the company and to shareholders' interests.

518 Creditors under the draft Act have standing to restrain proposed action by directors which is in breach of the Act or the company constitution. But they will not have standing to enforce liability for breach. The duties are still owed to the company and can, before insolvency, be enforced only by the company, or shareholders suing derivatively. After insolvency, they are enforceable by the liquidator. Permitting creditors to have standing to recover loss from directors would undermine the statutory system of liquidation and dilute director accountability by upsetting the hierarchy of responsibility imposed by the draft Act.

519 *Section 106* sets out the standard of care required of directors. It is an attempt to overcome deficiencies in the common law by imposing duties of diligence and skill. Those duties are to be measured against what can reasonably be expected of a director acting in like circumstances. We have concluded that some objective measure is necessary, which is why we have not based the duty on what may reasonably be expected of a "like person" but rather a "director". We think it is reasonable to expect a certain level of competence of directors although the level of competence will vary markedly according to the nature of the enterprise.

520 *Section 107* has been a subject of considerable debate within the Law Commission. Some of us are of the view, which was expressed in Preliminary Paper No. 5, that it is unnecessary to provide that directors can rely upon reports and financial data or expert advice, because whether it is reasonable for them to have done so will always be an element in assessing the duty of care, and because it may give a misleading impression to single this circumstance out for special mention. There is a danger that directors will gain too much comfort from a provision such as this and will fail to exercise independent judgment.

521 In the end, however, the Commission has come to the conclusion that the provision is justified, and (in the form in which it has been drafted) desirable. Many people in the commercial community regard the law of negligence in its application to directors as uncertain, and even unfair in its tendency to review business decisions with the benefit of hindsight. We can sympathise with that view. The knowledge and expertise of directors are not boundless. They must often seek knowledge and advice from others, and indeed they would be irresponsible if they did not. They should be able to place some reliance on the reports and advice of others where it is reasonable and proper to do so. On the other hand, directors should not be able to shelter behind information and advice provided and abdicate or attenuate their responsibility for making final judgments.

522 The provision establishes a degree of predictability in a difficult area which is productive of disputes. Equivalent provisions are standard in Canadian and U.S. company statutes. It is only on certain conditions that directors may accept reports as correct: it also emphasises that they must have reasons for reliance, including the results of reasonable inquiry; they must still determine the issue at which the reports are directed; the reports are not simply to be rubber-stamped. The section also emphasises that there is an objective element to the reliance: the director must have "reasonable grounds" to believe the reports and the competence of those preparing them. The objective standard is one which the Courts can supervise.

523 The law relating to self-interested transactions at present is unsatisfactory. The policy of the draft Act in this regard is set out at paragraph 193 above.

524 The major purpose of the reform is to replace the application to company directors of the rule of equity which makes voidable any transaction in which a fiduciary is directly or indirectly interested, irrespective of the merits of the transaction. The replacement contained in the draft Act makes such a transaction voidable only where the transaction is not fair to the company.

525 The test of fairness is coupled with disclosure provisions. It may be said ultimately to derive from the rule in *Coles v Trecothick* (1804) 9 Ves Jun 234.

526 The fairness test is found in the United States Model Business Corporations Act, section 8.31, and in section 132(7) of the Ontario Business Corporations Act (in the latter Act it is combined with the concept of reasonableness).

527 The strictness of the rule at equity has meant that companies have commonly adopted articles drafted to remove altogether any civil consequences for transactions affected by conflict of interest. The legality of such articles, and in particular whether they conflict with section 204 of the 1955 Act, is a matter of some difficulty much commented on in legal journals (see, for example, J Bird, "The Permissible Scope of Articles Excluding the Duties of Company Directors" (1976) 39 MLR 394; R Gregory, "The Scope of the Companies Act, Section 205" (1982) 98 LQR 413; J E Parkinson, "The Modification of Directors' Duties" [1981] JBL 325). We regard such provisions as undesirable and have replaced them with the statutory system set out in sections 104 to 109.

528 The present Act requires disclosure of interest in a transaction to a meeting of directors of a company (section 199). It has led to considerable difficulty in practice (often requiring directors to disclose to themselves or make disclosure in cases where their conflict arises out of inter-related company transactions) and operates only in relation to transactions which come to the board of directors (Gower, *Principles of Modern Company Law* (4th ed) at p 587; cf *Hely-Hutchinson v Brayhead Limited* [1968] 1 QB 549, where the English Court of Appeal assumed that the equivalent to section 199 is not so limited).

529 The draft Act imposes both a substantive test of fairness to the company and also disclosure to shareholders. Disclosure to directors only is inadequate because of difficulties in establishing disinterestedness. Disclosure to shareholders under the draft Act is secured in section 105 through the interests register which each company has to maintain. This requirement of an interests register is new, and the Law Commission attaches considerable importance to it. Any transaction included in the

interests register must also be included in the annual report to shareholders pursuant to section 177.

530 Transactions between the director and the company can be avoided by the company within three months of notification of the transaction to shareholders unless the company receives fair value *(section 110)*. The onus of proof is upon the director to show that the transaction is fair, unless the transaction was entered into by the company in the ordinary course of business and on usual terms and conditions, in which case it is presumed to be fair.

531 We considered whether to exempt from the conflict of interest provisions transactions "in the ordinary course of business and on usual terms and conditions" altogether. We have come to the conclusion that such an exemption would be undesirably wide and open to abuse. We think it would be dangerous as a blanket exemption but, as a pointer to how a transaction may be shown to be fair, we think it is acceptable.

532 Where the transaction involves third parties, the onus of proving the transaction to be unfair is on the company unless the other party to the transaction knew of the conflict of interest at the time the transaction was entered into. It should be noted that we have not attempted to define "knowledge" for the purpose of this provision. We are of the view that actual knowledge would set the standard too low, and we prefer to leave the matter to be dealt with by the Courts on principles generally applicable (as to which see the analysis of Dillon L. J. in *Baden, Delvaux & Lecuit* v *Société-General pour Favoriser le Développement du Commerce et de l'Industrie en France* S.A. [1985] BCLC 258, applied in *Westpac Banking Corporation* v *Savin* [1985] 2 NZLR 41 per Richardson J at 52).

533 The reverse onus of proof strikes what the Law Commission considers to be the right balance between the strict equitable rule and the absence of civil consequences if disclosure is made (which is the effect of the present system where the articles modify the equity rule). The ability to seek to set aside the transaction is limited to three months from notification both as an incentive to make prompt disclosure and in order to limit uncertainty. Of course, where the transaction is clearly fair to the company, there is no real uncertainty.

534 It should be noted that the extension of the definition of directors so as to impose conflict of interest duties upon nominating shareholders, and the New Zealand practice of interlocking directorships, will mean that the rule imposed by the draft Act has quite wide effect. We think that is entirely proper because of the risk to company interest. It is a preferable alternative in a small business community such a New Zealand's to prohibiting directors from getting into positions where there is a potential confict of interest. And the risk to directors and to other contracting parties is answered if the substantive test of fairness is met.

535 Because the emphasis in the draft Act is upon disclosure to shareholders and substantive fairness, it has been made clear that interested directors can vote. We think it undesirable to encourage the use of disinterested quorums because that process will obscure the proper inquiry, which is whether the transaction is fair to the company.

536 *Section 112* articulates a major premise upon which much law relating to fiduciary duties is based: the obligation to maintain confidential information in confidence. Section 112 also recognises the reality of the nominee director, in permitting him or her to pass on company confidential information to the appointing shareholder but only where that is disclosed in the interests register. This is an attempt to make the position of the nominee a more open one. It does not mean, of course, that the nominating shareholder is entitled to use the information for his or her own benefit: the nominating shareholder in such circumstances will be treated as a director for the purposes of use of the information and dealing with shares on the basis of confidential information (section 113). It should also be noted that employees are also covered by the section if they had confidential information.

537 *Section 113* is new. It overrides the decision in *Percival v Wright* [1902] 2 Ch 421 by recognising that directors do owe duties directly to shareholders in circumstances in which they deal in shares on the basis of confidential price-sensitive information. Again, directors are not prohibited from dealing, but will have to disclose it and may be at risk if the value given is not fair in the light of the confidential information possessed.

538 This provision is grounded on misuse of company confidential information. It differs from the self-interested transaction in that normally the company itself will not suffer loss, only those from whom the director buys or to whom he or she sells shares will do so. The Securities Amendment Act 1988 covers similar ground, but only in relation to companies whose securities are publicly offered.

539 The Law Commission is of the view that use by a director of company confidential information is a direct concern of core company law, because it amounts to abuse of the position of director. The different focus of securities regulation and company regulation may suggest different solutions.

540 Section 113 requires director dealings in shares to be entered on the interests' register. That means that they will also be notified in the annual report to shareholders. The Companies Amendment Act 1988 requires notification to the company of dealings by officers of the company in its shares and requires the company to keep a register of share transactions by officers. The draft Act does not contain any definition of officer or seek to regulate the conduct of officers, for reasons set out above in paragraph 287. Under section 96, any person to whom the board delegates its powers, is treated as a director for the purposes of the self-interested transaction provisions and the director dealing in shares provisions. Such a person will have his or her dealings in shares notified on the interests register. The same result is achieved in relation to employees who have confidential information. We consider these categories to provide a more useful test than the vague concept of "officer".

541 Insider trading is notoriously difficult to regulate. Section 113 differs in some important respects from Part I of the Securities Amendment Act 1988. In particular, the concept of "substantial security holder" means the ambit of the draft Act is narrower than the Securities Amendment Act 1988. It places less emphasis on relationships and more on the confidentiality of the information. We have not, for example, used the concept of "substantial security holder". We consider that in a core Companies Act which applies to all companies such sophistication is unnecessary. We have preferred a system which is more

simple and certain, even though it may not cover every problem.

542 The director who is in possession of material price-sensitive information has two options: to abstain from trading or to ensure that the person with whom he or she is dealing receives fair value.

543 *Section 114* of the Act implements the policy that each company must have at least one director but need not have any more. As such, it changes the existing law.

544 *Section 115* makes it explicit that directors cannot be corporate bodies, but must be natural persons. The liability provisions of the Act would be subverted if limited liability companies could be directors. On the other hand, through the nominee director provisions, a nominating company shareholder may be treated for the purposes of liability as though a director.

545 Section 115 indicates those people who are disqualified from acting as directors. Section 115 largely re-enacts section 188A of the Companies Act 1955 and, through the application of section 282 which provides for disqualification orders by the Court, section 189 of the Companies Act 1955.

546 *Section 282* provides for Court disqualification in cases of persistent failure to comply with the Companies or Securities Acts or incompetence in the performance of duties as a director. In requiring a Court order, the provisions of the draft Act do not adopt the provisions of section 189A of the Companies Act 1955. That provision was inserted into the main Act by amendment in 1988. It permits the Registrar to prohibit certain persons from managing companies and therefore would prohibit them from being directors of companies. Although this is a recent amendment, we are of the view that it is unacceptably severe and that the power for the Registrar to make application to the Court provides ample protection for the public interest.

547 *Section 117(3)* provides a backstop to ensure that there is no power vacuum in the company and that the minimum requirement of the Act, that there be at least one director, is

complied with. Any shareholder or creditor may apply to the Court to appoint a director.

548 *Section 118* substantially re-enacts the existing provisions of the 1955 Act. In the discussion paper, we raised the question whether the Act should permit cumulative voting for directors. Cumulative voting is permitted in most North American jurisdictions. It facilitates minority shareholder representation at board level by allowing shareholders to vote all their shares multiplied by the number of vacancies on the board for less than the full complement of directors.

549 Responses to the discussion paper indicated some support for the system, but little enthusiasm.

550 The draft Act does not prevent a company from adopting a system of cumulative voting for directors because the method of appointment of directors is subject to the arrangements adopted in the constitution. But the default provisions for removal of directors contained in section 119, which permit removal of directors by ordinary resolution, would have to be displaced in the company constitution if a cumulative voting arrangement were to be effective.

551 In general, the Law Commission has come to the view that while cumulative voting should not be prevented, there is little demonstrated need for it in New Zealand conditions and it creates procedural complexity in appointment and removal of directors. In particular, it cuts across the general policies of the default provisions in the draft Act by

- setting up directors to represent factions of shareholders
- providing a measure of entrenchment of directors, contrary to removal by ordinary resolution which is the default provision.

552 For these reasons, it has not been thought desirable in the draft Act to make more elaborate provision for cumulative voting.

553 Any director of the company, subject to the constitution, may be removed by ordinary resolution pursuant to *section 119*. This represents a change to the existing system because it extends the provisions of the Act, at present only applied to

public companies, to private companies also. We have considered that it is desirable in all companies where directors have lost the confidence of a majority of shareholders for them to be able to be removed. It will, of course, always be possible for companies to entrench the position of their directors by allocation of voting rights or providing for appointment of directors in the constitution.

554 Subject to the constitution, proceedings of the board are governed by the provisions set out in the Second Schedule to the Act, pursuant to *section 123.* That Schedule authorises meetings by telephone and resolutions in lieu of meeting where all directors consent.

555 *Section 124* deals with remuneration and other benefits for directors. This represents a departure from the existing legislation. The board may set its own remuneration and make loans and provide guarantees to directors. At present, the company is prohibited, except in the case of private companies, from making loans to or giving guarantees on behalf of directors and the remuneration of directors is fixed by the shareholders in general meeting.

556 We have thought it more sensible to impose the substantive standard that the payment or giving of a guarantee is fair to the company. In accordance with the policy of the draft Act, the duty to ensure that the remuneration is fair is imposed upon the board rather than passing the responsibility to the general meeting.

557 Remuneration and benefits to directors must be disclosed to shareholders in the interests' register and therefore annually in the annual report. Disclosure relating to each director separately is required (section 124). That represents a change from the law which permits disclosure of the aggregate payments to directors only. A further significant change from the existing provisions is the requirement that the disclosure be of all remuneration and benefits received by the director from the company, whatever the capacity in which he or she received them. That will mean that the salaries of executive directors will have to be disclosed.

558 In this, we depart from the recommendations of the Macarthur Committee. Our reasons for requiring greater disclosure are that all contracts for remuneration or other benefit are transactions where there is a conflict of interest. Identification of the remuneration or benefit as directors' fees or executive salaries does not, it seems to us, alter that fact.

559 The standard imposed by the draft Act is one of fairness which, for its enforcement, must depend upon disclosure. We are also of the view that the remuneration of executive directors (and therefore the range of the salary scale within the company) is a matter upon which the shareholders are entitled to be informed if they are to enforce the obligations of the directors in management of the company. Remuneration disclosed under section 124 is expressly excluded from the operation of the standard conflict of interest provisions under section 108.

560 *Section 125* is both a restatement and modification of section 204 of the 1955 Act. Section 204 prohibits any company from exempting any officer of the company from liability or indemnifying him or her against any liability. The meaning of this section is not entirely clear. Nor is its relationship with the usual provisions in the articles which purport to cut down the scope of directors' fiduciary duties in conflict of interest transactions (see paragraph 527 above).

561 Some of the difficulties at present surrounding section 204 are overcome by the draft Act in restating the general duties of directors in the statute. In section 125, therefore, a general prohibition against indemnity for liability or costs in proceedings is continued.

562 The section does permit a company, where expressly authorised to do so by its constitution, to provide indemnification or insurance in respect of proceedings by the company in which judgment is given in the directors' favour, and in any proceedings brought by other persons which do not arise out of a breach of the directors' fiduciary duties to the company.

563 Details of all insurance or indemnities given must be disclosed in the interests' register.

PART 8

Enforcement

564 Effective enforcement of directors' duties is hampered under the present system by

- the legal doctrine that directors' duties, in the absence of special circumstances, are owed to the company alone and not to the shareholders (despite the recognition of the memorandum and articles as a contract)
- the procedural rule by which, in the absence of fraud or wrong-doer control of the company, a shareholder does not have standing to enforce a duty owed to the company (*Foss v Harbottle* (1843) 2 Hare 461)
- judicial recognition of a power in the general meeting to ratify by ordinary resolution director wrong-doing which is not fraudulent (*Hogg v Cramphorn* [1967] Ch 254)

  This comes very close to identifying "the company" with the majority of shareholders.
- the costs of litigation
- difficulties of proof.

565 The draft Act contains significant changes designed to improve the remedies available to shareholders.

566 Shareholders are given rights to enforce the constitution and the Act by injunction restraining action proposed which is in breach of either *(section 126).*

567 Shareholders are recognised as having personal rights of action against the directors and the company wherever duties are imposed for their benefit (in the case of protection against erosion of class rights, and in the other circumstances where their proprietary interests are particularly affected, as in selective repurchase) (*sections 131 and 132*). Shareholders can also apply to the Court for an order requiring the directors or the company to comply with the constitution (section 131 and section 132).

568 Any shareholder, with the leave of the Court, may bring a derivative action to remedy a wrong done to the company *(section 127).* This provision, which is modelled on the Canadian reforms, does away with the rule in *Foss v Harbottle* while preserving, through Court supervision, protection against abuse.

569 Shareholder ratification is effective only to condone usurpation of powers reserved to shareholders (and where the ratification is by the majority required to exercise the original power) and is not a bar to a derivative suit authorised by the Court or a personal action *(section 136).*

570 A personal action may be in representative form where the Court so orders *(section 133).* This provision enables combination and Court control of an action, its costs and the distribution of proceeds recovered.

571 *Section 128* provides that in derivative suits the Court has power to advance costs from time to time from the company.

572 The Attorney-General has standing under *section 134* to take any action open to a shareholder as though a shareholder, where it is in the public interest to do so.

573 The remedy for unfair prejudice contained in the current section 209 is retained in the draft Act in *section 135.* This section modifies section 209 in two ways

- it removes the present ability of a shareholder to seek relief for prejudice suffered other than as shareholder
  We consider this undesirable because it does not relate to abuses arising from separation of ownership and management.

- it emphasises the diversity of orders available to the Court where it finds that shareholders have been prejudiced.

Section 135 is an extremely important section in the scheme of the draft Act. Breaches of a number of its requirements result in the action taken being deemed to be prejudicial conduct, giving the Court immediate jurisdiction to provide a remedy. Thus failure by the board to comply with the procedure of repurchase, issue, financial assistance or alteration of shareholder rights and absence of reasonable grounds for believing any matter contained in a certificate required by the Act is unfair prejudice giving the shareholder a right to seek relief. It should be noted that since the provisions infringed are for the most part procedural the Court is likely to require a shareholder to show loss or damage before granting substantive relief.

574 The draft Act seeks to overcome difficulties of proof of director wrong-doing in a number of ways. Directors must sign a certificate of compliance wherever a solvency test is imposed and wherever the Act requires adequacy of consideration or the reasons why a proposed transaction is in the best interests of the company and benefits existing shareholders. A certificate is required in the cases of share issue, distributions, repurchase of shares and financial assistance. In the case of self-dealing, the onus is upon the director to show that fair value was given.

575 *Section 137* continues the present power in the Court to grant relief from liability where the director has acted honestly and reasonably and ought fairly to be excused. Section 137 requires the circumstances connected with the appointment of the director to be taken into account. And the Court can exercise its powers in advance on application of a director who believes that action may be taken against him or her.

576 *Sections 138 and 139* provide for inspection of records and investigation of records. They replace sections 168 to 173 of the 1955 Act.

577 Section 138 provides a procedure for a shareholder to make written request to a company for information held by it. The company, within 10 days, must either agree to provide the information (and may require the costs of providing the information to be met) or may refuse to provide the information in which case it must give full reasons for the refusal. An aggrieved shareholder can then apply to the Court which can make such order as it thinks fit relating to the provision of the information and the use to which it can be put.

578 Section 139 permits a shareholder or creditor to apply to the Court for the appointment of a suitable person to inspect records of the company. The person appointed by the Court acts under the direction of the Court and reports to it.

579 The powers given to shareholders under section 138 and section 139 of the draft Act can also be exercised by the Attorney-General under section 134.

580 The existing New Zealand provisions for inspection at the instigation of shareholders or creditors are rarely used. It is not clear to what extent this has been due to the threshhold requirements (a minimum number of shareholders or else circumstances suggesting fraud), the costs of the application or the consequences (a Court officer, reporting to the Court with further action on the initiative of the Court).

581 In the company law discussion paper, we sought comment upon the adoption of an equivalent to the Australian section 265B or, alternatively, the United States Model Business Corporation Act provision which permits all shareholders a right to inspect and copy directors' minutes and accounting records of the company, provided that the demand is made in good faith and for proper purpose. In the first place, at any rate, the intervention of the Court is not required.

582 Most of the submissions which addressed this point thought that the Model Business Corporations Act solution goes too far. On the other hand it seems to the Law Commission that the Canadian provisions, which have the sort of

threshold required under the 1955 Act, are too restrictive. The Australian solution strikes a more appropriate balance and has been the model we have used for investigations. We have not thought it desirable to specify that only an accountant or lawyer can be appointed as inspector because the Court may often consider the shareholder applying to be a suitable person to conduct the inspection (that will be particularly so in the case of small companies).

583 Court supervision of inspection is necessary to ensure that the interests of the company in maintaining confidential information held in its records are respected. The supervisory role of the Court is appropriate in what is an intrusive process.

584 The Attorney-General is given standing under these provisions because we are of the view that a public enforcement agency should be able to apply for orders under them. In accordance with our view that, until the Securities Act review is complete, the conferral of public agency powers of enforcement should be kept open, we have thought it sensible to confer the power on the Attorney-General in the meantime.

585 We consider that powers of investigation by a public agency should be limited in a core companies act to cases where the public interest is involved (when the Attorney-General will have standing) or where there are special circumstances which justify the extremely wide powers conferred under the Corporations (Investigation and Management) Act 1989 (which replaces the Companies Special Investigation Act 1958). For this reason, the draft Act does not repeat the provisions of section 9A of the Companies Act 1955.

PART 9

Administration of Companies

586 This part of the Act contains machinery provisions for the operation of the company.

587 *Section 140* does away with the need for companies to have seals. This will not, of course, preclude the company from having and using one if it wants to. But section 140 sets out a simple method by which companies may enter into contracts and other obligations.

588 *Sections 142 and 143* have been commented upon in relation to the reform of the constructive notice rule and the ultra vires doctrine (paragraph 347).

589 *Section 144* substantially re-enacts the comprehensive reforms to the law concerning pre-incorporation contracts made in 1983 by section 42A of the Companies Act 1955. The draft Act makes it clear that these provisions operate as a code, exclude the application of the Contracts (Privity) Act 1982 and do not require recourse to the Contractual Mistakes Act 1977 as in *DFC* v *McSherry Export Kilns Ltd (In Liquidation)* (1986) 2 BCR 151.

590 The provisions relating to the company's registered office contained in *sections 145 and 146* do not substantially change the existing provisions.

591 *Section 147* sets out the records to be kept at the registered office or at some other place in New Zealand by the company for inspection.

592 Since annual accounts are no longer required to be maintained on the public register, the requirement that the company keep accounting records available for inspection is of particular importance.

593 *Section 150* is new and provides that the company may specify an address for service of documents other than its registered office. It recognises that there may be places more convenient than the registered office for serving documents.

594 *Sections 152 to 155* provide for the service of documents upon a company and are self-explanatory.

PART 10

Accounts and Audit

595 Significant differences from the existing law are

- the dropping of Schedule 8 to the Act
- the modification of the requirement for audit so that audit is only necessary where required by any shareholder of the company.

596 We have thought it preferable not to prescribe in the Act the accounting standards to be applied. In the first place, the matter is under review by the Securities Commission, as is explicitly acknowledged in the reference to us. The report of the Securities Commission is expected shortly. In the second place, we have taken the view that the Act should define the object to which accounts should be directed, and require directors to meet that object, rather than prescribe accounting forms which may not achieve the object and which may be circumvented by compliance with form but not substance.

597 Prescription of accounting form should not, in our view, exhaust the obligation of the directors to ensure that accounts give a proper picture of the financial position of the company.

598 We have concluded that the Act should impose the test presently required by the 1955 Act. The Acts we have studied

from other jurisdictions all have similar statements. "True and fair" is almost universal.

599 The accounting provisions in the draft Act are generally equivalent to those in the 1955 Act. The draft Act, however, differs from the present provisions in using the concepts of "accounting period" and "balance date" instead of the present "financial year".

600 The financial statements of the company pursuant to *section 160* must give a true and fair view of the state of affairs of the company at the balance date. The onus of establishing that financial statements comply is that of the board of the company which must also, without limiting its primary obligation, comply with any regulations made under the Act. The regulations will enable application of any standards approved, as a result of the review of accounting standards being undertaken by the Securities Commission and by the Committee of Inquiry into the Share Market. But compliance with those standards will not absolve the directors of their overriding duty to ensure that the accounts give a true and fair view.

601 It has been urged upon us that it is impossible for directors to know the financial position of the company at any time and that therefore the requirement in *section 156(b)* is little more than a pious hope. That conclusion is invalid. The requirement is not that directors should know the financial position at any time but that they should keep accounts from which it can be ascertained with reasonable accuracy. In the Law Commission's view that is a fundamental and basic obligation of all directors.

602 It is also the standard required by the Australian legislation and we think it would be wrong for New Zealand to resile from it.

603 Under *section 158* companies are required to prepare balance sheets and profit and loss accounts and cash flow statements. The requirement for cash flow statements is new, although a similar requirement is now contained in the Securities Regulations 1983. We have concluded that a statement of cash flows is useful to shareholders in enabling them to assess

the solvency of their company and could not be more complicated for companies to produce than the profit and loss account.

604 Group accounts are provided for in *sections 161 to 166* of the draft Act. The provisions generally follow the 1955 Act except that the definitions of holding company and subsidiary are amended so that a company is a subsidiary only if the holding company both controls the board and is entitled to more than 50% of the assets and earnings of the subsidiary. This reflects the actual ownership pattern of most group companies and is in our view necessary to prevent group accounts giving a misleading picture to shareholders. In particular, the control element alone without beneficial ownership should not be determinative of consolidation. We have thought it unnecessary to provide for consolidation of "in-substance" subsidiaries as a matter of basic company law because they are a sophistication that appears irrelevant to many companies. Moreover, the inclusion of the accounts of "in-substance" subsidiaries in cases where the shareholders have no beneficial interest in the assets of the subsidiary could be misleading. Again, additional standards, if thought desirable, can be imposed under the securities regime upon companies which offer securities to the public.

605 The requirement for audit is set out in *section 167.* Audit is necessary only if required by a shareholder in any accounting period. A director can require audit at any time as can the Court on application by any shareholder. This last provision is considered a necessary protection for directors. The requirement for shareholder request turns around the current provision for private companies (which requires unanimous resolution to dispense with audit). We are of the view that this reversal is more sensible and allows greater speed and less procedural complexity.

606 It is envisaged that in the case of companies which offer securities to the public, the Securities Act and the Stock Exchange Listing Requirements will require accounts to be audited.

607 Auditors under the draft Act are appointed by the board. They can be removed by the shareholders by ordinary resolution. This change may seem more significant than it really is. The law would reflect present practice whereby the general meeting approves auditors selected by the board. It is also considered desirable to cut down the cumbersome present system which is tied to shareholder meetings, and it would enable more prompt implementation upon a request being received (often the circumstances in which greater speed is desirable). It does not cut across the responsibility of auditors to the shareholders (described recently in *Caparo Industries PLC* v *Dickman and others* [1989] 2 W.L.R. 316) because the draft Act continues to require the auditors to report to the shareholders. In addition, we have required auditors to report to each director because in the scheme of the draft Act with its emphasis on director responsibility it may be particularly desirable for directors to receive such reports.

608 The provisions relating to qualification of auditors are generally consistent with the 1955 Act. In particular, we have not sought in this review to reassess the prohibition on bodies corporate being appointed as auditors. This is of concern to the accounting profession but raises considerations which go beyond the scope of this Report. It is allied to the question of liability.

609 Auditors may be excused liability by the Court pursuant to *section 137*. That section corresponds to section 468 of the 1955 Act. The concern of auditors (and others) about substantial liability in cases of professional negligence is a matter the Law Commission will address in the context of its current project on contribution in civil cases. For the time being, therefore, we consider that it is necessary to retain in the draft Act a power to excuse the liability of auditors.

PART 11

Disclosure by Companies

610 The disclosure provisions contained in the draft Act have two audiences: shareholders and the public generally. The principal vehicle for shareholder information is the annual report. The contents of the report are a matter of prescription in *section 177.* In addition, specific disclosure is required where directors propose to take certain actions (for example, selective share repurchase). And shareholders have a right to seek information from the company.

611 Section 177 of the draft Act sets out the contents of the annual report. This section substantially changes the current Act and is an attempt to make sure that shareholders receive all possible useful information, subject only to the need to protect the company from harm. The annual report must describe any changes to the business undertaken by the company and any change in accounting policies made since the date of the previous annual report. It must include the annual accounts and entries in the interests' register since the previous annual report.

612 In a provision which is new, but follows similar provisions in other jurisdictions, section 177(1)(g) requires the disclosure of any charitable or political donations made by the company since the date of the previous annual report. We

consider that this is information which shareholders are entitled to have if they are to assess whether gratuitous disposition of company assets by the directors is consistent with the fundamental obligation to act in the best interests of the company.

613 *Section 178* implements the policy described in paragraphs 295–306 above. It requires directors of offeree companies to advise shareholders whether offers made to them are, by reason of information known to the directors by virtue of their position, clearly inadequate. At the same time, directors must disclose whether they have any direct or indirect interest in the offeror company or in the offer.

614 *Section 179* is designed as a useful collection of all specific disclosures required under the Act.

615 *Section 180* provides for the means of disclosure.

616 Disclosure to the public is disclosure through the register. In its discussion paper, the Law Commission proposed that public disclosure be limited to the matters required for identification of the company and the information required by those having legal dealings with it. As a result of consultation, we have decided that the company constitution should continue to be registered. That is mainly for reasons of safe keeping and it is specifically provided that registration of the constitution is not notice of its contents.

617 We considered dispensing altogether with the annual return. Such a return is not required, for example, in Ontario and was dismissed as a "superfluous nuisance" by the Dickerson Committee. Many jurisdictions maintain it largely to enable an annual fee to be extracted from companies.

618 We have come to the conclusion, however, that the return is a useful check on the currency of information. We envisage a shuttle return system in which the Registrar will send out a form requiring confirmation that the information maintained on the register is current.

619 On the other hand, the draft Act does not require the inclusion of annual accounts in the annual return, which is simply an update of information held on the register which relates to identification of the company and its directors.

620 Most of the submissions we received in response to Preliminary Paper No. 5 favoured abolition of the requirement because the accounts were seen as providing information of historic interest only which was no guide to the current state of health of a company for those wishing to deal with it. Some respondents, however, pointed out that the historical record was itself in many cases a useful pointer to the performance of a company over time. That point was made, in particular, by a journalist who regularly uses such accounts.

621 The Law Commission, while sympathetic to the public record argument, has concluded that the cost of requiring all companies to file annual accounts is not warranted. At present, private companies are exempt from the provision. We are proposing the abolition of private companies as a separate class. To impose the requirement upon all companies seems unnecessarily onerous. Where companies seek money from the public we expect that publication of accounts will continue to be required under the Securities Act.

622 *Section 183* provides for the records that every company must keep available for public inspection. The information is also held by the Registrar with the important exception of the share register which is maintained only by the company. That is available for public inspection in the manner provided in *section 185.*

623 *Section 184* prescribes company records which must be available for inspection by shareholders. They include, most importantly, the interests' register of the company and all written communications (which will include the annual report and the financial disclosure required under it). Again, the manner of inspection is provided for in section 185 and any person entitled to inspect the register may require copies, on payment of a fee.

PART 12

Reconstructions and Amalgamations

624 *Sections 187 to 195* of the draft Act provide a system for company reconstruction. They replace the existing sections 205 to 209. They are necessary to provide convenient machinery for merging and reconstruction, without the expense and commercial embarassment of liquidation.

625 The 1955 Act provisions cover both reconstruction affecting creditors and reconstruction affecting shareholders. The draft Act makes a distinction between compromises where the company is or may be unable to pay its debts (which are covered in Part 13) and reconstructions before insolvency, which may still affect creditors. These are covered in Part 12.

626 The provisions of the 1955 Act have the disadvantage that they require intervention of the Court in all cases. This may be necessary in the case of creditors because of the need to identify those affected and determine in an authoritative way matters such as service upon them. In most reconstructions of insolvent companies, however, Court supervision will be unnecessary although the draft Act provides it as a backstop for cases where there is difficulty in identifying the class of shareholders or the creditors affected.

627 Reconstructions which also involve a compromise with creditors must also comply with the provisions of Part 13 of the draft Act.

628 The draft Act provisions are derived mainly from North American models—the Ontario Business Corporations Act and the Delaware Corporations Act.

629 The draft Act is more detailed than the present provisions. Amalgamation can be effected by informed vote of those affected without initial recourse to the Court. To make sure that the approval is informed, the draft Act provides for the information the directors must circulate before approval is sought.

630 *Section 187* requires reconstructions to be effected by amendment of the constitution, which means that, unless the constitution otherwise provides, they must be approved by a special majority and, where they affect class rights, will trigger dissentient rights.

631 *Sections 188 to 194* are new and enable amalgamation of two or more companies. The directors must certify as to solvency of the company after amalgamation and must explain to shareholders the implications of the proposed amalgamation and any material interests of the directors in it. The proposal is then approved by a special majority and, where class rights are affected, will trigger dissentient rights.

632 *Section 191* provides a simple amalgamation procedure, adopted from Canadian provisions, which enables the formalities of amalgamation to be avoided where the two companies are in the relationship of holding company and wholly owned subsidiary, or are both wholly owned subsidiaries of the same company.

633 *Section 195* retains an equivalent provision to section 205 for cases where it is not practicable to use the specific procedures of the Act. In such cases, the Court has a supervisory role.

634 The draft Act does not retain an equivalent to section 208 of the Companies Act 1955. Minority shareholders who

are locked into a company after its reconstruction are protected by the buy-out rights available to them if they dissented from the reconstruction. Where their minority position results from a takeover, there will be buy-out rights for dissentients if class rights are affected or the takeover involves a major transaction. The draft Act does not permit compulsory buy-out in other circumstances and does not provide for the compulsory sale of the shares of a remaining minority. If it is thought desirable to retain wider powers to compel sale or purchase of shares, they should be included in takeovers legislation.

PART 13

Compromises with Creditors

635 In the course of consultation with insolvency practitioners about possible changes to the statutory law on corporate insolvency and liquidations it became clear that compromises with creditors under section 205 of the 1955 Act are rarely attempted. The present procedure is perceived as slow, complex and expensive with an unnecessary degree of involvement by the Court. As a compromise should be a constructive alternative to liquidation of a company, the present state of affairs is most unsatisfactory. Part 13 of the draft Act is designed to provide a more useful procedure which features a greater provision of information by those proposing a compromise but limits the role of the Court to one of review on specified grounds.

636 In *section 196* it may be noted that "compromise" is defined to include creditors' agreement to a constitutional alteration affecting the likelihood of debt repayment by the company. The ability of a receiver to initiate a compromise *(section 197 (b))* is new and is a reflection of some degree of analogy between the modern role of a receiver and that of an administrator under the system of voluntary administration operating in the United Kingdom, favoured by the Australian

Law Reform Commission, and recommended in principle by the Law Commission (see paragraph 650).

637 The ability of a 75 percent majority to bind the majority of relevant creditors is retained in *section 198* but is subject to notice of the proposal being given to a creditor as well as the grounds for challenge set out in *section 200 (2).* The details of information required in *section 199* support the central theme that the compromise must be able to be properly considered by creditors affected, and opportunity afforded for other views to be made known.

638 As mentioned in the immediately preceding paragraphs, the role of the Court is quite different from that under section 205 of the 1955 Act. The fate of the compromise should rest with the voting creditors unless the information supplied or procedures followed are irregular. The "unfairly prejudicial" limb (section 200 (2) (c)) provides a residual power which will be available to prevent abuse of the new procedure.

PART 14

Liquidation

639 Legislation which establishes and governs the operations of companies must also provide for their demise. Part 14 of the proposed Act is intended to replace Parts VI and XI of the 1955 Act.

640 At present, there are five ways in which a company may be ended. The methods have different modes of commencement, different procedures and different consequences. We do not see any purpose or justification for this complexity. We believe that the disbanding of companies should be possible with minimum formality. Where a company is defunct, or where the shareholders or directors wish that it be disbanded, then the procedure should be rapid and simple. Where the appointment of a liquidator is desirable, however, that option is available. Liquidation can be applied to companies whether solvent or insolvent, and whether commenced by voluntary actions of the company or imposed by others.

641 We have therefore abandoned the terms "winding up", "voluntary winding up", "dissolution", "members voluntary", "creditors' voluntary" and "striking off," because we propose only two options—liquidation and direct removal from the register. We have used the term "liquidation" because it accurately describes the process under which a company's assets are

liquidated, a process carried out by a liquidator. At the end of the process, it is ready for removal from the register. We have used "removal from the register" because it accurately describes the process of terminating the company's existence whereby a company ceases to have a legal existence. It also relates to its opposite process, incorporation, by which the company is entered on the register (section 12).

642 One of the primary aims of our reforms is the simplification of the law, and this is no less critical in relation to liquidation than elsewhere. A major criticism has been the requirement that a liquidator must refer matters to the Court frequently. The draft Act would relieve the liquidator from having to do so. The Court's involvement was, of course, a protection, and the draft Act also provides protection, but in a different way. It imposes a requirement that the liquidator be an experienced insolvency practitioner (a term which is defined), who is independent (*section 217*).

643 The Australian Law Reform Commission's proposals proceed on a premise of independent and experienced insolvency practitioners being appointed as liquidators. That reflects the existence of a system of registration of insolvency practitioners in that country. No such registration exists in New Zealand and, although it is favoured by the New Zealand Society of Accountants, the Law Commission does not feel able to recommend that such a system be established. Our consultations indicated that the idea of a regulatory system was not supported by a number of leading accountants engaged in insolvency practice nor was it supported by the current New Zealand Law Society Committee on insolvency law reform. Further, the topic of occupational regulation is currently under review by other government agencies.

644 The reduced role of the Court also means that committees of inspection, which can be a substitute for the Court (section 240 of the 1955 Act), have a different role. Insolvency practitioners advised us that committees can be helpful in assisting the liquidator, and we see this as their primary function. It is recognised too, however, that the committee represents the creditors or shareholders, and therefore it is empowered to call for reports from the liquidator or call for a

meeting. This enables the committee to exercise a measure of supervision in the most effective way.

645 The second major simplification arises from the liquidation process being only one process, applicable to all liquidations. This flows from our belief that we have provided for adequate safeguards and sufficient shareholder or creditor involvement. We have therefore retained the advantages of the present court-ordered and voluntary liquidations, while shedding the disadvantages.

646 As well as seeking simplification, the Law Commission proposes several innovations. Firstly, we have endorsed the Australian Law Reform Commission's proposal to prohibit monopoly suppliers – of electricity or telephone connections for example – from using their position to achieve an improper preference in relation to past debts by making the future supply of such services to a liquidator or a receiver (see paragraph 785) of a company dependent on payment in full of past debts incurred by the company prior to entry into liquidation or receivership.

647 Secondly, the Australian Law Reform Commission's recommendation for the establishment of an assetless companies fund has been incorporated. This was a matter of debate within the Law Commission, but there is a recognised problem in a few cases of directors leaving a company so completely assetless that there are no funds for a liquidator to investigate and, if appropriate, pursue claims against the directors. A modest fund available for such cases is contemplated. It is also envisaged that applications to the fund be determined by experienced professionals. The funds should come from a small flat-rate levy on company annual returns. The fund should commence on a trial basis, with its future settled when the role of the Official Assignee's office is reassessed in a general review of insolvency law.

648 Thirdly, the method of enforcement of the liquidator's duties has been altered. Part VI of the 1955 Act includes more than a dozen penalty provisions for acts or omissions by a liquidator. We have preferred a regime that relies on a court ordering compliance with a particular duty, with the possibility of prohibition orders for serious or persistent default depriving

the liquidator of the right to practise for up to five years. This has the advantage of remedying the default, while also providing a sanction which, we suggest, is more effective than a fine.

649 The final innovation is that voidable transactions are dealt with differently. The focus at present, when a creditor receives payment in preference to others, is on the intention of the debtor company. This means that in circumstances where a creditor is preferred through no voluntary action by the debtor, for example, where a creditor is able to coerce the debtor, the transaction cannot be attacked. This leads to the unsatisfactory situation where creditors may be treated differently according to the quirks of their circumstances. The purpose of a voidable transactions regime is to avoid this, yet the present law permits it. Our proposals, which are drawn from both the Australian Law Reform Commission's Report and the submission of the New Zealand Society of Accountants, set out a test which is more straightforward to apply.

650 There are two areas where we favour change, but have not undertaken it. Firstly, the system of voluntary administration of companies, which is perhaps the most prominent feature of the Australian Law Reform Commission's proposals, does not appear in our draft Act. The Law Commission is persuaded that such a system would be valuable and should be introduced at an early date. On the other hand, it is a new procedure, which will be of relevance in only a relatively small number of situations, and could await the outcome of the Department of Justice's review of insolvency law.

651 Secondly, the Law Commission has resisted the temptation to rewrite the existing rules on preferential debts. The Australian Law Reform Commission recommended major changes in the position of such preferential debtors as employees and the revenue authorities. These are difficult and controversial matters which would apply to personal as well as corporate insolvencies and thus fall squarely within the departmental review of the law of insolvency.

652 Other, less major, changes are found in relation to claims (called proofs of debt in the 1955 Act) and powers of the liquidator.

653 Several matters have not been carried forward into this Part from the 1955 Act. The present provisions imposing liabilities on directors (sections 319 to 321 of the 1955 Act) have been dealt with in the provisions relating to directors' duties (sections 101 to 105). This removes the anomaly in the 1955 Act that duties which do not exist when a company is solvent arise when it is in liquidation. Secondly, there is no "relation back" period, whereby the order of a Court for a company to be placed in liquidation relates back to the date of commencement of the liquidation, which is the date of the presentation of the petition (and there are equivalent rules for voluntary liquidations). The artificiality of such a concept is undesirable in the law, and we believe the position is adequately covered by the new voidable transactions provisions. Thirdly, we have completely removed the concept of contributories. Sections 211 to 215 of the 1955 Act are an unnecessary complication.

654 Our proposals will require consequential amendments to the High Court (Winding Up) Rules and the Companies (Winding Up) Rules. Other statutes which rely on the Companies Act to provide for the ending of incorporated bodies (for example, the Incorporated Societies Act) will also need to be reviewed to assess whether the draft Act is an appropriate model.

655 *Section 201 (1)* provides a definition of "liquidator" to clarify that interim liquidators (discussed at paragraph 663) and Official Assignees come within the term. The definition of "Official Assignee" is a restatement in substance of section 228 of the 1955 Act.

656 Liquidation is a process, and *section 202* states that the purpose of Part 14 is to provide for that process, which then leads to a company being removed from the register under Part 15. The section emphasises that liquidation means that a company ceases to trade, and its assets are collected, realised and distributed according to the Part. Subsection (1) is a statement of the present law.

657 *Section 203* and following sections deal with commencement of liquidation and are the first major departure from the present law. They make the following changes

- solvent and insolvent liquidations are commenced under the same section (and subsequently dealt with in the same way)
- the commencement of liquidation does not, as is the case with a court-ordered liquidation at present, predate the order
- voluntary and insolvent liquidations, once commenced, are not distinguished

  Because the liquidation process has been simplified (discussed at paragraph 640), there is no need for three separate types.
- the liquidator is appointed, and the liquidation commences, simultaneously.

658 Section 203(1)(a) provides for shareholders to resolve that the company go into liquidation. It is drawn from the present section 268(1). It departs from the voluntary winding up provisions of the 1955 Act from that point on, however, as there is no requirement for a declaration of solvency. The present declaration of solvency is a safeguard to ensure that the only liquidations with minimal supervision are those that will not affect the company's creditors. The draft Act provides one simple method of liquidation, and relies for safeguards on the experience and independence required of the insolvency practitioner (discussed at paragraph 687) and the powers of the Court (see section 220).

659 Section 203(1)(b) permits the board of directors to resolve that the company go into liquidation if the company's constitution permits or requires this (perhaps in a limited-term joint venture).

660 Section 203(1)(c) empowers the court to put a company into liquidation and appoint a liquidator. Three of the grounds appear already in section 217 of the 1955 Act, but there is the addition in section 203(1)(c)(ii) of persistent or serious failure to comply with the Act by the board. Obviously, insolvency of a company is an appropriate ground for imposing liquidation. Persistent or serious default in compliance with the Act provides an ultimate sanction in enforcing the provisions of the Act. We envisage that it will be invoked only rarely.

661 As the requirement for a shareholder and directors is fundamental, section 203(1)(c)(iii) makes absence of these a new ground for ordering liquidation. There is also the broad and well established "just and equitable" ground. We envisage that the existing case law on this topic (notably *In re Westbourne Galleries Ltd* [1973] AC 360) will continue to be applied.

662 Section 203(2) provides that a liquidation commences when the resolutions, agreement or court order provided for in subsection (1) are made and a liquidator is appointed. In practice, this will involve most change in relation to court-ordered liquidations. This differs from the 1955 Act, where the Official Assignee is automatically the liquidator until the first creditors' meeting. We expect that the applicant to the Court would propose a named liquidator. In addition, we expect the Court would hold a list of liquidators who are qualified and willing to consent to appointment, and if faced with an application without a suggested liquidator, or with a liquidator unacceptable to the Court, the Court would be able to select from the list. This is a matter for administration not legislation, but we note that rosters of counsel in the court system can work quite satisfactorily. We also point out that a similar system operates informally now in relation to appointments by the Court of provisional liquidators under section 234 of the 1955 Act, and sometimes in relation to liquidators (other than Official Assignees) who are appointed at the first creditors' meeting.

663 *Section 204* permits the appointment of interim liquidators by the court after an application for liquidation has been made. It is a restatement of the present law but makes explicit that the basis of the appointment must be that it is necessary to preserve the value of the assets of the company. The use of "value" clarifies that the liquidator is not required to preserve assets if their value is declining; he or she may, for example, sell perishable goods, thereby preserving their value.

664 *Section 205* brings together in one section all the provisions about the status of a company once liquidation commences. It is essentially a restatement of the present law, with additions to reflect the changed status of shareholders under

the draft Act. The section deals with the liquidator taking control of the company (see section 238 of the 1955 Act), the cessation of the directors' powers (see section 287), the freezing and prohibition of legal proceedings against the company or its property (see sections 221, 222, 223, 226, 273 of the 1955 Act) (but note that the liquidator as well as the Court may agree to proceedings continuing; the 1955 Act leaves this solely with the Court), the freezing of the position of shareholders and a cessation of their powers and, for clarification, an explicit statement that the constitution of the company may not be altered.

665 The section also clarifies the position of a secured creditor in relation to any property of the company over which that creditor has a charge. This states existing law (that is, the creditor can take possession of and realise or otherwise deal with the property and must account for any surplus) but is included because the law is difficult to find (it is dealt with in the Insolvency Act which is imported into the Companies Act by virtue of section 309).

666 *Sections 201 to 206* are intended to outline the entire process of liquidation, with the details set out in the following divisions of Part 14. Hence section 206 states the last duty of the liquidator—a final report with accounts, and a statement that the assets have been dealt with and the proceeds distributed—and ties this in with Part 15 (Removal from the New Zealand register).

667 *Sections 207 to 216* concern the liquidator. They start with a general statement of the liquidator's duties and powers. This statement of the common law is included for clarity and completeness. (The 1955 Act deals with some of these matters in sections 240 and 293).

668 The following four sections add to the general statement. They contain provisions that either impose mandatory requirements on the liquidator, or specify powers where a legislative basis is necessary (for example, to administer oaths) or where it seems preferable to state the powers for reasons of certainty.

669 *Section 208* deals first with the duty of the liquidator to inform. This duty has been expanded. The liquidator must, within 10 days, advertise the commencement of the liquidation

and his or her appointment, and include a telephone number for inquiries from creditors and shareholders. The Registrar must also be notified. (See High Court Rules, R 700ZE; and section 225 of the 1955 Act). A list of known creditors must be prepared and, in a depature from the present law, the liquidator (not the directors) must prepare the statement of affairs. This subsection does not prescribe the form of the statement of affairs and a simpler statement than that now prescribed is envisaged. This does not relieve others from the duty to assist in this process (see section 209(2)), but it recognises that, at present in many cases, directors do not supply a statement of affairs, or supply an inadequate one. It is preferable that the liquidator compile reliable, if sometimes incomplete, information, and give that to creditors and shareholders rather than expend resources on obtaining a statement of affairs from difficult directors. (The expense of preparation of the statement is, of course, a cost borne by the liquidation.)

670 There is a new duty on a liquidator, when reporting on a company, to state proposals for the conduct of the liquidation, and an estimated date for its completion. This reflects the change from the court supervision of liquidators to creditor and shareholder oversight, which is aided by giving those groups full information.

671 The creditor and shareholder oversight function is further assisted under section 208(2)(b)(ii), which places a duty on the liquidator to notify them of their right to require the liquidator to call a meeting of creditors or shareholders.

672 The liquidator is required to report further at six monthly intervals until the liquidation is complete (subsection (2)(c)), when a final report is made (subsection (2)(d)).

673 Section 208(2)(f) permits disclosure of the liquidator accounts and records unless the liquidator believes this to be prejudicial to the liquidation. In that case, the Court may order disclosure to any shareholder or creditor.

674 The length of time a liquidator must retain records is prescribed in subsection (2)(g).

675 Section 208(2)(h) continues the present rule that documents issued by the liquidator must state that the company is in liquidation (see section 326 of the 1955 Act).

676 *Section 209* contains a general statement of the powers of the liquidator, that is, all those necessary to carry out the liquidator's functions and duties under the Act, followed by a list of specific powers. These deal with the liquidator's ability to obtain information, and subsections (6) to (10) cover the Court's role in this process. The liquidator is empowered to require the delivery of books, records or documents of the company. This section is drawn from section 252 of the 1955 Act, but omits the need for a court order. The sanction is found in subsection (6) where the Court may order a person to comply if in default. The liquidator may also require specified people to provide information.

677 The section retains the present rule (section 326A of the 1955 Act) that a person may not enforce a lien over any document of a company in respect of unpaid fees. It also clarifies the situation where a liquidator needs access to documents which create a charge and are held by a secured creditor.

678 Subsections 209(6) to (10) provide for examination before the court and are drawn from section 262A of the 1955 Act.

679 *Section 210* removes any doubt about whether section 207 covers calls on the grounds that a liability on a call is not an asset (see 1955 Act, section 254).

680 *Section 211* permits the liquidator to disclaim onerous property and is a restatement of the present law (see 1955 Act, section 312).

681 The 1980 amendments to the 1955 Act included provisions about related companies and their joint winding up. These appear in a more concise form in *section 212.*

682 *Section 213* overhauls the previous provisions relating to arrest, search and seizure (in section 264 of the 1955 Act), having regard to the Australian Law Reform Commission's

proposals. The section also incorporates requirements for disclosure of information and delivery of property to the liquidator, backed up by criminal sanctions (as in section 461B of the 1955 Act).

683 *Section 215* prohibits the refusal of essential services to a liquidator. At present some suppliers of essential services (gas, electricity, water and telecommunications) are able, because of their monopoly position, to be treated as preferential creditors by demanding payment of their debt in full before continuing to provide the service. This section prevents that, and is based on the Australian Law Reform Commission's proposals.

684 *Section 216* states the present law regarding the expenses of the liquidation and the liquidator's remuneration. Should the remuneration of the liquidator be thought unreasonable, the remedy is found in *section 220(1)(e) and (f)* where the Court can review it, and if it is found to be unreasonable, order the liquidator to make a refund.

685 Section 216 is essentially self-explanatory. The liquidator does not apply to the Court for a release, as is the case at present in relation to court-ordered liquidations, because the level of court intervention has been reduced. The liability of the liquidator for acts carried out in the course of the liquidation is governed by the provisions of the Limitation Act 1950 and the Insolvency Act 1967 (the latter imported by section 229).

686 *Sections 217 to 221* cover the qualifications and supervision of the liquidator.

687 The liquidator must be an experienced insolvency practitioner, a term defined in *section 217.* The experience may be that gained as (or in assisting or advising) a liquidator or a receiver. In the case of joint appointments, only one of the appointees need fulfil the criterion. The Official Assignee may accept sole appointments. There are a number of specific exclusions, some taken from the present law (for example, excluding bodies corporate, some to ensure the independence of the liquidator (subsection (3)(c) and (d)) and some to mirror the provisions relating to the qualifications of directors.

688 *Section 218(1)* makes the liquidator's consent a prerequisite to appointment.

689 *Section 219* deals with vacancies in the office of liquidator. It is drawn from the United Kingdom Insolvency Act 1986. There are only three ways the office may become vacant: if the liquidator resigns, dies, or becomes disqualified. If the liquidator does not, or cannot, appoint a replacement, the Official Assignee fills the vacuum.

690 The draft Act removes the requirements for frequent reporting to the Court, but it retains a considerable measure of court supervision available on application. On the most general level, *section 220* retains the present ability of the liquidator to apply to the Court for directions. In place of the present mandatory audit, subsection (1)(c) and (d) makes an audit optional and subject to a court order. Another departure concerns the liquidator's remuneration. Instead of being set by the Court, the Court may review or fix the remuneration if it is challenged.

691 *Section 221* deals with the enforcement of a liquidator's duties. If a liquidator fails to comply with a duty imposed when appointed or under the Act, then an application can be made to the Court for an order either relieving the liquidator from the duty or ordering compliance. Not only can affected parties apply to the Court, but so may the Presidents of the New Zealand Law Society and New Zealand Society of Accountants. Persistent or serious defaults may lead to an order prohibiting a person from acting as a receiver or liquidator. The defaults may be those arising from a person's appointment as a liquidator or a receiver.

692 *Sections 222 to 224* deal with what is known now as the "section 218" procedure, and sets out the steps to follow when an application is to be made to the Court for the liquidation of a company under section 203(1)(c)(i), that is, where it is unable to pay its debts.

693 The principal method in practice of proving that a company is unable to pay its debts is failure to comply with a statutory demand. The requirements for a statutory demand are set out in *section 223.*

694 The company may apply to the Court for the demand to be set aside. This application must be made within 15 working days. The Court can set aside the application if the debt is disputed or for other specified reasons. A creditor is not delayed by the company seeking an order that the demand be set aside, however, because *section 224(5)(b)* provides that where an application to set aside is dismissed, the Court may authorise the creditor to make an application for the liquidation immediately.

695 Much of the procedure relating to the present "section 218" process is contained in the High Court (Winding Up) Rules, which will require consequential amendment.

696 *Sections 225 to 228* cover transactions that may be set aside by the liquidator. For a transfer of property of a company to be voidable, it must be a transfer

- in relation to an antecedent debt
- while the company was insolvent
- within a year prior to liquidation
- enabling the creditor to receive more than the creditor would have received in a liquidation.

There is an exception, however, where the debt was incurred in the ordinary course of business and the transfer was made no later than 45 days after the debt was incurred. Transfers made within six months of the commencement of a liquidation are presumed to have been made while the company was insolvent and not in the ordinary course of business. Voidable charges (and set-offs: see definition of "charge" in *section 3 (1)*) are treated in a similar manner, that is, if created to secure an antecedent debt given while the company is insolvent, they are voidable. In addition, transactions at undervalue made within a year of a liquidation may be set aside in certain circumstances. Transactions with related companies entered into in the six months before liquidation are presumed to be at undervalue. As can be seen, the emphasis is on the effect of the transfer. Any system which creates a regime rendering some transactions void has to choose between competing interests. In this case, some measure of commercial certainty is sacrificed in favour of fairness to all creditors. The procedure for setting aside voidable transactions is the same as under the 1955 Act.

697 *Sections 229 to 240* use different terminology but in many respects follow the present law in relation to claims by creditors (called "proofs of debt" in the 1955 Act and the Insolvency Act 1967). Some additional provisions are included for clarity.

698 *Section 229* applies bankruptcy rules in this area to claims by creditors, and is merely a redrafting of section 307 of the 1955 Act.

699 *Section 230* describes what may constitute a claim in a liquidation, and is also a redraft of the present law.

700 The manner in which claims are to be made is dealt with in *section 231*, which contains a departure from the present law in that claims may be made without formality. It is a provision adopted from the Australian Law Reform Commission's proposals. There appears to be no advantage in requiring claims to be sworn, although a statutory declaration is an option for the liquidator.

701 *Section 232* is of major importance. It addresses the position of secured creditors by recognising their rights and options but imposing duties as to giving of notice, except where the existence of the security is recorded on an easily searched public register. At present, many unregistered charges become void on liquidation (see section 103 of the 1955 Act) but the proposed Personal Property Securities Act would not provide for the same result. This section attempts to reconcile the needs of efficient administration of liquidation with reasonable opportunity for recognition of secured creditors' claims. In those cases where the notice period passes and the charge is deemed to have been surrendered, the position may be restored by the liquidator or the Court under subsection (11) (which follows section 90 (3) of the Insolvency Act 1967).

702 *Section 233* tidies up an area presently not covered by legislation. It provides a rule for converting the amounts of claims not denominated in New Zealand currency.

703 *Section 234* deals with estimates by the liquidator of claims of an uncertain amount, and repeats the present law

found in sections 98 and 99 of the Insolvency Act. The liquidator may make an estimate or refer the matter to the Court for decision.

704 *Section 235* reverses the present law and permits fines or other monetary penalties to be the subject of claims. This reflects the Law Commission's endorsement of the Australian Law Reform Commission's disscussion of and conclusion on this point (ALRC Report No 45, paragraphs 789 to 791): a fine may be seen as the making of a claim by the community and should rank with the debts due to unsecured creditors.

705 *Section 237* largely transports the current rules on mutual credit and set-off from section 93 of the Insolvency Act 1967 to the Companies Act. The actual draft draws from the work of the Australian Law Reform Commission. It clarifies the law, and overcomes the problem in the present law of the artificiality of trying to establish the equivalent of an "act of bankruptcy" in the context of a liquidation.

706 At present, creditors are not entitled to interest on their claims after the commencement of winding up. *Section 238* changes this and permits interest at a prescribed rate. This places creditors in an equivalent position to judgment creditors.

707 As discussed at paragraph 651, we have elected to leave the law on preferential claims unchanged. For convenience, however, we have listed all preferential claims in *section 239.* Other unsecured claims are governed by *section 240.*

708 *Sections 241 and 242* deal with those rights of creditors and shareholders that can be exercised through a committee of inspection. Because there is not a compulsory creditors' meeting one month after a company goes into liquidation (as is the case under the present law), the creditors may require the liquidator to call a meeting of creditors to decide whether to appoint a committee of inspection. The same provisions apply to shareholders.

709 The committee may call for reports from the liquidator, call a meeting of shareholders or creditors, make any application to the Court which a creditor or shareholder is able to make, and assist the liquidator.

710 *Sections 243 to 250* establish an assetless companies fund (discussed at paragraph 647). It is closely modelled on the Australian Law Reform Commission's proposals. The provisions are self-explanatory, but there are two significant features to note. The first is that the main source of funding is a levy placed on annual return fees. Secondly, the fund is to be used to pursue matters that may result in benefit to creditors or shareholders.

711 In this latter respect the proposed fund would differ from the Australian proposals, in that the fund under those proposals is also to be used for paying the liquidator for carrying out the preliminary steps of a liquidation and reporting to the creditors. Because Part 15 (Removal from the New Zealand Register) permits insolvent companies to be removed directly without the necessity for a liquidation in some circumstances, the use of the fund in that way is unnecessary. It is limited therefore to matters where the liquidator needs funding for proceedings or inquiries that may result in assets being made available in the liquidation.

712 It is envisaged that the liquidator would be required to seek funding for each step of any process, and to report on how the money has been spent. The report should enable the supervisory board to determine whether its decision to fund a particular matter was appropriate, and hence aid decision-making on further funding applications.

PART 15

Removal of Companies from the New Zealand Register

713 Removal from the register terminates the existence of a company. Part 15 covers that termination, and sets out the procedure to be followed. It is important to note that removal under Part 15 can be the final step consequent on a liquidation or amalgamation, or it can constitute the entire process in its own right. In other words, solvent or insolvent companies may in certain circumstances without any prior steps be removed from the register directly.

714 Under the 1955 Act, a company can be removed from the register by way of an application to the Registrar (section 335A) and companies which appear to be defunct may be struck off by the Registrar (section 336). The simplicity of these procedures is desirable, but there appears to be two problems. First, it is not clear whether section 336 can, or should, be used as a process available by way of request. We are aware of different practices in this respect. Can a company, which cannot declare that it has discharged all its debts and liabilities, ask to be struck off? Secondly, if a company applies to be removed under section 335A, but the Registrar receives an objection from a director, member or creditor, the process stops. The objector may take no other steps beyond preventing the removal, and so the company remains on the register but

defunct. To overcome these problems we propose one procedure that is available to solvent and insolvent companies alike which contains protections for creditors and discourages frivolous objections.

715 Under the proposed procedure, there are several circumstances in which a company may be removed:

- as a result of an amalgamation
- the Registrar is satisfied that the company has ceased to carry on business
- the shareholders or board of directors have requested removal on the grounds that the company has ceased trading and discharged its liabilities (the ground for a solvent company) or that it has no surplus assets and no creditor has applied to put the company into liquidation (the ground for an insolvent company)
- a liquidation has been completed (*section 252*).

716 Except in the case of a removal after an amalgamation, the Registrar must advertise the intention to remove the company from the register (*section 253*). The advertisement advises the reader of the right to object to the removal. In addition, where the grounds are that the Registrar believes the company is defunct, or the directors or creditors of an insolvent company have applied for it to be removed, the Registrar must advise the company, any secured creditor and the Inland Revenue Department of their right to object. This provision recognises the status of the Department as a preferential creditor.

717 *Section 254* sets out the grounds for an objection. One is that a creditor or shareholder has an undischarged claim against the company. Here it is important to note that subsection (2) excludes deficits on claims in liquidation from the category of undischarged claims. Other grounds for objection are that the company is still carrying on business, that it is party to legal proceedings, that it is in receivership or liquidation, or both, that the objector intends to take proceedings under Part 8 [Enforcement] or that it would not be just and equitable to remove the company from the register.

718 *Section 255* provides that if the Registrar receives an objection on the grounds that the company is still carrying on business, is a party to legal proceedings, or is in liquidation or receivership, the Registrar is not to remove the company unless satisfied that the objection has been withdrawn, is not correct, is no longer correct or is frivolous. If there is an objection on the grounds that a person has an undischarged claim, intends to take proceedings, or that it would not be just and equitable for removal to occur, the Registrar advises the objector that he or she must apply to the Court for the company to be placed in liquidation or for a Court order that the company not be removed from the register.

719 Once a company has been removed from the register it is possible that property belonging to the company may be discovered. Its owner is no longer in existence and, as under the present law, the property is to vest in the Crown. Should a person believe that he or she would have had an interest in the property, as a shareholder or as a creditor, immediately before the company's removal from the register, he or she may apply to the Court. The Court may order that the property vest in the claimant, or that the claimant receive compensation. The Crown may disclaim any onerous property vesting in it under *section 257.*

PART 16

Overseas Companies

720 This part is self-explanatory and would substantially re-enact the existing provisions of the Act, although the provisions of the draft Act relating to company names and service of documents are adopted. The existing requirement to file annual accounts is omitted. There may be a case for further streamlining of these provisions and perhaps full integration with the rest of the Act. We received very few submissions on the existing part and have not felt in a position to make firm recommendations.

PART 17

Registrar of Companies

721 The policy of the draft Act in relation to the Registrar of Companies is set out at paragraphs 311–321.

722 The provisions of Part 17 are machinery provisions and are self-explanatory.

723 The references to District Registrars and registers are facilitative and not prescriptive. They will not preclude the reconstitution of the register in a central location, as will be sensible when it is computerised.

724 The function of the Registrar under the draft Act is to ensure that documents submitted for registration comply with form and not with the substantive provisions of the Act. We have thought, and have been confirmed in our view by the submissions received, that it is impracticable to require the Registrar to ensure compliance in substance.

725 Appeals from decisions of the Registrar are provided for in *section 269*, which follows the form of section 9B of the 1955 Act.

726 *Section 264* permits fees to be set by Order in Council for the performance of the Registrar's functions. We received a number of submissions criticising the present system under

which the fees charged by the Companies Office bear no relation to the cost of the service provided and amount to a tax upon companies for the benefit of the Consolidated Account. At present, fees are tied to nominal capital so that the lack of proportion between fee charged and service rendered is exacerbated in the case of larger companies. We have some sympathy with the views expressed, and we have considered whether the draft Act should indicate that fees must be set to cover the costs of the service or that they should be set at a flat rate for all companies. In the end, however, we have concluded that such proposals should be considered as a matter of administration, not law. We have therefore followed the normal legislative formula of permitting fees to be set by Order in Council. We make the recommendation, however, that the policy of setting fees be reviewed in light of the criticisms of the present system.

PART 18

Offences and Penalties

727 This Part replaces the present extensive, and often overlapping and inconsistent offence provisions with a system which imposes standard and significant penalties for the few offences created under the Act.

728 We consider that the overhaul of the existing penalty provisions of the 1955 Act is a significant and worthwhile reform in itself. The Act creates over 100 offences with penalties ranging from fines of $2 pursuant to section 38(1) (for each incorrect copy of an altered memorandum or articles supplied) to 14 years' imprisonment pursuant to section 94 (for personation of a shareholder).

729 The principles that the Law Commission has followed in reviewing these provisions are as follows

- where an act or omission is an offence under the Crimes Act or some other general enactment, or is covered in the recently introduced Crimes Bill, that provision should not be replicated in the Companies Act
- breaches of minor or regulatory provisions should not be made criminal offences
- the principal and most effective remedies for breaches of duties created by or recognised in the Companies

Act lie in civil rather than criminal proceedings, and in rules that are as far as practicable self-enforcing

- the creation of criminal offences by the Companies Act should therefore be restricted to those cases where the nature and seriousness of the wrongdoing demands the intervention of the criminal law (as with conduct that smacks of fraud), or where criminal prosecution is the most convenient and appropriate response (as with wilful failure to file information with the Registrar)
- maximum penalties, particularly fines, should be high enough to be a true deterrent, bearing in mind the financial resources of some companies and their officers.

730 In terms of penalty, the draft Act creates three categories of offence. *Sections 277 and 278* apply where there is failure to comply with the provisions of the Act which are essential to the integrity of the registration system or to the general scheme of the Act and cannot adequately be left to shareholder enforcement alone—either because they serve a wider public interest or because they are fundamental to shareholder protection. *Section 278* imposes liability on directors where the underlying duty is imposed upon the board or the company. Each group of offences is subdivided into two categories for penalty purposes. The first category relates to breaches for which there is no other effective sanction or where, in the case of the certificates to be given by directors, the policy of the provision (to facilitate shareholder substantive enforcement) would largely be frustrated if its enforcement had to be left to shareholders through the civil courts. These carry a maximum fine of $5,000. The second category of offence comprises failures which would substantially undermine the integrity of the registration system and the mandatory public interest provisions in the draft Act. In those cases, the maximum penalty is a $10,000 fine. Heavy penalties are imposed under *sections 272, 273 and 274* for fraudulent conduct in relation to company property, records and statements. The provisions permit a fine of up to $200,000 and the imposition of a prison term not exceeding five years. They are to be compared with similar provisions in the Securities Act 1978 and the recently introduced Crimes Bill. It is important that the sanctions are sufficient to deter people and

companies of vastly different means from conduct which strikes at the heart of the protection the draft Act is designed to give.

731 *Section 275* gives the Court power to disqualify directors. This does not follow the Companies Amendment Act 1988, discussed above in paragraph 312, in permitting the Registrar to ban directors. We are of the view that these powers are too sweeping for a core Companies Act.

PART 19

Miscellaneous

732 We have not attempted to draft prescribed forms or indicate the scope of regulations which might be made under the Act. Neither have we provided a substitute for Table A in the form of a draft constitution. The Act does, of course, provide a default constitution which should obviate the need to make detailed empowering provisions in the company's constitution, as are presently to be found in Table A.

733 We do envisage, however, that standard form constitutions which deviate from the statutory presumptive form will be made available and might usefully be included in a schedule to the Act. Such standard forms might be useful in the case of closely-held companies which wish to displace the statutory presumption of director management, or which wish to avail themselves of some of the empowering provisions which depend on constitutional permission.

734 As mentioned in paragraph 600, we also envisage that accounting standards will be prescribed by regulations made under the Act.

Schedules

FIRST SCHEDULE

Proceedings at Meetings of Shareholders

735 The first schedule to the Act sets out the proceedure to be followed at meetings of shareholders. Some of these matters may be varied by the constitution, but most apply to all the meetings of companies

736 *Clause 2* requires lists of shareholders entitled to notice of a meeting to be drawn up. The date on which entitlement to be on the list is determined is fixed under section 95. Persons on the list receive notice of the meeting and may attend and vote at that meeting unless they have transferred their shares, and the transferee requires his or her name to be entered on the list.

737 *Clause 4* enables shareholder meetings to be held by telephone, unless the constitution prevents this.

738 *Clause 7* makes it clear that a proxy is entitled to vote on show of hands. The proxy must be produced before the start of the meeting, to be effective. This represents a change from the present provision which requires 48 hours' notice to the company.

739 *Clause 8* is new and permits postal voting at shareholder meetings unless excluded by the constitution. This enables shareholders to vote without arranging for a proxy to attend, or appointing company directors with potentially conflicting interests as their proxies. Postal votes are counted both on a show of hands, and on a poll. The procedural requirements are not demanding, and ensure that postal votes are not ignored or withheld by directors with vested interests.

740 *Clause 10* is new and enables shareholders by written notice to require notice to be given of any resolution. If shareholders can vote on the resolution by proxy or postal vote, the board must circulate any statement in support of the resolution, not exceeding 1,000 words, provided by the shareholder.

741 *Clause 11* makes the current provisions relating to company representatives standard with the provisions for proxies, and *clause 13* provides that shares are not entitled to be voted where there is any sum due to the company unpaid on them but permits such shares to be voted at interest group meetings.

SECOND SCHEDULE

Proceedings of the Board of a Company

742 The second schedule regulates the calling, and proceedings, of meetings of the board of directors. The main features to be noted are that

- directors are entitled to not less than two days' notice of any meeting

  We consider that is the maximum time that should be prescribed without compromising the efficiency of management of the company.

- meetings by telephone are permitted by clause 3
- a presumption that all directors present at a meeting have voted in favour of a resolution of the board unless a director expressly dissents

  In this, we have followed the Canadian provisions. The rule is designed to assist enforcement of director responsibility. We have considered whether absent directors should have a similar rule applied

to them unless, within a certain period after hearing of the board decision, they take steps to have their dissent recorded. We have come to the conclusion that such a requirement would not be reasonable because the absent director would be dependent on the information given as to the discussion and the significance of the issue.

THIRD SCHEDULE

Proceedings at Meetings of Creditors

743 The third schedule adapts the provisions governing meetings of shareholders to situations where creditors need to hold a meeting, and provides that a vote on a duly circulated draft resolution may be taken by postal ballot without any need for creditors to meet in person. A liquidator who attends a meeting of creditors is to take the chair.

FOURTH SCHEDULE

Proceedings at Meetings of Committee of Inspection

744 This schedule outlines the procedure to be followed at any meeting of a committee of inspection which is representative of creditors or of shareholders or both.

FIFTH SCHEDULE

Liquidation of Assets of Overseas Companies

745 This schedule provides the modifications and exclusions necessary to enable the application of Part 14 [Liquidations] to the liquidation of the New Zealand assets of an overseas company.

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V

THE DRAFT COMPANIES ACT

Contents

DRAFT COMPANIES ACT ( )

(Enacting words)

An Act to restate and reform the law governing the incorporation, organisation, operation and termination of companies

1 Short title and commencement

(1) This Act may be cited as the Companies Act ( ).

(2) This Act comes into force on [ ].

PART 1
PRELIMINARY

2 Purpose of the Act

The purposes of this Act are

(a) to provide a structure for the organisation and operation of companies that imposes minimum standards but is adaptable to meet diverse needs and circumstances;

(b) to recognise the value of the limited liability company as a means of attaining the economic and social benefits of the aggregation of capital for productive purposes, the spreading of economic risk and the taking of business risks;

(c) to clarify the relationships between companies, their directors, shareholders and creditors;

(d) to encourage the efficient management of companies by permitting directors a wide measure of discretion in matters of business judgment while protecting shareholders and creditors against abuses of management power;

(e) to provide simple and fair procedures for realising and distributing the assets of insolvent companies.

3 Interpretation

(1) In this Act, unless the context otherwise requires,

"accounting period" in relation to a company, means a year ending on a balance date of the company; and, where by reason of any alteration of the balance date of the company, the period ending on that date is greater or less than a year that greater or lesser period shall be deemed to be an accounting period;

"address for service" has the meaning set out in section 150 [Address for service];

"annual meeting" means a meeting required to be held by virtue of section 90 [Annual meetings of shareholders];

"assigned name", in relation to a company, means the name of the company referred to in section 16 [Assigned names];

"balance date" has the meaning set out in section 157 [Balance date of company];

"board" and "board of directors" have the meaning set out in section 97 [Meaning of "board"];

"charge" includes any right or interest in relation to property owned by, or in or under the custody or control of, a company, by virtue of which a creditor of the company may claim to be entitled to payment in priority

to creditors entitled to be paid under section 240 [Claims of other creditors];

"class" has the meaning set out in section 87 [Classes and interest groups];

"company" means a body corporate incorporated or registered under Part 2;

"constitution" means a constitution of a company that complies with Part 4;

"Court" means the High Court, or a District Court;

"director" has the meaning set out in section 96 [Meaning of "director"];

"distribution" means a direct or indirect transfer of money or other property (except the company's own shares) or incurrence of indebtedness by a company to or for the benefit of a shareholder in respect of any of its shares, and may be in the form of a declaration or payment of a dividend, a purchase, redemption or other acquisition of shares, a distribution of indebtedness, or otherwise;

"dividend" has the meaning set out in section 43 [Dividends];

"existing company" means a body corporate registered or deemed to be registered under Part II of the Companies Act 1955, or under the Companies Act 1933, the Companies Act 1908, the Companies Act 1903, the Companies Act 1882, or the Joint Stock Companies Act 1860;

"financial statements" has the meaning set out in section 158 [Meaning of "financial statements"];

"group financial statements" has the meaning set out in section 164 [Meaning of "group financial statements"];

"group of companies" has the meaning set out in section 162 [Meaning of "group of companies"];

"holding company" has the meaning set out in section 161 [Meaning of "holding company" and "subsidiary"];

"incorporator" means a person who applies for incorporation of a company in accordance with Part 2;

"interested", in relation to a director, has the meaning set out in section 108 [Meaning of "interested"];

"interest group" has the meaning set out in section 87 [Classes and interest groups];

"interests register" means the register kept under section 147 (1) (e) [Company records to be kept];

"major transaction" has the meaning set out in section 99 [Major transactions];

"New Zealand register" means the register of companies incorporated in New Zealand kept pursuant to section 272 (1) (a) [Registers];

"ordinary resolution" has the meaning set out in section 77 [Simple majority of shareholders to exercise powers];

"overseas company" means a body corporate incorporated outside New Zealand;

"overseas register" means the register of bodies corporate incorporated outside New Zealand kept pursuant to section 272 (1) (b) [Registers];

"pre-emptive rights" means the rights conferred on shareholders under section 36 [Pre-emptive rights];

"prescribed form" means a form prescribed by regulations made under this Act and containing and having attached such information and documents as those regulations may require;

"receiver" has the same meaning as in Part VIIA of the Property Law Act 1952;

"records" means the documents and information required to be kept by a company under section 147 [Company records to be kept];

"registered name" means a name of a company registered under section 17 [Registered names];

"registered office", in relation to a company, means the office referred to in section 145 [Registered office];

"Registrar" means the Registrar of Companies appointed in accordance with section 268 [Registrar and Deputy Registrars of Companies];

"registration day", in relation to any document or other matter relating to a company, means a day on which the District Registrar's office that contains the part of the New Zealand register (or the overseas register) relating to that company is open for registration of documents;

"related company" has the meaning set out in subsection (2);

"secured creditor", in relation to any company, means a person entitled to a charge in relation to property owned by, or in or under the custody or control of, that company;

"securities" has the same meaning as in the Securities Act 1978;

"share" has the meaning set out in section 26 [Rights attached to shares];

"share description" means a share description adopted in accordance with section 34 [Issue decided on by board];

"shareholder" has the meaning set out in section 72 [Meaning of "shareholder"];

"share register" means the share register required to be kept under section 65 [Company to maintain share register];

"solvency test" has the meaning set out in subsection (3);

"special meeting" means a meeting called in accordance with section 91 [Special meetings of shareholders];

"special resolution" means a resolution approved by a majority of 75 percent of the votes of those shareholders entitled to vote and voting on the question;

"subsidiary" has the meaning set out in section 161 [Meaning of "holding company" and "subsidiary"]

"surplus assets" means assets of a company remaining after the payment of all its creditors and available for distribution in accordance with the company's constitution and this Act prior to its removal from the New Zealand register;

"working day" means any day of the week other than

(a) Saturday, Sunday, Good Friday, Easter Monday, Anzac Day, the Sovereign's Birthday, Labour Day and Waitangi Day; and

(b) a day in the period commencing with the 25th day of December in any year, and ending with the 2nd day of January in the following year.

(2) In this Act, a company is related to another company if

(a) the other company is its holding company or subsidiary; or

(b) there is another company to which both companies are related by virtue of paragraph (a)

and "related company" has a corresponding meaning.

(3) A company satisfies the solvency test if

(a) it is able to pay its debts as they become due; and

(b) the realisable value of the company's assets is greater than the aggregate of the present value of its liabilities, whether contingent or otherwise.

(4) A person required to give public notice of any matter in relation to a company must do so by inserting notice of that matter

(a) in at least one issue of the *New Zealand Gazette*; and

(b) in at least two issues of a newspaper circulating in the area in which is situated the company's place of business, or the company's chief executive office if the company has more than one place of business, or the company's registered office if the company has no place of business.

4 Act binds Crown

This Act binds the Crown.

PART 2
INCORPORATION UNDER THIS ACT

Characteristics of a company

5 Essential components

Every company shall have

(a) a name, which may be a registered name or an assigned name;

(b) a constitution;

(c) one or more shares;

(d) one or more shareholders, whose liability for the obligations of the company may be limited or unlimited; and

(e) one or more directors, who have the powers and duties set out in Part 7.

6 Essential rights and powers

The issued shares of a company must at all times carry between them the following rights and powers:

(a) the power to appoint or remove directors;

(b) the power to approve any alteration to the constitution;

(c) the power to approve any major transaction;

(d) the power to approve any amalgamation or reconstruction;

(e) the power to approve the liquidation or removal from the New Zealand register of the company;

(f) the right to receive any surplus assets of the company

except to the extent that those rights and powers are by its constitution limited, or conferred on persons other than shareholders.

7 Separate personality

A company is a person in its own right separate from its shareholders, and continues in existence until it is removed from the New Zealand register in accordance with this Act.

8 Capacity and powers

(1) Subject to its constitution, a company

(a) has the capacity, rights, powers and privileges of a natural person; and

(b) without limiting paragraph (a), may do anything which it is permitted or required to do by its constitution or by any enactment or rule of law.

(2) No act of a company, including any transfer of property to or by a company, is invalid by reason only that the act or transfer is contrary to its constitution or this Act, but this subsection does not limit section 126 [Injunction to restrain action], 127 [Derivative actions], 131 [Personal action by shareholder against directors], 132 [Personal action by shareholder against company], and 135 [Prejudiced shareholders].

9 Authority to bind a company

A company is bound by the actions of its directors, employees and agents in the manner set out in Part 9.

Method of incorporation

10 Incorporators

(1) Any person (other than a natural person who is disqualified from becoming a director under section 115 (2)(a) to (c) [Qualifications of directors] may, either alone or together with any other such person, apply for incorporation of a company under this Act.

11 Application for incorporation

(1) An application for incorporation of a company under this Act must be sent or delivered to the Registrar, and must

(a) be in the prescribed form; and

(b) be signed by each incorporator; and

(c) be accompanied by consents in the prescribed form signed by each of the persons named as directors or shareholders of the company in the application form.

(2) Without limiting subsection (1), every application for incorporation must state

(a) the full name and residential address of each incorporator; and

(b) the maximum number of directors of the company; and

(c) the full names and residential addresses of the first director or directors of the proposed company; and

(d) the full names and residential addresses of the first shareholder or shareholders of the proposed company, the number of shares held by each shareholder and the rights, privileges, limitations and conditions attached to each of those shares, if different from those set out in section 26 (2) [Rights attached to shares]; and

(e) the first registered office of the proposed company; and

(f) the first address for service of the proposed company.

12 Incorporation

(1) Forthwith after receipt of a properly completed application for incorporation of a company, the Registrar must

(a) enter on the New Zealand register the particulars of the company required by section 272 [Registers]; and

(b) issue a certificate of incorporation in the prescribed form.

(2) A certificate of incorporation of a company issued under this section must include, among other things, the first name of the company, which will be

(a) the first registered name, if any, of the company; or

(b) if there is no such registered name, the assigned name of the company.

(3) A certificate of incorporation of a company issued under this section is conclusive evidence that

(a) all the requirements of this Act as to incorporation of the company have been complied with; and

(b) the company has been incorporated under this Act with effect on and from the date of incorporation stated in the certificate.

Registration of existing companies

13 Existing companies to apply for registration under this Act

(1) Every existing company must apply for registration under this Part no later than three years after the commencement of this Act.

(2) An application for registration of an existing company under this Part must be delivered to the Registrar and must

(a) be in the prescribed form; and

(b) be signed by the existing company.

(3) Without limiting subsection (2), every application for registration must state

(a) the name of the existing company; and

(b) the maximum number of directors of the existing company; and

(c) the full names and residential addresses of the directors of the existing company at the date of the application; and

(d) the number of shares of the existing company, and the rights, privileges, limitations and conditions attached to each of those shares, if different from those set out in section 26 (2) [Rights attached to shares]; and

(e) the registered office of the existing company at the date of the application; and

(f) the address for service of the existing company at the date of registration.

14 Registration

(1) Forthwith after receipt of a properly completed application for registration under this Part of an existing company, the Registrar must

(a) enter on the New Zealand register the particulars of the company required under section 272 [Registers]; and

(b) issue a certificate of registration in the prescribed form.

(2) A certificate of registration of a company issued by the Registrar under this section is conclusive evidence that

(a) all the requirements of this Act as to registration of the company have been complied with; and

(b) the company has been registered under this Act with effect on and from the date of registration stated in the certificate.

15 Effect of registration

Every existing company that is registered under this Part shall be the same body corporate before and after registration, and registration does not affect any rights or obligations of the existing company, or render defective any legal proceedings by or against the company.

PART 3
COMPANY NAMES

16 Assigned names

(1) Every company shall have a name (an "assigned name") by which it will be known whenever it does not have a registered name.

(2) Subject to subsection (3), the assigned name for a company will be "Company No X Limited" where "X" is the number assigned by the Registrar for this purpose upon its incorporation or registration.

(3) The assigned name for a company shall not include the word "Limited" if the constitution of the company provides that the liability of the shareholders of the company is not limited, in accordance with section 73(3) [Liability of shareholders].

17 Registered names

(1) A company may have a name that has been registered as the name of the company by the Registrar pursuant to section 19 [Registration of name].

(2) Subject to the constitution of a company

(a) the incorporators of the company may apply to the Registrar for registration of the first registered name of the company; and

(b) any director of the company may, with the prior approval of the company's board, apply to the Registrar for registration of the first or a subsequent registered name of the company.

(3) The inclusion of the name of the company in its constitution does not affect the power of the board to approve an application under subsection 2 (b), and no such application is an amendment of the constitution for the purposes of this Act, unless the constitution expressly so provides.

(4) The registered name of a company must comprise roman letters and arabic numerals only.

(5) If the liability of the shareholders of a company is limited under section 73 [Liability of shareholders], the registered name of the company must end either with the word "Limited" or the abbreviation "Ltd".

18 Application for registration of name

(1) An application for registration of the first or a subsequent registered name of a company must be sent or delivered to the Registrar, and must

(a) be in the prescribed form; and

(b) contain or have attached such information and documents as the prescribed form may require; and

(c) have attached any consents of the kind referred to in subsection (3); and

(d) contain the statement specified in subsection (2); and

(e) if the application is made by a director, contain a statement that the board of the company has approved the making of the application by the director; and

(f) be signed by each applicant.

(2) Every application for registration of the first or a subsequent name of a company must contain a statement by each applicant that

(a) the applicant has caused a search to be made during the period of 10 working days immediately preceding the date of the application, of such registers, directories, and records of names or trademarks as are then prescribed by the Registrar for the purposes of this subsection; and

(b) the applicant has good reason to believe that the name for which registration is sought was adopted in good faith for the purpose of identifying the company and is readily distinguishable from every name, trademark or service mark included in those registers, directories and records, other than any name, trademark, or service mark to which subsection (3) applies.

(3) An application for registration of the first or a subsequent name of a company may have attached a consent in the prescribed form to the registration of the name signed by the owner of any similar name, trademark or service mark.

19 Registration of name

(1) Subject to subsection (2), forthwith after receipt of a properly completed application for registration of the first or a subsequent name of a company, the Registrar must

(a) enter the name on the New Zealand register as being the registered name of the company; and then

(b) unless the name is registered at the time of incorporation or registration of the company under Part 2, issue a certificate of change of name in the prescribed form.

(2) The Registrar is not obliged to enter a name on the New Zealand register if

(a) disregarding the word "Limited" (if any), the name is identical to the name of any body registered on any register prescribed by the Registrar for the purposes

of section 18 [Application for registration of name]; or

(b) the use of the name by a company would contravene any Act which prohibits the use of certain words or names.

(3) A change of name of a company

(a) takes effect from the date of the certificate issued under subsection (1) (b); and

(b) does not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced against the company by its former name may be continued or commenced against it by its new name.

20 Cessation order

(1) If at any time the Registrar believes on reasonable grounds that

(a) a name of a company should not have been registered under section 19 [Registration of name]; or

(b) continued registration of the name under that section is undesirable

the Registrar may serve written notice on the company to the effect that the name will cease to be the registered name of the company from a date specified in the notice (being a date not less than 20 working days after the date on which the notice is served on the company).

(2) Where the Registrar has served notice on a company under subsection (1) then, unless the company has changed its registered name from the name specified in the notice, the name of the company will be its assigned name from the date specified in the notice and the Registrar must forthwith after that date issue a certificate of change of name in the prescribed form.

21 Use of name

(1) Every company must ensure that its full name is clearly stated in

(a) all communications sent by or on behalf of the company; and

(b) all documents issued or signed by or on behalf of the company that evidence or create a legal obligation of the company.

(2) For the purposes of subsection (1) and of section 140 [Method of contracting etc], it is lawful to use any generally recognised abbreviation of a word or words in the name of a company, so long as it is not misleading to do so.

PART 4
COMPANY CONSTITUTION

22 Every company has a constitution

(1) Every company and the board, the shareholders and each director and shareholder of a company have the rights, powers, duties and obligations set out in this Act except in so far as they are negated or modified by the constitution of the company in accordance with this Act.

(2) Every company has a constitution which comprises

(a) the application for incorporation or registration or amalgamation proposal of the company; and

(b) any share descriptions registered under Part 5; and

(c) any document of the kind referred to in section 23 [Initial constitutional document], section 24 (3) [Alteration of constitution] or section 25 (2) [Power of Court to alter constitution].

(3) No provision of a constitution may contravene or be inconsistent with this Act, and a provision which contravenes or is inconsistent with this Act is invalid to the extent of that contravention or inconsistency.

23 Initial constitutional document

(1) An application for incorporation of a company under Part 2 may, but need not, be accompanied by a document certified by at least one of the incorporators as being the initial constitutional document for the company.

(2) An application for registration of an existing company under Part 2 may, but need not, be accompanied by a document certified by the existing company as being its initial constitutional document under this Act.

24 Alteration of constitution

(1) Subject to its constitution and without limiting sections 88 [Alteration of shareholder rights] and 135 [Prejudiced shareholders], the shareholders of a company may at any time alter the constitution by special resolution.

(2) The adoption of a constitutional document for a company is deemed to be an alteration of that company's constitution.

(3) Within 10 registration days of the alteration of the constitution of a company the board must ensure that a notice of change of constitution in the prescribed form is received by the Registrar.

(4) If the board of a company fails to comply with subsection (3), every director of the company may be convicted of an offence under section 278 (2) [Liability of directors for failure by board or company].

25 Power of Court to alter constitution

(1) Where it is not practicable to alter the constitution of a company by means of the procedure set out in this Act or in its constitution, any director or shareholder of the company may apply to the Court for an order altering the constitution, and the Court may make an order altering the constitution on such terms and conditions as it thinks fit.

(2) Where an order is made under subsection (1), the applicant for the order must ensure that a copy of the order is received by the Registrar within 10 registration days.

(3) If an applicant fails to comply with subsection (2) he or she may be convicted of an offence under section 277 (2) [Failure to comply with Act].

PART 5
SHARES

Nature of shares

26 Rights attached to shares

(1) A share is a form of personal property issued in accordance with section 31 [Issue of shares] which represents an entitlement in respect of the capital, income or control of a company and confers on the holder all or any of the following rights:

(a) the right to share in the distribution of income of the company;

(b) the right to share in the distribution of the surplus assets of the company upon its winding up;

(c) the right to vote at meetings of the company;

(d) the right to repayment of a sum in consideration of which the share was issued, at a future date;

(e) the right to be paid a return at a specified rate on a sum in consideration of which the share was issued

together with such other rights and privileges and subject to such limitations or conditions as may be provided for in the constitution of the company or the share description in respect of the share.

(2) Unless otherwise specified in the constitution or share description in respect of any share, each share has attached to it the following rights:

(a) the right to one vote at any meeting (other than an interest group meeting) which is held to do any one or more of the following:

(i) to appoint or remove a director or auditor;

(ii) to approve any alteration to the constitution;

(iii) to approve a major transaction;

(iv) to approve an amalgamation of the company, under section 190 [Manner of approving amalgamation proposal];

(v) to approve the liquidation of the company;

(b) the right to an equal share in dividends authorised by the directors;

(c) the right to an equal share in the distribution of the surplus assets of the company.

27 Types of share

Without limiting section 26 [Rights attached to shares], shares may be convertible, redeemable, subject to calls, entitled to preferential distribution (whether of income or of capital), and may have special, conditional, limited or no voting rights.

28 No nominal value

No share shall have a nominal or par value.

29 Transferability of shares

(1) A share may be either transferable or non-transferable.

(2) Any share which is transferable may be transferred by entry on the company's register, in accordance with section 63 [Transfer of shares], and may not be transferred in any other way.

(3) Unless otherwise specified in the constitution of the company, a share is transferable.

30 Share options

Sections 34 [Issue decided on by board], 36 [Pre-emptive rights], 37 [Persons to whom shares may be issued], 58 [Financial assistance], 59 [Special financial assistance], 60 [Disclosure document] and 61 [Enforceability of prohibited transactions] apply to any deed or contract under which the company is or may be required to issue shares as if that contract were a share, and as if entry into such a contract were the issue of a share.

Issue of shares

31 Issue of shares

Every share in a company must be either

(a) an initial share; or

(b) issued by the company, in accordance with section 33 [Company may issue shares].

32 Initial shares

(1) A share is an initial share if

(a) the holder of the share is named in the application for incorporation of a company; or

(b) in the case of an existing company, the share is issued at the date of registration under Part 2; or

(c) in the case of an amalgamated company, the share is provided for in the amalgamation proposal, and the holder of the share becomes entitled to the share under the amalgamation proposal.

(2) Where a share is an initial share the company must forthwith enter the name of the holder on the share register, in accordance with section 65 [Company to maintain share register].

(3) Where an initial share is transferable, that share may, subject to any restrictions in the constitution, be transferred by entry on the share register and any such transfer does not require and is not for the purposes of this Act an alteration of the constitution.

33 Company may issue shares

Subject to the Act and to any restrictions in its constitution, a company may issue shares at any time and in any number, provided that either

(a) its constitution makes provision for such shares, and they have not yet been issued; or

(b) the board has resolved to issue shares, in accordance with section 34 [Issue decided on by board].

34 Issue decided on by board

Shares may be issued under section 33 (b) [Company may issue shares] only if the board has passed a resolution

(a) that shares should be issued, specifying

(i) the rights, privileges, limitations and conditions attached to each share to be issued, if different from those set out in section 26 (2) [Rights attached to shares]; and

(ii) the maximum number of shares to be issued; and

(iii) whether the shares are transferable or non-transferable, and if transferable, whether their transfer is subject to any conditions or limitations; and

(b) adopting as the share description a written statement of the matters referred to in paragraph (a) in the prescribed form.

35 Share description to be registered

(1) Within 10 registration days of the adoption of a share description under section 34 (b) [Issue decided on by board], the board must ensure that the share description is received by the Registrar.

(2) Upon registration the share description forms part of the constitution of the company, provided that

(a) no provision in the constitution prior to the registration of a share description which relates to the rights attached to shares shall apply to the shares described in the share description, unless the share description so provides;

(b) no provision in the share description which relates to the rights attached to shares shall apply to other shares of the company.

(3) If the board of a company fails to comply with subsection (1), every director of the company may be convicted of an offence under section 278 (2) [Liability of directors for failure by board or company].

Persons to whom shares may be issued

36 Pre-emptive rights

Unless excluded or limited by the constitution, all shareholders are entitled to pre-emptive rights, which are the rights

(a) to be offered any further issue of shares which rank equally with or prior to their shares, whether as to voting or distribution rights, or both, in such a manner and on such terms as would, if accepted, preserve their relative voting and distribution rights; and

(b) to be afforded a reasonable opportunity of accepting any such offer.

37 Persons to whom shares may be issued

(1) Shares must be issued in accordance with shareholders' pre-emptive rights, unless either

(a) the constitution permits the issue in question to be made in the manner proposed by the board; or

(b) the board obtains approval for the issue in the same manner as approval is required for an alteration to the constitution which would permit such an issue.

(2) Within 10 registration days of approval being given under subsection (1) (b), the board must ensure that notice of that approval in the prescribed form is received by the Registrar.

(3) Nothing in this section affects the need to obtain the approval of an interest group, where the issue of shares affects the rights of that interest group, in accordance with section 88 [Alteration of shareholder rights].

(4) A failure to comply with this section does not affect the validity of any issue of shares, but has the consequences set out in section 135 (3) [Prejudiced shareholders].

(5) If the board of a company fails to comply with subsection (2), every director of the company may be convicted of an offence under section 278 (2) [Liability of directors for failure by board or company].

Consideration for issue of shares

38 Consideration for issue of shares

The consideration for which a share is issued may be cash, promissory notes, contracts for future services, real or personal property or other securities of the company.

39 Consideration for issue to be decided on by board

(1) Before a company issues shares under section 33 [Company may issue shares] other than as a share split, the board must

(a) decide the consideration for which the shares will be issued and the terms on which they will be issued; and

(b) resolve that in its opinion the consideration for and terms of the issue are fair and reasonable to the company and to the existing shareholders.

(2) The directors who vote in favour of the resolution required by subsection (1) must sign a certificate that, in their opinion, the conditions set out in subsection (1) are satisfied.

(3) The board may at any time resolve to issue shares as a share split, and subsections (1) and (2) do not apply to any such issue.

(4) A share split is an issue of shares where

(a) notwithstanding any provision in the constitution of the company, the issue is in accordance with shareholders' pre-emptive rights; and

(b) the shares issued are not redeemable; and

(c) the shares issued do not carry any fixed or preferential right to distributions or to the surplus assets of the company.

40 Consent to issue

A company may not issue a share to any person if the issue of that share increases any liability of that person to the company or imposes any new liability on that person unless that person has consented in writing to become the holder of that share and any issue without such consent is void.

Time of issue

41 Time of issue

A share is issued when

(a) the constitution or share description which provides for the share has been registered on the New Zealand register; and

(b) either the holder of the share is named in the constitution, or the name of the holder of the share has been entered on the register of shareholders.

Distributions

42 Board may authorise a distribution

(1) The board of a company may, subject to any restrictions contained in the constitution of the company, authorise a distribution by the company at such time and of such amount and to such shareholders as it thinks fit, provided that it is satisfied that the company will, after the distribution, satisfy the solvency test.

(2) The directors who vote in favour of a distribution must sign a certificate that in their opinion the company will, after the distribution, satisfy the solvency test.

(3) In applying the solvency test for the purposes of this section,

(a) "debts" is to be treated as including fixed preferential returns on shares ranking ahead of those in respect of which a distribution is made; and

(b) "liabilities" is to be treated as including the amount that would be required, if the company were to be removed from the New Zealand register immediately after the time of distribution, to satisfy the fixed entitlements of all shareholders at that time, or upon an earlier redemption;

except where that fixed preferential return or entitlement is expressed in the constitution as being subject to the power of the directors to make distributions.

(4) Every director who fails to comply with subsection (2) may be convicted of an offence under section 277 (1) [Failure to comply with Act].

43 Dividends

(1) A dividend is a distribution which does not fall within section 49 [Acquisition of company's own shares] or section 58 [Financial assistance].

(2) The board of a company may not authorise a dividend

(a) in respect of some shares in a class, and not of others of that class; or

(b) of a greater value per share in respect of some shares of a class than in respect of others of that class

except where the amount of the dividend is proportional to the amount paid to the company in respect of the shares.

(3) Notwithstanding subsection (2), a shareholder may waive his or her entitlement to receive a dividend by notice in writing to the company signed by or on behalf of the shareholder.

44 Shares in lieu of dividend options

(1) Notwithstanding section 43 (2) [Dividends], but subject to section 31 [Issue of shares] and to the constitution of the company, a board may offer shareholders the option of receiving shares in the company in lieu of any proposed dividend.

(2) The dividend option offered to shareholders must comply with section 43 (2) [Dividends].

(3) The share option offered to shareholders must be an offer made in accordance with shareholders' pre-emptive rights.

(4) The board must give notice to shareholders of the shares in lieu of dividend option stating the date by which the option must be exercised, and all shareholders must be afforded a reasonable opportunity of exercising the option.

(5) Upon the date specified in the notice given under subsection (4) the board may

(a) subject to section 31 [Issue of shares], issue shares to those shareholders who have elected to receive shares in lieu of the proposed dividend; and

(b) subject to section 42 [Board may authorise a distribution], authorise the proposed dividend to be paid to those shareholders who have not elected to receive shares.

45 Shareholder discounts

(1) Notwithstanding section 42 [Board may authorise a distribution] and section 43 [Dividends], the board of a company may resolve that the company should offer shareholders discounts in respect of some or all of the trading activities of the company.

(2) The board may approve a discount scheme under subsection (1) only if it has previously resolved that the proposed discounts

(a) are fair and reasonable to the company and to all shareholders; and

(b) are to be available to all shareholders on the same terms.

(3) No discount scheme may be approved or continued by the board if there are reasonable grounds for believing that the company does not satisfy the solvency test.

46 Recovery of distributions

(1) A distribution to a shareholder made at a time when the company did not immediately after the distribution satisfy the solvency test as required by section 42 [Board may authorise a distribution] may be recovered by the company from the shareholder unless the shareholder

(a) received the distribution in good faith and without knowledge of the company's failure to satisfy the solvency test; and

(b) has altered his or her position in reliance on the validity of the distribution, so that having regard to all possible implications in respect of other persons it is inequitable to require repayment in full or at all, as the case may be.

(2) Where a distribution has been made and, either,

(a) the procedure set out in section 42 [Board may authorise a distribution] has not been followed; or

(b) a certificate was given under section 42 (2) [Board may authorise a distribution], and there did not exist reasonable grounds for the opinion set out in the certificate;

those directors who failed to take reasonable steps to ensure the procedure was followed, or who signed the certificate, are personally liable to the company to restore the distribution, except in so far as it may be recoverable from shareholders under subsection (1).

(3) If in any action brought against a director or shareholder under this section the Court is satisfied that the company could properly have made a distribution of lesser value which would not have caused the company to fail to satisfy the solvency test, the Court may

(a) relieve the director from liability in respect of; or

(b) permit the shareholder to retain;

the distribution made up to the value of any distribution that might properly have been made.

Company holding its own shares

47 Company holding its own shares

Except as provided in sections 49 to 53, a company shall not hold shares in itself.

48 Cross-holdings

(1) Where one company (referred to as "the owning company") holds shares in another company (referred to as "the partly-owned company")

(a) the partly-owned company may acquire shares in the owning company unless there are at the time of the acquisition reasonable grounds for believing that the partly-owned company does not, or would not after the acquisition, satisfy the solvency test; and

(b) the owning company, where the partly-owned company is its subsidiary, shall not permit the partly-owned company to acquire any shares in the owning company where there are at the time of acquisition reasonable grounds for believing that the owning company does not, or would not after the acquisition, satisfy the solvency test.

(2) Each director of the partly-owned company owes a duty to that company to take reasonable steps to ensure that it complies with subsection (1) (a).

(3) Each director of the owning company owes a duty to that company to take reasonable steps to ensure that it complies with subsection (1) (b).

(4) In applying the solvency test for the purposes of this section

(a) "debts" is to be treated as including fixed returns on shares; and

(b) "liabilities" is to be treated as including the amount that would be required, if the company were to be removed from the New Zealand register immediately after the time of the acquisition, to satisfy the fixed entitlements of all shareholders to surplus assets at that time, or upon an earlier redemption.

Acquisition by company of its own shares

49 Acquisition of company's own shares

(1) Subject to section 42 [Board may authorise a distribution], a company may purchase or otherwise acquire shares issued by it, if expressly permitted to do so by its constitution, in accordance with section 50 [Board may make offer to acquire shares].

(2) Notwithstanding subsection (1) and sections 50 to 54, a company may purchase or otherwise acquire shares issued by it

(a) in accordance with an order of the Court made under this Act on the terms and conditions set out in that order; or

(b) in accordance with section 81 [Minority buy-out rights] or section 88 [Alteration of shareholder rights].

50 Board may make offer to acquire shares

(1) At any time when a company is entitled to acquire its own shares by virtue of section 49 (1) [Acquisition of company's own shares], the board may

(a) make an offer to all shareholders to acquire a proportion of their shares, where

(i) such an offer will, if accepted in full, leave unaffected relative voting and distribution rights; and

(ii) all shareholders are afforded a reasonable opportunity to accept the offer; or

(b) make an offer to one or more shareholders to acquire shares, other than in accordance with paragraph (a), if

(i) all shareholders have consented in writing to that offer; or

(ii) such an offer is expressly permitted by the constitution, and the procedure set out in section 51 [Special offers to acquire shares] is followed.

(2) The board may make an offer under subsection (1) only if it has previously resolved

(a) that the acquisition in question is in the best interests of the company; and

(b) that the terms of the offer and the consideration offered for the shares are fair and reasonable to the company; and

(c) that it is not aware of any information not available to shareholders

(i) which is material to an assessment of the value of the shares; and

(ii) as a result of which the terms of the offer and consideration offered for the shares are unfair to shareholders accepting the offer;

and any such resolution must set out full reasons for the directors' conclusions.

(3) The directors who vote in favour of a resolution required by subsection (2) must sign a certificate as to the matters set out in subsection (2), which may be combined with the

certificate required by section 42 [Board may authorise a distribution] and any certificate required under section 51 [Special offers to acquire shares].

(4) Every director who fails to comply with subsection (3) may be convicted of an offence under section 277 (1) [Failure to comply with Act].

51 Special offers to acquire shares

(1) The board may make an offer under section 50 (1) (b) (ii) [Board may make offer to acquire shares] only if it has previously resolved

(a) that the acquisition in question is of benefit to the remaining shareholders; and

(b) that the terms of the offer and the consideration offered for the shares are fair and reasonable to the remaining shareholders;

and any such resolution must set out full reasons for the directors' conclusions.

(2) The directors who vote in favour of a resolution required by subsection (1) must sign a certificate as to the matters set out in subsection (1).

(3) Before an offer is made pursuant to a resolution under subsection (1), the company must send each shareholder a disclosure document which complies with section 52 [Disclosure document].

(4) The offer may be made not less than 10 and not more than 30 working days after the disclosure document has been sent to each shareholder.

(5) A shareholder, the company or any creditor of the company, may apply to the Court for an order restraining the proposed acquisition on the grounds that

(a) it is not in the best interests of the company and of benefit to remaining shareholders; or

(b) the terms of the offer and the consideration offered for the shares are not fair and reasonable to the company and remaining shareholders.

(6) Every director who fails to comply with subsection (2) may be convicted of an offence under section 277 (1) [Failure to comply with Act].

52 Disclosure document

The document to be sent to all shareholders by way of disclosure pursuant to section 48 (3) [Cross-holdings] must set out

(a) the nature and terms of the offer, and if made to specified shareholders, to whom it will be made; and

(b) the text of the resolution required by section 48 (1) [Cross-holdings], together with such further information and explanation as may be necessary to enable a reasonable shareholder to understand the nature and implications for the company and its shareholders of the proposed acquisition.

53 Cancellation of shares re-purchased

(1) Any shares acquired by a company pursuant to section 49 [Acquisition of company's own shares] shall immediately upon acquisition be deemed to be cancelled.

(2) Shares are acquired for the purposes of subsection (1) on the date upon which the company would, apart from this section, become entitled to exercise the rights attached to the shares.

(3) Where a share is cancelled under this section

(a) all the rights and privileges attached to that share expire; but

(b) the constitution of the company is not affected, and the share may be reissued in accordance with this Part.

54 Enforceability of contract to re-purchase shares

(1) A contract with a company providing for the acquisition by the company of its shares is specifically enforceable against the company except to the extent that the company cannot perform the contract without thereby being in breach of section 42 [Board may authorise a distribution].

(2) In any action brought on a contract referred to in subsection (1), the company has the burden of proving that performance of that contract is prevented by section 42 [Board may authorise a distribution].

(3) Until the company has fully performed a contract referred to in subsection (1), the other party retains the status of a claimant entitled to be paid as soon as the company is lawfully able to do so or, prior to the removal of the company from the New Zealand register, to be ranked subordinate to the rights of creditors but in priority to the other shareholders.

Redemption of shares

55 Redemption at the option of the company

Where a share is redeemable at the option of the company, any such redemption shall be deemed to be an acquisition of the share for the purposes of sections 50 to 53.

56 Redemption at the option of the shareholder

(1) Where a share is redeemable at the option of the holder of the share, and the holder gives proper notice to the company requiring the share to be redeemed, the company shall redeem the share upon the date specified in the notice, or if none upon the date of receipt of the notice, and as of the date of redemption the share is deemed to be cancelled and the shareholder ranks as an unsecured creditor of the company in respect of the sum specified in the constitution as being payable upon such redemption.

(2) Notwithstanding subsection (1), any sum payable upon redemption is deemed to be a distribution for the purposes of section 46 [Recovery of distributions].

57 Redemption upon a fixed date

(1) Where a share is redeemable upon a date specified in the constitution, the company shall redeem the share upon that date, and as of that date the share is deemed to be cancelled and the holder of the share ranks as an unsecured creditor of the company in respect of the sum specified in the constitution as being payable upon such redemption.

(2) Notwithstanding subsection (1), a sum payable upon redemption is deemed to be a distribution for the purposes of section 46 [Recovery of distributions].

Assistance by a company in the purchase of its own shares

58 Financial assistance

(1) Subject to section 42 [Board may authorise a distribution] a company may give financial assistance by means of a loan, guarantee, the provision of security or otherwise to any person for the purpose of or in connection with the purchase of any share issued or to be issued by the company, whether directly or indirectly, only if either

(a) the company

(i) gives the financial assistance in the ordinary course of business and on usual terms and conditions; and

(ii) receives fair value in connection with the assistance; or

(b) the financial assistance is given in accordance with subsection (3), and either

(i) all shareholders have consented in writing to the giving of the assistance; or

(ii) the procedure set out in section 59 [Special financial assistance] is followed.

(2) Financial assistance given under subsection (1) (a) is deemed not to be a distribution for the purposes of this Act.

(3) Financial assistance given otherwise than under subsection (1) (a) is deemed to be a distribution in respect of the shares purchased, or to be purchased, whether or not the person to whom the assistance is given holds or acquires shares in the company at the time the assistance is given.

(4) A company may give financial assistance under subsection (1) (b) if the board has previously resolved that

(a) the company should provide the assistance; and

(b) the giving of such assistance is in the best interests of the company; and

(c) the terms and conditions under which the assistance is given are fair and reasonable to the company;

and any such resolution must set out full reasons for the board's conclusions.

(5) The directors who vote in favour of a resolution required by subsection (4) must sign a certificate as to the matters set out in subsection (4), and that certificate may be combined with the certificate required under section 42 [Board may authorise a distribution] and any certificate required under section 59 [Special financial assistance].

(6) For the purpose of determining whether financial assistance may be given under section 42 [Board may authorise a distribution],

"assets" is to be taken to exclude the amount of any financial assistance in the form of a loan; and

"liabilities" includes the face value of any liability, whether contingent or otherwise, incurred in connection with the giving of the assistance.

(7) Every director who fails to comply with subsection (5) may be convicted of an offence under section 277 (1) [Failure to comply with Act].

59 Special financial assistance

(1) Financial assistance may be given under section 58 (1) (b) (ii) [Financial assistance] only if the Board has previously resolved

(a) that giving the assistance in question is of benefit to those shareholders not receiving the assistance; and

(b) that the terms and conditions under which the assistance is given are fair and reasonable to those shareholders not receiving the assistance;

and any such resolution must set out full reasons for the directors' conclusions.

(2) The directors who vote in favour of a resolution required by subsection (1) must sign a certificate as to the matters set out in subsection (1).

(3) Before assistance is given under section 58 (1) (b) (ii) [Financial assistance], the company must send each

shareholder a disclosure document which complies with section 60 [Disclosure document].

(4) The assistance may be given not less than 10 and not more than 30 working days after the disclosure document has been sent to each shareholder.

(5) A shareholder, the company or any creditor of the company, may apply to the Court for an order restraining the proposed financial assistance on the grounds that

(a) it is not in the best interests of the company and of benefit to those shareholders not receiving the assistance; or

(b) the terms and conditions under which the assistance is to be given are not fair and reasonable to the company and to those shareholders not receiving the assistance.

(6) Every director who fails to comply with subsection (2) may be convicted of an offence under section 277 (1) [Failure to comply with Act].

60 Disclosure document

The document to be sent to all shareholders by way of disclosure pursuant to section 59 (4) [Special financial assistance] must set out

(a) the nature and terms of the assistance to be given, and to whom it will be given; and

(b) the text of the resolution required by section 59 (2) [Special financial assistance], together with such further information and explanation as may be necessary to enable a reasonable shareholder to understand the nature and implications for the company and its shareholders of the proposed acquisition.

61 Enforceability of prohibited transactions

(1) A failure to comply with the provisions of section 58 [Financial assistance] does not affect the validity of any transaction, but has the consequences set out in section 135 [Prejudiced shareholders].

(2) This section does not affect any liability of a director or any other person for breach of any duty, or as a constructive trustee, or otherwise.

Statement of shareholder rights

62 Statement of shareholder rights

(1) Every shareholder is entitled to be issued by the company, upon request, with a statement of the number of shares held by him or her, and the rights, privileges, conditions and limitations, including restrictions on transfer, attached to his or her shares; and their relative position in relation to other classes of shares (if any).

(2) The company is not obliged to provide a shareholder with a statement under subsection (1) if

(a) such a statement has been provided within the previous six months; and

(b) the shareholder has not acquired or disposed of shares since the previous statement was issued; and

(c) the rights attached to shares of the company have not been altered since the previous statement was issued; and

(d) there are no special circumstances which would make it unreasonable for the company to refuse the request.

(3) No person other than the shareholder to whom a statement is issued under this section is entitled to rely on that statement as evidence of title to the shares or of any of the matters set out in the statement, or otherwise.

(4) If a company fails to comply with subsection (1)

(a) the company may be convicted of an offence under section 277 (1) [Failure to comply with Act]; and

(b) every director of the company may be convicted of an offence under section 278 (1) [Liability of directors for failure by board or company].

63 Transfer of shares

(1) Shares which are transferable are transferable by entry of the name of the transferee on the share register.

(2) Where shares are to be transferred, a form of transfer signed by the present holder of the shares must be delivered to the company.

(3) The form of transfer required by subsection (2) must be signed by the transferee if registration as holder of the shares imposes any liability to the company on the transferee.

(4) Upon receipt of a form of transfer in accordance with subsection (2), the company must forthwith enter the name of the transferee on the share register as holder of the shares, unless

(a) the board resolves within 30 working days of receipt of the transfer to refuse or delay the registration of the transfer, and the resolution sets out full reasons for so doing; and

(b) notice of the resolution, including reasons, is sent to the tranferor and to the transferee within five working days of its approval by the board; and

(c) the Act or the constitution expressly permits the board to refuse or delay registration for the reasons stated.

(5) Subject to the constitution of a company, the board may refuse or delay the registration of a transfer of shares where the holder of the shares has failed to pay to the company any amount due in respect of those shares, whether by way of consideration for the issue of the shares or in respect of sums payable by the holder of the share in accordance with the constitution.

(6) If a company fails to comply with subsection (4)

(a) the company may be convicted of an offence under section 277 (1) [Failure to comply with Act]; and

(b) every director of the company may be convicted of an offence under section 278 (1) [Liability of directors for failure by board or company].

64 Permissible dealings with non-transferable shares

Shares which are non-transferable may not be voluntarily transferred to any person by the holder of the shares, but may pass by transmission or by operation of law, or may be repurchased or redeemed by the company in accordance with this Act unless the constitution of the company provides otherwise.

Share register

65 Company to maintain share register

(1) Every company must maintain a share register in which it records the shares issued by the company, showing whether the shares are transferable or non-transferable, and with respect to each class of shares the share register must state

(a) the names, alphabetically arranged, and the latest known address of each person who is or has within the last 10 years been a shareholder;

(b) the number of shares of that class held by each shareholder;

(c) the date and particulars of the issue and transfer within the last 10 years of each share.

(2) If a company fails to comply with subsection (1)

(a) the company may be convicted of an offence under section 277 (2) [Failure to comply with Act]; and

(b) every director of the company may be convicted of an offence under section 278 (2) [Liability of directors for failure by board or company].

66 Place of register

(1) A company may appoint an agent to maintain the share register of the company.

(2) The share register must be kept at the registered office of the company, provided that

(a) if the maintenance of the register is carried out at another office of the company in New Zealand, it may be kept at that other office; and

(b) if the company arranges with some other person to maintain the register on behalf of the company, it may be kept at the office in New Zealand of that other person at which the work is done.

(3) If a share register is not kept at the registered office of the company, or if the place at which it is kept is changed, the company must ensure that within 10 registration days of it first being kept elsewhere or moved, as the case may be, notice is received by the Registrar of the place where the share register is kept.

(4) If a company fails to comply with subsection (3)

(a) the company may be convicted of an offence under section 277 (2) [Failure to comply with Act]; and

(b) every director of the company may be convicted of an offence under section 278 (2) [Liability of directors for failure by board or company].

67 Share register determines legal title

(1) Subject to section 69 [Power of Court to rectify share register], the entry of the name of a person in the share register as holder of a share is effective to vest legal title to that share in that person.

(2) A company may treat the registered holder of a share as the person exclusively entitled to vote, to receive notices, to receive any distribution in respect of the share, and otherwise to exercise all the rights and powers of an owner of the share.

68 Directors' duty to supervise share register

(1) It is the duty of each director to take reasonable steps to ensure that the share register is properly kept and that share transfers are promptly entered on the share register, in accordance with section 63 [Transfer of shares].

(2) Every director who fails to comply with subsection (1) may be convicted of an offence under section 277 (2) [Failure to comply with Act].

69 Power of Court to rectify share register

(1) If the name of any person is wrongly entered in or omitted from, or wrongly continues to be entered in the share register of a company, the person aggrieved, or any shareholder, may apply to the Court for rectification of the share register or for compensation for any loss sustained, or both.

(2) Where an application is made under this section, the Court may order rectification of the register and payment of compensation by the company or any director for any loss sustained by any party aggrieved.

(3) On an application under this section the Court may decide any question relating to the entitlement of any person who is a party to the application to have his or her name entered in or omitted from the share register, and generally may decide any question necessary or expedient to be decided for rectification of the share register.

70 Trusts not to be entered on register

No notice of any trust, express, implied, or constructive may be entered on the share register.

Share certificates

71 Share certificate may be issued

(1) Subject to the constitution of the company, a shareholder may apply to the company for a certificate relating to some or all of his or her shares in the company.

(2) Upon receipt of an application for a share certificate under this section, the company must forthwith

(a) separate the shares shown in the register as owned by the applicant into separate parcels; one parcel being the shares to which the share certificate relates, and the other parcel being any remaining shares;

(b) send to the shareholder a certificate stating

(i) the name of the company;

(ii) the class of shares represented by the certificate;

(iii) the number of shares represented by the certificate.

(3) Notwithstanding section 63 (3) [Transfer of shares], where a share certificate has been issued which relates to a parcel of shares, a transfer of that parcel may not be registered by the company unless the form of transfer required by section 63 (2) [Transfer of shares] is accompanied by the share certificate relating to that parcel, or by evidence as to its loss or destruction and, if required, an indemnity to the satisfaction of the board.

(4) Where a parcel of shares to which a share certificate relates is to be transferred, and the share certificate is sent to the company to enable the registration of the transfer, the share certificate must be cancelled and no further share certificate issued without a specific request by the transferee.

PART 6
SHAREHOLDERS AND THEIR RIGHTS AND OBLIGATIONS

72 Meaning of "shareholder"

In this Act, the term "shareholder" means, in relation to a company

(a) any person registered on the share register as the owner of one or more shares in the company; and

(b) any person named as a shareholder in the constitution at the time of incorporation of the company, until such time as his or her name is entered on the share register.

Liability of shareholders

73 Liability of shareholders

(1) Subject to section 26 [Rights attached to shares], a shareholder is not liable for any obligation of the company by virtue only of his or her status as shareholder.

(2) The liability of a shareholder to the company is limited to

(a) any liability expressly provided for in the constitution, including any amount unpaid on any share held by the shareholder; and

(b) any liability under section 80(2) [Liability of shareholders in respect of exercise of powers]; and

(c) any distribution received by the shareholder to the extent that the distribution is recoverable under section 46 [Recovery of distributions].

(3) The constitution of a company may provide that the liability of the shareholders to the company is unlimited.

(4) For the avoidance of doubt

(a) where

(i) all or part of the consideration for the issue of a share remains unsatisfied; and

(ii) the person to whom the share was issued no longer holds that share the person to whom the share was issued continues to be liable in respect of the unsatisfied consideration, and no liability in respect of that unsatisfied consideration attaches to subsequent holders of the share;

(b) where the constitution provides that a share renders its holder liable to calls, or otherwise imposes a liability on its holder, that liability attaches to the holder of the share for the time being, and no such liability attaches to prior holders of the share.

(5) Nothing in this section affects a shareholder's liability to the company on any contract (including a contract for the issue of shares) or for any tort or breach of fiduciary duty or other actionable wrong committed by him or her.

74 Liability of personal representative

(1) The liability of an executor, administrator or trustee of the estate of a deceased person, who is registered as the holder of a share comprised in that estate, shall, in respect of that share, not exceed the value of any assets which, at the time when any demand is made for the satisfaction of any such liability, are held by that executor, administrator or trustee upon the same trusts as are applicable to that share.

(2) For the purposes of this section "trust" extends to the duties of a personal representative, and "trustee" has a corresponding meaning.

75 Liability of an assignee

(1) The liability of the assignee of the property of a bankrupt, who is registered as the holder of a share which is comprised in the property of the bankrupt, shall, in respect of that share, not exceed the value of any property of the bankrupt which, at the time when any demand is made for the satisfaction of any such liability, is vested in the assignee.

(2) In this section, "assignee" means the assignee in whom the property of a bankrupt is vested pursuant to the Insolvency Act 1967.

Powers of shareholders

76 Exercise of powers reserved to shareholders

Powers reserved to the shareholders of a company by this Act or by the constitution may be exercised either at a meeting of shareholders pursuant to sections 90 [Annual meetings of shareholders] and 91 [Special meetings of shareholders], or by a resolution in lieu of meeting pursuant to section 92 [Resolution in lieu of meeting].

77 Simple majority of shareholders to exercise powers

Unless otherwise specified in this Act or the constitution of a company, any power reserved to shareholders may be exercised by an ordinary resolution, being a simple majority of the votes of those shareholders entitled to vote and voting on the matter.

78 Powers exercised by special resolution

(1) Notwithstanding any provision in the constitution of a company, when shareholders exercise a power

(a) to approve any alteration to the constitution; or

(b) to approve a major transaction; or

(c) to approve an amalgamation; or

(d) to approve the liquidation of the company;

that power may be exercised only by a special resolution.

(2) Any decision made by a special resolution pursuant to subsection (1) may be rescinded only by a special resolution.

79 Management review by shareholders

Notwithstanding section 98 [Management of company] or any provision in the constitution of a company

(a) any shareholder may question or discuss the management of a company at a meeting of shareholders of the company; and

(b) a meeting of shareholders may pass a resolution relating to the management of a company (with every shareholder of the company having one vote per share), but no such resolution shall be binding on the board unless this Act or the constitution of the company expressly provides otherwise.

80 Liability of shareholders in respect of exercise of powers

(1) A shareholder voting on the exercise of any of the powers set out in section 26 (2) (a) [Rights attached to shares] does not owe any duty to the company or to any other person and does not incur any liability in respect of the exercise of or failure to exercise votes to which that shareholder is entitled.

(2) If the constitution of a company

(a) confers any power on shareholders which would otherwise fall to be exercised by the board; or

(b) requires any director or the board to exercise or refrain from exercising a power in accordance with a decision or direction of shareholders;

the shareholders who vote on or control

(c) the exercise of that power; or

(d) the decision or direction that the power should be or should not be exercised;

are deemed to be directors for the purposes of sections 101 to 107.

(3) Nothing in this section affects any liability arising out of a contract or other obligation expressly entered into by a shareholder.

Minority buy-out rights

81 Minority buy-out rights

Where

(a) a shareholder is entitled to vote on the exercise of one of the powers set out in

(i) section 78 (1) (a) [Powers exercised by special resolution], and the proposed alteration removes any restriction on the activities of the company; or

(ii) section 78 (1) (b) and (c) [Powers exercised by special resolution]; and

(b) he or she cast all the votes to which he or she was entitled against the exercise of the power; and

(c) the shareholders resolve pursuant to section 78 [Powers exercised by special resolution] to exercise the power;

that shareholder is entitled to require the company to purchase his or her shares, in accordance with section 82 [Procedure for buy-out].

82 Procedure for buy-out

(1) Any shareholder entitled to require the company to purchase shares by virtue of section 81 [Minority buy-out rights] or section 88 [Alteration of shareholder rights] may within 10 working days of the announcement of the result of the vote in question or the company becoming entitled to take the action, as the case may be, give a written notice to the company requiring it to purchase all his or her shares in the company.

(2) Within 20 working days of receiving a notice under subsection (1), the board must either

(a) agree to the purchase of the shares by the company; or

(b) arrange for some other person to agree to purchase the shares; or

(c) apply to the Court for an order exempting the company from minority buy-out under section 85 [Exemption from buy-out] or section 86 [No buy-out if insolvent]; or

(d) arrange for the resolution to be rescinded, in accordance with section 78 (2) [Powers exercised by special resolution], or decide in the appropriate manner not to take the action concerned, as the case may be.

83 Purchase by company

(1) If the board agrees to purchase shares in accordance with section 82 (2) (a) [Procedure for buy-out], the company must pay a fair and reasonable price for the shares.

(2) Within five working days of agreeing to purchase shares, the board must nominate a fair and reasonable price for the shares to be acquired, and must give notice of the price to the holders of those shares.

(3) If a shareholder considers that the price nominated by the board is not fair and reasonable, he or she must forthwith give notice of objection to the company.

(4) If within 10 working days of giving notice to shareholders under subsection (2), no objections to the price have been received by the company, the company must purchase all the shares concerned at the nominated price.

(5) If within 10 working days of giving notice to shareholders under subsection (2), an objection to the price has been received by the company, the company must

(a) refer the price to arbitration forthwith; and

(b) within five working days, pay an interim price in respect of each share equal to the price nominated by the board.

(6) Any reference to arbitration under this section is deemed to be a "submission" for the purposes of the Arbitration Act 1908.

(7) The arbitrator must expeditiously determine a fair and reasonable price for the shares to be purchased. If the price

determined equals or exceeds the interim price, the company must purchase the shares at the price determined, and must forthwith pay any balance owing to shareholders. If the price determined is less than the interim price paid, the company must purchase the shares at the price determined, and may recover the excess paid to shareholders.

(8) The arbitrator may award interest on any balance payable or excess to be repaid under subsection (7) at such rate as he or she thinks fit taking into account the reasonableness of the interim price paid and of the reference to arbitration, and may provide for interest to be paid to or payable by some or all of the shareholders whose shares are to be purchased.

84 Purchase by third party

(1) If the company arranges for another person to agree to purchase shares in accordance with subsection 78(2)(b) [Powers exercised by special resolution], that person must agree to purchase the shares at a fair and reasonable price.

(2) The price to be paid by the purchaser shall be determined under section 83 [Purchase by company], as if the company were to purchase the shares, save that

(a) any payment which that section requires to be made by the company must be made by the third party; and

(b) the shares must be purchased by the third party and not by the company; and

(c) any excess paid to shareholders may be recovered by the third party and not by the company.

(3) The company must indemnify the holders of the shares to be purchased in respect of any failure by the intended purchaser to purchase the shares at the price nominated or fixed by the arbitrator, as the case may be.

85 Exemption from buy-out

(1) Where a shareholder seeks to exercise minority buy-out rights, a company may apply to the Court for an order that it should be exempted from the requirement to purchase his or her shares on the grounds that

(a) such a purchase would be disproportionately damaging to the company; or

(b) the company cannot reasonably be required to fund the repurchase; or

(c) the shareholder's notice was not given in good faith or was frivolous or vexatious.

(2) Upon an application under this section, the Court may order that the company should not purchase the shares, and may make such further order as it thinks fit, including, without limiting the generality of this provision, an order that

(a) any resolution of the shareholders be set aside;

(b) the company should refrain from taking or should take certain action;

(c) compensation be paid by the company to the shareholders affected;

(d) the company be put into liquidation.

(3) No company may seek an exemption from buy-out on the grounds set out in paragraphs (a) or (b) of subsection (1) unless it can satisfy the Court that it has made reasonable endeavours to arrange a sale of the shares to a third party.

86 No buy-out if insolvent

(1) If

(a) one or more shareholders seek to exercise buy-out rights; and

(b) the company has made reasonable endeavours to arrange the purchase of their shares by a third party; and

(c) the board considers that if the company purchases those shares which are not to be purchased by a third party, it will not satisfy the solvency test;

the board must apply to the Court for an order under this section.

(2) If an application is made under this section, the Court shall order that the company must not purchase the shares, and the Court may make such further order as it thinks fit, including without limiting the generality of this provision,

any order that might be made under section 85(2) [Exemption from buy-out].

Interest groups

87 Classes and interest groups

In this Act

"class" means a class of shares comprising all those shares having attached to them identical rights, privileges, limitations and conditions;

"interest group", in relation to any action or proposal affecting rights attached to shares, means an interest group of shareholders, and each interest group comprises the holders of shares whose affected rights are identical. In relation to any action or proposal there may be one or more interest groups, and each interest group will comprise the holders of one or more classes.

88 Alteration of shareholder rights

(1) No action may be taken by a company which affects the rights attached to any shares unless that action has been approved by a special resolution of each interest group.

(2) For the purposes of subsection (1), the rights attached to a share include

(a) the rights, privileges, limitations and conditions attached to the share by this Act or the constitution, including any voting rights and rights to distributions attached to the share;

(b) pre-emptive rights in accordance with section 36 [Pre-emptive rights];

(c) the right that any acquisition of shares by the company be made in accordance with section 50(1)(a) [Board may make offer to acquire shares], unless the constitution otherwise permits;

(d) the right to have the procedure set out in this section, and any further procedure required by the constitution for the amendment or alteration of rights, duly observed by the company;

(e) the right that any procedure required by the constitution for the amendment or alteration of rights not be amended or altered itself.

(3) For the purposes of subsection (1), the issue of further shares ranking equally with or in priority to existing shares, whether as to voting rights or distributions, is deemed to be action affecting the rights attached to the existing shares, unless

(a) the constitution of the company expressly permits the issue of further shares ranking equally with or in priority to those shares; or

(b) the issue is made in accordance with the shareholders' pre-emptive rights.

(4) Where an interest group by special resolution approves the taking of action by a company, and the company becomes entitled to take that action, a shareholder belonging to that interest group who voted against approval of the action is entitled to require the company to purchase the shares voted by him or her, pursuant to section 82 [Procedure for buy-out].

89 Failure to seek interest group approval

If action is taken by a company which required the approval of an interest group under section 88 [Alteration of shareholder rights], and that approval was not obtained, that action

(a) is not for that reason invalid; but

(b) is deemed to be conduct which is unfairly prejudicial to the members of that interest group, and the court is not precluded by paragraph (a) from setting it aside.

Meetings of shareholders

90 Annual meetings of shareholders

The board of a company must call an annual meeting of all shareholders to be held

(a) not later than six months after the balance date in each calendar year; and

(b) at a time such that not more than 15 months will elapse between one annual meeting and the following annual meeting.

91 Special meetings of shareholders

(1) A special meeting of shareholders entitled to vote on one or more issues may be called to consider those issues at any time by the directors or any other person authorised to do so by the constitution.

(2) Such a meeting must be called by the board upon a request being made by written notice to the board signed by persons holding the right to exercise not less than 5 percent of the votes entitled to be cast on the issues set out in the notice as to be discussed at the special meeting.

92 Resolution in lieu of meeting

(1) A resolution in writing signed by all the shareholders entitled to vote on that resolution at a meeting of shareholders is as valid as if it had been passed at a meeting of those shareholders.

(2) A resolution in writing dealing with all matters to be dealt with at a meeting of shareholders, and signed by all the shareholders entitled to vote at that meeting, satisfies all the requirements of this Act relating to meetings of shareholders.

93 Meeting called by Court

If for any reason

(a) it is impracticable to call a meeting of shareholders in the manner prescribed by this Act or the constitution or to conduct the meeting in the manner prescribed; or

(b) it is in the opinion of the Court in the interests of the company that a meeting be held;

the Court may, on application by a director, shareholder or creditor of a company, order a meeting to be called or conducted in such manner as the Court directs and upon such terms as to the costs of the meeting and as to security for those costs as the Court may think fit.

94 Proceedings at meetings

The provisions set out in the First Schedule govern proceedings at meetings of shareholders.

Date for determining shareholder entitlements

95 Determination of shareholders entitled to receive distributions, attend meetings etc

(1) For the purpose of determining shareholders

(a) entitled to receive a distribution; or

(b) entitled to pre-emptive rights in respect of an issue; or

(c) for any other purpose except the right to receive notice of or to vote at a meeting,

the board may fix in advance a date on which the shareholders of the company are to be determined, provided that the date fixed may not precede by more than 40 working days the particular action to be taken.

(2) For the purpose of determining shareholders entitled to receive notice of a meeting of shareholders, the board may fix in advance a date on which the shareholders of the company are to be determined, provided that the date fixed may not precede by more than 40 working days or by less than 15 working days the date on which the meeting is to be held.

(3) If no date is fixed by the board under subsections (1) or (2)

(a) the date for the determination of shareholders entitled to receive notice of a meeting of shareholders shall be

(i) at the close of business on the day immediately preceding the day on which the notice is given; or

(ii) if no notice is given, the day on which the meeting is held; and

(b) the date for the determination of shareholders for any purpose except determining the right to receive notice of or to vote at a meeting shall be at the close

of business on the day on which the board passes the resolution relating thereto.

PART 7
DIRECTORS AND THEIR POWERS AND DUTIES

96 Meaning of "director"

(1) In this Act, the term "director", in relation to a company, includes

(a) any person occupying the position of director of the company by whatever name called; and

(b) for the purposes of sections 97, 101–110, 112, 113 and 226,

(i) a person in accordance with whose directions or instructions the board of the company may be required or is accustomed to act; and

(ii) a person who is entitled to exercise or control the exercise of powers which, apart from the constitution of the company, would fall to be exercised by the board;

(c) for the purposes of sections 101–113 and 226, any person to whom any power or duty of the board has been directly delegated by the board with that person's consent or acquiescence, and any person who exercises any such power or duty with the consent or acquiescence of the board; and

(d) for the purposes of sections 112 [Use of company information or opportunity] and 113 [Directors' share dealings]

(i) a person in accordance with whose directions or instructions a person referred to in paragraphs (a) to (c) may be required or is accustomed to act in respect of his or her duties and powers as director; and

(ii) any employee of the company to the extent that he or she receives information concerning the company or its activities on the basis that it is to be kept confidential.

(2) Paragraphs (b) to (d) of subsection (1) do not include a person to the extent that the person acts only in a professional capacity.

97 Meaning of "board"

In this Act, the terms "board" and "board of directors", in relation to a company, mean

(a) directors of the company of a number not less than the required quorum, acting together as a board of directors; or

(b) if the constitution provides that a company has only one director, that director.

Powers of management

98 Management of company

The business and affairs of a company shall be managed by or under the direction of the board of the company who shall have all powers necessary for that management except to the extent that the constitution or this Act expressly requires those powers to be exercised by the shareholders or any other person.

99 Major transactions

(1) A company may not enter into a major transaction (as defined in subsection (2)) unless the transaction is

(a) of a kind expressly permitted by the constitution of the company; or

(b) approved by special resolution or contingent upon approval by special resolution.

(2) In this section

"assets" includes property of any kind, whether tangible or intangible;

"major transaction" in relation to a company, means

(a) the acquisition of (or an agreement to acquire, whether contingent or otherwise) assets equivalent to the greater part of the assets of the company before the acquisition; or

(b) the disposition of (or an agreement to dispose of, whether contingent or otherwise) the whole or the greater part of the assets of the company.

100 Delegation of powers

(1) Subject to this Act and to any restrictions in the constitution of the company, the board of a company may delegate, either formally or informally (including by course of conduct), to a committee of directors, any director or employee of the company, or any other person any one or more of its powers other than its powers under the following sections:

(a) section 17 [Registered names]

(b) section 34 [Issue decided on by board]

(c) section 39 [Consideration for issue to be decided on by board]

(d) section 42 [Board may authorise a distribution]

(e) section 44 [Shares in lieu of dividend options]

(f) section 45 [Shareholder discounts]

(g) section 50 [Board may make offer to acquire shares]

(h) section 51 [Special offers to acquire shares]

(i) section 58 [Financial assistance]

(j) section 59 [Special financial assistance]

(k) section 63 (4) [Transfer of shares]

(l) section 146 [Change of registered office]

(m) section 151 [Change of address for service]

(n) section 190 [Manner of approving amalgamation proposal]

(o) section 191 [Short form amalgamation].

(2) A board that delegates any power under subsection (1) is responsible for every exercise of the power by the delegate, as if the power was exercised by the board, unless the board

(a) believes on reasonable grounds at all times before the exercise of the power that the delegate will exercise the power in conformity with the duties imposed on directors of the company by this Act and the company's constitution; and

(b) has monitored, by means of reasonable methods properly used, the exercise of the power by the delegate.

Directors' duties

101 Fundamental duty

The fundamental duty of every director of a company, when exercising powers or performing duties as a director, is to act in good faith and in a manner that he or she believes on reasonable grounds is in the best interests of the company.

102 Existing shareholders

A director of a company must not, when exercising powers or performing duties as a director, act or agree to the company acting in a manner that unfairly prejudices or unfairly discriminates against any existing shareholder of the company, unless the director believes on reasonable grounds that the duty set out in section 101 [Fundamental duty] requires him or her to do so.

103 Creditors and employees

A director of a company may, when exercising powers or performing duties as a director, have regard to the interests of creditors and employees of the company, but nothing in this section limits the duties or obligations of directors set out in this Act.

104 Compliance with constitution and this Act

A director of a company must not act or agree to the company acting in a manner that contravenes the constitution of the company or this Act.

105 Solvency

(1) A director of a company must not agree to the company entering into a contract or arrangement or acting in any other manner unless he or she believes at that time on reasonable grounds that the act concerned does not

involve an unreasonable risk of causing the company to fail to satisfy the solvency test.

(2) A director of a company must not agree to the company incurring an obligation unless he or she believes at that time on reasonable grounds that the company will be able to perform the obligation when required to do so.

106 Standard of care of directors

Every director of a company, when exercising powers or performing duties as a director, must exercise the care, diligence and skill reasonably to be expected of a director acting in like circumstances.

107 Use of information and advice

Every director of a company, when exercising powers or performing duties as a director, may accept as correct, reports, statements, financial data and other information prepared, and professional or expert advice given, by any of the following persons to the extent only that the director acts in good faith, after reasonable inquiry when the need for inquiry is indicated by the circumstances, and without knowledge that would cause such acceptance to be unwarranted:

(a) any employee of the company whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned;

(b) any professional or expert person in relation to matters which the director believes on reasonable grounds to be within the person's professional or expert competence;

(c) any other director, or committee of directors upon which the director did not serve, in relation to matters within the director's or committee's designated authority.

108 Meaning of "interested"

(1) Subject to subsection (2), for the purposes of this Act, a director of a company is to be treated as interested in a transaction to which the company is a party if and only if the director

(a) is a party to or will or may derive a material financial benefit from the transaction; or

(b) has a material financial interest in another party to the transaction; or

(c) is a director, officer or trustee of another party to, or person who will or may derive a material financial benefit from, the transaction (not being a party or person that is a related company of the company); or

(d) is the parent, child, or spouse of another party to, or person who will or may derive a material financial benefit from, the transaction; or

(e) is otherwise directly or indirectly materially interested in the transaction.

(2) For the purposes of this Act, a director of a company is not to be treated as interested in a transaction to which the company is a party if the transaction comprises only the giving by the company of any security to a third party which is unconnected with the director, at the request of the third party, in respect of a debt or obligation of the company for which the director or another person has personally assumed responsibility in whole or in part under a guarantee, indemnity, or by the deposit of a security.

(3) Sections 109 [Disclosure of interest] and 110 [Transactions may be avoided] do not apply

(a) to any remuneration or other benefit given to a director in accordance with section 124 [Remuneration and other benefits]; or

(b) to any indemnity given or insurance provided in accordance with section 125 [Indemnity and insurance].

109 Disclosure of interest

(1) A director of a company who is interested in a transaction or proposed transaction with the company, must forthwith after becoming aware of the transaction or proposed transaction cause to be entered in the interests register, and disclose to the board of the company, the nature and extent of the director's interest.

(2) For the purposes of subsection (1), a general notice entered in the interests register or disclosed to the board to the effect that a director is a shareholder, director, officer or trustee of another named company or other person and is to be regarded as interested in any transaction which may, after the date of the entry or disclosure, be entered into with that company or person, is a sufficient disclosure of interest in relation to any such transaction.

(3) A failure by a director to comply with subsection (1) does not affect the validity of any transaction entered into by the company or the director, but the director may be convicted of an offence under section 277(2) [Failure to comply with Act].

110 Transactions may be avoided

(1) A transaction entered into by the company in which a director of the company is in any way interested may be avoided by the company within three months of the transaction being disclosed to all the shareholders (whether by means of the company's annual report or otherwise), unless the company receives fair value under the transaction.

(2) For the purposes of subsection (1), the question whether a company receives fair value under a transaction shall be determined on the basis of the information known to the company and to the interested director at the time the transaction is entered into.

(3) If a transaction is entered into by the company in the ordinary course of its business and on usual terms and conditions, the company is presumed to receive fair value under the transaction.

(4) For the purposes of subsection (1)

(a) where a person seeking to uphold a transaction knew of the director's interest at the time the transaction was entered into, the onus of establishing fair value is on that person;

(b) in any other case, the company has the onus of establishing that it did not receive fair value.

(5) Subject to subsection (1) and to the constitution of a company, no transaction entered into by the company in which a director is interested shall be liable to be avoided, nor shall any director be liable to account to the company for any profit realised by any such transaction by reason only of such interest.

(6) The avoidance by a company of any transaction under this section does not affect the title or interest of a person in property which that person has acquired

(a) from a person other than the company; and

(b) for valuable consideration; and

(c) without knowledge of the circumstances of the transaction under which the second-mentioned person acquired the property from the company.

111 Interested director may vote etc

Subject to the constitution of a company, a director of the company who is interested in a transaction entered into or to be entered into by the company may

(a) vote in respect of the transaction; and

(b) attend any meeting of directors and be included amongst the directors present for the purpose of a quorum; and

(c) sign any documents relating to the transaction on behalf of the company; and

(d) do any other thing in his or her capacity as a director in relation to the transaction

as if he or she was not so interested.

112 Use of company information or opportunity

(1) Where a director of a company has information in his or her capacity as a director or employee of the company (being information that would not otherwise be available

to him or her), the director must not disclose that information to any person, or use or act on the basis of that information, other than

(a) for the purposes of the company; or

(b) as required by law; or

(c) in accordance with subsection (2) or subsection (3); or

(d) in accordance with section 109 [Disclosure of interest].

(2) A director of a company may disclose any information to any person who is named in the interests register as a person in accordance with whose directions or instructions the director may be required or is accustomed to act in respect of his or her duties and powers as director.

(3) A director of a company may disclose, use, or act on the basis of any information if particulars of such disclosure, use, or act are entered in the interests register and the director is authorised to do so by the board and the company receives fair value in respect of the disclosure, use, or act.

(4) In this section, the term "director" includes the persons referred to in section 96 (1) (d) [Meaning of "director"]

113 Directors' share dealings

(1) A director of a company who acquires or disposes of shares or other securities issued by the company or a related company, or a direct or indirect interest in such shares or other securities, must

(a) forthwith after the acquisition or disposal is made, disclose to the board the number and type of shares acquired or disposed of, the consideration paid or received therefor and the date of acquisition or disposal; and

(b) ensure that particulars of the acquisition or disposal are forthwith entered in the interests register.

(2) Where a director of a company has information in his or her capacity as a director or employee of the company or a related company (being information that would not otherwise be available to him or her) and that information

is material to an assessment of the value of the shares or other securities issued by the company or a related company, the director may acquire or dispose of any such shares or other securities, or a direct or indirect interest therein, only if

(a) in the case of an acquisition, the consideration given for the acquisition is not less than the fair value of the securities or interest acquired; or

(b) in the case of a disposition, the consideration received for the disposition is not more than the fair value of the securities or interest disposed of.

(3) For the purposes of subsection (2), the fair value of any securities or interest therein is to be arrived at on the basis of all information known to the director or publicly available.

(4) Subsection (2) shall not apply in respect of any security or interest acquired or disposed of by a director only as a nominee for the company or any related company.

(5) For the purposes of this section and without limiting the meaning of the term "interest", a director of a company has an interest in securities if another body corporate holds or has an interest in them and either

(a) that body corporate, or its board, are accustomed or required to act in accordance with the director's directions or instructions; or

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

(6) In this section, the term "director" includes the persons referred to in section 96 (1) (d) [Meaning of "director"].

Appointment and removal of directors

114 Number of directors

Every company must have at least one director.

115 Qualifications of directors

(1) Any natural person who is not disqualified by subsection (2) may be appointed as a director of a company.

(2) The following persons are disqualified from becoming or remaining as a director of a company:

(a) anyone who is under 20 years of age;

(b) anyone who is an undischarged bankrupt;

(c) anyone who has been convicted in the immediately preceding five years of an offence:

(i) under this Act, the Companies Act 1955, or the Securities Act 1978; or

(ii) involving dishonesty as defined in section 3 (1) [Interpretation] of the Crimes Act 1961, unless the leave of the Court is obtained;

(d) anyone who is subject to a disqualification order made under section 282 [Disqualification of director]

(e) anyone who is subject to a property order made under section 30 or section 31 of the Protection of Personal and Property Rights Act 1988;

(f) in relation to any particular company, a person who does not comply with any qualification for directors contained in the constitution of that company;

(g) any person who is not a natural person.

(3) Any person who is disqualified from being a director but nevertheless acts as a director shall be a director for the purposes of any provision of this Act imposing liability on directors.

116 Director's consent required

No person shall be appointed as a director of a company unless he or she has signed a consent to act as such in the prescribed form.

117 Appointment of first and succeeding directors

(1) Every person named as a director in an application for incorporation or registration or an amalgamation proposal is a director from the date of incorporation or registration until that person ceases to hold office as such in accordance with this Act.

(2) Subject to the constitution of a company, succeeding directors of the company shall be appointed by ordinary resolution.

(3) If

(a) there are no directors of a company, or the number of directors is less than the quorum required for a meeting of the board; and

(b) it is not possible or practicable to appoint directors in accordance with the company's constitution

any shareholder or creditor of the company may apply to the Court to appoint one or more persons as directors of the company, and the Court may make any such appointment if it considers that it is in the best interests of the company to do so, and on such terms and conditions as the Court thinks fit.

118 Appointment of directors to be voted on individually

(1) Subject to the constitution of a company, a motion at a meeting of shareholders for the appointment of two or more persons as directors of the company by a single resolution may not be made unless a resolution that it shall be so made has first been passed without any vote being given against it.

(2) A resolution moved in contravention of subsection (1) is void, whether or not its being so moved was objected to at the time, provided that

(a) this subsection shall not be taken as excluding the operation of section 121 [Validity of director's acts];

(b) where a resolution so moved is passed, no provision for the automatic reappointment of retiring directors in default of another appointment shall apply.

(3) Nothing in this section shall be deemed to prevent the election of two or more directors by ballot or poll.

119 Removal of directors

Subject to the constitution of a company, any director of the company may be removed by ordinary resolution passed at a meeting called for the purpose or for purposes including that

removal, and the purpose of removal must be stated in the notice of the meeting.

120 Director ceasing to hold office

(1) An office of director of a company is vacated if the person holding that office

(a) resigns in accordance with subsection (2); or

(b) is removed from office in accordance with this Act or the constitution of the company; or

(c) becomes disqualified from being a director pursuant to section 115 [Qualifications of directors]; or

(d) dies; or

(e) otherwise vacates office in accordance with the constitution of the company.

(2) A director of a company may resign office as such by signing a written notice of resignation and delivering it to the address for service of the company and any such notice shall be effective from the time of receipt at the address for service of the company or from such later time as is specified in the notice.

(3) Notwithstanding vacation of an office of director, a person who held that office remains liable under the provisions of this Act imposing liabilities on directors, in relation to all acts done and decisions made while that person was a director.

121 Validity of director's acts

The acts of any person as director are valid notwithstanding any defect that may afterwards be discovered in the person's appointment or qualification.

122 Notification to Registrar of directors

(1) The board of a company must ensure that, within 20 working days of a change in directors of the company, notice of the change in the prescribed form is received by the Registrar.

(2) A notice to the Registrar of a change in directors of a company must

(a) include the full name and residential address of every person who is a director of the company from the date of the notice; and

(b) have attached the consents to act of any new directors under section 116 [Director's consent required].

(3) If the board of a company fails to comply with subsections (1) or (2), every director of the company may be convicted of an offence under section 278(2) [Liability of directors for failure by board or company].

Miscellaneous provisions relating to directors

123 Proceedings of board

Subject to the constitution of a company, the provisions set out in the Second Schedule govern proceedings of the board of the company.

124 Remuneration and other benefits

(1) The board of a company may, subject to any restrictions contained in the constitution of the company, authorise

(a) the making of payments by the company to a director by way of remuneration for his or her services as such or in any other capacity or by way of compensation for loss of office; and

(b) the making of payments by the company to a director by way of loan; and

(c) the giving of guarantees by the company for debts incurred by directors; and

(d) entry into a contract to do any of the things set out in paragraphs (a), (b) and (c);

provided that the board is satisfied that the making of such payments or giving of such guarantees is fair to the company and particulars of the payment to or guarantee for the benefit of, or contract with, that director are entered in the interests register.

(2) The payment of remuneration, or any other benefit given to a director in accordance with a contract authorised

under subsection (1) need not be separately authorised under subsection (1).

(3) Directors who vote in favour of authorising a payment or guarantee or contract under subsection (1) must sign a certificate that in their opinion the making of the payment or giving of the guarantee or entry into the contract is fair to the company.

(4) Where a payment is made or guarantee given to which subsection (1) applies and either

(a) the procedures set out in subsections (1) and (3) have not been followed; or

(b) there did not exist reasonable grounds for the opinion set out in the certificate given under subsection (3);

the director to whom the payment is made or in respect of whom the guarantee is given, is personally liable to the company for the amount of the payment, or any amount paid by the company under the guarantee, except to the extent to which he or she proves that the payment or the guarantee was fair to the company at the time it was made or given.

125 Indemnity and insurance

(1) Except as provided in this section, no company may indemnify, or provide insurance for, any director or employee of the company in respect of any liability or costs incurred by him or her in any proceedings, and any indemnity given or insurance provided in breach of this section is void.

(2) A company may, if expressly authorised to do so by its constitution, indemnify or provide insurance for a director or employee of the company in respect of any costs incurred by him or her in any proceedings

(a) brought by the company against the director or employee in that capacity; and

(b) in which judgment is given in his or her favour, or he or she is acquitted, or relief is granted to him or her under section 137; [Court may grant relief].

(3) A company may indemnify or provide insurance for a director or employee of the company in respect of any liability or costs incurred by him or her in any proceedings

(a) brought by any person other than the company against the director or employee in that capacity; and

(b) which do not result from a failure by the director or employee to act in good faith in a manner that he or she believes on reasonable grounds to be in the best interests of the company.

(4) The board of a company shall ensure that particulars of every indemnity given to or insurance provided for any director or employee of the company shall forthwith be entered in the interests register.

(5) In this section

"director" includes a former director;

"employee" includes a former employee;

"indemnify" includes relieve or excuse from liability;

"proceedings" includes civil, criminal and administrative proceedings.

PART 8
ENFORCEMENT

126 Injunction to restrain action

(1) Where a company or the board proposes to engage in any conduct that contravenes the constitution of the company or the Act, the company or any director, shareholder or creditor of the company may apply to the Court for an order restraining the company or the director, as the case may be, from so acting.

(2) Where the Court grants an order under subsection (1), it may grant such consequential relief as it thinks proper.

(3) No order may be made under this section in respect of any conduct or course of conduct that has been completed at the time the order is to be made.

127 Derivative actions

(1) Subject to subsection (2), a shareholder or director of a company may apply to the Court for leave to bring any proceedings in the name of and on behalf of the company or any of its subsidiaries, or intervene in proceedings to which the company or any of its subsidiaries is a party, for the purpose of prosecuting, defending or discontinuing the proceedings on behalf of the company or subsidiary, as the case may be.

(2) No proceedings may be brought and no intervention in proceedings may be made under subsection (1) unless the Court is satisfied that either

(a) the company or subsidiary does not intend to bring, diligently prosecute, defend or discontinue the proceedings, and it appears to be in the interests of the company or its subsidiary that the proceedings be brought, prosecuted, defended or discontinued; or

(b) it is in the interests of the company that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders as a whole.

(3) Notice of application for the leave of the Court under subsection (1) must be served on the company or subsidiary, which may appear and oppose the application, and which must advise the Court whether it intends to bring, prosecute, defend, or discontinue the proceedings.

(4) Save as provided in subsection (1), no shareholder shall be entitled to bring or intervene in any proceedings in the name of, or on behalf of, a company or its subsidiary.

128 Cost of derivative action to be borne by company

(1) Subject to subsection (2), where leave is granted under section 127 [Derivative actions] the Court may from time to time order that the whole or any part of the reasonable costs of bringing or intervening in the proceedings shall be borne by the company.

(2) The Court shall not make an order under subsection (1) in respect of the whole or any part of the costs of the

proceedings where it is of the opinion that it would be unjust or inequitable for the company to bear those costs.

(3) Any order made under subsection (1) may include an order that the company advance to the shareholder a sum in respect of costs to be incurred, on such terms and subject to the provision of such security for repayment as the Court may think fit.

129 Powers of Court where leave granted

In connection with any proceedings brought or intervened in under section 127 [Derivative actions] the Court may at any time make any order it thinks fit including, without limiting the generality of this provision, an order

(a) authorising the shareholder or any other person to control the conduct of the action;

(b) giving directions for the conduct of the action;

(c) requiring the company, or the directors, to provide information or assistance in relation to the action;

(d) directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former and present shareholders of the company or its subsidiary instead of to the company or subsidiary.

130 Compromise or settlement of derivative action

No proceedings brought or intervened in under section 127 [Derivative actions] may be settled or compromised without the approval of the Court, which upon granting approval may make such order as it thinks fit as to costs, including an order requiring a shareholder to repay some or all of any sums advanced under section 128 (3) [Cost of derivative action to be borne by company].

131 Personal action by shareholder against directors

(1) A shareholder may bring an action against a director in respect of any breach of a duty owed to him or her personally, but not

(a) in respect of a breach of a duty owed solely to the company; or

(b) where the only damage complained of is a diminution in or prevention of increase in the value of shares in the company as a result of loss suffered by or gain foregone by the company;

except in accordance with section 127 [Derivative actions].

(2) The duties of directors set out in sections 68 [Directors' duty to supervise share register], 102 [Existing shareholders], 104 [Compliance with constitution and this Act] and 113 [Directors' share dealings] are duties owed to shareholders personally.

(3) The duties of directors set out in sections 48 [Cross-holdings], 101 [Fundamental duty], 105 [Solvency], 109 [Disclosure of interest] and 112 [Use of company information or opportunity] are duties owed solely to the company.

(4) Notwithstanding subsection (3), a shareholder may apply to the Court for an order requiring the directors of a company to take any action required to be taken by them under the constitution or this Act and, the Court may, if it is in all the circumstances just and equitable to do so, make such an order and grant such consequential relief as it thinks fit.

132 Personal action by shareholder against company

(1) A shareholder may bring an action against the company in respect of any breach of a duty owed by the company to him or her personally.

(2) Notwithstanding subsection (1), a shareholder may apply to the Court for an order requiring the company to take any action required to be taken by it under its constitution

or this Act, and the Court may, if it is in all the circumstances just and equitable to do so, make such an order and grant such consequential relief as it thinks fit.

133 Representative actions

Where a shareholder brings an action against the company or a director, and other shareholders have the same or substantially the same interest in relation to the subject-matter of the action, the Court may appoint that shareholder to represent all or some of the shareholders having the same or substantially the same interest, and may make such order as it thinks fit including, without limiting the generality of this provision, an order

(a) as to the control and conduct of the action;

(b) as to the costs of the action;

(c) directing the distribution of any amount adjudged payable by a defendant in the action among those shareholders represented.

Standing of Attorney-General

134 Standing of Attorney-General

The Attorney-General may, where it is in his or her opinion in the public interest to do so, make an application under section 126 [Injunction to restrain action], 127 [Derivative actions], 133 [Representative actions], 138 [Information for shareholders] or 139 [Investigation of records] as if he or she were a shareholder in the company concerned.

Prejudiced shareholders

135 Prejudiced shareholders

(1) Where the affairs of a company have been or are being or are likely to be conducted in a manner that is, or any act or acts of the company have been or are or are likely to be, oppressive, unfairly discriminatory, or unfairly prejudicial, to a former or existing shareholder, he or she may apply to the Court for an order under this section.

(2) If on an application under this section the Court considers that it is just and equitable to do so, it may make such order as it thinks fit including, without limiting the generality of this provision, an order

(a) for the acquisition of the shareholder's shares by the company or any other person;

(b) for the payment of compensation to any person by the company or any other person;

(c) regulating the conduct of the company's affairs in future;

(d) appointing a receiver of the company;

(e) directing the rectification of the records of the company;

(f) putting the company into liquidation.

(3) Failure to comply with the procedure required by any of the following sections is deemed to be conduct which is unfairly prejudicial to all shareholders:

(a) section 37 [Persons to whom shares may be issued];

(b) section 39 [Consideration for issue to be decided on by board];

(c) section 43 [Dividends];

(d) section 50 [Board may make offer to acquire shares];

(e) section 58 [Financial assistance];

(f) section 99 [Major transactions].

(4) Where directors have signed a certificate required by this Act, and there do not exist reasonable grounds for any opinion set out in the certificate, the signing of that certificate is deemed to be conduct which is unfairly prejudicial to all shareholders.

Ratification of directors' acts

136 Ratification of directors' acts

(1) Where a director or the board has purported to exercise a power vested in the shareholders or in some other person or persons, the shareholders or that person or those persons may ratify the exercise of the power by the

director or board in the same manner as would be required to exercise the power.

(2) Any purported exercise of power ratified under subsection (1) shall be deemed to be and always to have been a proper and valid exercise of that power.

(3) Except as provided in this section, ratification or approval by the shareholders or any other person or persons of any action by a director or by the board shall not validate or render lawful that action and shall not of itself preclude the Court from granting any relief or exercising any power which might, apart from such ratification or approval, fail to be granted or exercised in relation to the action.

Relief of directors and auditors

137 Court may grant relief

(1) If, in any proceeding for negligence, default, breach of duty, or breach of trust against a director or auditor of the company, it appears to the Court hearing the case that the director or auditor is or may be liable in respect of the negligence, default, breach of duty, or breach of trust, but that he or she has acted honestly and reasonably, and that, having regard to all the circumstances of the case, including those connected with his or her appointment, he or she ought fairly to be excused for the negligence, default, breach of duty, or breach of trust, the Court may relieve him or her, either wholly or partly, from liability on such terms as the Court may think fit.

(2) Where any such director or auditor has reason to believe that any claim will or might be made against him or her in respect of any negligence, default, breach of duty, or breach of trust, he or she may apply to the Court for relief, and the Court on any such application shall have the same power to grant relief under this section as it would have had if it had been a Court before which proceedings had been brought against that person.

(3) Where any case to which subsection (1) of this section applies is being tried by a Judge with a jury, the Judge, after hearing the evidence, may, if he or she is satisfied that

the defendant ought under that subsection to be relieved in whole or in part from liability, withdraw the case in whole or in part from the jury and direct judgment to be entered for the defendant on such terms as to costs or otherwise as the Judge may think proper.

Inspection of records

138 Information for shareholders

(1) A shareholder may at any time make a written request to a company for information held by the company.

(2) The request must specify the information sought with sufficient particularity.

(3) Within 10 working days of receiving a request under subsection (1), the company must either

(a) provide the information; or

(b) agree to provide the information within a specified period; or

(c) agree to provide the information within a specified period if the shareholder pays a specified charge to the company to meet the cost of providing the information, and explain how the specified charge is calculated; or

(d) refuse to provide the information, and give full reasons for the refusal.

(4) Where the company requires the shareholder to pay a charge for information, the shareholder may withdraw the request, and is deemed to have done so unless within 10 working days of receiving notification of the charge he or she informs the company that he or she will pay the charge.

(5) A shareholder aggrieved by the decision of a company in relation to a request for information may apply to the Court for relief on the grounds that

(a) the period specified for providing the information is manifestly unreasonable; or

(b) the charge set by the company is manifestly unreasonable; or

(c) the refusal to provide information is manifestly unreasonable;

and on an application under this subsection the Court may make such order as it thinks fit, including, without limiting the generality of this provision, an order

(d) as to the provision of the information; or

(e) as to the use that may be made of the information, and the persons to whom it may be disclosed; or

(f) as to the costs of the application.

139 Investigation of records

(1) Where

(a) a shareholder or creditor of a company applies to the Court for an order appointing a suitable person to inspect records of the company; and

(b) the Court is satisfied that the shareholder or creditor is acting in good faith and that the inspection is to be made for a proper purpose; and

(c) the Court is satisfied that the person to be appointed is a proper person for the task;

the Court may make an order authorising that person, at such time as is specified in the order, to inspect and to make copies of, or take extracts from, the records of the company or such of the records of the company as are specified in the order and may make such ancillary order as it thinks fit, including an order that the accounts of the company be audited by that person.

(2) A person appointed by the Court under subsection (1) must diligently carry out the inspection and must make a full report to the Court.

(3) When the Court receives the report of an inspector in accordance with subsection (2), it may make such order in relation to the disclosure and use that may be made of records and information obtained as it thinks fit.

(4) An order of the Court made under subsection (3) may be varied from time to time.

(5) No person may disclose or make use of information or records obtained under this section other than in accordance with an order of the Court made under subsections (3) or (4).

(6) Every person who acts in contravention of subsection (5) may be convicted of an offence under section 277(2) [Failure to comply with Act].

PART 9
ADMINISTRATION OF COMPANIES

Authority to bind a company

140 Method of contracting etc

Subject to its constitution, contracts and other enforceable obligations may be entered into on behalf of a company as follows:

(a) an obligation which if made between natural persons would by law be required to be by deed may be entered into on behalf of the company in writing signed under the name of the company by

(i) two or more directors of the company (or, if there is only one such director, by that director); or

(ii) one or more attorneys appointed by the company in accordance with section 141 [Attorneys];

(b) any other obligation may be entered into on behalf of the company by any person acting under its authority, express or implied.

141 Attorneys

(1) Subject to its constitution, a company may by deed empower any person as its attorney either generally or in respect of any specified matters, and any act of the attorney in accordance with the deed binds the company.

(2) The provisions of Part XII of the Property Law Act 1952 apply, with the necessary modifications, with respect to any power of attorney executed by a company to the same extent as if the company were a natural person and as if the commencement of the liquidation or, if there is no liquidation, the removal from the register of the company were the death of a person within the meaning of that Part XII.

142 Dealings between company and other persons

(1) A company or a guarantor of an obligation of a company may not assert against a person dealing with the company or with any person who has acquired any property, rights or interests from the company that

(a) the constitution of the company has not been complied with;

(b) the persons named as directors of the company in the most recent notice received by the Registrar under section 122 [Notification to Registrar of directors] are not the directors of the company;

(c) a person held out by the company as a director, employee or agent of the company has not been duly appointed, or has no authority to exercise a power that is customary in the operations of the company or usual for such director, employee or agent;

(d) a document issued on behalf of a company by any director, employee or agent of the company with actual or usual authority to issue the document is not valid or not genuine

except where the person has or ought to have by virtue of his or her position with or relationship to the company knowledge to the contrary.

(2) Subsection (1) applies where a person of the kind referred to in paragraphs (b) to (d) of that subsection acts fraudulently, unless the person dealing with the company or with any person who has acquired any property, rights or interests from the company has actual knowledge of the fraud.

143 No constructive notice

No person is affected by or deemed to have notice or knowledge of the contents of the constitution of, or any other document relating to a company by reason only that the constitution or document is referred to in or forms part of the New Zealand register or is available for inspection at an office of the company.

144 Pre-incorporation contracts

(1) In this section, the term "pre-incorporation contract" means

(a) a contract purporting to be made by a company before its incorporation;

(b) a contract made by a person on behalf of a company before and in contemplation of its incorporation.

(2) Notwithstanding any enactment or rule of law, a pre-incorporation contract may be ratified within such period as may be specified in the contract, or if no period is specified, then within a reasonable time after the incorporation of the company in the name of which, or on behalf of which, it has been made. A contract so ratified shall, upon ratification, be valid and enforceable as if the company had been a party to the contract when it was made.

(3) A pre-incorporation contract may be ratified by a company in the same manner as a contract may be entered into on behalf of a company under section 140 [Method of contracting etc].

(4) Notwithstanding any enactment or rule of law, in a pre-incorporation contract, unless a contrary intention is expressed in the contract, there is an implied warranty by the person who purports to make the contract in the name of, or on behalf of, the company

(a) that the company will be incorporated within such period as may be specified in the contract, or if no period is specified, then within a reasonable time after the making of the contract; and

(b) that the company will ratify the contract within such period as may be specified in the contract, or if no

period is specified, then within a reasonable time after the incorporation of the company.

(5) The amount of any damages recoverable in an action for breach of a warranty implied by virtue of subsection (4) shall be the same as the amount of damages that would be recoverable in an action against the company for damages for breach by the company of the unperformed obligations under the contract if the contract had been ratified and cancelled.

(6) Where a company after its incorporation does not ratify a pre-incorporation contract, any party to that contract may apply to the Court for an order

(a) directing the company to return any property, whether real or personal, acquired pursuant to the contract to that party; or

(b) for any other relief in favour of that party respecting any such property; or

(c) validating the contract, whether in whole or in part;

and the Court may, if it considers it just and equitable to do so, make any order or grant such relief as it thinks fit and whether or not an order has been made under subsection (5).

(7) In any proceedings against a company for breach of a pre-incorporation contract which has been ratified by the company, the Court may, on the application of the company, any other party to the proceedings, or of its own motion, make such order for the payment of damages or other relief, in addition to or in substitution for any order which may be made against the company, against any person by whom that contract was made in the name of, or on behalf of the company, as the Court considers just and equitable.

(8) Where a company, after its incorporation, enters into a contract in the same terms as, or in substitution for, a pre-incorporation contract (not being a contract ratified by the company under this section), the liability of any person under subsection (4) (including any liability under an order made by the Court thereunder for the payment of damages) shall be discharged.

(9) Notwithstanding the Contracts (Privity) Act 1982, if a pre-incorporation contract has not been ratified by a company, or validated by the Court under subsection (6), the company may not enforce or otherwise take the benefit of that contract.

Registered office

145 Registered office

(1) Every company must at all times have a registered office in New Zealand.

(2) The registered office of a company at any time shall subject to section 146 (2) [Change of registered office], be the place that is described as such on the New Zealand register at that time.

146 Change of registered office

(1) Subject to the company's constitution and to subsection (2) the board of a company may change the registered office of the company at any time.

(2) No change of the registered office of a company has effect until at least five registration days after notice of the change in the prescribed form is entered on the New Zealand register, by the Registrar.

Company records

147 Company records to be kept

(1) Subject to subsection (2) every company must keep at its registered office, or at some other place in New Zealand, notice of which in the prescribed form has been registered by the Registrar, each of the following documents and information relating to the company:

(a) the constitutional documents referred to in section 22 [Every company has a constitution];

(b) minutes of all meetings and resolutions of shareholders within the last 10 years;

(c) the share register;
(d) an interests register;
(e) minutes of all meetings and resolutions of directors and directors' committees within the last 10 years;
(f) certificates given by directors under this Act within the last 10 years;
(g) the full names and addresses of the current directors;
(h) copies of all written communications to shareholders during the preceding 10 years, including annual reports made under section 176 [Annual report to shareholders];
(i) the accounting records required by section 156 [Accounting records to be kept] in relation to the last 10 completed financial years of the company;
(j) copies of all financial statements required by section 159 [Obligation to prepare financial statements for company] in relation to the last 10 completed financial years of the company.

(2) A company need not keep its accounting records at a place in New Zealand, but if it does not do so the board of the company must ensure that there shall be sent to, and kept at a place in New Zealand, such accounts and returns with respect to the operations of the company as will disclose with reasonable accuracy the financial position of the company at intervals not exceeding six months and will enable to be prepared in accordance with this Act the company's balance sheet, its profit and loss account or income and expenditure account, and any other document giving information required by this Act.

(3) If a company fails to comply with subsection (1) or (2)
(a) the company may be convicted of an offence under section 277(2) [Failure to comply with Act]; and
(b) every director of the company may be convicted of an offence under section 278(2) [Liability of directors for failure by board of company].

148 Form of records

(1) All records of a company must be kept either in written form or so as to enable the documents and information to

be readily accessible and readily convertible into written form.

(2) The board of a company must ensure at all times that adequate precautions are taken against falsification of the company's records, and for facilitating the discovery of any such falsification.

149 Inspection of records by directors

(1) The board of a company must ensure that all records of the company are available in written form at all reasonable times for inspection without charge by any director of the company.

(2) If the board of a company fails to comply with subsection (1), every director of the company may be convicted of an offence under section 278(2) [Liability of directors for failure by board or company].

Service of documents upon companies

150 Address for service

(1) Every company shall at all times have an address for service in New Zealand to which a document may be delivered at any time between 9.00 a.m. and 5.00 p.m. on any working day.

(2) An address for service may be the company's registered office or another place, but may not be a box or bag at a postal centre or document exchange.

(3) The address for service of a company at any time shall, subject to section 151 (2) [Change of address for service], be the place that is described as such in the New Zealand register at that time.

151 Change of address for service

(1) Subject to the company's constitution and to subsection (2) the board of a company may change the address for service of the company at any time.

(2) No change of the address for service of a company has effect until at least five registration days after notice of the

change in the prescribed form is entered on the New Zealand register by the Registrar.

152 Methods of service of documents

(1) A summons, writ, claim, notice, order, or other document of similar nature may be served on a company as follows:

(a) by delivery to a director, employee or agent of the company at the company's address for service, or to a person who appears to be in charge of that place at the time of delivery; or

(b) if delivery in accordance with paragraph (a) is not practicable at the relevant time, by delivery to a director, employee or agent of the company at any place where the company carries on its operations, or to a person who appears to be in charge of that place at the time of delivery; or

(c) if delivery in accordance with paragraph (b) is not practicable at the relevant time, by delivery at any time to any person who is named as a director of the company on the New Zealand register at that time; or

(d) if delivery in accordance with paragraph (c) is not practicable at the relevant time, by posting the document to the company's address for service, or delivering it to a box at a document exchange which the company is then using.

(2) In addition to subsection (1), a particular document may be served on a company in a manner approved by the Court.

(3) Subsections (1) and (2) shall have effect notwithstanding any other Act or rule of law, but shall not limit section 153 [Agreements as to service].

153 Agreements as to service

A company may agree with another person that service of a document on the company by that person may be made other than in accordance with section 152 (1) [Methods of service of documents], and any such agreement is effective as between the company and that person.

154 Service by delivery

For the purposes of section 152 [Methods of service of documents], where service of a document on a company is to be made by delivery to a natural person, service shall be made

(a) by handing the document to the person; or

(b) if the person refuses to accept the document, by bringing the document to the attention of, and leaving it in a place accessible to, the person.

155 Service by post or document exchange

(1) For the purposes of section 152 [Methods of service of documents], any document posted to a company, or delivered to a document exchange box or bag of the company, is deemed to be received by the company five working days (or such shorter period as the Court may determine in any particular case) after it is so posted or delivered.

(2) In proving service of any document on a company by post or by delivery to a document exchange for the purposes of section 152 [Methods of service of documents], it is sufficient to prove that the document was properly addressed to the company, that all postal or delivery charges were paid, and that the document was posted or delivered to the document exchange.

PART 10
ACCOUNTS AND AUDIT

Accounting records

156 Accounting records to be kept

(1) The board of a company must cause to be kept accounting records that

(a) correctly record and explain the transactions of the company; and

(b) from which the financial position of the company may be ascertained with reasonable accuracy at any time; and

(c) will enable the directors to ensure that any financial statements of the company comply with section 160 [Content of financial statements]; and

(d) will enable the financial statements of the company to be readily and properly audited.

(2) If the board of a company fails to comply with subsection (1), every director of the company may be convicted of an offence under section 278(2) [Liability of directors for failure by board or company].

Financial statements for companies

157 Balance date of company

(1) In this Act, the term "balance date" in regard to a company, means the close of the 31 March or of such other date as the board of the company adopts as the company's balance date.

(2) Every company shall have a balance date in every calendar year, except that

(a) if a company is incorporated after 31 March in any calendar year, it need not have a balance date in that year so long as its first balance date is no later than 30 June in the succeeding calendar year; and

(b) if a company changes its balance date, it need not have a balance date in a calendar year so long as the period between any two balance dates does not exceed 15 months.

158 Meaning of "financial statements"

In this Act, the term "financial statements" means, in relation to a company and a balance date,

(a) a balance sheet for the company as at that balance date; and

(b) in the case of a company trading for profit, a profit and loss statement for the company in respect of the accounting period ending at that balance date; and

(c) in the case of a company not trading for profit, an income and expenditure statement for the company

in respect of the accounting period ending at that balance date; and

(d) a statement of cash flows for the company in respect of the accounting period ending at that balance date

together with any notes thereon or documents attached thereto giving information relating to the balance sheet or statement.

159 Obligation to prepare financial statements for company

(1) The board of every company must ensure that, within three months of every balance date of the company, financial statements that comply with section 160 [Content of financial statements] are

(a) completed in respect of the company and that balance date; and

(b) signed on behalf of the board by two directors of the company (or, if there is then only one director, by that director).

(2) If the board of a company fails to comply with subsection (1), every director of the company may be convicted of an offence under section 278(2) [Liability of directors for failure by board or company].

160 Content of financial statements

(1) The financial statements of a company shall give a true and fair view of the state of affairs, and the profit or loss (or income and expenditure) and the cash flows of the company as at the balance date, and for the accounting period, concerned.

(2) The onus of establishing that financial statements of a company comply with subsection (1) shall be that of the board of the company.

(3) Without limiting subsection (1), financial statements must comply with any regulations made under section 285 [Regulations].

161 Meaning of "holding company" and "subsidiary"

(1) For the purposes of this Act, and subject to subsection (3), a company is a subsidiary of another company if, but only if,

(a) that other company

(i) controls the composition of the board of the first-mentioned company; and

(ii) is entitled to receive more than half of every dividend paid by the first-mentioned company; and

(iii) is entitled to receive more than half of the surplus assets of the first-mentioned company; or

(b) the first-mentioned company is a subsidiary of any company which is that other company's subsidiary.

(2) For the purposes of subsection (1), the composition of a company's board shall be deemed to be controlled by another company if, but only if, that other company by the exercise of some power exercisable by it without the consent or concurrence of any other person can appoint or remove the holders of all or a majority of the directorships; and for the purposes of this provision that other company shall be deemed to have power to appoint to a directorship with respect to which any of the following conditions is satisfied, namely:

(a) that a person cannot be appointed thereto without the exercise in his or her favour by that other company of such a power; or

(b) that a person's appointment thereto follows necessarily from his or her appointment as director of that other company.

(3) In determining whether one company is a subsidiary of another company

(a) any shares held or power exercisable by that other company in a fiduciary capacity shall be treated as not held or exercisable by it;

(b) subject to paragraphs (c) and (d) any shares held or power exercisable

(i) by any person as a nominee for that other company (except where that other company is concerned only in a fiduciary capacity); or

(ii) by a nominee for a subsidiary of that other company, not being a subsidiary which is concerned only in a fiduciary capacity, shall be treated as held or exercisable by that other company;

(c) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first mentioned company or of a trust deed for securing any issue of such debentures shall be disregarded;

(d) any shares held or power exercisable by, or by a nominee for, that other company or its subsidiary (not being held or exercisable as mentioned in paragraph (c)) shall be treated as not held or exercisable by that other company if the ordinary business of that other company or its subsidiary, as the case may be, includes the lending of money and the shares are held or power is exercisable as aforesaid by way of security only for the purpose of a transaction entered into in the ordinary course of that business.

(4) For the purposes of this Act, a company is another company's holding company if, but only if, that other company is its subsidiary.

(5) In this section the expression "company" includes any body corporate.

162 Meaning of "group of companies"

In this Act the term "group of companies" means a company and all its subsidiaries.

163 Balance date of group of companies

(1) The board of a company shall ensure that, unless in the board's opinion there are good reasons against it, the balance date of each subsidiary of the company shall be the same as the balance date of the company.

(2) Where the balance date of a subsidiary of a company is not the same as that of the company, the balance date of the subsidiary for the purposes of any particular group financial statements shall be that preceding the balance date of the company.

164 Meaning of "group financial statements"

(1) In this Act the term "group financial statements" means, in regard to a group of companies and a balance date

(a) a consolidated balance sheet for the group as at that balance date; and

(b) where any member of the group trades for profit, a consolidated profit and loss account for the group in respect of the accounting period ending on that balance date; and

(c) where no member of the group trades for profit, a consolidated income and expenditure statement for the group in respect of the accounting period ending on that balance date; and

(d) a consolidated statement of cash flows for the group in respect of the accounting period ending on that balance date;

together with any notes thereon or documents attached thereto giving information relating to the balance sheet or statement.

(2) If a company's board is of the opinion that it is better for the purpose

(a) of presenting the same or equivalent information about the state of affairs, profit or loss (or income and expenditure), or cash flows of the company and its subsidiaries; and

(b) of so presenting it that it may be readily appreciated by the company's shareholders—

the group financial statements for the company and its subsidiaries may be prepared in a form other than that required by subsection (1) and in particular may consist of more than one set of consolidated statements dealing respectively with the company and one group of subsidiaries and with other groups of subsidiaries or of

separate statements dealing with each of the subsidiaries, or of statements expanding the information about the subsidiaries in the company's own statements, or any combination of those forms.

(3) The group financial statements for a company and its subsidiaries may be wholly or partly incorporated in the company's own balance sheet and profit and loss (or income and expenditure) and cash flow statements.

165 Obligation to prepare group financial statements

(1) Subject to subsections (2) and (3), where on a balance date of a company, the company has one or more subsidiaries, the board of the company must ensure that within three months of the balance date, group financial statements that comply with section 166 [Content of group financial statements] are

(a) completed in respect of that group of companies and that balance date; and

(b) signed on behalf of the board by two directors of the company (or, if there is then only one director, by that director).

(2) Group financial statements shall not be required in respect of a company and a balance date if the only shareholders of the company at that balance date are any or all of another body corporate incorporated in New Zealand, subsidiaries of that body corporate, and its or their nominees.

(3) Group financial statements need not deal with a subsidiary of a company if the board of the company is of the opinion that

(a) it is impracticable, or would be of no real value to shareholders of the company, in view of the insignificant amounts involved, or would involve expense or delay out of proportion to the value to shareholders of the company; or

(b) the result would be misleading and, if the board is of such an opinion about every subsidiary of the company, group financial statements are not required.

(4) If the board of a company fails to comply with subsection (1), every director of the company may be convicted of an offence under section 278(2) [Liability of directors for failure by board or company].

166 Content of group financial statements

(1) The group financial statements of a group of companies must give a true and fair view of the state of affairs and the profit or loss (or income and expenditure), and the cash flow of the group as at the balance date, and for the accounting period, concerned.

(2) The onus of establishing that group financial statements of a company comply with subsection (1) is that of the board of the company.

(3) Without limiting subsection (1), group financial statements must comply with any regulations made under section 285 [Regulations].

Auditors

167 Requirement for audit

(1) If

(a) the constitution of a company requires that the financial statements of the company and all or any of its subsidiaries for all or any accountinig periods be audited; or

(b) a shareholder or director of a company gives written notice to the board of the company that the shareholder or director requires that the financial statements of the company and all or any of its subsidiaries for all or any accounting periods ending after the date of receipt of the notice by the board be audited

an auditor must be appointed in accordance with this Part to audit the financial statements of the company and its subsidiaries for the accounting periods concerned.

(2) Any notice given or resolution passed for the purposes of subsection (1) may be withdrawn or amended in the same manner as it was given or passed.

(3) Subject to subsection (1), the financial statements of a company need not be audited.

168 Qualifications of auditors

(1) No person may be appointed or act as auditor of a company unless the person is

(a) a member of the New Zealand Society of Accountants who holds a certificate of public practice; or

(b) a member, fellow or associate of an association of accountants constituted outside New Zealand which is for the time being approved for the purposes of this section by the Minister of Justice by notice in the Gazette.

(2) None of the following persons may be appointed or act as auditor of a company:

(a) a director or employee of the company;

(b) a person who is a partner of or in the employment of a director or employee of the company;

(c) a body corporate;

(d) a person who, by virtue of either of paragraphs (a) and (b), may not be appointed or act as auditor of a related company.

169 Appointment of auditors

(1) Subject to the constitution of a company and to any ordinary resolution, every auditor of a company must be appointed by the board for such period and on such terms as the board may agree with the auditor.

(2) The appointment of a partnership by the firm name to be the auditors of a company is deemed to be the appointment of all the persons who are partners in the firm from time to time.

170 Removal of auditor

(1) Subject to subsection (3), an auditor may be removed from office at any time by ordinary resolution.

(2) Subject to subsection (3), on the expiry of a term of appointment of an auditor, another person may be appointed in his or her place in accordance with section 169(1) [Appointment of auditors].

(3) No auditor may be removed from office, or another person appointed in his or her place, unless

(a) at least 10 working days' written notice of intention to do so has been given to the auditor; and

(b) the auditor has been given a reasonable opportunity to make representations to the shareholders on the removal, or appointment of another person, either in writing or by the auditor or his or her representative speaking at a shareholders meeting (whichever the auditor shall choose).

171 Reappointment of retiring auditors

Where the term of appointment of an auditor of a company expires and the company is required by section 167 [Requirement for audit] to continue to have an auditor, the retiring auditor is deemed to be reappointed for a further year (which year is itself a term of appointment for the purposes of this section) unless

(a) the auditor is not qualified for reappointment; or

(b) another person is appointed auditor of the company no later than two months from the expiry of the auditor's term; or

(c) the auditor has given the board written notice of his or her unwillingness to be reappointed.

172 Auditor's report

(1) The auditor of a company must make a report to the shareholders and to each director on the financial statements audited by him or her.

(2) An auditor's report under subsection (1) must state

(a) whether the auditor has obtained all information and explanations that he or she has required;

(b) whether, in the auditor's opinion, proper accounting records have been kept by the company, so far as appears from their examination of those records;

(c) whether, in the auditor's opinion, according to the best of the information and the explanations given to him or her as shown by the accounting records, documents and other information of the company, the financial statements comply with section 160 [Content of financial statements] or section 166 [Content of group financial statements] (as the case may be) and, where they do not, the respects in which they fail to comply.

173 Auditor's right of access

(1) The board of a company must ensure that an auditor of a company has a right of access at all times to the accounting records, documents and other information of the company.

(2) An auditor of a company is entitled to require from any director or employee of the company such information and explanation as he or she thinks necessary for the performance of his or her duties as auditor.

174 Auditor's attendance at shareholders' meetings

The board of a company must ensure that an auditor of the company

(a) is permitted to attend any meeting of shareholders of the company; and

(b) receives all notices of and other communications relating to any meeting which any shareholder of the company is entitled to receive; and

(c) may be heard at any meeting of shareholders which he or she attends on any part of the business of the meeting which concerns him or her as auditor.

175 Remuneration and relief from liability of auditor

(1) The fees and expenses of an auditor of a company shall be fixed

(a) in the manner provided in the constitution of the company; or

(b) if the constitution does not so provide, by the board.

(2) An auditor is entitled to be paid by the company reasonable fees and expenses for making representations to shareholders under section 170(3) [Removal of auditor].

(3) A court may relieve an auditor from liability in any proceedings in accordance with section 137 [Court may grant relief].

PART 11
DISCLOSURE BY COMPANIES

Disclosure to shareholders

176 Annual report to shareholders

Unless all the shareholders of a company otherwise agree, the board of each company must cause to be sent to every shareholder of the company within 20 working days of each date on which financial statements of the company are signed under section 159(b) [Obligation to prepare financial statements for company], an annual report on the affairs of the company during the accounting period to which those statements relate.

177 Contents of annual report

(1) Every annual report for a company must be in writing and unless all the shareholders of the company otherwise agree must

(a) describe, so far as the board believes is material for the appreciation of the state of the company's affairs by its shareholders and will not be harmful to the business of the company or of any of its subsidiaries, any change during the accounting period in the nature of the business of the company or of its subsidiaries, or in the classes of business in which the company has an interest (whether as a shareholder of another company or otherwise); and

(b) where group financial statements for the company and its subsidiaries for that accounting period are required to be completed and signed under section 165(1)(b) [Obligation to prepare group financial statements], include those group financial statements; and

(c) where no such group financial statements are required to be so completed and signed, include the financial statements for the company for that accounting period signed under section 159(b) [Obligation to prepare financial statements for company]; and

(d) where an auditor's report is required under Part 10 in respect of the financial statements included in the report, include that auditor's report; and

(e) describe any change in accounting policies made since the date of the previous annual report; and

(f) state particulars of any entries in the interests register made since the date of the previous annual report (other than disclosures under section 113(1) [Directors' share dealings] by employees who are not also directors); and

(g) state any donations, including charitable or political donations made by the company since the date of the previous annual report; and

(h) state the names of the directors of the company; and

(i) state the amount of any fees paid to auditors since the date of the previous annual report; and

(j) be signed on behalf of the board by two directors of the company (or, if there is then only one director, by that director).

178 Takeovers

Where an offer (whether written or not) is made to acquire shares in a company which represent in aggregate 20 percent or more of the total issued shares of the same class, the board of the company shall, upon written request by any shareholder to whom the offer has been made, forthwith advise (in such manner as the board thinks fit) all shareholders to whom the offer has been made of the following information:

(a) whether, having regard to information known only to the board, the offer is clearly inadequate;

(b) whether any director of the company directly or indirectly holds or has an interest in any shares to which the offer relates and, if so, whether the director intends to accept or recommend acceptance of the offer;

(c) any direct or indirect interest of any director of the company in the offeror or in the offer.

179 Other disclosure to shareholders

Disclosure shall be made to shareholders in accordance with the following provisions of this Act:

(a) section 51 [Special offers to acquire shares];

(b) section 59 [Special financial assistance];

(c) section 62 [Statement of shareholder rights];

(d) section 94 [Proceedings at meetings];

(e) section 138 [Information for shareholders];

(f) section 139 [Investigation of records];

(g) section 184 [Company records available for inspection by shareholders];

(h) section 190 [Manner of approving amlagamation proposal];

(i) section 208 [Other duties of liquidator].

180 Method of disclosure to shareholders

(1) Any annual report, notice, or other document to be sent to a shareholder may be

(a) delivered by hand to the shareholder; or

(b) posted or delivered to the address for that shareholder shown on the share register; or

(c) sent by telex, facsimile machine, or other similar means of communication to the number of the shareholder.

(2) For the purposes of subsection (1)

(a) any document posted to a shareholder, or delivered to a document exchange, shall be deemed to be received by the shareholder five working days (or

such shorter period as the Court may determine in any particular case) after it is so posted or delivered;

(b) any document sent by telex, facsimile machine, or other similar means of communication shall be deemed to be received by the shareholder on the working day following the day on which it was sent.

(3) In proving the sending of any document to a shareholder by post or delivery to a document exchange for the purposes of this section, it shall be sufficient to prove that the document was properly addressed to the shareholder, that all postal or delivery charges were paid, and that the document was posted or delivered to the document exchange.

(4) If documents sent to a shareholder at its address shown on the share register are returned unclaimed three consecutive times, the company need not send any further documents to the shareholder until the shareholder notifies the company of its new address.

(5) A shareholder of a company may, by written notice to the company, waive the right to receive all or any documents from the company, and may revoke any such waiver in the same manner. While any such waiver is in effect, the company need not send to the shareholder the documents to which the waiver relates.

Disclosure to Registrar

181 Disclosure required by Act

Documents must be sent or delivered to the Registrar in accordance with the following provisions of this Act:

(a) section 11 [Application for incorporation];

(b) section 13 [Existing companies may apply for registration under this Act];

(c) section 18 [Application for registration of name];

(d) section 24 [Alteration of constitution];

(e) section 25(2) [Power of court to alter constitution];

(f) section 35 [Share description to be registered];

(g) section 37 [Persons to whom shares may be issued];

(h) section 66 [Place of register];
(i) section 122 [Notification to Registrar of directors];
(j) section 146 [Change of registered office];
(k) section 147 [Company records to be kept];
(l) section 151 [Change of address for service];
(m) section 182 [Annual return];
(n) section 192 [Registration of amalgamation];
(o) section 195 [Powers of court in relation to reconstructions etc];
(p) section 199 [Notice of proposed compromise];
(q) section 206 [Completion of liquidation];
(r) section 208 [Other duties of liquidator];
(s) section 241 [Meetings of creditors or shareholders];
(t) section 250 [Liquidator's report];
(u) section 252 [Grounds for removal from register];
(v) section 254 [Grounds for objecting to removal from register];
(w) section 257 [Property of company removed from register];
(x) section 259 [Application for registration];
(y) section 263 [Alteration of constitution, name, etc];
(z) section 264 [Annual return of overseas company];
(aa) section 266 [Ceasing to carry on business in New Zealand].

182 Annual return

(1) The board of a company must ensure that the Registrar receives each year, during the month allocated to the company for the purposes of this section, an annual return in the prescribed form confirming that the information of the kind referred to in the return that is on the New Zealand register in respect of the company at the date of the return is correct.

(2) An annual return must be dated as at a day within the month during which the return is required to be received by the Registrar.

(3) On incorporation or registration of a company under Part 2 the Registrar must allocate a month to the company for the purposes of this section.

(4) The Registrar may, by written notice to a company, alter the month allocated to the company under subsection (3) or under this subsection.

(5) Notwithstanding subsection (1)

(a) a company need not make an annual return in the calendar year of its incorporation or registration under Part 2;

(b) a subsidiary may, with the written approval of the Registrar, make an annual return during the month allocated to its holding company for the purposes of this section rather than during the month allocated to it.

(6) If the board of a company fails to comply with subsections (1) and (2), every director of the company may be convicted or an offence under section 278 (2) [Liability of directors for failure by board or company].

Inspection of company records

183 Company records available for public inspection

(1) Every company must keep the following records available for inspection in the manner specified in section 185 [Manner of inspection] by any person who serves written notice of intention to inspect on the company:

(a) the certificate of incorporation or registration of the company; and

(b) the current constitution of the company; and

(b) the share register; and

(c) the full names and addresses of the current directors; and

(d) the current registered office and address for service of the company.

(2) If a company fails to comply with subsection (1)

(a) the company may be convicted of an offence under section 277 (2) [Failure to comply with Act]; and

(b) every director of a company may be convicted of an offence under section 278 (2) [Liability of directors for failure by board or company].

184 Company records available for inspection by shareholders

(1) In addition to the records available for public inspection, every company must keep the following records available for inspection in the manner specified in section 185 [Manner of inspection] by any shareholder of the company (or by any person authorised in writing by a shareholder for this purpose) who serves written notice of intention to inspect on the company:

(a) minutes of all meetings and resolutions of shareholders; and

(b) copies of all written communications to shareholders during the preceding three years, including annual reports under section 176 [Annual report to shareholders]; and

(c) certificates given by directors under this Act; and

(d) the interests register of the company.

(2) If a company fails to comply with subsection (1)

(a) the company may be convicted of an offence under section 277 (2) [Failure to comply with Act]; and

(b) every director of a company may be convicted of an offence under section 278 (2) [Liability of directors for failure by board or company].

185 Manner of inspection

(1) Documents which may be inspected by any person or shareholder under section 183 [Company records available for public inspection] or section 184 [Company records available for inspection by shareholders] must be available for inspection at the place at which the company records are kept in accordance with section 147 [Company records to be kept] between the hours of 9.00 a.m. to 5.00 p.m. on each working day during the inspection period.

(2) In this section, the term "inspection period" means the period commencing on the third working day after the day on which notice of intention to inspect is served on the company by the person or shareholder concerned and ending with the eighth working day after that day of service.

186 Copies of documents

(1) Any person may require a copy of or extract from any document which is available for inspection by him or her in accordance with section 183 [Company records available for public inspection] or section 184 [Company records available for inspection by shareholders] to be sent to him or her within five working days after he or she has made a request in writing for the copy or extract and has paid a reasonable copying and administration fee prescribed by the board of the company.

(2) If a company fails to provide a copy of or extract from a document in accordance with a request under subsection (1)

(a) the company may be convicted of an offence under section 277(1) [Failure to comply with Act]; and

(b) every director of a company may be convicted of an offence under section 278(1) [Liability of directors for failure by board or company].

PART 12
RECONSTRUCTIONS AND AMALGAMATIONS

Reconstructions

187 Reconstructions

(1) Any reconstruction of the share structure of a company, whether or not entered into as part of a compromise with creditors, must be effected by amendment of the constitution in accordance with the procedures required by this Act.

(2) Any reconstruction which affects the likelihood of the company meeting its obligations to creditors must be approved as a compromise with creditors under Part 13.

188 Amalgamations

Two or more companies may amalgamate, and continue as one company, which may be one of the amalgamating companies, or may be a new company.

189 Amalgamation proposal

(1) Each company which proposes to amalgamate must approve an amalgamation proposal setting out the terms of the amalgamation, and in particular

(a) the name of the amalgamated company, if it is the same as the name of one of the amalgamating companies;

(b) the first registered office of the amalgamated company;

(c) the maximum number of directors of the amalgamated company;

(d) the full names and residential addresses of the first director or directors of the amalgamated company;

(e) the first address for service of the amalgamated company;

(f) the share structure of the amalgamated company, specifying

(i) the number of shares of the company;

(ii) the rights, privileges, limitations and conditions attached to each share of the company, if different from those set out in section 26 (2) [Rights attached to shares];

(iii) whether the shares are transferable or non-transferable, and if transferable, whether their transfer is subject to any conditions or limitations;

(g) a copy of the first constitutional document, if any, of the amalgamated company;

(h) the manner in which the shares of each amalgamating company are to be converted into shares of the amalgamated company;

(i) if any shares of an amalgamating company are not to be converted into shares of the amalgamated company, the amount of money that the holders of those shares are to receive instead of shares of the amalgamated company;

(j) any payment to be made to any shareholder or director of an amalgamating company, other than a payment of the kind described in paragraph (i);

(k) details of any arrangements necessary to perfect the amalgamation and to provide for the subsequent management and operation of the amalgamating company.

(2) If shares of one of the amalgamating companies are held by or on behalf of another of the amalgamating companies, the amalgamation proposal must provide for the cancellation of those shares when the amalgamation becomes effective without any payment in respect of those shares, and no provision may be made in the proposal for the conversion of such shares into shares of the amalgamated company.

190 Manner of approving amalgamation proposal

(1) The board of each amalgamating company must resolve that in its opinion

(a) the amalgamation is in the best interests of the shareholders of the company; and

(b) the amalgamating company will satisfy the solvency test immediately prior to the time at which the merger is to become effective; and

(c) the amalgamated company will satisfy the solvency test immediately after the time at which the merger is to become effective.

(2) The directors voting in favour of a resolution required by subsection (1) must sign a certificate that, in their opinion, the conditions set out in subsection (1) are satisfied.

(3) The board of each amalgamating company must send to each shareholder of that company not less than 20 working days before the amalgamation is to take effect

(a) a copy of the amalgamation proposal;

(b) copies of the certificates given by each board under subsection (2);

(c) a statement of any material interests of the directors, whether in that capacity or otherwise;

(d) such further information and explanation as may be necessary to enable a reasonable shareholder to understand the nature and implications for the company and its shareholders of the proposed amalgamation.

(4) The amalgamation proposal will not take effect unless it has been approved

(a) by the shareholders of each amalgamating company, in accordance with section 78 [Powers exercised by special resolution]; and

(b) by any interest group of an amalgamating company, where any provision in the amalgamation proposal would, if contained in an amendment to that company's constitution or otherwise proposed in relation to that company, require the approval of that interest group.

(5) Every director who fails to comply with subsection (2) may be convicted of an offence under section 277(1) [Failure to comply with Act].

191 Short form amalgamation

(1) A company and one or more of its wholly-owned subsidiaries may amalgamate and continue as one company without complying with section 189 [Amalgamation proposal] and 190 [Manner of approving amalgamation proposal] if

(a) the amalgamation is approved by a resolution of the board of each amalgamating company; and

(b) the resolutions provide that

(i) the shares of each amalgamating subsidiary company shall be cancelled without any payment or any other consideration in respect of those shares;

(ii) the constitution of the amalgamated company will be the same as the constitution of the amalgamating holding company.

(2) Two or more wholly-owned subsidiary companies of the same holding company may amalgamate and continue as one company without complying with sections 189 [Amalgamation proposal] and 190 [Manner of approving of amalgamation proposal] if

(a) the amalgamation is approved by a resolution of the board of each amalgamating company; and

(b) the resolutions provide that

(i) the shares of all but one of the amalgamating companies shall be cancelled without any payment or other consideration in respect of those shares;

(ii) the constitution of the amalgamated company will be the same as the constitution of the amalgamating company whose shares are not cancelled.

192 Registration of amalgamation

After an amalgamation has been approved under sections 190 [Manner of approving of amalgamation proposal] or 191 [Short form amalgamation] the following documents must be sent to the Registrar:

(a) the amalgamation proposal, if any;

(b) any certificates required under section 190 [Manner of approving amalgamation proposal];

(c) a certificate signed by the board of each amalgamating company stating that the company has approved the amalgamation in the manner required by this Act and by the constitution of the company;

(d) a certificate signed by the board, or proposed board, of the amalgamated company stating that in their opinion no creditor will be prejudiced by the amalgamation;

(e) consents in the prescribed form signed by each of the persons named as directors in the amalgamation proposal.

193 Certificate of amalgamation

Forthwith after receipt of the documents required under section 192 [Registration of amalgamation], the Registrar shall

(a) if the amalgamated company is the same as one of the amalgamating companies, issue a certificate of amalgamation in the prescribed form; or

(b) if the amalgamated company is a new company, enter on the New Zealand register the particulars of the company required by section 272 [Registers], and issue a certificate of amalgamation in the prescribed form together with a certificate of incorporation in the prescribed form.

194 Effect of certificate

On the date shown in a certificate of amalgamation

(a) the amalgamation becomes effective;

(b) the Registrar is required to remove the amalgamating companies other than the amalgamated company from the New Zealand register;

(c) the amalgamated company succeeds to all the property, rights and privileges of each of the amalgamating companies;

(d) the amalgamated company succeeds to all the liabilities of each of the amalgamating companies;

(e) proceedings pending by or against any amalgamating company may be continued by or against the amalgamated company;

(f) any conviction, ruling, order or judgment in favour of or against an amalgamating company may be enforced by or against the amalgamated company;

(g) the shares and rights of the shareholders in the amalgamating companies are converted into the shares and rights provided for in the amalgamation proposal, if any.

Powers of Court in relation to reconstructions and amalgamations

195 Powers of Court in relation to reconstructions etc

(1) Notwithstanding any provision in this Act or in the constitution of any company, where it is not practicable to effect a reconstruction or amalgamation in respect of one or more companies in accordance with the procedures set out in this Act or the constitutions of those companies, those companies may apply to the Court for approval of a reconstruction or amalgamation and the Court may approve any such proposal on such terms and subject to such conditions as it thinks fit.

(2) Within 10 registration days of any order being made by the Court under subsection (1), the board of each applicant company must ensure that a copy of the order is received by the Registrar, who must take such steps (if any) as the order may prescribe.

(3) If the board of a company fails to comply with subsection (2), every director of the company may be convicted of an offence under section 278(2) [Liability of directors for failure by board or company].

PART 13
COMPROMISES WITH CREDITORS

196 Interpretation

In this Part, unless the context otherwise requires,

"compromise" means a compromise between a company and its creditors cancelling all or part of any debt of a company, or varying the terms upon which the debt is payable or is secured, or agreeing to an alteration of a company's constitution which

affects the likelihood of the company being able to pay its due debts;

"creditor" includes every person who, in a liquidation, would be entitled to claim in accordance with section 230 [Admissible claims] that a debt is owing to that person by the company;

"proposer" means any person referred to in section 197 [Proposal of compromise] who proposes a compromise in accordance with this Part.

197 Proposal of compromise

Where there is reason to believe that a company is or will be unable to pay its debts within the meaning of section 222 [Inability to pay debts],

(a) the board of directors of the company; or

(b) a receiver appointed in respect of the whole or substantially the whole of the assets and undertaking of the company; or

(c) a liquidator of the company; or

(d) with the leave of the Court, any two or more creditors or shareholders of the company;

may propose a compromise under this Part.

198 Binding effect of compromise

(1) A compromise approved by creditors or any class of creditors of a company in accordance with this Part is binding on the company and on

(a) all creditors; or

(b) if there is more than one class of creditors, on all creditors of that class

to whom notice of the proposal was given under section 199 [Notice of proposed compromise].

(2) Subject to subsection (3), a compromise is approved by creditors or any class of creditors if, at a meeting of creditors or that class of creditors conducted in accordance with the Third Schedule,

(a) a resolution proposing the compromise is put to a vote; and

(b) not less than 75% of the votes validly cast by the creditors or that class of creditors are in favour of the resolution.

(3) Where a resolution proposing a compromise is put to the vote of more than one class of creditors, it shall be presumed, unless the contrary is expressly stated in the resolution, that the approval of the compromise by that class is conditional on the approval of the compromise by every other class voting on the resolution.

199 Notice of proposed compromise

(1) The proposer must compile a list of known creditors of the company who would be affected by the proposed compromise, setting out the amount owing or estimated to be owing to each, and the number of votes which each is entitled to cast on a resolution approving the compromise; and if there is more than one class of creditors so affected, a list of the known creditors in each class.

(2) The proposer must give to each known creditor, the company, any receiver, any liquidator and the Registrar

(a) notice in accordance with the Third Schedule of the intention to hold a meeting of creditors or any two or more classes of creditors for the purpose of voting on the draft resolution; and

(b) the name and address of the proposer and the capacity in which the proposer is acting; and

(c) the address and telephone number to which inquiries may be directed by any creditor during normal business hours; and

(d) a statement fairly setting out the reasons for the proposed compromise and all reasonably foreseeable consequences, for creditors and for the company, if the resolution is approved, including the extent, if any, to which any director is interested in the proposed compromise; and

(e) a copy of the list or lists of creditors referred to in subsection (1); and

(4) The proposer must give to each known creditor, the company, any receiver, any liquidator and the Registrar written notice of the result of the voting.

(5) Unless the Court orders otherwise, the costs incurred in organising and conducting a meeting of creditors for the purpose of voting on a proposed compromise

(a) must be met by the company; or

(b) if incurred by a receiver or a liquidator, are an expense of the receivership or liquidation; or

(c) if incurred by any other person, are a debt due to that person by the company.

200 Powers of Court

(1) On the application of the proposer or the company, the Court may

(a) give directions in relation to any procedural requirement imposed by this Part, or waive or vary any such requirement if satisfied that it would be just to do so; or

(b) order that, during any period specified in the order, beginning not earlier than the date on which notice was given of the proposed compromise and ending not later than 10 working days after the date on which notice was given of the result of the voting thereon,

(i) any proceedings in relation to a debt owing by the company be stayed; or

(ii) any creditor refrain from taking any other measure to enforce payment of any debt owing by the company;

but nothing in this paragraph affects the right of any secured creditor during that period to take possession of, realise or otherwise deal with any property of the company over which that creditor has a charge.

(2) Not later than 10 working days after the date of a notice that, as a result of the voting, a compromise was approved, a creditor who was entitled to take part in the vote may apply to the Court for an order that the creditor is not bound by the compromise on the grounds that

(a) insufficient notice of the meeting or of the matter required to be notified under section 199(3) [Notice of proposed compromise] was given to that creditor; or

(b) there was some other material irregularity in obtaining approval of the compromise; or

(c) that, in the case of a creditor who voted against the compromise, the compromise is unfairly prejudicial to that creditor or to the class of creditors to which that creditor belongs.

PART 14
LIQUIDATIONS

The process of liquidation

201 Interpretation

In this Part, unless the context otherwise requires;

"committee of inspection" means the committee of inspection elected or appointed under section 241 [Meetings of creditors or shareholders];

"liquidator" includes interim liquidator and an Official Assignee when acting as liquidator;

"Official Assignee" means any Official Assignee or Deputy Assignee appointed under the Insolvency Act 1967;

"statutory demand" has the meaning set out in section 223 [Statutory demand].

202 Purpose of this Part

The purpose of this Part is to establish that

(a) liquidation is a process which requires a company to cease carrying on business and its assets to be collected, realised and distributed in accordance with this Part; and

(b) at the completion of the liquidation a company is ready to be removed from the New Zealand register in accordance with Part 15.

203 Commencement of liquidation

(1) A company may be put into liquidation by the appointment of a named person, or of an Official Assignee for a named district, as liquidator by

(a) those shareholders entitled to vote and voting on the question, by special resolution; or

(b) the board of directors, if the constitution of the company so requires or permits, by resolution passed at a meeting of the board; or

(c) the Court, on the application of the company or of any shareholder, director or creditor of the company, or of the Attorney-General, if the Court is satisfied that

(i) the company is unable to pay its debts; or

(ii) the company or the board has persistently or seriously failed to comply with this Act; or

(iii) the company does not comply with section 5 [Essential components]; or

(iv) it is just and equitable that the company be put into liquidation.

(2) The liquidation commences on the date on which the liquidator is appointed.

204 Interim liquidator

(1) Where an application has been made to the Court for an order that a company be put into liquidation, the Court may appoint a named person or an Official Assignee for a named district as interim liquidator on the ground that the appointment is necessary or expedient for the preservation of the value of the company's assets.

(2) An interim liquidator has all the powers, duties and entitlements of a liquidator, unless the Court limits the powers or places conditions on their exercise.

205 Effect of commencement of liquidation

(1) As from the commencement of the liquidation of a company

(a) the liquidator takes custody and control of the company's assets;

(b) the directors remain in office but cease to have any powers, functions or duties other than those required or permitted to be exercised by this Part;

(c) no person may commence or continue legal proceedings against the company or with respect to its property, or enforce any other remedy against property of the company, unless the liquidator otherwise agrees or the Court otherwise orders;

(d) no share of the company may be transferred or other alteration made in the rights or liabilities of any shareholder, and no shareholder may exercise any power under the company's constitution or this Act, other than this Part;

(e) the constitution of the company may not be altered.

(2) Subsection (1) does not affect the right of a secured creditor to take possession of and realise or otherwise deal with any property of the company over which that creditor has a charge, subject to compliance with section 232 (4) (b) [Rights and duties of secured creditors].

206 Completion of liquidation

The liquidation of a company is complete when the liquidator files with the Registrar a final report and final accounts of the liquidation and a statement that:

(a) all known assets have been disclaimed, realised or distributed without realisation;

(b) all proceeds of realisation have been distributed; and

(c) the company is ready to be removed from the New Zealand register.

Duties, powers and entitlements of liquidator

207 Primary duty of liquidator

The primary duty of a liquidator is to take, in a reasonable and expeditious manner, all steps necessary to collect, realise and distribute the assets or the proceeds of the assets of the company to its creditors in accordance with this Part, and, if there are any

surplus assets, to the persons entitled to them under the company's constitution and this Act.

208 Other duties of liquidator

(1) Without limiting section 207 [Primary duty of liquidator], the liquidator has the other functions and duties specified in this Act.

(2) Without limiting subsection (1), the liquidator must

(a) within 10 working days of the commencement of the liquidation,

(i) give public notice of the appointment of the liquidator, the date of the commencement of the liquidation and the address and telephone number to which inquiries may be directed by any creditor or shareholder during normal business hours;

(ii) send or deliver to the Registrar a notice of the appointment of the liquidator in the prescribed form;

(b) prepare as soon as practicable and after such inquiries as are in all the circumstances reasonable, a list of every known creditor of the company;

(c) within 40 working days of the commencement of the liquidation, or such further period as the Court may allow for the preparation of the list referred to in paragraph (b), prepare and send to every known creditor and every shareholder, and send or deliver to the Registrar,

(i) a report on the state of the company's affairs, proposals for conducting the liquidation and the estimated date of its completion; and

(ii) a notice explaining the right of any creditor or shareholder to require the liquidator to call a meeting of creditors under section 240 [Claims of other creditors; surplus assets];

(d) within 20 working days of the end of each period of six months following the commencement of the liquidation, prepare and send to every known creditor and every shareholder, and send or deliver to the Registrar, a report on the conduct of the

liquidation during the preceding six months and the liquidator's further proposals for its completion;

(e) prepare and send to every known creditor and every shareholder the final report and final accounts of the liquidation, and the statement referred to in section 206 [Completion of liquidation], together with a summary of the grounds on which the creditor or shareholder may object to the removal of the company from the New Zealand register under section 254 [Grounds for objecting to removal from register];

(f) send or deliver to the Registrar copies of the documents referred to in paragraph (e);

(g) keep accounts and records of the liquidation and permit those accounts and records, and the accounts and records of the company, to be inspected by

(i) any committee of inspection appointed under section 241 [Meetings of creditors or shareholders], unless the liquidator believes on reasonable grounds that inspection would be prejudicial to the liquidation; or

(ii) if the Court so orders, any creditor or shareholder;

(h) retain the accounts and records of the liquidation and of the company for not less than six years after the completion of the liquidation, unless the Court orders otherwise;

(i) in every document issued by the liquidator on the company's behalf, give notice that the company is in liquidation, but failure to comply with this paragraph does not affect the validity of the document.

209 Powers of a liquidator

(1) A liquidator has all the powers necessary to carry out the functions and duties of liquidator under this Act.

(2) Without limiting subsection (1), a liquidator may

(a) subject to subsection (4), require any director or shareholder of the company or other person having possession of books, records or documents of the company to deliver them to the liquidator;

(b) require

(i) any director or shareholder of the company;

(ii) any person who has been a director of the company;

(iii) any person who was an incorporator of the company;

(iv) any person who is or has been an employee of the company;

(v) a receiver, solicitor, accountant or auditor or any other person having knowledge of the financial affairs of the company;

to attend on the liquidator at any reasonable time, provide the liquidator with such information concerning the business, accounts or other affairs of the company as the liquidator requests, be examined on oath or affirmation by the liquidator on any of those matters, and assist in the liquidation to the utmost of the person's ability.

(3) A liquidator may administer an oath to, or take the affirmation of, any person required to be examined under subsection (2).

(4) No person may withhold a document of the company from the liquidator on the ground that possession of the document creates a charge over property of the company, but, subject to subsection (5), production of a document to the liquidator does not prejudice the existence or priority of the charge, and the liquidator must make the document available to any person otherwise entitled to it for the purpose of dealing with or realising the charge or the secured property.

(5) No person may enforce a lien over any document of the company in respect of a debt for services rendered to the company before the commencement of the liquidation, but the debt is a preferential claim against the company under section 239 [Preferential claims] to the extent of $500 (or such greater amount as may be prescribed at the commencement of the liquidation).

(6) Where any person fails to comply with a requirement of the liquidator under subsection (2), the Court, on the

application of the liquidator, may order the person to comply.

(7) On the application of the liquidator, the Court may order any person to whom subsection (2) applies to attend before the Court and be examined on oath or affirmation by the Court or the liquidator on any matter relating to the company.

(8) A person examined under subsections (2) or (7) is not excused from answering any question on the ground that the answer may incriminate or tend to incriminate him or her.

(9) The testimony of any person examined under subsections (2) or (6) is not admissible as evidence in any criminal proceedings against that person, except on a charge of perjury in respect of that testimony.

(10) A person examined under subsections (2) or (7) may apply to the Court to be exculpated from any allegation made or suggested against him or her.

(11) On the hearing of any application under subsection (10), the liquidator shall appear and call the attention of the Court to any matter which appears to be relevant.

210 Power to make calls

Where the company's constitution provides that a share renders its holder liable to calls or otherwise imposes a liability on its holder, the liquidator may make calls or enforce all or part of any outstanding liability.

211 Power to disclaim onerous property

(1) The liquidator may disclaim any onerous property, even if the liquidator has taken possession of it, tried to sell it, or otherwise exercised rights of ownership.

(2) For the purposes of this section "onerous property" means

(a) any unprofitable contract; or

(b) any other property of the company which is unsaleable or not readily saleable or may give rise to a liability to pay money or perform any other onerous act.

(3) A disclaimer under this section

(a) brings to an end the rights, interests and liabilities of the company in respect of the property disclaimed; but

(b) does not, except so far as necessary to release the company from any liability, affect the rights or liabilities of any other person.

(4) A person suffering loss or damage as a result of a disclaimer under this section may

(a) claim as a creditor of the company for the amount of the loss or damage (taking account of the effect of any order made by the Court under paragraph (b));

(b) apply to the Court for an order that the disclaimed property be delivered to or vested in that person, and the Court may make such an order.

212 Pooling of assets of related companies

On the application of the liquidator or any creditor or shareholder, the Court, if satisfied that it is just and equitable to do so, may order that

(a) any company that is or has been related to the company in liquidation shall pay to the liquidator the whole or part of any or all of the claims made in the liquidation;

(b) where two or more related companies are in liquidation, the liquidations in respect of each company shall proceed together, as if they were one company, to the extent that the Court so orders and subject to such terms and conditions as the Court may impose.

213 Offences, search and seizure

(1) Where a company is in liquidation or an application has been made to the Court for an order that a company be put into liquidation, no person may

(a) leave New Zealand with the intention of

(i) avoiding payment of money due to the company; or

(ii) avoiding examination with respect to the affairs of the company; or

(iii) avoiding compliance with an order of the Court or some other obligation under this Part with respect to the affairs of the company; or

(b) conceal or remove property of the company with the intention of preventing or delaying the assumption of custody or control of the property by the liquidator; or

(c) destroy, conceal or remove books, documents or records of the company.

(2) Upon the commencement of the liquidation of a company, it is the duty of every present or former director and employee of the company

(a) to discover fully and truly to the liquidator all the property of the company, and the details of the disposal of any property by the company other than in the ordinary course of business; and

(b) to deliver to the liquidator, or in accordance with the liquidator's directions

(i) all property of the company; and

(ii) all books, documents or records belonging to the company;

in or under his or her custody or control.

(3) A person who

(a) acts in contravention of subsection (1); or

(b) fails to comply with subsection (2);

may be convicted of an offence under section 277 (2) [Failure to comply with Act].

(4) Where a company is in liquidation or an application has been made to the Court for an order that a company be put into liquidation, and the Court is satisfied, on the application of the liquidator, that there are reasonable grounds for believing that there is, in or on any place or thing, any property, books, documents or records of the company in respect of which an offence under subsection (1) or (2) has been or is about to be committed, the Court may issue a warrant authorising the person named in the warrant to search for and seize property, books, documents or records of the company in or on that place or thing and deliver them to the liquidator.

(5) In issuing a search warrant under subsection (2), the Court may specify in the warrant such reasonable conditions as it thinks fit.

(6) Subject to any conditions specified in the warrant, the person named in the warrant may

(a) enter and search the place or thing at any time which is reasonable in the circumstances on one occasion within 14 days of the date of issue of the warrant; and

(b) use such assistance as is reasonable in the circumstances; and

(c) use such force, both for making entry (whether by breaking open doors or otherwise) and for breaking open anything therein or thereon as is reasonable in the circumstances.

214 Refusal of essential services prohibited

(1) For the purposes of this section an "essential service" means:

(a) the supply of gas;

(b) the supply of electricity;

(c) the supply of water;

(d) telecommunication services;

(e) any other prescribed service.

(2) For the purposes of this section "telecommunication services" means the conveyance from one device to another by any line, radio frequency or other medium of any sign, signal, impulse, writing, image, sound, instruction, information or intelligence of any nature, whether or not for the information of any person using the device.

(3) Nothing in any other Act or in any contract entitles a supplier of an essential service to:

(a) refuse to supply the service to a liquidator or to the company in liquidation by reason of the company's default in paying any charges due for the service in respect of any period before the commencement of the liquidation; or

(b) make it a condition of the further supply of the service to a liquidator or to a company in liquidation

that payment be made of any outstanding charges due for the service in respect of any period before the commencement of the liquidation.

(2) A supplier of an essential service may make it a condition of the supply of the service to a company in liquidation that the liquidator shall personally guarantee the payment of charges to be incurred for the supply.

215 Expenses of liquidation

The expenses of the liquidation, including the reasonable remuneration of the liquidator, are payable out of the assets of the company.

216 When liquidator ceases to hold office

On sending or delivering to the Registrar the final report, the final accounts and the statement referred to in section 206 [Completion of liquidation], the liquidator ceases to hold office, but this section does not limit section 220 [Court supervision of liquidation] or section 221 [Enforcement of a liquidator's duties].

Qualifications and supervision of liquidator

217 Persons qualified to be liquidators

(1) A person who has substantial experience in administering or advising on the insolvency of individuals, or the liquidation of companies, or receiverships is an experienced insolvency practitioner for the purposes of this Part.

(2) Unless the Court orders otherwise, a sole liquidator, or where there is more than one liquidator, at least one of them, must be an experienced insolvency practitioner or an Official Assignee.

(3) The following persons may not be appointed or act as a liquidator:

(a) a person less than 20 years old;

(b) a body corporate;

(c) a creditor of the company in liquidation;

(d) a person who has, within the two years immediately preceding the commencement of the liquidation, been a shareholder, director or auditor of the company in liquidation or of any related company;

(e) an undischarged bankrupt;

(f) a person who is mentally disordered within the meaning of the Mental Health Act 1969;

(g) a person in respect of whom an order has been made under section 30 [Temporary orders] or 31 [Appointment of manager] of the Protection of Personal and Property Rights Act 1988;

(h) a person in respect of whom a prohibition order has been made under section 221 [Enforcement of a liquidator's duties], or under section 104AS [Enforcement of a receiver's duties] of the Property Law Act 1952;

(i) any person who has been convicted in the preceding five years of an offence

(i) under this Act, the Companies Act 1955 or the Securities Act 1978, or

(ii) involving dishonesty as defined in section 2 (1) [Interpretation] of the Crimes Act 1961.

(4) The fact that a person is disqualified under this section from acting as a liquidator does not affect the validity of anything done while so acting, unless the Court orders otherwise.

218 Consent to appointment as liquidator

(1) A person's appointment as liquidator is of no effect unless that person has consented in writing to the appointment.

(2) An Official Assignee may not withhold consent to an appointment as liquidator unless satisfied that there is another qualified person willing to consent to appointment.

219 Vacancies in the office of liquidator

(1) The office of liquidator becomes vacant if the person holding office resigns, dies, or becomes disqualified under section 217 [Persons qualified to be liquidators].

(2) An experienced insolvency practitioner may resign from the office of liquidator by appointing another experienced insolvency practitioner as his or her successor and sending or delivering notice in writing of the appointment to the Official Assignee for New Zealand.

(3) An Official Assignee may resign from the office of liquidator by appointing an experienced insolvency practitioner as his or her successor.

(4) The Court, on the application of the company or of any shareholder, director or creditor of the company, may review any appointment of a successor to a liquidator made under subsection (2) or (3), and, if it thinks fit, may appoint instead any other experienced insolvency practitioner or an Official Assignee of a named district.

(5) Where, for any reason other than resignation, a vacancy occurs in the office of liquidator, written notice of the vacancy shall forthwith be sent or delivered to the Official Assignee for New Zealand by the person vacating office, or if that person is unable to act, by his or her personal representative.

(6) Where, as the result of the vacation of office by a liquidator, no person, or no experienced insolvency practitioner, is acting as liquidator, the Official Assignee of New Zealand shall appoint an Official Assignee of a named district to act as liquidator until a successor is appointed under subsection (3).

(7) A person vacating the office of liquidator must, where practicable, provide such information and give such assistance in the conduct of the liquidation as that person's successor reasonably requires.

220 Court supervision of liquidation

(1) On the application of the liquidator, any committee of inspection or the Attorney-General, or, with the leave of the Court, any creditor, shareholder or director of a company in liquidation, the Court may

(a) give directions in relation to any matter arising in connection with the liquidation;

(b) confirm, reverse or modify any act or decision of the liquidator;

(c) order an audit of the accounts of the liquidation;

(d) order the liquidator to produce the accounts and records of the liquidation for audit and to provide the auditor with such information concerning the conduct of the liquidation as the auditor requests;

(e) in respect of any period, review or fix the remuneration of the liquidator at a level which is reasonable in the circumstances;

(f) to the extent that an amount retained by the liquidator as remuneration is found by the Court to be unreasonable in the circumstances, order the liquidator to refund the amount;

(g) declare whether or not the liquidator was validly appointed or validly assumed custody or control of any property;

(h) make an order concerning the retention or the disposition of the accounts and records of the liquidation or of the company.

(2) The powers given by subsection (1) are in addition to any other powers a Court may exercise in its jurisdiction relating to liquidators under this Part, and may be exercised in relation to any matter occurring either before or after the commencement of the liquidation or the removal of the company from the New Zealand register, and whether or not the liquidator has ceased to act as liquidator when the application or the order is made.

(3) Subject to subsection (4), a liquidator who has

(a) obtained a direction of a Court with respect to a matter connected with the exercise of the powers or functions of liquidator; and

(b) acted in accordance with the direction;

is entitled to rely on having so acted as a defence to any claim in respect of anything done or not done in accordance with the direction.

(4) A Court may order that, by reason of the circumstances in which a direction is obtained under subsection (1), the

liquidator shall not have the protection given by subsection (3).

221 Enforcement of a liquidator's duties

(1) In this section, unless the context otherwise requires, "failure to comply" means a failure of a liquidator to comply with any relevant duty arising

(a) under the special resolution or unanimous shareholder agreement or resolution of the board or the order of the Court by which the liquidator was appointed; or

(b) under this or any other Act or rule of law or rules of court; or

(c) under any order or direction of a Court other than an order so to comply made under this section;

and "comply", "compliance" and "failed to comply" have corresponding meanings.

(2) An application for an order under this section may be made by

(a) a liquidator;

(b) a person seeking appointment as a liquidator;

(c) any creditor, shareholder or director of the company in liquidation;

(d) a receiver appointed in respect of any property of the company in liquidation;

(e) the President of the New Zealand Society of Accountants;

(f) the President of the New Zealand Law Society;

(g) an Official Assignee.

(3) No application may be made to a Court by any person other than a liquidator in respect of any failure to comply unless notice of the failure to comply has been served on the liquidator not less than 5 working days before the date of the application and, as at the date of the application, there is a continuing failure to comply.

(4) In respect of any failure to comply, a Court may

(a) relieve the liquidator of the duty to comply, wholly or in part; or

(b) without prejudice to any other remedy which may be available in respect of any breach of duty by the liquidator, order the liquidator to comply to the extent specified in the order.

(5) A Court may, in respect of a person who fails to comply with an order made under subsection (4)(b), or is or becomes disqualified under section 217 [Persons qualified to be liquidators] to become or remain a liquidator,

(a) remove the liquidator from office; or

(b) order that the person may be appointed and act or may continue to act as liquidator, notwithstanding the provisions of section 217.

(6) Where it is shown to the satisfaction of a Court that a person is unfit to act as liquidator by reason of

(a) persistent failures to comply within the meaning of this section; or

(b) the seriousness of any failure to comply

the Court shall make in respect of that person a prohibition order having such duration not exceeding 5 years as the Court thinks fit.

(7) For so long as a prohibition order under subsection (6) remains in force in respect of any person, that person shall not

(a) act as a liquidator in any current or other liquidation; or

(b) act as a receiver in any current or other receivership.

(8) Evidence that, on two or more occasions within the preceding 5 years, while a person was acting as a liquidator or as a receiver,

(a) a Court has made

(i) an order to comply under this section; or

(ii) an order to comply under section 104AS [Enforcement of a receiver's duties] of the Property Law Act 1952;

in respect of the same person; or

(b) an application for

(i) an order to comply under this section; or

(ii) an order to comply under section 104AS of the Property Law Act 1952

has been made in respect of the same person and that in each case the person has complied after the making of the application and before the hearing;

is, in the absence of special reasons to the contrary, evidence of persistent failures to comply within the meaning of this section.

(9) In making any order under this section a Court may if it sees fit

(a) make an order extending any time for compliance; or

(b) impose any term or condition; or

(c) make any other ancillary order.

(10) All proceedings relating to any application for an order under this section shall be served on the Official Assignee for New Zealand who shall keep a copy of the proceedings on a public file indexed by reference to the name of the liquidator concerned.

Company unable to pay its debts

222 Inability to pay debts

(1) Unless the contrary is proved, and subject to subsection (2), a company is presumed to be unable to pay its debts if

(a) the company has failed to comply with a statutory demand; or

(b) execution issued against the company in respect of a judgment debt has been returned unsatisfied in whole or in part; or

(c) all or substantially all the assets of the company are in the possession or control of a receiver or some other person empowered to enforce a charge over those assets; or

(d) a compromise between a company and its creditors has been put to a vote in accordance with Part 13 but has not been approved.

(2) On an application to the Court for an order that a company be put into liquidation, evidence of failure to comply with a statutory demand is not receivable as evidence that a company is unable to pay its debts unless

the application is made within 30 working days after the last date for compliance with the demand.

(3) Subsection (1) does not prevent proof by other means that a company is unable to pay its debts.

(4) Information or records acquired under section 138 [Information for shareholders] or, if the Court so orders, under section 139 [Investigation of records] may be received as evidence that a company is unable to pay its debts.

(5) In determining whether a company is unable to pay its debts, its contingent or prospective liabilities may be taken into account.

(6) An application to the Court for an order that a company be put into liquidation on the ground that it is unable to pay its debts may be made by a contingent or prospective creditor only with the leave of the Court; and the Court may give such leave, with or without conditions, only if it is satisfied that a prima facie case has been made out that the company is unable to pay its debts.

223 Statutory demand

(1) A demand by a creditor in respect of a debt owing by a company made in accordance with this section is a statutory demand.

(2) A statutory demand must
- (a) be in respect of a debt that is due and is not less than the prescribed amount; and
- (b) be in writing; and
- (c) except where the debt is a judgment debt, be verified by affidavit attached to the demand; and
- (d) be served on the company; and
- (e) require the company to pay the debt, or enter into a compromise under Part 13 or otherwise compound with the creditor or give a charge over its property to secure payment of the debt, to the reasonable satisfaction of the creditor, within 20 working days of the date of service, or such longer period as the Court may order.

224 Setting aside a statutory demand

(1) The Court may, on the application of the company, set aside a statutory demand.

(2) The application must

(a) be made within 10 working days of the date of service of the demand; and

(b) be supported by affidavit; and

(c) be served on the creditor with the affidavit within 10 working days of the date of service of the demand.

(3) No extension of time may be given for making or serving an application to have a statutory demand set aside, but, at the hearing of the application, the Court may extend the time for compliance with the statutory demand.

(4) The Court may grant an application to set aside a statutory demand if it is satisfied that

(a) there is a substantial dispute whether the debt is owing or is due; or

(b) the company appears to have a counterclaim, set-off or cross-demand and the amount specified in the demand less the amount of the counterclaim, set-off or cross-demand is less than the prescribed amount; or

(c) the demand ought to be set aside on other grounds.

(5) If, on the hearing of the application, the Court is satisfied that there is a debt due by the company to the creditor that is not the subject of a substantial dispute or is not subject to a counterclaim, set-off or cross-demand, the Court may

(a) order that the company pay the debt within a specified period and that, in default of payment, the creditor may forthwith make an application to put the company into liquidation; or

(b) dismiss the application and forthwith make an order under section 203(1)(c) [Commencement of liquidation] putting the company into liquidation;

on the ground that the company is unable to pay its debts.

(6) On the hearing of an application to put the company into liquidation pursuant to an order made under subsection (5)(a), failure of the company to pay the debt within the

specified period is presumptive evidence that the company is unable to pay its debts.

(7) A demand shall not be set aside by reason only of a defect or irregularity unless the Court considers that substantial injustice would be caused if it were not set aside.

(8) In subsection (7), "defect" includes a material misstatement of the amount due to the creditor and a material misdescription of the debt referred to in the demand.

(9) An order under this section may be made subject to conditions.

Voidable transactions

225 Voidable transfers

(1) A transaction involving a transfer of property by the company to another person is voidable on the application of the liquidator if the transfer

(a) was made

(i) on account of antecedent debt; and

(ii) at a time when the company was unable to pay its due debts; and

(iii) within the year preceding the commencement of the liquidation; and

(b) enabled that person to receive more toward satisfaction of the debt than the person would otherwise have received or be likely to receive in the liquidation;

unless the debt was incurred in the ordinary course of business and the transfer was made no later than 45 working days after the debt was incurred.

(2) Unless the contrary is proved, a transfer made within the six months preceding the commencement of the liquidation is presumed to have been made

(a) at a time when the company was unable to pay its due debts; and

(b) on account of a debt not incurred in the ordinary course of business.

226 Transactions at undervalue

(1) A transaction entered into by a company is voidable on the application of the liquidator if

(a) it was entered into within the year preceding the commencement of the liquidation; and

(b) the value of the consideration received by the company was significantly less than the value of the consideration provided by the company; and

(c) when the transaction was entered into, the company

(i) was unable to pay its due debts; or

(ii) was engaged or about to engage in business for which its financial resources were unreasonably small; or

(iii) incurred the obligation knowing that the company would not be able to perform the obligation when required to do so; or

(d) the company became unable to pay its due debts as a result of the transaction.

(2) Unless the contrary is proved, the value of the consideration received by the company under a transaction

(a) with a related company; or

(b) in which a director of the company is interested;

entered into within the six months preceding the commencement of the liquidation is presumed to be significantly less than the value of the consideration provided by the company.

227 Voidable charges

(1) A transaction providing for or creating a charge over any property or undertaking of a company in respect of any debt is voidable on the application of the liquidator if the charge was given within the year preceding the commencement of the liquidation on account of antecedent debt, unless

(a) the charge secures the actual price or value of property sold or supplied to the company, or any other valuable consideration given by the grantee of the charge prior to the execution of the security, and,

immediately after the charge was given, the company was able to pay its due debts; or

(b) the charge is in substitution for a charge given more than one year preceding the commencement of the liquidation.

(2) Unless the contrary is proved, a company giving a charge within the six months preceding the commencement of the liquidation is presumed to have been unable to pay its due debts immediately after giving the charge.

228 Procedure for setting aside voidable transactions

(1) A liquidator who wishes to have a transaction that is voidable under sections 225 [Voidable transfers], 226 [Transactions at undervalue] or 227 [Voidable charges] set aside must

(a) file in the Court a notice to that effect specifying the transaction to be set aside and the property or value thereof which the liquidator wishes to recover, and also the effect of subsections (2), (3) and (4); and

(b) serve a copy of the notice on the person with whom the transaction was entered into, and on every other person from whom the liquidator wishes to recover.

(2) Any person

(a) who would be affected by the setting aside of the transaction specified in the notice; and

(b) who considers that the transaction is not voidable under sections 225 [Voidable transfers], 226 [Transactions at undervalue] or 227 [Voidable charges]

may apply to the Court for an order that the transaction not be set aside.

(3) Unless a person on whom the notice was served has applied to the Court under subsection (2), the transaction is set aside as from the twentieth working day after the date of service of the notice.

(4) Where one or more persons have applied to the Court under subsection (2), the transaction is set aside as from the day on which the last such application is finally determined, unless the Court orders otherwise.

(5) Where a transaction is set aside under this section, any person affected may, after giving up the benefit of the transaction, claim for the value of the benefit as a creditor in the liquidation.

(6) Where a transaction is set aside under this section, the Court may make one or more of the following orders:

(a) an order requiring a person to pay to the liquidator, in respect of benefits received by that person as a result of the transaction, such sums as fairly represent those benefits;

(b) an order requiring property transferred as part of the transaction to be restored to the company;

(c) an order requiring property to be vested in the company if it represents in a person's hands the application, either of the proceeds of sale of property, or of money, so transferred;

(d) an order releasing, in whole or in part, a charge given by the company;

(e) an order requiring security to be given for the discharge of an order made under this section;

(f) an order specifying the extent to which a person affected by the setting aside of a transaction or by a declaration or order made under this section is entitled to claim as a creditor in the liquidation.

(7) The setting aside of a transaction or a declaration or order made under this section does not affect the title or interest of a person in property which that person has acquired

(a) from a person other than the company; and

(b) for valuable consideration; and

(c) without knowledge of the circumstances of the transaction under which the second-mentioned person acquired the property from the company.

(8) Recovery by the liquidator of any property or the value thereof (whether under this section or any other section of this Act or under any other enactment or in equity or otherwise) may be denied wholly or in part if

(a) the person from whom recovery is sought received the property in good faith and has altered his or her position in the reasonably held belief that the transfer

or payment of the property to that person was validly made and would not be set aside; and

(b) in the opinion of the Court it is inequitable to order recovery, or recovery in full.

(9) Nothing in the Land Transfer Act 1952 restricts the operation of this section.

(10) In this section, "transaction" includes an execution under any judicial proceedings, or a payment (including a payment made in pursuance of a judgment or order of a court) in respect of any transaction to which sections 225, 226 or 227 applies.

Creditors' claims

229 Application of bankruptcy rules to a liquidation

(1) Subject to this Part, the rules in force under the law of bankruptcy with respect to the estates of persons adjudged bankrupt apply in a liquidation to

(a) the rights of secured and unsecured creditors;

(b) claims by creditors;

(c) the valuation of annuities and future and contingent liabilities;

and all persons who in any such case would be entitled to make claims and receive payment in whole or in part are so entitled in a liquidation.

(2) In applying in a liquidation the rules in force under the law of bankruptcy, a claim made under section 231 [Claims by unsecured creditors] and admitted by the liquidator is to be treated as if it were a debt proved in accordance with the requirements of the Insolvency Act 1967.

230 Admissible claims

Any debt or liability, present or future, certain or contingent, whether it is an ascertained debt or liability or a liability sounding only in damages, may be admitted as a claim against a company in liquidation.

231 Claims by unsecured creditors

(1) Unless otherwise required by the liquidator, an unsecured creditor may make a claim without formality.

(2) Where the liquidator requires a claim to be made formally, the claimant must complete and give to the liquidator a claim verified by statutory declaration

(a) setting out full particulars of the claim; and

(b) identifying any documents that evidence or substantiate the claim.

(3) The liquidator may require the production of any document mentioned in paragraph (2) (b).

(4) The liquidator may admit or reject any claim in whole or in part, and if the liquidator subsequently considers that a claim has been wrongly admitted or rejected in whole or in part, the liquidator may revoke or amend any such decision.

232 Rights and duties of secured creditors

(1) As soon as practicable after the liquidator of a company has given public notice of the commencement of the liquidation under section 208 (2) (a) (i) [Other duties of liquidator], every secured creditor of a company in liquidation must send or deliver to the liquidator written notice of any debt secured by a charge over any property of the company; including particulars of the property subject to the charge and the amount secured.

(2) On the expiry of 30 working days from the time at which the liquidator has given public notice of the commencement of the liquidation under section 208 (2) (a) (i) [Other duties of liquidator], a secured creditor whose charge is not

(a) a charge relating to land

(i) created by an instrument registered under the Deeds Registration Act 1908 the Land Transfer Act 1952; or

(ii) in respect of which a caveat or other notice has been lodged or recorded under the Land Transfer Act 1952; or

(b) a transfer or assignment or mortgage or assignment of a mortgage of any ship or vessel or any share of any ship or vessel registered under Part XII of the Shipping and Seamen Act 1952; or

(c) a charge perfected by registration under the Personal Property Securities Act [ ];

and who has not sent notice of his or her charge to the liquidator in accordance with subsection (1), is to be taken as having surrendered that charge to the liquidator under subsection (3)(c).

(3) A secured creditor may

(a) realise any property subject to a charge, if entitled to do so; or

(b) claim as a secured creditor in the liquidation; or

(c) surrender the charge to the liquidator for the general benefit of creditors, and claim in the liquidation as an unsecured creditor for his or her whole debt.

(4) A secured creditor who realises property subject to a charge

(a) may claim as an unsecured creditor for any balance due to him or her, after deducting the net amount realised;

(b) must account to the liquidator for any surplus remaining from the net amount realised after satisfaction of his or her whole debt, including any interest payable in respect of that debt up to the time of its satisfaction, and after making any proper payments to the holder of any other charge over the property subject to the charge.

(5) If a creditor claims as a secured creditor in the liquidation, the claim must be verified by statutory declaration and must

(a) set out full particulars of the claim; and

(b) set out full particulars of the charge including the date on which it was given; and

(c) identify any documents that substantiate the claim and the charge;

and sections 233 [Ascertainment of amount of claim], 234 [Claim not of an ascertained amount] and 236 [Claim in

respect of debts payable at a future time] apply to any claim as a secured creditor.

(6) The liquidator may require production of any document mentioned in subsection 5 (c).

(7) Where a claim is made by a creditor as a secured creditor, the liquidator must

(a) meet the claim in full and redeem the security; or

(b) realise the property subject to the charge, and pay the secured creditor the lesser of the amount of the claim and the net amount realised taking into account the liquidator's reasonable remuneration; or

(c) reject the claim in whole or in part, but

(i) where a claim is rejected in whole or in part, the creditor may make a revised claim as a secured creditor within 10 working days of receiving notice of the rejection; and

(ii) the liquidator may, if he or she subsequently considers that a claim was wrongly rejected in whole or in part, revoke or amend any such decision.

(8) A creditor who claims in the liquidation as a secured creditor may claim as an unsecured creditor for any balance due to him or her, after deducting any payment made by the liquidator under subsection (6).

(9) The liquidator may at any time require a secured creditor by notice in writing either to

(a) take possession of property subject to a charge, if entitled to do so; or

(b) file a claim as a secured creditor in accordance with subsection (5);

within not more than 20 working days of receipt of the notice, if he or she intends to rely on the security.

(10) A secured creditor on whom notice has been served under subsection (9) who fails to comply with the notice, is to be taken as having surrendered his or her charge to the liquidator under subsection (3) (c) for the general benefit of creditors, and may claim in the liquidation as an unsecured creditor for his or her whole debt.

(11) A secured creditor who has surrendered his or her charge under this section may, with the leave of the Court or the liquidator and subject to such terms and conditions as the Court or the liquidator thinks fit, at any time before the liquidator has realised the property charged

(a) withdraw the surrender and rely on the charge; or

(b) submit a new claim under this section.

233 Ascertainment of amount of claim

(1) The amount of a claim shall be ascertained as at the date of commencement of the liquidation.

(2) The amount of a claim based on a debt or liability denominated in a currency other than New Zealand currency shall be converted into New Zealand currency at the rate of exchange on the date of commencement of the liquidation, or, if there is more than one such rate of exchange on that date, at the average of those rates.

234 Claim not of an ascertained amount

(1) If a claim is subject to a contingency or is for damages or if for some other reason the amount of the claim is not certain, the liquidator may

(a) make an estimate of the amount of the claim; or

(b) refer the matter to the Court for a decision on the amount of the claim.

(2) On the application of the liquidator, or of any claimant who is aggrieved by an estimate made by the liquidator, the Court shall determine the amount of the claim as it sees fit.

235 Fines and penalties

A fine or other monetary penalty imposed on a company, whether before or after the commencement of the liquidation, in respect of an offence committed before the commencement of the liquidation, and costs ordered to be paid with respect to proceedings for the offence, may be admitted as a claim in the liquidation.

236 Claim in respect of debts payable at a future time

The amount of a claim made in respect of a debt that, but for the liquidation, would not be due and payable until 6 months after the commencement of the liquidation shall be ascertained according to the present value of the debt, having regard to the prescribed rate of interest as at the date of commencement of the liquidation.

237 Mutual credit and set-off

(1) Subject to section 227 [Voidable charges], where there have been mutual credits, mutual debts or other mutual dealings between a company and a person who seeks or, but for the operation of this section, would seek to have a claim admitted in the liquidation of the company

(a) an account shall be taken of what is due from the one party to the other in respect of those credits, debts or dealings; and

(b) an amount due from one party shall be set off against any amount due from the other party; and

(c) only the balance of the account may be claimed in the liquidation, or is payable to the company, as the case may be.

(2) This section does not apply to any amount paid or payable by a shareholder as the consideration or part of the consideration for the issue of a share or in satisfaction of a call in respect of any outstanding liability of the shareholder made by the board of directors or by the liquidator.

238 Ascertainment of amount of interest

If there is a surplus after payment in full of all admitted claims, interest on a claim accrues as from the date of the commencement of the liquidation at a rate not exceeding the prescribed rate.

239 Preferential claims

(1) Subject to section 232 (7) (a) and (b) [Rights and duties of secured creditors], the liquidator must pay, out of the assets of the company, the following expenses, fees and

claims, to the extent and in the order of priority specified in this section.

(2) The liquidator must first pay, in the order of priority in which they are listed:

(a) the fees and expenses properly incurred by the liquidator in collecting, preserving, realising or distributing the company's assets, including the remuneration of the liquidator other than a liquidator appointed by the Court;

(b) the taxed costs of any person who applied to the Court for an order that the company be put into liquidation, including the taxed costs of any person appearing on the application whose costs are allowed by the Court;

(c) the remuneration of any special manager;

(d) the costs and expenses of any person who makes or concurs in making the report on the state of the company's affairs;

(e) the taxed charges of any shorthand writer appointed to take an examination of any person under this Part (other than a shorthand writer appointed at the instance of an Official Assignee, in which case the charges are an expense incurred by the Official Assignee in collecting and realising the company's assets);

(f) the necessary disbursements of any liquidator appointed by the Court, other than fees and expenses payable under paragraph (a);

(g) The costs of any person properly employed by a liquidator appointed by the Court;

(h) The remuneration of a liquidator appointed by the Court;

(i) The actual out-of-pocket expenses necessarily incurred by any committee of inspection, subject to the approval of the Audit Office.

(3) After paying the expenses and fees referred to in subsection (2), the liquidator must next pay the following claims:

(a) subject to subsection (6), all wages or salary of any employee, whether or not earned wholly or in part by

way of commission, and whether payable for time or for piece work, in respect of services rendered to the company during the four months preceding the commencement of the liquidation;

(b) subject to subsection (6), all holiday pay becoming payable to any employee (or where the employee has died, to any other person in the employee's right) on the termination of the employment before or by reason of the commencement of the liquidation;

(c) all amounts due in respect of any compensation or liability for compensation under the Workers' Compensation Act 1956 accrued before the commencement of the liquidation;

(d) subject to subsection (6), all amounts deducted by the company from the wages or salary of any employee in order to satisfy obligations of the employee;

(e) all amounts that are preferential claims under section 209 (4) [Powers of a liquidator];

(f) subject to subsection (8), any sum that, in accordance with section 57 [First week] of the Accident Compensation Act 1982 is payable by a company in respect of time lost before the commencement of the liquidation;

(g) any amount that, under section 23 [Winding up of businesses] of the Apprenticeship Act 1983 the Court may order to be paid to an apprentice who is deprived of employment by reason of the commencement of the liquidation;

(h) all sums that the Motor Vehicle Dealers Institute Incorporated is entitled to recover from a defaulting licensee company under section 42 [Subrogation of rights of action against defaulting motor dealers] of the Motor Vehicle Dealers Act 1975 in the event of the company being put into liquidation;

(i) subject to subsection (9), any sum ordered or adjudged to be paid by a company under section 6 [Workers not to be dismissed by reason of protected voluntary service or training] of the Volunteers Employment Protection Act 1973 as compensation in respect of a default or contravention occurring

before the commencement of the liquidation, whether or not the order or judgment for compensation was made or given before that date;

(j) all sums which by any other enactment are required to be paid in accordance with the priority established by this subsection.

(4) After paying the claims referred to in subsection (3), the liquidator must next pay all sums

(a) paid by a buyer to a seller on account of the purchase price of goods; or

(b) to which a buyer is or becomes entitled to receive from a seller under section 9 [Rights of seller and buyer on cancellation of layby sale] of the Layby Sales Act 1971;

and for which the buyer is a creditor in the liquidation of the company under section 11 [Preference on winding up, bankruptcy, or receivership of seller] of the Layby Sales Act 1971.

(5) After paying the sums referred to in subsection (4), the liquidator must next pay the amount of

(a) any tax payable by the company in the manner required by Part III of the Goods and Services Tax Act 1985;

(b) any tax deductions made by the company under Part XI of the Income Tax Act 1976;

(c) any non-resident withholding tax deducted by a company under Part IX of the Income Tax Act 1976;

(d) every resident withholding tax deduction made by a company under Part IXA of the Income Tax Act 1976 (as inserted by section 11 of the Income Tax Amendment (No.8) Act 1989);

to the extent that the amount is for the time being unpaid to the Commissioner of Inland Revenue.

(6) The total sum to which priority is to be given under subsection (3)(a), (b), or (d) shall not, in the case of any one employee, exceed $6,000 or such greater amount as is prescribed at the commencement of the liquidation.

(7) Where any payment has been made

(a) to any employee of a company, on account of wages or salary; or

(b) to any such employee or, where the employee has died, to any other person in the employee's right, on account of holiday pay;

out of money advanced by some person for that purpose, the person by whom the money was advanced shall in a liquidation have the same right of priority in respect of the money so advanced as the employee, or other person receiving the payment in right of the employee, would have had if the payment had not been made.

(8) The total sum to which priority is to be given under subsection (3) (f) shall not, in the case of any one claimant, exceed $1,500; but where the Accident Compensation Corporation is a claimant in respect of time lost by more than one employee, its claim in respect of the time lost by each of those employees shall be treated as a separate claim made by a separate claimant.

(9) The total sum to which priority is to be given under subsection (3) (i) shall not, in the case of any one claimant, exceed $200.

(10) The claims listed in each of subsections (3), (4) and (5)

(a) rank equally among themselves and must be paid in full, unless the assets are insufficient to meet them, in which case they abate in equal proportions; and

(b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of secured parties in respect of assets

(i) which are subject to a security interest; and

(ii) became subject to that security interest by reason of its application to certain existing assets of the company and those of its future assets which were after acquired property or proceeds;

and must be paid accordingly out of those assets.

(11) To the extent that the claims to which subsection (10) applies are paid out of assets referred to in paragraph (b) of

that subsection, the amount so paid is an unsecured debt due by the company to the secured party.

(12) If a landlord or other person has distrained on any goods or effects of the company within the month preceding the commencement of the liquidation, the claims to which priority is given by this section are a first charge on the goods or effects so distrained on, or the proceeds from their sale, but where any money is paid to a claimant under any such charge, the landlord or other person has the same rights of priority as that claimant.

(13) For the purposes of this section

(a) any remuneration in respect of a period of holiday or of absence from work through sickness or other good cause is to be treated as wages in respect of services rendered to the company during that period;

(b) the expression "holiday pay", in relation to any person, means all sums payable to that person by the company under sections 11 to 23 of the Holidays Act 1981, and includes all sums which by or under any other enactment or any award, agreement, or contract of service are payable to that person by the company as holiday pay.

(c) the expressions "after acquired property"; "proceeds"; "security interest"; and "secured party" have the same meanings as in the Personal Property Securities Act [ ].

240 Claims of other creditors; surplus assets

(1) After paying preferential claims in accordance with section 239 [Preferential claims], the liquidator shall apply the assets of the company in satisfaction of all other claims.

(2) The claims referred to in subsection (1) rank equally among themselves and shall be paid in full, unless the assets are insufficient to meet them, in which case they abate in equal proportions.

(3) Where, before the commencement of a liquidation, a creditor agrees to accept a lower priority in respect of a debt than that which it would otherwise have under this

section, nothing in this section prevents the agreement from having effect according to its terms.

(4) After paying the claims referred to in subsection (1), the liquidator shall distribute the company's surplus assets in accordance with its constitution and this Act.

Rights of creditors and shareholders

241 Meetings of creditors or shareholders

(1) Any two or more creditors or shareholders of a company in liquidation may, by notice served on the liquidator at any time in the course of the liquidation, request the liquidator to call a meeting of creditors or of shareholders

(a) to vote on a proposal that a committee of inspection be appointed to act with the liquidator; and

(b) if it is so decided, to choose the members of the committee.

(2) A liquidator may decline any such request to call a meeting on the ground that

(a) the request is frivolous or vexatious; or

(b) the request was not made in good faith; or

(c) the costs of calling a meeting would be out of proportion to the value of the company's assets.

(3) The decision of a liquidator to decline a request to call a meeting of creditors or of shareholders may be reviewed by the Court on the application of any one or more creditors or shareholders, as the case may be.

(4) Subject to subsections (2) and (3), a liquidator who receives a request to call a meeting of creditors or of shareholders shall forthwith call such a meeting in accordance with the Third Schedule or the Second Schedule as the case may be.

(5) The members of a committee of inspection chosen by any meeting of creditors or of shareholders take office forthwith, but if there is a difference between the decisions of meetings of creditors and meetings of shareholders on

(a) the question of appointing a committee of inspection; or

(b) the membership of a committee of inspection;

the liquidator shall refer the matter to the Court which may make such decision thereon as it thinks fit.

(6) The sole shareholder of a company may present to the liquidator a view on any matter which could have been decided at a meeting of shareholders under this section, and that view shall for all purposes be treated as though it were a decision taken at a meeting of shareholders.

(7) The liquidator shall send or deliver to the Registrar a copy of all communications received or sent by the liquidator, and all decisions taken at any meeting of creditors or shareholders, in accordance with this section.

242 Committees of inspection

(1) A committee of inspection shall consist of not less than three persons who are creditors or shareholders, or persons holding general powers of attorney from creditors or shareholders, or authorised directors of companies which are creditors or shareholders of the company in liquidation.

(2) A committee of inspection has the power to

(a) call for reports from the liquidator on the progress of the liquidation;

(b) call a meeting of creditors or of shareholders; and

(c) assist the liquidator as appropriate in the conduct of the liquidation.

(3) The provisions set out in the Fourth Schedule govern proceedings at meetings of committees of inspection.

(4) Where, by reason of vacancies in a committee of inspection the committee is unable to act, the liquidator must call attention to the situation in the next six-monthly report required to be prepared and sent under section 208 (2) (c) [Other duties of liquidator].

243 Interpretation

For the purposes of sections 244–250, unless the context otherwise requires,

"Fund" means the Insolvency (Assetless Companies) Fund established by section 244(1) [Insolvency (Assetless Companies Fund)];

"supervisory board" means the supervisory board set up under section 244(2).

244 Insolvency (Assetless Companies) Fund

(1) The Registrar shall establish, maintain and administer a fund to be called the Insolvency (Assetless Companies) Fund.

(2) The Registrar shall convene a supervisory board consisting of nominees of

(a) the Registrar; and

(b) the President of the New Zealand Law Society; and

(c) the President of the New Zealand Society of Accountants.

(3) The Registrar may invest money forming part of the Fund in the manner in which money in the Public Account may be invested under section 50 [Investment of money in Public Account] of the Public Finance Act 1977.

245 Property of the Fund

The Fund consists of

(a) all contributions paid under section 247 [Payment of contributions];

(b) all interest received from the investment of moneys forming part of the Fund; and

(c) any other money lawfully paid into the Fund.

246 Expenditure from the Fund

There shall be paid out of the Fund

(a) the expenses of maintaining and administering the Fund; and

(b) the amounts advanced from the Fund under section 248 [Advances for inquiries or proceedings].

247 Payment of contributions

A company that lodges an annual return shall pay to the Registrar, at the time of lodging the return, such fee by way of contribution to the Fund as is prescribed.

248 Advances for inquiries or proceedings

(1) On the application of the liquidator of a company in liquidation that does not have unencumbered assets immediately available to the liquidator of a value greater than the prescribed amount (an "assetless company"), the supervisory board may make one or more advances from the Fund under this section, if it is satisfied that it would be in the interests of the company's creditors or shareholders, or both, for the liquidator to

(a) make inquiries concerning the business, property, affairs or entitlements of the company; or

(b) bring, continue or defend proceedings relating to the business, property or affairs of the company;

for the purpose of recovering, retaining or realising the company's assets.

(2) Advances from the Fund under this section shall be of such amount as the supervisory board determines, having regard to the proposals of the liquidator for the conduct of the proceedings or the inquiry, and may be made in relation to any one or more stages of the proceedings or the inquiry, and on such terms and conditions as the supervisory board thinks fit.

(3) Advances from the Fund may include an amount to meet any costs awarded against the liquidator.

249 Priority of the Fund

(1) Where an advance has been authorised by the supervisory board under section 248 [Advances for inquiries or proceedings], the Registrar has, in the liquidation of the company concerned, a claim to be repaid the amount of that advance.

(2) The Registrar's claim under subsection (1) shall be treated as an expense properly incurred by the liquidator under section 239 (2) (a) [Preferential claims].

250 Liquidator's report

As soon as practicable after the completion of the inquiry or proceedings, or any stage of the inquiry or proceedings, in respect of which an advance was made under section 248 [Advances for inquiries or proceedings], the liquidator must send or deliver to the Registrar a report on the purposes for which the money advanced was expended and the outcome of the proceedings or inquiry to date.

PART 15
REMOVAL FROM THE NEW ZEALAND REGISTER

251 Effect of removal from register

A company ceases to exist when it is removed from the New Zealand register.

252 Grounds for removal from register

(1) Subject to subsection (3), the Registrar shall remove a company from the New Zealand register if

(a) the company is an amalgamating company other than an amalgamated company and, on the same day, the Registrar issues a certificate of amalgamation under section 193 [Certificate of amalgamation]; or

(b) the Registrar is satisfied that the company has ceased to carry on business; or

(c) there is sent or delivered to the Registrar a request made by

(i) those shareholders entitled to vote and voting on the question, by special resolution; or

(ii) the board of directors, if the constitution of the company so requires or permits, by resolution passed at a meeting of the board;

that the company be removed from the New Zealand register on one or other of the grounds specified in subsection (2); or

(d) a liquidator sends or delivers to the Registrar the final report and final accounts of the liquidation and the statement required by section 206 [Completion of liquidation].

(2) A request that a company be removed from the New Zealand register under subsection (1)(c) may be made on the grounds

(a) that the company has ceased to carry on business, has discharged in full its liabilities to all its known creditors, and has distributed its surplus assets in accordance with its constitution and this Act; or

(b) that the company has no surplus assets after paying its debts in full or in part, and no creditor has applied to the Court under section 203 [Commencement of liquidation] for an order putting the company into liquidation.

(3) The Registrar shall remove a company from the New Zealand register under subsection (1) paragraphs (b), (c) or (d) only when

(a) the Registrar has given the notice required by section 253 [Notice of intention to remove company from register] and

(b) the Registrar

(i) is satisfied that no person has objected to the removal under section 254 [Grounds for objecting to removal from register]; or

(ii) if an objection to the removal has been received, has carried out the duties required by section 255 [Duties of Registrar where objection received].

253 Notice of intention to remove company from register

(1) Where the Registrar

(a) has reason to believe that a company has ceased to carry on business and ought to be removed from the

New Zealand register under section 252 (1) (b) [Grounds for removal from register]; or

(b) has received a request that the company be removed from the New Zealand register under section 252 (1) (c); or

(c) has received from a liquidator the documents referred to in section 252 (1) (d);

the Registrar must, as soon as practicable, give public notice of the matters specified in subsection (3).

(2) Where the Registrar intends to remove the company from the New Zealand register on the ground referred to in subsection (1) (a) or (b), the Registrar must also give notice of the matters specified in subsection (3) to

(a) the company; and

(b) any secured party who has registered a financing statement under the Personal Property Securities Act [ ] in relation to any property of the company; and

(c) the Inland Revenue Department.

(3) The notice to be given under this section must specify

(a) the name of the company and its registered office;

(b) the section under and the grounds on which the Registrar proposes to remove the company from the New Zealand register;

(c) the date by which an objection to the removal under section 254 [Grounds for objecting to removal from register] must be sent or delivered to the Registrar, which shall be not less than 20 working days after the date of the notice.

254 Grounds for objecting to removal from register

(1) Where the Registrar gives notice of an intention to remove a company from the New Zealand register, any person may send or deliver to the Registrar, not later than the date specified in the notice, an objection to the removal on any one or more of the following grounds:

(a) that the company is still carrying on business; or

(b) that the company is a party to legal proceedings; or

(c) that the company is in receivership, or liquidation, or both; or

(d) that the person is a creditor, a shareholder or any other person who has an undischarged claim against the company; or

(e) that the person believes that there exists, and intends to pursue, a right of action on behalf of the company under Part 8; or

(f) that for any other reason it would not be just and equitable to remove the company from the New Zealand register.

(2) For the purposes of subsection (1)(d),

(a) a claim by a creditor against a company is not an undischarged claim where:

(i) the claim has been paid in full; or

(ii) the claim has been paid in part under a compromise entered into under Part 13 or by being otherwise compounded to the reasonable satisfaction of the creditor; or

(iii) the claim has been paid in full or in part by a receiver or a liquidator in the course of a completed receivership or liquidation; or

(iv) a receiver or a liquidator has notified the creditor that the assets of the company are not sufficient to enable any payment to be made to the creditor; and

(b) a claim by a shareholder or any other person is not undischarged where

(i) payment has been made to the shareholder or that person in accordance with any right under the company's constitution and this Act to receive or share in any of the company's surplus assets; or

(ii) a receiver or liquidator has notified the shareholder or that person that the company has no surplus assets.

255 Duties of Registrar where objection received

(1) Where an objection to the removal of a company from the New Zealand register is made on a ground specified in section 254(1)(a), (b) or (c) [Grounds for objecting to

removal from register], the Registrar shall not proceed with the removal unless the Registrar is satisfied that

(a) the objection has been withdrawn; or

(b) any facts on which the objection is based are not, or are no longer, correct; or

(c) the objection is frivolous or vexatious.

(2) Where an objection to the removal of a company from the New Zealand register is made on a ground specified in section 254 (1) (d), (e) or (f) [Grounds for objecting to removal from register],

(a) the Registrar shall give notice to the person objecting that, unless notice of an application to the Court by that person for an order

(i) under section 203 (1) (c) [Commencement of liquidation], that the company be put into liquidation; or

(ii) under section 256 [Powers of the Court], that, on any ground specified in section 254 [Grounds for objecting to removal from register], the company not be removed from the New Zealand register;

is served on the Registrar not later than 30 working days after the date of the notice, the Registrar intends to proceed with the removal; and

(b) if

(i) notice of such an application to the Court is not duly served on the Registrar; or

(ii) on the hearing of such an application, the Court refuses to grant either an order putting the company into liquidation or an order that the company not be removed from the New Zealand register;

the Registrar shall proceed with the removal.

(3) The Registrar shall send

(a) a copy of any objection under section 254 [Grounds for objecting to removal from register]; and

(b) a copy of any notice given by or served on the Registrar under this section; and

(c) if the company is removed from the New Zealand register, notice of the removal;

to any person who sent or delivered to the Registrar a request that the company be removed from the New Zealand register under section 252 (1) (c) [Grounds for removal from register] or, while acting as liquidator, sent or delivered to the Registrar the documents referred to in section 252 (1) (d).

256 Powers of the Court

On an application by any person for an order that, on any ground specified in section 254 [Grounds for objecting to removal from register], the company not be removed from the New Zealand register, the Court may make such order as it thinks fit.

257 Property of a company removed from register

(1) If, after the removal of a company from the New Zealand register, it should be found that property of the former company has not been distributed, that property is to be treated as unclaimed property and vests in the Crown.

(2) For the purposes of this section, property of the former company includes leasehold property and all other rights vested in or held on trust for the former company, but does not include property held by the former company on trust for any other person.

(3) When the vesting of any property under this section comes to the notice of the Secretary to the Treasury, the Secretary must forthwith give public notice of the vesting, setting out the name of the former company and particulars of the property vesting, and must send or deliver a copy of the notice to the Registrar.

(4) The Secretary to the Treasury may disclaim the Crown's title to any property vesting in the Crown under this section if the property is onerous property within the meaning of section 211 (2) [Power to disclaim onerous property].

(5) The Secretary to the Treasury must forthwith give public notice of any disclaimer under subsection (4) and send or deliver a copy of the notice to the Registrar.

(6) Whether or not any property vesting in the Crown under this section is disclaimed under subsection (4), any person who would have been entitled to receive all or part of the property or payment from the proceeds of its realisation if it had been in the hands of the company immediately before the removal of the company from the New Zealand register, or any other person claiming through any such person, may apply to the Court for an order

(a) vesting all or part of the property in that person; or

(b) awarding that person compensation from the Crown of an amount not greater than the value of the property.

(7) On an application made under subsection (6), the Court may

(a) decide any question concerning the value of the property vesting in the Crown under this section, the entitlement of any applicant to any such property or to compensation, and the apportionment of any property or compensation among any two or more applicants;

(b) order that the hearing of any two or more applications be consolidated;

(c) order that any application be treated as an application on behalf of all persons, or all members of a class of persons, with an interest in the property;

(d) make any ancillary order.

(8) Any compensation awarded under subsection (6) shall be paid out of the Consolidated Account without further appropriation than this Act.

PART 16
OVERSEAS COMPANIES

258 Overseas companies to register under this Act

(1) Every overseas company that, on or after the commencement of this Act, establishes a place of business (including a share transfer or share registration office) within New Zealand must apply for registration under this Part in accordance with section 259 [Application for registration] within 10 registration days of establishing the place of business.

(2) Every overseas company whose constitutional documents are registered under Part XII of the Companies Act 1955 immediately before the date of commencement of this Act is, on and from that date, deemed to be registered under this Part instead of under Part XII of the Companies Act 1955.

(3) Every overseas company that, before the commencement of this Act, has established a place of business (including a share transfer or share registration office) within New Zealand but whose constitutional documents are not registered under Part XII of the Companies Act 1955, must apply for registration under this Part in accordance with section 259 [Application for registration] within 10 registration days of the commencement of this Act.

(4) If an overseas company fails to comply with subsections (1) or (3)

(a) the overseas company may be convicted of an offence under section 277 (2) [Failure to comply with Act]; and

(b) every director of the overseas company may be convicted of an offence under section 278 (2) [Liability of directors for failure by board or company].

259 Application for registration

(1) An application for registration of an overseas company under this Part must be delivered to the Registrar and must

(a) be in the prescribed form; and

(b) be signed by or on behalf of the overseas company.

(2) Without limiting subsection (1), every application for registration of an overseas company under this Part must

(a) state the name of the overseas company; and

(b) contain a statement by the applicant

(i) that the applicant has caused a search to be made, during the period of 10 working days immediately preceding the date of the application, of such registers, directories and records of names, trademarks, or service marks as are then prescribed by the Registrar for the purposes of this paragraph; and

(ii) whether, disregarding the word "Limited" (if any) the name of the overseas company is identical to the name of any body registered on any register prescribed by the Registrar for the purposes of subparagraph (i) and, if the name of the overseas company is so identical, whether the body has consented to the use of the name in New Zealand by the overseas company; and

(c) state the full names and residential addresses of the directors of the overseas company at the date of the application; and

(d) state the full address of the principal place of business of the overseas company; and

(e) have attached evidence of incorporation of the overseas company and a copy of the instrument constituting or defining the constitution of the company, both being certified in accordance with regulations made under this Act; and

(f) state the full name and address of one or more persons resident or incorporated in New Zealand who are authorised to accept service in New Zealand of documents on behalf of the overseas company.

260 Registration of overseas company

Forthwith after receipt of a properly completed application for registration under this Part of an overseas company, the Registrar must

(a) enter on the overseas register the particulars of the company required under section 272 [Registers]; and

(b) assign a number to the overseas company for the purposes of section 261 [Name of overseas company].

261 Name of overseas company

(1) If at any time the Registrar believes on reasonable grounds that

(a) disregarding the word "Limited" (if any), the name of an overseas company is identical to the name of any body registered on any register prescribed by the Registrar for the purposes of section 259 (2) (b) (i) [Application for registration]; or

(b) the use in New Zealand by an overseas company of its name contravenes any Act which prohibits the use of certain words or names; or

(c) the use in New Zealand by an overseas company of its name is undesirable;

the Registrar may serve written notice on the overseas company to the effect that the overseas company must not use its name in New Zealand from a date specified in the notice (being a date not less than 20 working days after the date on which the notice is served on the overseas company).

(2) Subject to subsection (3), where the Registrar has served notice on an overseas company under subsection (1) then, unless the overseas company has changed its name from the name specified in the notice, from the date specified in the notice the name of the overseas company in New Zealand will be "Company No X Limited" where "X" is the number assigned by the Registrar for this purpose upon the overseas company's registration under this Part.

(3) The name given to an overseas company under subsection (2) shall not include the word "Limited" if the liability of the members of the overseas company is unlimited.

262 Use of name by overseas company

(1) Every overseas company must ensure that its full name, and the name of the country where it was incorporated, are clearly stated in

(a) all communications sent by or on behalf of the company; and

(b) all documents issued or signed by or on behalf of the company that evidence or create a legal obligation of the company.

(2) For the purposes of subsection (1), it is lawful to use any generally recognised abbreviation of a word or words in the name of an overseas company, so long as it is not misleading to do so.

263 Alteration of constitution, name, etc

(1) Where there is

(a) an alteration to the instrument constituting or defining the constitution of an overseas company; or

(b) a change in the directors of an overseas company; or

(c) a change in the persons authorised to accept service in New Zealand of documents on behalf of the overseas company

the overseas company must ensure that the Registrar receives notice in the prescribed form of the alteration or change within 20 registration days of the day on which the alteration or change takes effect.

(2) If an overseas company fails to comply with subsection (1)

(a) the overseas company may be convicted of an offence under section 277 (2) [Failure to comply with Act]; and

(b) every director of the overseas company may be convicted of an offence under section 278 (2) [Liability of directors for failure by board or company].

264 Annual return of overseas company

(1) Every overseas company must ensure that the Registrar receives each year, during the month allocated to the overseas company for the purposes of this section, an annual return in the prescribed form confirming that the information of the kind referred to in the return on the overseas register in respect of the overseas company at the date of the return is correct.

(2) An annual return must be dated a day within the month during which the return is required to be received by the Registrar.

(3) On registration of an overseas company under this Part, the Registrar must allocate a month to the company for the purposes of this section.

(4) The Registrar may, by written notice to an overseas company, alter the month allocated to the company under subsection (3) or under this subsection.

(5) Notwithstanding subsection (1), an overseas company need not make an annual return in the calendar year of its registration under this Part.

(6) If an overseas company fails to comply with subsections (1) and (2)

(a) the company may be convicted of an offence under section 277 (2) [Failure to comply with Act]; and

(b) every director of the overseas company may be convicted of an offence under section 278 (2) [Liability of directors for failure by board or company].

265 Service of documents upon overseas company

(1) A summons, writ, claim, notice, order or other document of similar nature may be served on an overseas company registered under this Part as follows:

(a) by delivery to a person named in the overseas register as being authorised to accept service in New Zealand of documents on behalf of the overseas company; or

(b) if delivery in accordance with paragraph (a) is not practicable at the relevant time, by delivery to a director, employee or agent of the company at any

place of business of the company in New Zealand, or to a person who appears to be in charge of that place at the time of delivery; or

(c) if delivery in accordance with paragraph (b) is not practicable at the relevant time, by posting the document to the address of a person referred to in paragraph (a), or delivering it to a box at a document exchange which that person is then using; or

(d) if delivery in accordance with paragraph (c) is not practicable at the relevant time, by posting the document to the address of any place of business in New Zealand of the company, or delivering it to a box at a document exchange which the company is then using.

(2) In addition to subsection (1), a particular document may be served on an overseas company in a manner approved by the Court.

(3) Subsections (1) and (2) have effect notwithstanding any other Act or rule of law, but do not limit section 153 [Agreements as to service] (as applied by subsection (4)).

(4) Sections 153 [Agreements as to service], 154 [Service by delivery] and 155 [Service by post or document exchange] apply in respect of an overseas company as if

(a) every reference therein to a company were a reference to an overseas company; and

(b) every reference therein to section 152 [Methods of service of documents] were a reference to subsection (1).

266 Ceasing to carry on business in New Zealand

(1) Every overseas company registered under this Part that intends to cease to have a place of business in New Zealand must

(a) give public notice of that intention; and

(b) no earlier than three months after giving notice in accordance with paragraph (a), give notice to the Registrar in the prescribed form stating the date on which it will cease to have a place of business in New Zealand.

(2) The Registrar must remove an overseas company from the overseas register forthwith after receipt of a notice given in accordance with subsection (1)(b), or by a liquidator in accordance with the provisions of the Fifth Schedule.

(3) An application may be made to the Court for the liquidation of the assets in New Zealand of an overseas company in accordance with Part 14, subject to the modifications and exclusions set out in the Fifth Schedule.

(4) An application may be made under subsection (3) whether or not

(a) the overseas company is registered under this Part; or

(b) the overseas company has given public notice of an intention to cease to have a place of business in New Zealand; or

(c) the overseas company has given notice to the Registrar in accordance with subsection (1)(b); or

(d) it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of any other country.

267 Attorneys of overseas companies

(1) Part XII of the Property Law Act 1952 applies, with the necessary modifications, with respect to any power of attorney executed by an overseas company registered under this Part to the same extent as if the company were a person and as if the commencement of the winding up of the company were the death of a person within the meaning of the said Part XII.

(2) A declaration endorsed upon or annexed to any instrument appointing, or purporting to appoint an attorney of an overseas company, made or purporting to be made by one of the directors before a person authorised by section 11 [Declarations made outside New Zealand] to take a declaration for use in New Zealand, in the country concerned,

(a) the company is incorporated under the style mentioned in the instrument, in accordance with the law of the country in which it is so incorporated, the

name of the country being specified in the declaration; and

(b) the instrument has been executed, and the powers and authorities purporting to be conferred upon the attorney are authorised to be conferred under the constitution of the company, or in pursuance of the Act or instrument under which the company is incorporated, or by any other instrument constituting or defining the constitution of the company; and

(c) the declarant is a director or general manager of the company,

is conclusive evidence of the facts set forth therein.

PART 17
REGISTRAR OF COMPANIES

268 Registrar and Deputy Registrars of Companies

(1) There shall be appointed in accordance with the State Sector Act 1988

(a) a Registrar of Companies; and

(b) as many Deputy Registrars of Companies as may be found necessary for the purposes of this Act.

(2) Subject to the control of the Registrar of Companies, a Deputy Registrar shall have and may exercise all the powers, duties and functions of the Registrar of Companies under this Act. The fact that a Deputy Registrar exercises any such power, duty, or function is conclusive evidence of his or her authority to do so.

269 District and Assistant Registrars of Companies

(1) There shall from time to time be appointed in accordance with the State Sector Act 1988 as many District Registrars of Companies and Assistant Registrars of Companies as may be found necessary for the purposes of this Act.

(2) Subject to the control of the Registrar, every District Registrar shall have and may exercise all the powers, duties and functions of the Registrar.

(3) Subject to the control of the Registrar and of the District Registrar, every Assistant Registrar shall have and may exercise all the powers, duties and functions of the Registrar.

(4) The fact that a District Registrar or an Assistant Registrar exercises any powers or functions conferred by this Act on the Registrar is conclusive evidence of his or her authority to do so.

270 Official seals

There shall be an official seal in the custody of the Registrar, and there shall also be an official seal in the custody of each District Registrar.

271 Fees

(1) The Governor-General may by Order in Council, prescribe

(a) fees payable to the Registrar for the performance of the Registrar's functions under this Act; and

(b) penalty fees payable to the Registrar for failure to lodge a document with the Registrar within the time prescribed by this Act; and

(c) fees payable to the Registrar for the purposes of or as contemplated by this Act.

(2) Where a fee is prescribed for the performance of a function of the Registrar, the Registrar may refuse to perform the function until the fee is paid.

(3) The Registrar may waive or reduce a penalty fee prescribed pursuant to subsection (1)(b) in any particular case if the Registrar considers that in the circumstances it is proper and reasonable to do so.

272 Registers

(1) The Registrar shall cause to be kept in New Zealand

(a) a register of companies incorporated or registered in New Zealand under Part 2; and

(b) a register of overseas companies registered in New Zealand under Part 16

each of which must contain such information as is prescribed by regulations made under this Act.

(2) The New Zealand register may be divided into different parts which may be kept in different places in New Zealand.

(3) The overseas register must be kept in full at Wellington.

(4) The Registrar may, after giving notice to such persons as the Registrar considers have an interest in the transfer, direct the transfer of any part of the New Zealand register, and of any record relating to any company, from one place in New Zealand to another such place.

273 Registration of documents

(1) On receipt of a document for registration under this Act the Registrar shall

(a) mark the time and date of receipt on the document; and

(b) subject to subsection (2), forthwith register it in the New Zealand register or the overseas register, as the case may be; and

(c) forthwith give written advice of registration to the person from whom the document was received.

(2) If any document received by the Registrar for registration under this Act

(a) is not in the prescribed form, if any; or

(b) has not been duly completed; or

(c) contains any matter that is not clearly legible, the Registrar may refuse to register the document, and in that event shall forthwith request either that the document be appropriately amended or completed and submitted for registration again or that a fresh document be submitted in its place.

(3) Neither registration, nor refusal of registration, of a document by the Registrar shall affect, or create any presumption as to, the validity or invalidity of the document or the correctness or otherwise of the information contained in the document.

274 Inspection and evidence of registers

(1) Any person may, on payment of the prescribed fee and during normal business hours on any registration day, inspect the New Zealand register or overseas register and any information or document forming part of either register.

(2) Any person may, on payment of the prescribed fee, require a certificate of the incorporation or registration of any company, or a copy of or extract from any document or any part of any document forming part of the New Zealand register or the overseas register to be given or certified by the Registrar.

(3) No process for compelling the production of any document kept by the Registrar shall issue from any Court, except with the leave of that Court, and any such process if issued must have attached a statement that it is issued with the leave of the Court.

(4) A copy of or extract from any document forming part of the New Zealand register or the overseas register, certified to be a true copy under the hand and seal of the Registrar (whose official position and signature it shall not be necessary to prove), shall in all legal proceedings be admissible in evidence as of equal validity with the original document.

275 Notice by Registrar

(1) Where the Registrar is required by this Act to give notice to any person, the Registrar shall give such notice in writing in such manner as the Registrar considers appropriate in the circumstances.

(2) Without limiting subsection (1), the Registrar may give notice in writing to a person by

(a) having a notice delivered to the person; or

(b) sending a notice to the person by registered post, ordinary post or courier; or

(c) having a notice published in a newspaper or other publication in circulation in the area where the person resides.

276 Appeal from Registrar

(1) Any person who is aggrieved by any act or decision of the Registrar under this Act may appeal to the Court within 15 working days after the date of notification of the act or decision, or within such further time as the Court may allow.

(2) On hearing the appeal, the Court may approve the Registrar's act or decision or may give such directions or make such determination in the matter as the Court thinks fit.

PART 18
OFFENCES AND PENALTIES

277 Failure to comply with Act

(1) Every person who acts in contravention of or fails to comply in any respect with any of the following provisions of this Act, or any requirement imposed under any such provision, namely

(a) section 42 (2) [Board may authorise a distribution];

(b) section 50 (3) [Board may make offer to acquire shares];

(c) section 51 (2) [Special offers to acquire shares];

(d) section 58 (5) [Financial assistance];

(e) section 59 (2) [Special financial assistance];

(f) section 62 (1) [Statement of shareholder rights];

(g) section 63 (4) [Transfer of shares];

(h) section 186 (1) [Copies of documents];

(i) section 190 (2) [Manner of approving amalgamation proposal],

commits an offence and is liable on conviction to a fine not exceeding $5,000.

(2) Every person who acts in contravention of or fails to comply in any respect with any of the following provisions of this Act, or any requirement imposed under any such provisions, namely

(a) section 25 (2) [Power of Court to alter constitution];

(b) section 65 (1) [Company to maintain share register];

(c) section 66 (3) [Place of register];
(d) section 68 (1) [Directors' duty to supervise share register];
(e) section 109 (1) [Disclosure of interest];
(f) section 139 (5) [Investigation of records];
(g) section 147 [Company records to be kept];
(h) section 213 (1) [Offences, search and seizure];
(i) section 213 (2) [Offences, search and seizure];
(j) section 258 (1) [Overseas companies to register under this Act];
(k) section 258 (3) [Overseas companies to register under this Act];
(l) section 263 (1) [Alteration of constitution, name etc];
(m) section 264 (1) and (2) [Annual return of overseas company];

commits an offence and is liable on conviction to a fine not exceeding $10,000.

278 Liability of directors for failure by board or by company

(1) Where a company or the board of a company acts in contravention of or fails to comply with any of the following provisions of this Act, or any requirement imposed pursuant to any such provision, namely
(a) section 62 (1) [Statement of shareholder rights];
(b) section 63 (4) [Transfer of shares];
(c) section 186 (1) [Copies of documents],

then, without limiting the liability of any person under section 277 [Failure to comply with Act], every director of the company commits an offence, and is liable on conviction to a fine not exceeding $5,000.

(2) Where a company or the board of a company acts in contravention of or fails to comply with any of the following provisions of this Act, or any requirement imposed pursuant to any such provision, namely
(a) section 24 (3) [Alteration of constitution];
(b) section 35 (1) [Share description to be registered];
(c) section 37 (2) [Persons to whom shares may be issued];

(d) section 65 (1) [Company to maintain share register];

(e) section 66 (3) [Place of register];

(f) section 122 [Notification to Registrar of directors];

(g) section 147 [Company records to be kept];

(h) section 149 (1) [Inspection of records by directors];

(i) section 156 (1) [Accounting records to be kept];

(j) section 159 (1) [Obligations to prepare financial statements for company];

(k) section 165 (1) [Obligation to prepare group financial statements];

(l) section 182 (1) and (2) [Annual return];

(m) section 183 (1) [Company records available for public inspection];

(n) section 184 (1) [Company records available for inspection by shareholders];

(o) section 195 (2) [Powers of Court in relation to reconstruction etc];

(p) section 258 (1) [Overseas companies to register under this Act];

(q) section 258 (3) [Overseas companies to register under this Act];

(r) section 263 (1) [Alteration of constitution, name etc];

(s) section 264 (1) and (2) [Annual return of overseas company];

then, without limiting the liability of any person under section 277 [Failure to comply with Act], every director of the company commits an offence, and is liable on conviction to a fine not exceeding $10,000.

(3) Where a director is charged under subsection (1) or (2) in respect of a duty imposed on the board of a company, it is a defence to the charge to show that the board had taken reasonable and proper steps in all the circumstances to ensure that the requirements of the Act would be complied with.

(4) Where a director is charged under subsection (1) or (2) in respect of a duty imposed on a company, it is a defence to the charge to show that

(a) he or she did not know of and could not reasonably have been expected to know of the contravention or failure to comply; or

(b) he or she took all reasonable steps to ensure that the requirements of the Act would be complied with.

279 False statements

(1) Every person who, with respect to a document required by or for the purposes of this Act,

(a) makes or authorises the making of a statement therein that is false or misleading in a material particular knowing it to be false or misleading; or

(b) omits or authorises the omission therefrom of any matter knowing that the omission renders the document false or misleading in a material particular

commits an offence, and is liable on conviction to a fine not exceeding $200,000 or to imprisonment for a term not exceeding five years, or to both.

(2) Every director or employee of a company who makes or furnishes, or authorises or permits the making or furnishing of, a statement or report that relates to the affairs of the company and that is false or misleading in a material particular, to

(a) a director, employee, auditor, shareholder, debenture holder, or trustee for debenture holders of the company; or

(b) a liquidator, committee of inspection, or receiver or manager of any property of the company; or

(c) where the company is a subsidiary, a director, employee, or auditor of the holding company

knowing it to be false or misleading, commits an offence, and is liable on conviction to a fine not exceeding $200,000 or to imprisonment for a term not exceeding five years, or to both.

(3) Where a person at a meeting votes in favour of the making of a statement the person shall, for the purposes of this section, be deemed to have authorised the making of the statement.

280 Fraudulent destruction of property

Every director, employee, or shareholder of a company who

(a) fraudulently takes or applies property of the company for his or her own use or benefit, or for any use or purpose other than the use or purpose of the company; or

(b) fraudulently conceals or destroys any property of the company

commits an offence, and is liable on conviction to a fine not exceeding $200,000 or to imprisonment for a term not exceeding five years, or to both.

281 Falsification of records

(1) Every director, employee, or shareholder of a company who, with intent to defraud or deceive any person,

(a) destroys, parts with, mutilates, alters, or falsifies, or is a party to the destruction, mutilation, alteration, or falsification of any register, accounting records, book, paper, or other document belonging or relating to the company; or

(b) makes, or is a party to the making of, a false entry in any register, accounting records, book, paper, or other document belonging or relating to the company

commits an offence, and is liable on conviction to a fine not exceeding $200,000 or to imprisonment for a term not exceeding five years, or to both.

(2) Where any mechanical, electronic, or other device is used in connection with the keeping or preparation of any register, accounting or other records, index, book, paper, or other document for the purposes of a company or this Act, every person who

(a) records or stores in the device, or makes available to any person from the device, any matter that he or she knows to be false or misleading in a material particular; or

(b) with intent to falsify or render misleading any such register, accounting or other records, index, book, paper, or other document, destroys, removes, or falsifies any matter recorded or stored in the device,

or fails or omits to record or store in the device any matter

commits an offence, and is liable on conviction to a fine not exceeding $200,000, or to imprisonment for a term not exceeding five years, or to both.

282 Disqualification of director

(1) Where

(a) it appears that a person has been guilty of any offence for which the person is liable (whether convicted or not) under this Part; or

(b) it appears that a person has, while a director of a company and whether convicted or not

(i) persistently failed to comply with this Act, the Companies Act 1955 or the Securities Act 1978; or

(ii) been guilty of fraud in relation to the company or of any breach of duty to the company or any shareholder or third party; or

(iii) acted in a reckless or incompetent manner in the performance of his or her duties as director; or

(c) any person was a director of a company which went into liquidation (whether while that person was a director or subsequently) and was unable to pay its debts at that time; and was also the director of another unrelated company which went into liquidation (whether while that person was a director or subsequently) within five years of the date on which the first-mentioned company went into liquidation; and it appears that that person's conduct as director of either of the companies makes him or her unfit to be a director of a company; or

(d) it appears that a person has become of unsound mind;

the Court may make an order that the person shall not, without the leave of the Court, be a director of any company for such period not exceeding 10 years as may be specified in the order.

(2) A person intending to apply for an order under this section must give not less than 10 days' notice of that intention to the person against whom the order is sought, and on the hearing of the application the last-mentioned person may appear and give evidence or call witnesses.

(3) An application for an order under this section may be made by the Registrar, the Official Assignee, or by the liquidator of the company, or by any person who is or has been a shareholder or creditor of the company; and on the hearing of

(a) any application for an order under this section by the Registrar or the Official Assignee or the liquidator; or

(b) of any application for leave under this section by a person against whom an order has been made on the application of the Registrar, the Official Assignee, or the liquidator;

the Registrar, Official Assignee, or liquidator shall appear and call the attention of the Court to any matters which seem to him or her to be relevant, and may himself or herself give evidence or call witnesses.

(4) An order may be made under this section notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the order is to be made.

(5) If any person acts in contravention of an order made under this section, that person shall, in respect of each offence, be liable on conviction to imprisonment for a term not exceeding 5 years, or to a fine not exceeding $200,000, or to both.

PART 19
MISCELLANEOUS

283 Information for creditors

(1) Any notice, statement, report, accounts or other document to be sent to a creditor may be

(a) delivered by hand to the creditor, or, if the creditor is a company, delivered in accordance with section

152 (a), (b) or (c) [Methods of service of documents]; or

(b) posted or delivered to the last known address of the creditor or if the creditor is a company to the company's address for service, or delivered to a box at a document exchange which the creditor is then using; or

(c) sent by telex, facsimile machine, or other similar means of communication to the number of the creditor.

(2) For the purposes of subsection (1)

(a) any document posted to a creditor, or delivered to a document exchange, shall be deemed to be received by the creditor five working days (or such shorter period as the Court may determine in any particular case) after it is so posted or delivered;

(b) any document sent by telex, facsimile machine, or other similar means of communication shall be deemed to be received by the creditor on the working day following the day on which it was sent.

(3) In proving the sending of any document to a creditor by post or delivery to a document exchange for the purposes of this section, it shall be sufficient to prove that the document was properly addressed to the creditor, that all postal or delivery charges were paid, and that the document was posted or delivered to the document exchange.

(4) If documents sent to a creditor's last known address, or if the creditor is a company, to the company's address for service, are returned unclaimed three consecutive times, the liquidator need not send any further documents to the creditor until the creditor notifies the company of its new address.

284 Prescribed forms

The Governor-General may, by regulations made under this Act,

(a) prescribe forms for the purposes of this Act; and

(b) require the inclusion in or attachment to any such form, when used for the purposes of this Act, of any information or document; and

(c) require the signing of any such form by specified persons.

285 Regulations

The Governor-General may, by Order in Council, make regulations providing for such matters, not inconsistent with this Act, as are contemplated by or necessary for giving full effect to this Act and for its due administration.

FIRST SCHEDULE

PROCEEDINGS AT MEETINGS OF SHAREHOLDERS

1 Chairman

(1) If the directors have elected a chairman of the board, and the chairman of the board is present at a meeting of shareholders, he or she shall chair the meeting.

(2) If no chairman of the board has been elected or if, at any meeting of shareholders, the chairman of the board is not present within five minutes of the time appointed for the commencement of the meeting, the shareholders present may choose one of their number to be chairman of the meeting.

2 List of shareholders entitled to notice of meetings

(1) A company must prepare a list of shareholders entitled to receive notice of a meeting, arranged in alphabetical order and showing the number of shares held by each shareholder,

(a) if a date has been fixed under section 95(2) [Determination of shareholders entitled to distributions, attend meetings etc], not later than ten working days after that date; or

(b) if no such date has been fixed,

(i) at the close of business on the day immediately preceding the day on which the notice is given; or

(ii) where no notice is given, on the day on which the meeting is held.

(2) A person named in a list prepared under paragraph (1) is entitled to attend the meeting and to vote the shares shown opposite his or her name in person or by proxy or by postal vote, except to the extent that

(a) that person has, since the date on which shareholders entitled to receive notice of the meeting were determined, transferred the ownership of any of his or her shares; and

(b) the transferee of those shares has been registered as the holder of those shares and demands not later than ten working days before the meeting that his or her name be included in the list before the meeting.

(3) A shareholder may examine the list of shareholders during normal business hours at the registered office of the company.

3 Notice of meetings

(1) Written notice of the time and place of any meeting of shareholders must be given to every shareholder entitled to receive notice of the meeting and to every director and any auditor of the company not less than ten working days before the meeting.

(2) The notice must state

(a) the nature of the business to be transacted at the meeting in sufficient detail to enable a shareholder to form a reasoned judgment in relation to it; and

(b) the text of any resolution to be submitted to the meeting.

(3) Any irregularity in notice for a meeting is waived if all the shareholders entitled to attend and vote at the meeting attend the meeting without protest as to the irregularity, or if all such shareholders agree to the waiver.

(4) If a meeting of shareholders is adjourned for less than 30 days it is not necessary to give notice of the time and place of the adjourned meeting other than by announcement at the meeting which is adjourned.

4 Methods of holding meetings

Subject to the constitution, a meeting of shareholders may be held either

(a) by a number of shareholders, who constitute a quorum, being assembled together at the place, date and time appointed for the meeting; or

(b) by means of audio, or audio and visual, communication by which all shareholders participating, being a quorum, can simultaneously hear each other throughout the meeting.

5 Quorum

(1) A quorum for a meeting of shareholders is present if shareholders or their proxies are present or have cast postal votes who are between them able to exercise a majority of the votes to be cast on the business to be transacted by the meeting.

(2) No business may be transacted at a meeting of shareholders if a quorum is not present.

6 Voting

(1) Unless a poll is demanded, voting at a meeting of shareholders is to be by show of hands.

(2) A declaration by the chairman of the meeting that a resolution is carried by the requisite majority is conclusive evidence of that fact unless a poll is demanded by any shareholder entitled to vote on the resolution.

(3) A poll may be demanded by any shareholder entitled to vote on the resolution either before or after the vote is taken on a resolution.

(4) If a poll is taken, votes must be counted according to the votes attached to the shares of each shareholder present and voting.

(5) The chairman of a shareholders' meeting is not entitled to a casting vote.

7 Proxies

(1) A shareholder may exercise the right to vote either by being present in person or by proxy.

(2) A proxy for any shareholder is entitled to attend and be heard at a meeting of shareholders as if the proxy were the shareholder.

(3) A proxy must be appointed by notice in writing signed by the shareholder and the notice must state whether the appointment is for a particular meeting or a specified term not exceeding 12 months.

(4) No proxy is effective in respect of any meeting unless a copy of the notice of appointment is produced before the start of the meeting.

8 Postal votes

(1) Subject to the constitution of a company, a shareholder may exercise the right to vote at a meeting by casting a postal vote in accordance with the provisions of this clause.

(2) The notice of any meeting at which shareholders are entitled to cast a postal vote must state the name of the person authorised by the board to receive and count postal votes at that meeting.

(3) If no person has been authorised to receive and count postal votes at a meeting, or if no person is named as being so authorised in the notice of the meeting, every director is deemed to be so authorised.

(4) A shareholder may cast a postal vote on all or any of the matters to be voted on at the meeting by sending a notice of the manner in which his or her shares are to be voted on a matter to a person authorised to receive and count postal votes at that meeting, which must reach that person not less than 24 hours before the start of the meeting.

(5) It is the duty of a person authorised to receive and count postal votes at a meeting

(a) to collect together all postal votes received by him or her, or by any other authorised person, or by the company;

(b) in respect of each resolution to be voted on at the meeting, to count

(i) the number of shareholders voting in favour of the resolution and the number of votes cast by each shareholder in favour of the resolution; and

(ii) the number of shareholders voting against the resolution, and the number of votes cast by each shareholder against the resolution;

(c) to sign a certificate that he or she has carried out the duties set out in subparagraphs (a) and (b) and which sets out the results of the counts required by subparagraph (b);

(d) to ensure that the certificate required by subparagraph (c) is presented to the chairman of the meeting.

(6) If a vote is taken at a meeting on any resolution on which postal votes have been cast, the chairman of the meeting must

(a) on any vote by show of hands, count each shareholder who has submitted a postal vote for or against the resolution;

(b) on any poll, count the votes cast by each shareholder who has submitted a postal vote for or against the resolution.

(7) The chairman of a meeting must call for a poll on any resolution on which he or she holds sufficient postal votes that he or she believes that if a poll is taken the result may differ from that obtained on a show of hands.

(8) The chairman of a meeting must ensure that any certificate of postal votes held by him or her is annexed to the minutes of the meeting.

9 Minutes

(1) The board must ensure that full and accurate minutes are kept of all proceedings at all meetings of shareholders.

(2) Minutes which have been signed correct by the chairman of the meeting are prima facie evidence of the proceedings.

10 Shareholder proposals

(1) A shareholder may give written notice to the board of any matter the shareholder proposes to raise for discussion or resolution at the next meeting of shareholders at which the shareholder is entitled to vote.

(2) The written notice given under paragraph (1) must be received by the board no less than five working days before the last day on which notice of the relevant meeting of shareholders is required to be given by the board.

(3) The board must give notice of any shareholder proposal and the text of any proposed resolution received by it under paragraph (1) in the notice of the meeting given to shareholders, and, if the directors intend that shareholders

may vote on that proposal by proxy or by postal vote, they must give the proposing shareholder the right to include in the notice of meeting a statement of not more than 1,000 words prepared by the proposing shareholder in support of the proposal, together with the name and address of the proposing shareholder.

(4) The board is not required to include in the notice of meeting any statement prepared by a shareholder which the directors consider to be defamatory, frivolous or vexatious.

11 Corporations may act by representatives

A body corporate which is a shareholder may appoint a representative to attend a meeting of shareholders on its behalf in the same manner as that in which it could appoint a proxy.

12 Votes of joint holders

Where two or more persons are registered as the holder of a share, the vote of the person named first in the share register and voting on any matter shall be accepted to the exclusion of the votes of the other joint holders.

13 Loss of voting right if calls unpaid

Subject to the constitution of a company, where any sum is due to a company in respect of a share and has not been paid, that share may not be voted at any shareholders' meeting other than a meeting of an interest group.

14 Other proceedings

Except as provided above, and subject to the constitution of a company, a meeting of shareholders may regulate its own procedure.

PROCEEDINGS OF THE BOARD OF A COMPANY

1 Chairman

(1) The directors may elect one of their number as chairman of the board and determine the period for which the chairman is to hold office.

(2) If no such chairman is elected, or if at any meeting of the board the chairman is not present within five minutes after the time appointed for the commencement of the meeting, the directors present may choose one of their number to be chairman of the meeting.

2 Notice of meeting

(1) Any director or, if requested by a director to do so, any employee of the company may convene a meeting of the board by giving notice in accordance with this clause.

(2) Not less than two days' notice of a meeting of the board shall be given to every director who is in New Zealand, and the notice shall include the date, time and place of the meeting and the matters to be discussed.

(3) Any irregularity in notice for a meeting shall be waived if all directors attend the meeting without protest as to the irregularity or if all directors agree to the waiver.

3 Methods of holding meetings

A meeting of the board may be held either

(a) by a number of the directors, not less than the quorum, being assembled together at the place, date and time appointed for the meeting; or

(b) by means of audio, or audio and visual, communication by which all directors participating, being a number not less than the quorum, can simultaneously hear each other throughout the meeting.

4 Quorum

A quorum for a meeting of the board shall be a majority of the directors.

5 Voting

(1) Every director shall have one vote.

(2) The chairman of the board shall not have a casting vote.

(3) A resolution of the board shall be passed if it is agreed to by all directors present without dissent, or if a majority of the votes cast on it are in favour of it.

(4) A director present at a meeting of the board is presumed to have agreed to, and to have voted in favour of, a resolution of the board unless he or she expressly dissents from or votes against the resolution at the meeting.

6 Minutes

The board shall ensure that full and accurate minutes are kept of all proceedings at meetings of the board.

7 Unanimous resolution

A resolution in writing, signed or assented to by all directors then entitled to receive notice of a board meeting, shall be as valid and effectual as if it had been passed at a meeting of the board duly convened and held. Any such resolution may consist of several documents (including facsimile or other similar means of communication) in like form each signed or assented to by one or more directors. A copy of any such resolution shall be entered in the minute book of board proceedings.

8 Other proceedings

Except as stated above, the board may meet for the dispatch of business, adjourn, and otherwise regulate its meetings as it thinks fit.

THIRD SCHEDULE

PROCEEDINGS AT MEETINGS OF CREDITORS

1 Methods of holding meetings

A meeting of creditors may be held

(a) by assembling together those creditors entitled to take part and who choose to attend at the place, date and time appointed for the meeting; or

(b) by means of audio, or audio and visual communication by which all creditors participating can simultaneously hear each other throughout the meeting; or

(c) by conducting a postal ballot in accordance with clause 5 of those creditors entitled to take part.

2 Notice of meeting

(1) Written notice of

(a) the time and place of every meeting to be held under clause 1 (a); or

(b) the time and method of communication for every meeting to be held under clause 1 (b); and

(c) the time and address for the return of voting papers for every meeting to be held under clause 1 (a) or (b) or (c)

must be given to every creditor entitled to attend the meeting, and to any liquidator not less than ten working days before the meeting.

(2) The notice must:

(a) state the nature of the business to be transacted at the meeting in sufficient detail to enable a creditor to form a reasoned judgment in relation to it; and

(b) set out the text of any resolution to be submitted to the meeting;

(c) include a voting paper in respect of each such resolution and voting and mailing instructions.

(3) Any irregularity in a notice for a meeting shall not invalidate anything done by that meeting if it is not material or all the creditors entitled to attend and vote at

the meeting attend the meeting without protest as to the irregularity or if all such creditors agree to waive the irregularity.

(4) If a meeting of creditors under clause 1 (a) or (b) is adjourned for less than thirty days, it is not necessary to give notice of the time and place of the adjourned meeting other than by announcement at the meeting which is adjourned.

3 Chair

(1) If a liquidator has been appointed and is present, he or she shall chair a meeting held in accordance with clause 1 (a) or (b).

(2) In any case where there is no liquidator or the liquidator is not present, the creditors participating shall choose one of their number to chair the meeting.

(3) The person convening a meeting under clause 1 (c) shall do any necessary thing that would otherwise be done by the person chairing a meeting.

4 Voting

(1) At any meeting,

(a) each creditor is entitled to cast a number of votes proportionate to the value which the amount of the debt owing to that creditor bears to the aggregate of the debts owning to all creditors or, if there is more than one class of creditors, to the aggregate of the debts owning to all creditors of the class to which that creditor belongs;

(b) a resolution is adopted if approved by a majority of the votes cast, unless in the particular case a greater majority is required by this Act;

(c) A creditor chairing the meeting does not have a casting vote.

5 Postal votes

(1) Any creditor entitled to vote at a meeting of creditors held in accordance with clause 1 (a) or (b) or (c) may exercise

the right to vote by casting a postal vote in respect of any matter to be decided at that meeting.

(2) The notice of any meeting must state the name of the person authorised to receive and count postal votes in respect of that meeting.

(3) If no person has been authorised to receive and count postal votes in respect of a meeting, or if no person is named as being so authorised in the notice of the meeting, every director, or if the company is in liquidation, the liquidator is deemed to be so authorised.

(4) A creditor may cast a postal vote on all or any of the matters to be voted on at the meeting by sending a marked voting paper to a person authorised to receive and count postal votes in respect of that meeting, so as to reach that person not later than 24 hours before the start of the meeting or, if the meeting is held under clause 1 (c), not later than the date named for the return of the voting paper.

(5) It is the duty of a person authorised to receive and count postal votes in respect of a meeting

(a) to collect together all postal votes received by him or her, or by any other authorised person;

(b) in respect of each resolution to be voted on, to count

(i) the number of creditors voting in favour of the resolution, and the number of votes cast by each creditor in favour of the resolution; and

(ii) the number of creditors voting against the resolution, and the number of votes cast by each creditor against the resolution;

(c) to sign a certificate

(i) that he or she has carried out the duties set out in paragraphs (a) and (b); and

(ii) stating the results of the counts required by paragraph (b);

(d) to ensure that the certificate required by paragraph (c) is presented to the person chairing or convening the meeting.

(6) If a vote is taken at a meeting held under clause 1 (a) or (b) on any resolution on which postal votes have been cast, the

person chairing the meeting must count the votes cast by each creditor who has sent in a voting paper duly marked as for or against the resolution.

(7) Any certificate given under subclause (5) in relation to the postal votes cast in respect of any meeting of creditors must be annexed to the minutes of the meeting.

6 Minutes

(1) The person chairing a meeting of creditors, or in the case of a meeting held under clause 1 (c), the person convening the meeting, must ensure that full and accurate minutes are kept of all proceedings.

(2) Minutes which have been signed correct by the person chairing or convening the meeting are prima facie evidence of the proceedings.

7 Corporations may act by representatives

A body corporate which is a creditor may appoint a representative to attend a meeting of creditors on its behalf.

8 Other proceedings

Except as provided above, a meeting of creditors may regulate its own procedure.

FOURTH SCHEDULE

PROCEEDINGS AT MEETINGS OF COMMITTEES OF INSPECTION

1 Frequency of meetings

The committee shall meet at such times as it from time to time appoints, and the liquidator or any member of the committee may also call a meeting of the committee as and when necessary.

2 Majorities

The committee may act by a majority of its members present at a meeting, but may not act unless a majority of the committee are present.

3 Resignation

A member of the committee may resign by notice in writing signed by him or her and delivered to the liquidator.

4 Office becoming vacant

If a member of the committee becomes bankrupt, or compounds or arranges with his or her creditors, or is absent from 3 consecutive meetings of the committee without the leave of those members who together with that member represent the creditors or shareholders, as the case may be, the office of that member shall thereupon become vacant.

5 Removal of a member

A member of the committee may be removed by a resolution carried at a meeting of creditors, if the member represents creditors, or of shareholders, if the member represents shareholders, of which five working days' notice has been given, stating the object of the meeting.

6 Vacancy filled

A vacancy in the committee may be filled by the appointment by the committee of the same or another creditor or shareholder, as the case may be, (or of a person holding a general power of attorney from, or being an authorised director

of, a company which is a creditor or shareholder, as the case may be).

7 Committee with vacancy may act

The continuing members of the committee, if not less than 2, may act notwithstanding any vacancy in the committee.

FIFTH SCHEDULE

LIQUIDATION OF ASSETS OF OVERSEAS COMPANIES

1 Application of Part 14

Part 14 applies to the liquidation of the assets in New Zealand of an overseas company, with the following modifications and exclusions:

(a) all references to assets are to be taken as references to assets in New Zealand;

(b) all references to a company are to be taken as references to an overseas company;

(c) all references to removal from the New Zealand register are to be taken as references to ceasing to carry on business in New Zealand;

(d) the following provisions do not apply to such a liquidation:

(i) section 205(1)(d) and (e) [Effect of commencement of liquidation];

(ii) section 210 [Power to make calls];

(iii) sections 243–250, relating to the Insolvency (Assetless Companies) Fund;

(e) section 205(1)(b) [Effect of commencement of liquidation] does not affect the tenure of directors of an overseas company in any way, but the overseas company and its directors shall cease to have any powers, functions or duties in respect of the company's assets in New Zealand, other than those required or permitted to be exercised by Part 14;

(f) section 206 [Completion of liquidation] applies to such a liquidation, but instead of making the statement required by paragraph (c), the liquidator shall state that the company has ceased to carry on business in New Zealand and is ready to be removed from the overseas register.

2 Rights of action not affected

Nothing in this Act shall be taken to exclude the right of a creditor of an overseas company in respect of the assets of which a liquidator has been appointed

(a) to bring any proceeding outside New Zealand against the overseas company in respect of any debt not claimed in the liquidation, or any balance of a debt remaining unpaid after the completion of a liquidation; or

(b) to bring an action in New Zealand in respect of any balance of a debt remaining unpaid after the completion of a liquidation.

VI
Receiverships

746 This chapter contains a draft Property Law Amendment Act which, if enacted, would insert a complete new Part VIIA (sections 104AB to 104AV), dealing with receivers and receiverships, in the Property Law Act 1952 (hereinafter referred to as "the principal Act").

747 A "receiver" may generally be described as a person appointed by another (normally a creditor) or by the Court whose first function is to preserve the property of a third party (usually a debtor). In many (if not most) cases the receiver will also have a power of sale which is to be exercised in the interests of the person by whom the receiver was appointed. In contemporary usage, the term "receiver" is often used to describe a "receiver/manager" with power to manage, as well as to hold or sell the property in question.

748 At the present time, receiverships and receivers are most often associated with the assumption of management of a company under the terms of a debenture or similar security when the secured creditor has grounds for believing that the company is at risk of failure. Much of modern business would be severely hampered, if not rendered impossible, were secured creditors denied the ability to appoint receivers as a means of enforcing their securities.

749 Part VII of the Companies Act 1955 (sections 342 to 352) relates to receivers and managers of companies. Some residual provisions as to debentures are located in Part III of the Act (sections 97 to 101). Part VII deals with a number of matters, including

- specification of qualifications for appointment of receivers (for example, exclusion of bodies corporate)
- conferral of powers on receivers (for example, to make calls on unpaid share capital)
- imposition of obligations on receivers (for example, to obtain the best price for assets sold)
- publication of the fact and progress of the receivership (for example, company documents must refer to the receivership)
- sorting out of problems where liquidations and receiverships overlap (for example, the Court may determine receivership on a liquidator's application)
- provision of assistance for receivers (for example, giving directions) by the Court
- determination of disputes over remuneration
- provision of sanctions to enforce the penalties of the Part (generally by imposing monetary penalties).

750 The work of the Law Commission and its advisory committee on personal property securities, which resulted in Report No. 8 (*A Personal Property Securities Act for New Zealand*), emphasises that no useful distinction can be drawn between securities granted by companies and those granted by sole traders, partnerships or other entities. That being so, the ability of a creditor effectively to appoint a receiver is more properly located in a general property statute than in the Companies Act. For this purpose, the obvious statute is the Property Law Act 1952 which already deals extensively with aspects of mortgages. The proposed new Companies Act therefore contains no provisions related to receivership.

751 The proposed new Part VIIA of the principal Act is set out later in this Chapter. This new Part would apply to receivers appointed under securities granted by both incorporated and unincorporated persons as well as to receivers appointed under other kinds of instrument or by the Court.

752 The proposals do not amount to a complete codification of the relevant law. Such a code would require wider inquiry (including close examination of the law relating to mortgagees in possession) than has been possible and might justify a separate statute. In developing the present proposals the Commission has addressed those areas where substantive reform is clearly justified or the law is unclear or inaccessible.

753 The central features of the proposals are

- application of the statutory rules to a far wider range of receiverships (involving property owned by bodies corporate, individuals or firms)
- codification of the primary and secondary duties of care owed by a receiver
- limitation of the appointment of receivers to independent and experienced insolvency practitioners
- the introduction of civil compliance remedies as a replacement for offences as the main means of enforcement
- provision of a different means of distinguishing between the receivership remedy and that of entry into possession by a mortgagee.

754 It should be noted that sections 97 to 100 of the 1955 Act are miscellaneous provisions relating to tradeable debentures and the Law Commission's proposals would repeal and not replace these. If required, such provisions should be relocated in the Securities Act 1978.

755 In this area, as in liquidation, the Law Commission has drawn on the insolvency law reform work of the Australian Law Reform Commission. We also acknowledge with appreciation the valuable assistance of Peter Blanchard of Auckland, author of a standard text on company receivers, and a member of the Law Commission's advisory committee on personal property securities.

756 *Section 2* of the draft Amendment Act inserts section 91A in the principal Act. *Section 91A,* in conjunction with the definition of "receiver" in section 104AB, applies a limited number of the provisions of the new Part to mortgagees in possession.

757 *Section 3* inserts the new Part VIIA (which makes up the rest of the draft amending Act) in the principal Act.

758 *Section 104AB* sets out the additional definitions required for Part VIIA. It should, however, be noted that definitions from section 2 of the principal Act are also relevant (for example, "instrument", "mortgage" and "property"). The new definitions are largely self-explanatory but the following points should be noted

- "director"—this extended definition is necessary to ensure that the responsible officers of all bodies corporate are subject to the obligations imposed by section 104AI
- "grantor"—this term will ordinarily refer to the person who has granted to a third party (usually a secured creditor) the power to appoint a receiver but extends to cover the owner of the property placed in the hands of a receiver by a Court, or pursuant to a power contained in an Act or another instrument
- "receiver"—the definition extends to catch managers and receiver/managers, and applies whether the appointment is made under a security agreement, some other form of contract or deed, pursuant to an Act (see definition of "instrument" in section 2 of the principal Act) or by a Court.

A receiver without a power of sale falls within the definition. The definition of "receiver" excludes mortgagees or their agents. Under section 352 of the Companies Act 1955, mortgagees (or their agents) can, in some circumstances, be subject to the receivership provisions as if they were a receiver. By adopting that approach, the Companies Act 1955 renders the law less accessible. Part VII of the Property Law Act contains provisions regarding mortgagees in possession (for example, section 91) and yet makes no reference to the fact that in some circumstances mortgagees in possession are also subject to the provisions of Part VII of the Companies Act 1955. Overall, accessibility will be improved by the insertion of section 91A in Part VII of the principal Act thereby highlighting the existence of other provisions relevant to mortgagees in possession.

759 For drafting convenience, section 104AB(2) defines the requirements for the giving of public notice.

760 *Section 104AC* determines the extent to which the new provisions would apply to receivers appointed before the coming into force of the draft Act and to documents executed prior to that time.

761 As in the case of a liquidator, it is important that receivers be competent and independent of the person in respect of whose property they are appointed. *Section 104AD* therefore adopts the system of experienced insolvency practitioners described in Chapter 4 in the context of liquidators. A sole receiver, and at least one of a group of joint receivers, must be an experienced insolvency practitioner. Subsection (3) of this section renders certain types of person ineligible for appointment as receivers. These exclusions apply whether or not the person is otherwise an experienced insolvency practitioner.

762 In special circumstances, the Court has power to permit the appointment of a person otherwise excluded. There may be cases where, because of particular expertise or knowledge, an interested or otherwise disqualified person might be the best person to act as a receiver.

763 There is presently no statutory provision which expressly recognises the ability of any person (including a company) to grant a power to appoint a third party to act as the receiver of their property. This power is implicit in the Companies Act 1955 and in the Industrial and Provident Societies Amendment Act 1952. *Section 104AE* removes any doubt as to whether individuals and partnerships have the same power. The exercise of the power of appointment (in the case of a mortgage) is limited to the point at which the mortgagee would otherwise have been entitled to commence to exercise a power of sale.

764 Where section 92 applies, there can be no entitlement to sell or enter into possession of property until the mortgagee has complied with section 92(1). Section 104AE(3) provides that no such compliance is required prior to the appointment of a receiver.

765 In those security agreements which contain a power to appoint a receiver, it is almost universal to provide that a receiver, when appointed, is to act as the agent of the grantor. A person purportedly appointed by a mortgagee as a receiver would otherwise, prima facie, be the agent of the mortgagee and the mortgagee would be exposed (through the agent) to the duties imposed upon mortgagees in possession. It is not intended that mortgagees be denied the option of entering into possession of property through the agency of a third party. However, in such a case the law relating to mortgagees in possession would apply and Part VIIA would only apply to the extent set out in the proposed section 91A. Section 104AE(4) provides the default provision where a document containing a power to appoint a receiver is silent on the question of agency. It is to be noted that similar provisions have, for many years, existed in the statute law of jurisdictions such as the United Kingdom and some Australian states.

766 *Section 104AF* reiterates what is to be found in many security agreements. However, agreements have sometimes been less than adequate to deal with the power to appoint substitutes or with the issue of whether or not joint receivers have the ability to act jointly and severally. The section is designed to reduce the grounds upon which the appointment or acts of receivers can be challenged on technicalities alone. While the section will effectively override the provisions of some security agreements, subsection (2) permits subsection (1) to be overriden by an order of the Court or express provision in the written document of appointment.

767 *Section 104AG* rewrites the rule presently found in section 346 of the 1955 Act and extends its application to all receiverships. The obligation to give notice of appointment is imposed upon the receiver. In many cases the receiver already prepares and gives the requisite notice. By imposing the duty on the receiver, it becomes a matter which can be policed through the compliance procedures provided in the proposals.

768 *Section 104AH* has no equivalent in the 1955 Act. Because most receivers are appointed under a contract, statute should not interfere more than necessary. It is, however, appropriate that some protection be given against the possibility that

a receiver's resignation will jeopardise other parties interested in the property in receivership. For this reason, prior notice of the intention to resign is required, so as to give an opportunity for a successor to be appointed in time to achieve a smooth transition.

769 *Section 104AI* is designed to ensure that the grantor does not frustrate the receiver in carrying on the receivership. It is essential that the receiver promptly receives all necessary information and assistance.

770 The powers of a receiver are set out in *section 104AJ*. The provision is drafted widely to cover the normal requirements of receiverships. The statutory powers will apply unless added to (or excluded) by the Court or by the instrument under which the appointment is made. The written document of appointment could, in relevant cases, cut back the powers otherwise available under the instrument giving rise to the appointment.

771 Subsections (7) and (8) of section 104AJ are new and intended to facilitate the sale of assets where other mortgagees attempt to obstruct the sale. While this imposes a gloss upon the law of priority of mortgages, the interests of prior mortgagees are protected by the fact that the power can only be exercised if the Court is satisfied that the interests of the mortgagee are sufficiently protected in terms of subsection (8). In reality, a receiver appointed by a second or subsequent mortgagee is closely supervised by the first mortgagee (or indeed, in some cases, receivers are appointed to act jointly for both mortgagees) and use of this provision should be rare.

772 A receiver's primary responsibility is to protect the interests of the person by whom the receiver is effectively (if not always technically) appointed. It would entirely defeat the purpose of receiverships were this prime duty removed. But if a receiver exercises his or her powers purely in the interests of that party, unnecessary loss may be suffered by the grantor or other persons interested in the property in receivership. However, in many cases, the receiver will be able to both serve the interests of the appointor and take into account the interest of those other parties. Section 345B of the Companies Act 1955 is one example of attempts to ensure that a receiver exercises receivership powers in the manner least detrimental to other

parties. Case law has also imposed secondary duties on receivers designed to achieve similar purposes.

773 *Section 104AK* codifies both these primary and secondary duties. This removes any uncertainty there might otherwise have been as to the extent of a receiver's duties to persons other than the appointor.

774 *Section 104AL* lists the other duties traditionally imposed on receivers whether by statute (for example, see sections 348 and 349 of the Companies Act 1955) or the common law. It will be noted that section 104AL(5) amends the law with regard to statements of position under the 1955 Act. It rationalises the present law by requiring the receiver to prepare the statement of position on the basis of information supplied by the grantor or, in the case of a body corporate, by the responsible officers. This provision should be read in conjunction with section 104AI. Not only will this regime enable statements to be prepared more promptly but it also highlights, for the benefit of other creditors, any lack of co-operation of the grantor or its responsible officers.

775 *Section 104AM* restructures the rules presently found in section 101 of the 1955 Act in order to fit the structure of the proposed Personal Property Securities Act. It is not intended to widen the pool of assets from which preferential claims must be paid beyond the limits defined by section 101, pending reconsideration of this topic in a general insolvency review. However, there may be relatively rare circumstances in which the limits are not precisely the same under the two rules.

776 There is, at present, a degree of confusion as to the effect of liquidation upon a receiver. *Section 104AN* confirms that only the liquidator can act as the agent of a company in liquidation. The Court and the liquidator are empowered to approve the receiver continuing to act as agent of the company. The position of receivers and individual bankruptcy is dealt with likewise.

777 *Section 104AO* addresses the matter of a receiver's personal liability in respect of contracts entered into by the receiver and two classes of pre-existing contract with which a receiver is commonly required to deal. The rules governing

liability for wages, salary and rent give the receiver a period within which to assess the benefits of retention of the employee or the premises respectively. If the contracts are permitted to continue, the receiver becomes personally liable under them (although entitled to indemnity from the property in receivership) during the period of the receivership.

778 *Section 104AP* re-enacts, and extends the application of, section 345A of the 1955 Act but introduces the requirement that the action giving rise to the liability be fair and reasonable.

779 *Section 104AQ* removes any doubt over access to the court in respect of receivers appointed under instruments. Although giving wide standing to various interested parties to apply under subsection (2), an application for directions may only be made under subsection (1) by the receiver. Section 104 AQ (1) (c) addresses an important issue canvassed by the Australian Law Reform Commission in its 1988 final report on insolvency law.

780 *Section 104AR* re-enacts section 346A of the 1955 Act but specifies the grounds upon which the Court may order a receiver to cease to act.

781 *Section 104AS* is central to the enforcement regime of the draft Act. The Commission is of the view that penalties are, in this context, ineffective in securing proper compliance with the duties of a receiver. Adoption of the concept of experienced insolvency practitioners enables the creation of effective incentives in the ultimate form of prohibition orders. If a receiver fails in performance of a duty, he or she may be ordered to comply and evidence of two such orders would, in the absence of special reasons, result in a prohibition order.

782 All proceedings commenced under section 104AS must be filed on a new public register to be kept by the Official Assignee for New Zealand. That register may provide evidence of repeated non-compliance regardless of whether or not compliance orders are made. Such evidence could form the basis of further enquiry leading ultimately to a prohibition order.

783 *Section 104AT* is further recognition of the need to protect grantors and their creditors against the effects of an interruption in a receivership.

784 Zealous use of a monopoly position can give an effective preference to an otherwise unsecured creditor. Such action may jeopardise not only the secured creditor but the prospects of less fortunate unsecured creditors. The concern of insolvency practitioners about this situation was made known to the Law Commission on many occasions.

785 *Section 104AU* proscribes this abuse by certain suppliers of their monopoly and is based on the Australian Law Reform Commission proposals. There are numerous other classes of monopoly supplier not presently caught by the provision. It is, however, more difficult to determine which of those other classes should be caught and which should not. The Commission considers that other classes should be brought within the provision by Order in Council if circumstances prove such action necessary. Parallel provisions appear in the liquidation part of the (draft) Companies Act.

786 The text of the proposed Property Law Amendment Act follows.

(DRAFT) PROPERTY LAW AMENDMENT ACT ( )

Contents

(DRAFT) PROPERTY LAW AMENDMENT ACT ( )

(Enacting words)

An Act to amend the Property Law Act 1952

1 Short title and commencement

(1) This Act may be cited as the Property Law Amendment Act [ ], and forms part of the Property Law Act 1952 (referred to as the principal Act).

(2) This Act comes into force on [ ].

2 Duties of mortgagee

The principal Act is amended by inserting after section 91 the following section:

91A Other duties of a mortgagee in possession

The provisions of sections 104AG [Notice of appointment], 104AI [Obligations of grantor when receiver appointed] 104AL [Other duties of receiver] and

104AR [Court may determine or limit receivership] apply to:

(a) a mortgagee in possession (whether personally or by agent) of any mortgaged property; and

(b) any mortgagee who (whether personally or by agent) is in receipt of the income from any mortgaged property:

as if that person were a receiver within the meaning of section 104AB [Interpretation].

3 New Part inserted relating to receivers

The principal Act is amended by adding, after section 104AA, the following Part:

PART VIIA
RECEIVERS

104AB Interpretation

(1) In this Part:

"Official Assignee" means, in relation to the estate of a bankrupt, any Official Assignee or Deputy Assignee appointed under the Insolvency Act 1967 and having charge of that estate;

"company" has the same meaning as in the Companies Act [ ] and includes an overseas company;

"Court" means the High Court or a District Court;

"creditor" includes every person who, in a liquidation, would be entitled to claim in accordance with section 230 [Admissable claims] of the Companies Act [ ] that a debt is owing to that person by the company;

"director"

(a) in respect of a company, has the same meaning as in the Companies Act [ ]; and

(b) in respect of an overseas company, includes any agent, officer or employee responsible in

New Zealand for the business of the overseas company; and

(c) in respect of any other body corporate, means a person having functions similar to those of a director;

but does not include a receiver;

"grantor" means the person in respect of whose property a receiver is, or may be, appointed;

"liquidator" means a liquidator appointed under Part 14 of the Companies Act [ ] and "liquidation" has a corresponding meaning;

"overseas company" has the same meaning as in the Companies Act [ ];

"property in receivership" means property in respect of which a receiver is appointed;

"preferential claims" are the claims referred to in section 239(3), (4) and (5) [Preferential claims] of the Companies Act [ ], as applied by section 104AM [Priority of preferential claims] of this Act;

"receiver" means a receiver, or a manager, or a receiver and manager in respect of any property, and includes any person appointed as a receiver

(a) by or under any instrument; or

(b) by the Court in the exercise of a power to make such an appointment given by any Act or any rule of court or in the exercise of its inherent jurisdiction

whether or not the person appointed is empowered to sell any of the property in receivership; but does not include a mortgagee who, whether personally or through an agent, exercises a power to:

(c) receive income from any mortgaged property; or

(d) enter into possession or assume control of any mortgaged property; or

(e) sell or otherwise alienate any mortgaged property.

"Registrar" means, in relation to

(a) a company, the Registrar of Companies appointed in accordance with section 268 [Registrar and Deputy Registrars of Companies] of the Companies Act [ ]; and

(b) a society registered under the Industrial and Provident Societies Act 1908, the Registrar of Industrial and Provident Societies; and

(c) a society registered under the Incorporated Societies Act 1908, the Registrar of Incorporated Societies; and

(d) a friendly society or a credit union registered under the Friendly Societies and Credit Unions Act 1982, the Registrar of Friendly Societies and Credit Unions; and

(e) any other body corporate registered under any enactment, any person discharging the powers funtions and duties of a registrar under that enactment.

(2) A person required to give public notice of any matter shall do so by inserting notice of that matter

(a) in at least one issue of the New Zealand Gazette; and

(b) in at least two issues of a newspaper circulating in the area in which is situated the grantor's place of business, or the grantor's chief executive office if the grantor has more than one place of business, or the grantor's principal residence if the grantor has no place of business.

104AC Application of this Part

(1) This Part applies

(a) to every receiver appointed after the coming into force of this Part; and

(b) with the exceptions and modifications specified in subsection (2), to every receiver holding office on the coming into force of this Part.

(2) In the application of this Part to a receiver holding office on the coming into force of this Part

(a) sections 104AD [Persons qualified to be receivers] and 104AF(2) [Powers of appointment and authority of receivers] do not apply; and

(b) section 104AO(1) [Liabilities of a receiver] does not apply to a contract entered into before the coming into force of this Part; but nothing in this paragraph affects any personal liability which a receiver otherwise has in respect of the contract; and

(c) in section 104AO(4), the expression "7 days" shall be read as "one month".

104AD Persons qualified to be receivers

(1) A person who has substantial experience in administering or advising on the insolvency of individuals, or the liquidation of companies or receiverships is an experienced insolvency practitioner for the purposes of this Part.

(2) Unless the Court orders otherwise, a sole receiver, or where there is more than one receiver at least one of them, must be an experienced insolvency practitioner.

(3) The following persons may not be appointed or act as a receiver:

(a) a person less than 20 years old;

(b) a body corporate;

(c) a mortgagee of the property in receivership;

(d) a person who has, within the two years immediately preceding the commencement of the receivership, been a shareholder, director or auditor of any mortgagee of the property in receivership;

(e) an undischarged bankrupt;

(f) a person who is mentally disordered within the meaning of the Mental Health Act 1969;

(g) a person in respect of whom an order has been made under section 30 [Temporary orders] or

31 [Appointment of manager] of the Protection of Personal and Property Rights Act 1988;

(h) a person in respect of whom a prohibition order has been made under section 104AS [Enforcement of a receiver's duties] of this Act or under section 221 [Enforcement of a liquidator's duties] of the Companies Act [ ];

(i) any person who has been convicted in the preceding five years of an offence

(i) under the Companies Act [ ], the Companies Act 1955 or the Securities Act 1978; or

(ii) involving dishonesty as defined in section 2(1) [Interpretation] of the Crimes Act 1961;

(j) a person who is disqualified from acting as a receiver by the instrument giving the power to appoint a receiver.

(4) The fact that a person is disqualified under this section from acting as a receiver does not affect the validity of anything done while so acting, unless the Court orders otherwise.

104AE Appointment of receivers under deed or agreement

(1) A receiver may be appointed in respect of any property of the grantor by, or in the exercise of any power conferred by, any deed or agreement to which the grantor is a party.

(2) The appointment of a receiver in the exercise of a power referred to in subsection (1) must be in writing.

(3) Nothing in section 92 of this Act prevents a mortgagee from appointing a receiver in accordance with any power to do so given by a mortgage, but the powers of a receiver so appointed are subject to section 104AJ(2) [Powers of a receiver].

(4) A receiver appointed by or under any power given by a deed or agreement shall be treated as the agent of the grantor unless expressly provided to the contrary

in the deed or agreement or the writing by or under which the appointment was made.

104AF Powers of appointment and authority of receivers

(1) Where an instrument confers a power to appoint a receiver, that power extends to the appointment of

(a) a sole receiver; or

(b) two or more receivers; or

(c) a receiver additional to one or more presently in office; or

(d) a receiver in succession to one whose office has become vacant.

(2) Where two or more receivers are appointed, they may act jointly and severally to the extent that they share the same powers, unless expressly provided to the contrary in the writing or the order of the Court by which the appointment is made.

104AG Notice of appointment

(1) Immediately following appointment, a receiver shall give written notice of the appointment to the grantor.

(2) A receiver shall, within 7 days of appointment, give public notice of the appointment including:

(a) the date of the appointment;

(b) the receiver's full name;

(c) the receiver's office address;

(d) a brief description of the property in receivership.

(3) Where the grantor is a body corporate, the receiver shall send or deliver to the Registrar, within seven days of appointment, a copy of the notice referred to in subsection (2).

104AH Vacancies in the office of receiver

(1) The office of receiver becomes vacant if the person holding office resigns, dies, or becomes disqualified under section 104AD [Persons qualified to be receivers].

(2) A receiver may resign from office by giving not less than seven days' notice in writing of his or her intention to resign to the person by whom that receiver was appointed, or, if the receiver was appointed in the interests of any person other than the person making the appointment, then to the person who nominated the receiver for appointment.

(3) Where, for any reason other than resignation, a vacancy occurs in the office of receiver, the person vacating office, or, if unable to act, his or her personal representative, shall forthwith give written notice of the vacancy to the person who would have been entitled under subsection (2) to receive notice of the receiver's intention to resign from office.

(4) Where a receiver appointed by the Court gives notice of an intention to resign under subsection (2) or the office of that receiver becomes vacant under subsection (3), a copy of the notice required by the applicable subsection shall also be filed in the registry of that Court.

(5) A person vacating the office of receiver must, where practicable, provide such information and give such assistance in the conduct of the receivership as that person's successor reasonably requires.

(6) On the application of a person appointed to fill a vacancy in the office of receiver, the Court may make any order that it considers necessary to facilitate the performance of the receiver's duties.

104AI Obligations of grantor when receiver appointed

(1) The grantor shall make available to the receiver all books, documents and information relating to the property in receivership and give all assistance reasonably required by the receiver.

(2) If required by the receiver, the grantor shall verify by statutory declaration that the material and information made available to the receiver is complete and correct.

(3) If the grantor is a body corporate, each director shall comply with this section as if that director were the grantor.

(4) If the grantor is a body corporate whose constitution provides that it shall have a common seal, it shall make the common seal available for use by the receiver on any document required by the constitution to be executed under the common seal, but nothing in this subsection affects the application of sections 140 [Method of contracting etc], 142 [Dealings between company and other persons] or 143 [No constructive notice] of the Companies Act [ ].

(5) On the application of the receiver, the Court may order the grantor or any director to whom subsection (3) applies to comply with this section.

(6) Any person who fails to comply with this section commits an offence and is liable on conviction to a fine not exceeding $10,000.

104AJ Powers of a receiver

(1) Except as provided in subsection (2), a receiver has the powers and authorities expressly or impliedly conferred by the instrument or the writing or the order of the Court by or under which the appointment was made.

(2) Section 92 of this Act applies to the exercise of a power of sale by a receiver appointed under any mortgage of land, as if the receiver were the mortgagee, subject however to subsection (3).

(3) Unless expressly provided to the contrary in the instrument or the writing or the order of the Court by or under which the appointment was made, a receiver may:

(a) demand and recover, by action or otherwise, all income of the property in receivership;

(b) issue receipts for income recovered;

(c) manage any of the property in receivership;

(d) carry on any associated business;

(e) inspect at any reasonable time any books or records of the grantor (including records stored by the use of a computer or other electronic or mechanical device) relating to the property in receivership, and whether in the custody of the grantor or of some other person;

(f) execute in the name and on behalf of the grantor all documents necessary or incidental to the exercise of the receiver's powers.

(4) Where the property in receivership includes the outstanding liability, under the constitution of a company, of the holder of any share, the receiver may make calls on the shareholder or otherwise enforce all or part of the outstanding liability.

(5) A receiver appointed in respect of all, or substantially all, the assets and undertaking of a company may change its registered office or its address for service.

(6) A person paying money or giving other consideration to a receiver need not enquire whether the receiver was validly appointed or authorised to act.

(7) If the receiver is unable to obtain the consent of any mortgagee (where that consent is required) to the sale of any property in receivership, the receiver may apply to the Court for an order authorising the sale of the property, by itself or together with other assets.

(8) The Court may make an order sought by a receiver under subsection (7), on such terms and conditions as it sees fit, if satisfied that

(a) the receiver has made reasonable efforts to obtain the mortgagee's consent; and

(b) the sale

(i) is in the interests of the grantor and the grantor's creditors; and

(ii) will not substantially prejudice the interests of the mortgagee.

104AK Receiver's duty of care

(1) The fundamental duty of a receiver is to exercise all powers in respect of the property in receivership in a manner which the receiver believes on reasonable

grounds to be in the best interests of all persons in whose interests the receiver was appointed.

(2) Except where inconsistent with the duty owed under subsection (1), a receiver shall exercise all powers in respect of the property in receivership with reasonable regard to the interests of

(a) the grantor; and

(b) any person claiming, through the grantor, an interest in the property in receivership; and

(c) any unsecured creditor of the grantor; and

(d) any surety who may be called upon to fulfil any obligation of the grantor to a person in whose interests the receiver was appointed, if that obligation is not satisfied by recourse to the property in receivership;

and, in particular, a receiver who exercises a power of sale in respect of any property in receivership shall take all reasonable care to obtain the best price reasonably obtainable as at the time of the sale.

(3) No rule of law and nothing in any instrument or writing by or under which the receiver was appointed entitles a receiver to

(a) defend any proceedings relating to any breach of duty under this section on the ground that the receiver was acting as the grantor's agent or under a power of attorney from the grantor; or

(b) receive compensation or indemnity from the property in receivership or the grantor in respect of any liability incurred by the receiver through any breach of a duty under this section.

104AL Other duties of receiver

(1) A receiver shall keep all money relating to the property in receivership separate from other money received in the course of, but not relating to, the receivership and from other money held by or under the control of the receiver.

(2) A receiver shall give adequate notice of the receivership in entering into any transaction or issuing any document in connection with the

property in receivership, but a failure to comply with this subsection does not affect the validity of the transaction or document.

(3) At all times during a receivership the receiver shall keep, in accordance with generally accepted accounting procedures and standards, full accounts and other records of all receipts, expenditure and other transactions relating to the property in receivership, and to any associated business carried on by the receiver; and shall retain the accounts and records for not less than six years after the receivership ends.

(4) Within two months of appointment a receiver shall prepare a report on the state of affairs with respect to the property in receivership including:

(a) particulars of the assets comprising the property in receivership; and

(b) particulars of the debts and liabilities to be satisfied from the property in receivership; and

(c) the names and addresses of all creditors with an interest in the property in receivership; and

(d) the names and addresses of all creditors of any associated business; and

(e) particulars of any encumbrance over the property in receivership held by any creditor (including the date on which it was created); and

(f) particulars of any default by the grantor in making available any relevant information; and

(g) such other information as may be prescribed.

(5) The report referred to in subsection (4) shall include a description of

(a) the events leading up to the appointment of the receiver, so far as the receiver is aware of them; and

(b) the disposal or proposed disposal of the property in receivership; and

(c) the carrying on, or proposed carrying on, of any associated business; and

(d) any amounts owing, as at the date of appointment, to any person in whose interests the receiver was appointed; and

(e) any amounts owing, as at the date of appointment, to creditors of the grantor having preferential claims; and

(f) any amounts likely to be available for payment to creditors other than those referred to in paragraphs (d) and (e); and

(g) where the grantor is a company, any breaches of the Companies Act [ ] by the grantor or any director of the grantor so far as the receiver is aware of them.

(6) A receiver shall, within two months after

(a) the end of each period of six months following the appointment of the receiver; and

(b) the date on which the receivership ends;

prepare a further report summarising the state of affairs with respect to the property in receivership as at those dates, and the conduct of the receivership, including all amounts received and paid, during the period to which the report relates, with particular reference, so far as relevant, to the matters specified in subsections (4) and (5).

(7) The receiver may omit from any report required under this section any matter which, if included, would materially prejudice the exercise of the receiver's functions; but the fact of the omission must be stated in the report.

(8) A receiver has qualified privilege in any proceedings for defamation in respect of any matter included in a report prepared under this section.

(9) A receiver shall send to the grantor and to all persons in whose interests the receiver is appointed a copy of every report prepared under this section, and, if the receiver was appointed by the Court, shall file a copy of every report in the registry of that Court.

(10) Within 21 days after receiving a written request for a copy of any report prepared under this section from

(a) any creditor, director or surety of the grantor; or

(b) any other person with an interest in any of the property in receivership; or

(c) the authorised agent of any of them;

a receiver shall send the copy of the report to the person requesting it, if the receiver's reasonable costs in making and sending the copy have been paid.

(11) A receiver shall permit a person entitled to receive a copy of any report prepared under this section to inspect the report at the receiver's office during regular business hours.

(12) Where the grantor is a body corporate, the receiver must send or deliver to the Registrar

(a) within seven days of its preparation, a copy of every report prepared under this section; and

(b) within seven days after the ending of the receivership, written notice of that fact.

104AM Priority of preferential claims

(1) Where

(a) the grantor is a company which is not in liquidation; and

(b) the property in receivership includes assets

(i) which are subject to a security interest; and

(ii) became subject to that security interest by reason of its application to certain existing assets of the company and those of its future assets which were after acquired property or proceeds;

the receiver shall apply all assets subject to that security interest at the date of the appointment of the receiver

first: to reimburse the receiver for his or her expenses and remuneration, to the extent that full reimbursement cannot be made out of other assets forming part of the property in receivership; and

next: to pay any claim specified in section 239 (3), (4), and (5) [Preferential claims] of the

Companies Act [ ], to the extent and in the order of priority specified in that section;

before paying any claim of the secured party.

(2) In the application of section 239 [Preferential claims] of the Companies Act [ ] in accordance with subsection (1), all references to a liquidator shall be read as references to a receiver; all references to the commencement of the liquidation shall be read as references to the appointment of the receiver and all references to a company being put into or being in liquidation shall be read as references to the company being put into or being in receivership.

(3) To the extent that claims to which subsection (1) applies are paid out of assets referred to in that subsection, and are not otherwise recoverable from the property in receivership the amount so paid is an unsecured debt due by the company to the secured party.

(4) In this section "after acquired property", "proceeds" and "security interest" have the same meanings as in the Personal Property Securities Act [ ].

104AN Powers of receiver on liquidation or bankruptcy

(1) Subject to subsection (2), a receiver may be appointed or continue to act as a receiver and exercise all the powers of a receiver in respect of any property of

(a) a company which has been put into liquidation; or

(b) a debtor who has been adjudged bankrupt under the Insolvency Act 1967;

unless the Court orders otherwise.

(2) A receiver holding office in respect of any property referred to in subsection (1) may act as the agent of the grantor only

(a) with the approval of the Court; or

(b) with the written consent of the liquidator or the Official Assignee, as the case may be.

(3) A receiver who, under subsection (2), is not the agent of the grantor does not, by reason only of that fact, become the agent of any person by whom or in whose interests the receiver was appointed.

(4) A debt or liability incurred by a grantor through the acts of a receiver who is acting as the agent of the grantor in accordance with subsection (2) is not a cost, charge or expense of the liquidation or the administration of the bankrupt's estate.

104AO Liabilities of a receiver

(1) A receiver is personally liable

(a) on any contract entered into by the receiver in the exercise of any of the receiver's powers; and

(b) for wages or salary that, during the receivership, accrue under any contract of employment relating to the property in receivership unless,

(i) notice of the termination of the contract of employment is lawfully given within 14 days after the date of the receiver's appointment; or

(ii) in the case of a contract of employment with any director of a corporate grantor, the receiver has expressly confirmed the contract.

(2) The terms of any contract referred to in subsection (1)(a) may exclude or limit the personal liability of a receiver other than a receiver appointed by the Court.

(3) If

(a) a grantor continues to use, possess or occupy property in receivership under an agreement subsisting at the date of the receiver's appointment; and

(b) the legal title to the property is not vested in the grantor

the receiver is personally liable, to the extent specified in subsection (4), for rent and any other payments becoming due under the agreement.

(4) A receiver's liability under subsection (3) is limited to that portion of the rent or other payments which accrue in the period commencing seven days after the date of the receiver's appointment and ending on

(a) the date on which the receivership ends; or

(b) the date on which the grantor ceases to use, possess or occupy the property;

whichever is the earlier; but the Court may further limit or excuse the liability of the receiver.

(5) Nothing in subsections (3) or (4)

(a) is to be taken as an adoption by the receiver of any agreement referred to in subsection (3); or

(b) renders the receiver liable to perform any other obligation under the agreement.

(6) The receiver is entitled to an indemnity out of the property in receivership in respect of any personal liability under this section.

(7) Nothing in this section

(a) limits any other right of indemnity to which a receiver may be entitled; or

(b) limits a receiver's liability on any contract entered into without authority; or

(c) confers on a receiver any right to an indemnity in respect of liability on any contract entered into without authority.

104AP Relief from liability

(1) The Court may relieve a person who has acted as a receiver from all or any personal liability incurred in the course of the receivership if satisfied

(a) that the liability was incurred solely by reason of a defect in the appointment of the receiver or in the instrument, writing or order of the Court by or under which the receiver was appointed; and

(b) that the receiver acted honestly and reasonably and ought, in the circumstances, fairly to be excused.

(2) To the extent that a receiver is relieved from personal liability under subsection (1), every person in whose interests the receiver was appointed shall be liable, unless the Court orders otherwise.

(3) In exercising the powers conferred by this section, the Court may give such directions and impose such terms and conditions and apportion any liability as it sees fit.

104AQ Court supervision of receiver

(1) On the application of the receiver, the Court may give directions in relation to any matter arising in connection with the performance of the functions of the receiver.

(2) On the application of the receiver, the grantor, or any creditor of the grantor or any other person claiming, through the grantor, an interest in the property in receivership, or any liquidator of a grantor that is a company, or the Official Assignee administering the estate of a grantor who has been adjudged bankrupt, the Court may

(a) in respect of any period, review or fix the remuneration of the receiver at a level which is reasonable in the circumstances;

(b) to the extent that an amount retained by the receiver as remuneration is found by the Court to be unreasonable in the circumstances, order the receiver to refund the amount;

(c) declare whether or not the receiver was validly appointed in respect of all or any part of any property or validly entered into possession or assumed control of any property.

(3) The powers given by subsections (1) and (2) are in addition to any other powers the Court may exercise in its jurisdiction relating to receivers under this Act, any other Act or in its inherent jurisdiction, and may be exercised in relation to any matter occurring either before or after the commencement of this section and whether or not the receiver has ceased to act as receiver when the application is made.

(4) Subject to subsection (5), a receiver who has

(a) obtained a direction of the Court with respect to a matter connected with the exercise of the powers or functions of the receiver; and

(b) acted in accordance with the direction;

is entitled to rely on having so acted as a defence to any claim in respect of anything done or not done in accordance with the direction.

(5) The Court may order that, by reason of the circumstances in which a direction is obtained under subsection (1), the receiver shall not have the protection given by subsection (4).

104AR Court may determine or limit receivership

(1) On the application of a grantor or any liquidator of a grantor that is a company, or the Official Assignee administering the estate of a grantor who has been adjudged bankrupt, the Court may, on the ground that the purpose of the receivership has been fulfilled so far as possible or that the circumstances no longer justify the continuation of the receivership

(a) order that the receiver shall cease to act as such as from a specified date, and prohibit the appointment of any other receiver in respect of the property in receivership; or

(b) order that the receiver shall, as from a specified date, act only in respect of specified assets forming part of the property in receivership.

(2) Except as otherwise ordered by the Court, a copy of any application made under this section shall be served on the receiver not less than eight days before the hearing of the application, and the receiver may appear and be heard at the hearing.

(3) An order under subsection (1) may be made on such terms and conditions as the Court sees fit.

(4) In making an order under subsection (1), the Court may prohibit any person in whose interests the receiver was appointed from taking possession or assuming control of all or any of the property in receivership.

(5) Except as permitted by subsection (4), no order under this section affects any mortgage over the property in respect of which the order is made.

(6) The Court may rescind or amend an order made under this section on the application of any person who applied for or is affected by the order.

104AS Enforcement of a receiver's duties

(1) In this section "failure to comply" means a failure of a receiver to comply with any relevant duty arising

(a) under the instrument or the writing or the order of the Court by or under which the receiver was appointed; or

(b) under this or any other Act or rule of law or rules of court; or

(c) under any order or direction of the Court other than an order so to comply made under this section;

and "comply", "compliance" and "failed to comply" have corresponding meanings.

(2) An application for an order under this section may be made by:

(a) a receiver;

(b) a person seeking appointment as a receiver;

(c) the grantor, or any person with an interest in the property in receivership or any creditor of the grantor;

(d) a liquidator appointed in respect of any property of a grantor that is a company;

(e) the President of the New Zealand Society of Accountants;

(f) the President of the New Zealand Law Society;

(g) an Official Assignee.

(3) No application may be made to the Court by any person other than a receiver in respect of any failure to comply unless notice of the failure to comply has been served on the receiver not less than eight days before the date of the application and, as at the date

of the application, there is a continuing failure to comply.

(4) In respect of any failure to comply, the Court may

(a) relieve the receiver of the duty to comply, wholly or in part; or

(b) without prejudice to any other remedy which may be available in respect of any breach of duty by the receiver, order the receiver to comply to the extent specified in the order.

(5) The Court may, in respect of a person who fails to comply with an order made under subsection (4)(b), or is or becomes disqualified under section 104AD [Persons qualified to be receivers] to become or remain a receiver

(a) remove the receiver from office; or

(b) order that the person may be appointed and act or may continue to act as a receiver, notwithstanding the provisions of section 104AD.

(6) Where it is shown to the satisfaction of the Court that a person is unfit to act as a receiver by reason of

(a) persistent failures to comply within the meaning of this section; or

(b) the seriousness of any failure to comply;

the Court shall make in respect of that person a prohibition order having such duration not exceeding five years as the Court thinks fit.

(7) For so long as a prohibition order under subsection (6) remains in force in respect of any person, that person shall not

(a) act as a receiver in any current or other receivership; or

(b) act as a liquidator in any current or other liquidation.

(8) Evidence that, on two or more occasions within the preceding five years, while a person was acting as a receiver or as a liquidator

(a) the Court has made

(i) an order to comply under this section; or

(ii) an order to comply under section 221 [Enforcement of a liquidator's duties] of the Companies Act [ ]

in respect of the same person; or

(b) an application for

(i) an order to comply under this section; or

(ii) an order to comply under section 221 of the Companies Act [ ];

has been made in respect of the same person and that in each case the person has complied after the making of the application and before the hearing;

is, in the absence of special reasons to the contrary, evidence of persistent failures to comply within the meaning of this section.

(9) In making any order under this section the Court may if it sees fit

(a) make an order extending any time for compliance;

(b) impose any term or condition;

(c) order that the receiver reimburse the applicant's reasonable legal costs on a solicitor and client basis;

(d) at any time dismiss an application for any order on the ground that it has been made without reasonable cause;

(e) order that the applicant reimburse the receiver's reasonable legal costs on a solicitor and client basis;

(f) make any other ancillary order.

(10) All proceedings relating to any application for an order under this section shall be served on the Official Assignee for New Zealand who shall keep a copy of the proceedings on a public file indexed by reference to the name of the receiver concerned.

104AT Preservation of the property in receivership

When making any order which removes or has the effect of removing a receiver from office, the Court shall make such

orders as are appropriate for the preservation of the property in receivership and may require the receiver to make available any accounts, records or other information necessary for that purpose.

104AU Refusal of essential services prohibited

(1) For the purposes of this section an "essential service" means:

(a) the supply of gas;

(b) the supply of electricity;

(c) the supply of water;

(d) telecommunication services;

(e) any other prescribed service.

(2) For the purposes of this section "telecommunication services" means the conveyance from one device to another by any line, radio frequency or other medium of any sign, signal, impulse, writing, image, sound, instruction, information or intelligence of any nature, whether or not for the information of any person using the device.

(3) Nothing in any other Act or in any contract entitles a supplier of an essential service to:

(a) refuse to supply the service to a receiver or to the owner of the property in receivership by reason of the grantor's default in paying any charges due for the service in respect of any period before the date of the appointment of the receiver; or

(b) make it a condition of the further supply of the service to a receiver or to the owner of the property in receivership that payment be made of any outstanding charges due for the service in respect of any period before the date of the appointment of the receiver.

(4) A supplier of an essential service may make it a condition of the supply of the service to the grantor during the period of a receivership that the receiver shall personally guarantee the payment of charges to be incurred for the supply.

104AV Regulations

The Governor-General may, by Order in Council, make regulations for all or any of the following purposes:

(a) prescribing that any service is an essential service for the purposes of section 104AU [Refusal of essential services prohibited];

(b) providing for such other matters as are contemplated by or necessary for giving full effect to this Part and for its due administration.

APPENDIX A

Consultative Activities and Acknowledgements

The Law Commission received the reference on Company Law on 5 September 1986. It set up an informal committee to assist it, comprising P B Baines, J A Farmer QC, Professor J H Farrar, T N McFadgen, M C Walls and P G Watts.

A discussion paper on company law was published in November 1987 and more than 60 responses were received by October 1988. Many of the responses were lengthy and scholarly and produced at considerable effort and cost.

The Law Commission helped sponsor a number of seminars throughout the country on insolvency law reform after it became apparent that the Department of Justice was unlikely to complete its review before this report was due for publication. In addition, the Commission sought the views of the New Zealand Society of Accountants on the preliminary report of the Australian Law Reform Commission on insolvency law. A very detailed and helpful submission was subsequently presented by the Society.

We greatly appreciate the assistance we have had from busy people who are experts in the fields of company law and practice. It has demonstrated to us a widespread support for substantial reform. We owe a special debt of gratitude to Peter Blanchard, Francis Dawson, John Farrar, Stephen Franks, Rob Thompson and Peter Watts.

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APPENDIX B

Comparative Table of Sections — 1955 Companies Act and Draft Act

As the draft Act is so different from the 1955 Act, it is not possible to produce a succinct comparative table which is exhaustive and authoritative. The following table is included as an aid and a guide only. It takes the 1955 Act sections and provides a cross reference to any section in the draft Act which deals with the same subject matter, whether or not the policy in the draft act is the same. If the right hand column contains no reference then the new Act may be taken to have no equivalent provision to that of the 1955 Act section recorded in the left hand column.

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