



सत्यमेव जयते

**REPORT
OF THE
HIGH-POWERED EXPERT COMMITTEE
ON
COMPANIES AND MRTP ACTS**

AUGUST, 1978

**MINISTRY OF LAW, JUSTICE AND COMPANY AFFAIRS
DEPARTMENT OF COMPANY AFFAIRS
GOVERNMENT OF INDIA
NEW DELHI**



CHAIRMAN

GOVERNMENT OF INDIA
Ministry of Law, Justice & Company Affairs
Department of Company Affairs
High-Powered Expert Committee for reviewing
the working of the Companies Act, 1956
and MRTP Act, 1969

New Delhi-110001, August 29, 1978

My dear Shri Minister

By a resolution No. 7/6/77-CLV dated June 23, 1977 of the Ministry of Law, Justice and Company Affairs (Department of Company Affairs), the Government of India constituted a High-Powered Expert Committee for review of the Companies Act and the Monopolies and Restrictive Trade Practices Act. Originally the Committee was to submit its report by December 31, 1977. Later on, in view of the vast nature of the task assigned to the Committee, the time was extended upto August 31, 1978.

I have great pleasure in presenting to you the report of the Committee. It is duly signed by all the Members.

With best regards,

Yours sincerely,
Sd/-
(Rajindar Sacher)

Shri Shanti Bhushan,
Minister for Law, Justice & Company Affairs,
Shastri Bhavan,
New Delhi.

**COMPOSITION OF THE
HIGH-POWERED EXPERT COMMITTEE**

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Judge of the High Court of Delhi

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- 2 Shri S. Ranganathan
Member of Parliament
(former Comptroller and Auditor General of India)
- 3 Shri R. D. Gattani
Member of Parliament
(Retired Judge of Rajasthan High Court)
- 4 Shri Bedabrata Barua
Member of Parliament
- 5 Shri F. S. Nariman
Senior Advocate, Supreme Court of India
(former Additional Solicitor-General of India)
- 6 Shri Shantanu N. Desai
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(former President of the Institute of Chartered Accountants
of India and Merchants' Chamber of Commerce, Bombay)
- 7 Shri M. Srinivasa Rao
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Professional Accountant
(former President of the Institute of Costs & Works
Accountants of India and also a Member of the Institute of
Company Secretaries of India)
- 8 Shri D. C. Mothari
Industrialist
Madras
(former President of FICCI and President, Asian Chamber
of Commerce)
- 9 Shri Keshub Mahindra
Industrialist
Bombay
- 10 Shri K. P. Tripathi
Labour Leader
(former Minister of Assam)
- 11 *Shri K. K. Ray
Barrister-at-Law
Secretary
Department of Company Affairs

Secretary

Shri M. K. Kukreja
Joint Secretary
Department of Company Affairs

From 1st March, 1978

* He ceased to be the Secretary of the Department of Company Affairs from the 1st January, 1978 but continued as Member-Secretary of the Committee upto 28th February, 1978 when he retired from the Indian Administrative Service. Thereafter, Shri Ray continued only as Member.

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CHAPTER I

INTRODUCTION

1.1 This Committee was constituted by Government in terms of the Ministry of Law, Justice and Company Affairs (Department of Company Affairs) Resolution No. 7/6/77-CL.V dated the 23rd June, 1977 (Appendix 'I') —

“to consider and report on what changes are necessary in the Companies Act, 1956, and the Monopolies and Restrictive Trade Practices Act, 1969, with particular reference to the modifications which are required to be made in the form and structure of the Companies Act, 1956, and the Monopolies and Restrictive Trade Practices Act, 1969, so as to simplify them and to make them more effective, wherever necessary.”

The Committee was called upon to consider the provisions of the two Acts and report, *inter alia*, on —

- (i) classification and formation of companies and the constitution of Board of directors with special reference to protection of the interests of shareholders who are in a minority;
- (ii) exercise of managerial powers, and protection of shareholders' and creditors' interests and their relations, *inter se*;
- (iii) measures by which workers' participation in the share capital and management of companies could be brought about;
- (iv) provisions which are required to be made to prevent mis-management with special reference to safeguarding of company's own interests and the public interest;
- (v) measures necessary to promote professionalisation of management and regulation of managerial and executive remuneration commensurate with their responsibilities;
- (vi) measures by which re-orientation of managerial outlook in the corporate sector could be brought about so as to ensure the discharge of social responsibilities by companies;
- (vii) what changes are required to be made in the Companies Act, 1956, to streamline the winding-up procedures so as to expedite the realisation and distribution of assets to the creditors and contributories;
- (viii) whether it is desirable to enact special provisions applicable to the Government companies as a class so as to exclude the provisions of the Companies Act, 1956, generally in their applicability to such companies;
- (ix) what adaptations and modifications are necessary in the provisions of the Companies Act, 1956, in their application to entrepreneurs in medium and small scale sectors carrying on business as joint stock companies;
- (x) what further changes are required to be made in the Companies Act, 1956, regarding the establishment of places of business and operation of foreign companies in India;
- (xi) what improvements, if any, are required to be made in the present administrative structure and procedures regarding the enforcement of the provisions of the Companies Act, 1956, and the Monopolies and Restrictive Trade Practices Act, 1969;
- (xii) what changes are required to be made in the Monopolies and Restrictive Trade Practices Act, 1969, in the light of the experience gained in the administration and operation of the said Act; and
- (xiii) any other matter incidental or ancillary to the administration of the Companies Act, 1956, and the Monopolies and Restrictive Trade Practices Act, 1969, having regard to the growth and development of trade, commerce and industry.

1.2 Indian Company Law has a long history. The present Companies Act, 1956, was the successor to the Indian Companies Act of 1913 and is a consolidation of many successive Amendment Acts, statutory rules and principles laid down in decisions of the courts in India and in England. There were several Acts passed from 1850 onwards. The first Act passed in 1850 was known as the Joint Stock Companies Act. This was followed by two Acts of 1857 and 1860 but the Act of 1866 which followed soon after repealed all the previous enactments and this Act was itself again repealed in turn by the Act of 1882. This last mentioned Act remained on the statute book upto 1913 though in the meantime it was amended several times to meet the demands of the commercial world. The Indian Companies Act of 1913 was passed with the object of consolidating and amending the law relating to trading companies and other associations in what was then known as British India and was mainly based upon the English Companies Act of 1908 with certain additional provisions to meet the peculiar business conditions obtaining in this country. Since the Indian Act closely followed the English Company Law, the decisions of the English courts under the latter were also generally followed by courts in India. This Act of 1913, however, did not provide for certain peculiarities of the Indian commercial world such as managing agency and was, therefore, found to be highly unsatisfactory in several respects in the course of its working. Eventually, extensive amendments were introduced in the Act by the Indian Companies (Amendment) Act of 1935, which came into operation on the 15th January, 1937. The vast number of amendments introduced by this Act, 1937, however, involved a few omissions but they were sought to be removed by amending the Act frequently in the subsequent years.

1.3 The Act of 1913 was, however, repealed by the present Companies Act (1 of 1956) which was brought into force from the 1st April, 1956. This followed the acceptance by the Government of the recommendations of what is known as the Bhabha Committee which, like the present Committee, consisted some Members of Parliament. This Committee submitted a detailed report in 1952 and a Bill incorporating the amendments suggested by this Committee was introduced in the Lok Sabha in 1953 and became subsequently Act 1 of 1956. This Act while adopting the scheme and most of the provisions of the U.K. Companies Act of 1948 marked a distinct improvement on the Act of 1913 in several respects and sought to ensure an efficient and honest management of companies governed by the Act.

1.4 The Companies Act, 1956, for the first time also provided for a greater measure of Governmental control over the formation and management of joint stock companies. This was considered desirable in the public interest and in order to prevent the diversion of company's funds for purposes which thwarted national economic policies or approved economic objectives. The basic objectives underlying the law were to provide a minimum standard of good behaviour and business honesty in company promotion and management; due recognition of the legitimate interest of shareholders and creditors and of the duty of managements not to prejudice or jeopardise those interests; provision for greater and effective control over and voice in the management for shareholders; a fair and true disclosure of the affairs of companies in their annual published balance sheet and profit and loss accounts; a higher standard of accounting and auditing; recognition of the rights of shareholders to receive reasonable information and facilities for exercising an intelligent judgement with reference to the management; a ceiling on the share of profits payable to the management as remuneration for services rendered; a check on their transactions where there was a possibility of conflict of duty and interest; a provision for investigation into the affairs of any company managed in a manner oppressive to a minority of the shareholders or prejudicial to the interests of the company as a whole; enforcement of the performance of their duties by those engaged in the management of public companies or of private companies which were subsidiaries of public companies by providing sanctions in the case of breach and subjecting the latter also to the more restrictive provisions of law applicable to public companies.

1.5 Even before the provisions of this law had been in operation for over an year, criticism was voiced in many quarters about its inordinate length, the complexity of its structure, its involved language, the vagueness and obscurities of many of its material provisions, inter-position of Government control even in apparently minor matter, the plethora of returns and forms required to be furnished by managements without any commensurate utility, the loopholes it suffered from and many other features which made the enactment cumbersome or defective and difficult of application. Accordingly, the Viswanatha Sastri Committee was appointed in May, 1957, and on the basis of its recommendations, the Companies (Amendment) Act (65 of 1960), comprising as many as 218 sections was passed by the Parliament and brought into force with effect from the 28th December, 1960. This Act not only considerably amended the then existing provisions of the principal Act but also introduced

therein several new provisions concerning a number of aspects of company management which were either overlooked or not seriously considered while enacting the principal Act.

1.6 The next amendment of the Companies Act came in 1962 and was effected by Act No. XLIII of 1962, initially through a Presidential ordinance promulgated on the 3rd November, 1962. This introduced a new section, viz., section 293B, authorising the Board of directors of a company to make contributions to the National Defence Fund or any other fund approved by the Central Government for the purpose of National Defence, without any limit and without obtaining the sanction of the company in general meeting and notwithstanding anything contained in the memorandum or articles or any other instrument relating to the company. The ordinance was subsequently replaced by an Act, with the addition of a provision for the disclosure in the profit and loss account of the company of the amounts of contributions made to the National Defence Fund or to any other Fund approved for the purposes of National Defence by the Central Government. Though the section was enacted in the wake of the Chinese aggression, it has continued to be on the statute book and was subsequently replaced by a new section through Act LXXX of 1971, which enlarged the scope of the section by authorising persons or authorities (other than the Board of directors of a company) exercising the powers of the Board or of the company in general meeting, to make contributions to the National Defence Fund and other funds approved by the Central Government for the purpose of National Defence.

1.7 The Companies Act was further amended on a regular basis in 1963 which, *inter alia*, provided for the appointment of a Companies Tribunal and the constitution of the Board of Company Law Administration (now known as the Company Law Board) by the Central Government and for the exercise of the powers and functions by such Tribunal and Board. According to the scheme of this amendment, the Tribunal was to enquire into and submit its findings to Central Government in respect of persons involved in cases of fraud, misfeasance and other such malpractices and irregularities in the management of a company so that the Central Government could take action for removing such persons from positions of managerial authority. The Tribunal was also empowered to hear applications under certain sections relating to prevention of oppression and mismanagement. For this purpose, it was empowered to exercise the powers and functions of a court under the relevant sections of the Companies Act.

1.8 The Board of Company Law Administration was set up to exercise most of the powers and functions of the Central Government under the Companies Act, subject to the control of the Central Government. The provisions relating to the Companies Tribunal were, however, subsequently repealed by the Companies (Tribunal Abolition) Act, 1967 (17 of 1967) but the provisions relating to the Company Law Board have remained on the statute book and were subsequently strengthened by the Amendment Act of 1974 (Act XLI of 1974).

1.9 The next amendment made to the Act was in substitution of an ordinance promulgated by the President on the 5th March, 1964, adding a new section, viz., section 635B, providing temporary protection to employees of companies whose affairs were being investigated under the Act.

1.10 A bill still further to amend the Act was introduced in Parliament in 1964 based on the recommendations of the Commission of Inquiry appointed by the Central Government to enquire into the administration of certain Dalmia Jain companies as well as recommendations of the Daphtary Shastri Committee. The underlying intention of this Bill was to strengthen the provisions relating to investigation into the affairs of companies and to provide for more effective audit in dealing with cases of dishonesty and fraud in the corporate sector and to simplify some of the procedural requirements which were found to be burdensome to companies without being of corresponding advantage to Government. This Bill was enacted as the Companies (Amendment) Act (31 of 1965).

1.11 In less than a year, thereafter, another amendment was effected known as the Companies (Second Amendment) Act (37 of 1966) replacing an ordinance issued on the 21st September, 1966, to meet the situation created by the Supreme Court Judgement in Barium Chemicals Ltd. vs. the Company Law Board (AIR 1967 SC 295) in regard to the competence of the Chairman of the Company Law Board or any of its members individually to exercise and discharge the powers and functions delegated to the Board by the Central Government. Another amendment being the Amendment Act (34 of 1966) was also enacted by Parliament

in the same year to remove certain lacunae in section 370 of the Act relating to loans by one company to one or more other companies under the same management or otherwise.

1.12 The Companies (Amendment) Act, 1969 (70 of 1969) which followed, introduced section 293A, prohibiting companies from making contributions to political parties or for political purposes and replacing the earlier section 293A introduced by section 100 of the Amendment Act to 1960. This amendment of 1969 also abolished the system of management of companies by managing agents and secretaries and treasurers, with effect from the 3rd April, 1970.

1.13 The last major amendment made to the Act came through the Companies (Amendment) Bill of 1972 which became the Companies (Amendment) Act of 1974. This Act which consists of 43 sections, the last two of which respectively sought to amend section 22 of the Securities Contracts (Regulations) Act, 1956 and clause (g) of section 2 of the MRTP Act, 1969, introduced several new provisions in the statute, while amending many existing provisions. Among the new provisions may be mentioned sections 108A to 108H, which impose restrictions on the acquisition and transfer of shares in certain companies governed by the MRTP Act, except with the approval of the Central Government and also provide for the automatic transfer of shares in certain cases either to the Central Government or to a corporation owned or controlled by it. Sections 187C and 187D seek to regulate benami holding of shares and sections 205A and 205B provide for the transfer of unpaid or unclaimed dividends to the General Revenue Account of the Central Government after a specified period. The provisions of this Amendment Act were brought into force with effect from the 1st February, 1975. Mention may also be made of some minor and formal amendments made to the Act, after this Committee was appointed, by the Companies (Amendment) Act, 1977 (No. 46 of 1977), which came into force from the 24th December, 1977. These amendments were considered urgent and necessary with a view to removing certain practical difficulties experienced in the working of the relevant provisions. This Amendment Act sought, *inter alia*, to empower the Central Government to grant for the repayment of deposits accepted by companies, partial relaxation like extension of time or exemption from one or more provisions in section 58A of the Act in deserving cases. It also raised the limit of donations for charitable purposes which a company could make under section 293 of the Act. Another provision in the Amendment Act sought to clarify the position arising out of court decisions as to whether a company could be proceeded against for not laying the balance sheet and profit and loss account before the company in annual general meeting even where such a meeting was not held. It is now mandatory for a company in such a case to file with the Registrar copies of its accounts within thirty days from the latest day on or before which that meeting should have been held in accordance with the provisions of the Act. Failure to do so will be visited with penalties in the same manner as where the meeting had been held but default has nevertheless occurred in filing copies of the accounts with the Registrar.

1.14 As a result of these frequent changes in the law, the structure of the Act has been affected and it had been represented that the provisions have become cumbersome and not amenable to easy interpretation and understanding. It has also been pointed out that some of the provisions such as those relating to managing agents and secretaries and treasurers have become obsolete while some others have proved to be ineffective to meet the present day need of corporate management and administration. Another important part of Company Law which had not been reviewed in depth so far was the part dealing with winding-up procedures. The statutory provisions in this respect had more or less remained unchanged since 1913. The need for a fresh look so as to ensure early termination of the winding up proceedings and settlement of the claims of the creditors and contributories of companies in liquidation had, therefore, become apparent and Government had to consider if a review of the various provisions of the Act was called for.

1.15 The other legislation, viz., the Monopolies and Restrictive Trade Practices Act (whose review is also the subject matter of the Committee's Terms of References) was passed by Parliament on the 18th December, 1969 and brought into force from the 1st June, 1970. This Act has for its genesis the Directive Principles of State Policy enshrined in Article 39(b) of the Indian Constitution, which enjoins on the State to ensure "that the ownership and control of the material resources of the community are so distributed as best to subserve the common good". Similarly, clause (c) of this Article directs the State to ensure that "the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment". The Act was enacted in pursuance of the

recommendations of the Monopolies Inquiry Commission (MIC) made in October, 1965, and is also broadly based on the draft Bill appended to the Commission's report.

1.16 Legislative attempts to control monopoly power and restrictive trade practices are not peculiar to our country. The Federation of Canada, which came into existence in 1857, had its anti-monopoly legislation soon thereafter in 1889. The other Commonwealth country, the Federation of Australia, which came into being in 1900, enacted the Industries Preservation Act of 1906, which prohibited entering into any contract in restraint of trade or monopolising any part of trade or commerce with intent to control the supply or prices. In the United States of America, the challenge from the trusts and combines posed a problem resulting in the Sherman Act of 1890 being passed. In the United Kingdom (whose legislation on corporate matters has generally formed the basis of legislation in our country) has also had its share of anti-monopoly legislation starting with the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948. Similarly, the whole of Western Europe, Japan and Latin American countries also have their anti-monopoly legislations. Measures to control monopoly and restrictive trade practices were recognised even by the United Nations Conference on Trade and Development which at its Fourth Session held in Nairobi in May, 1976, decided to prepare a model law on restrictive business practices in order to assist the developing countries in devising appropriate legislation. Since then a draft model law has been circulated. The said law provides for measures to check concentration of economic power and also suggests steps to check prohibited practices. It will thus be seen that the MRTP Act is not something peculiar to this country.

1.17 The MRTP Act, 1969, has been in operation in this country for the last eight years. Experience of its working during this period has shown that several provisions of the Act needed to be modified or simplified. In the implementation of the Act also, it has been stated that certain difficulties have been encountered and several obscurities and lacunae have been noticed in the provisions of the Act with the result that the realisation of the objectives underlying the enactment has not been effective to the extent desired.

1.18 For the reasons stated in the foregoing paragraphs, the Government considered it necessary to set up a High Powered Expert Committee with the terms of reference indicated at the outset in para 1.1. The Committee's first Chairman was Shri K.S. Hegde, Member of Parliament and formerly a Judge of the Supreme Court of India. The other members of the Committee included three members of Parliament and seven other distinguished persons drawn from different walks of life.

1.19 Shri K.S. Hegde was, however, subsequently elected as Speaker of the Lok Sabha and resigned his chairmanship of the Committee. A new Chairman, Shri Justice Rajindar Sachar, a sitting Judge of the Delhi High Court, was appointed in his place by the Government towards the end of August, 1977, *vide* Government of India, Department of Company Affairs Resolution dated the 26th August, 1977 (Appendix 'II').

1.20 In view of this initial delay and also because of the vast nature of the task assigned to it, the date for submission of the Committee's report had to be extended by Government first upto the 30th June, 1978, *vide*, copy of Resolution dated the 30th December, 1977 (Appendix 'III'). A further extension of two months only i.e. upto the 31st August, 1978 (*vide* Appendix 'IV') became necessary as the Committee had to take note of the various submissions made at the oral hearings held in the principal cities and also those contained in the written Memoranda received by it subsequently.

1.21 Shri K.K. Ray, the then Secretary of the Department of Company Affairs, who was first appointed as Member-Secretary of the Committee continued as such upto the 28th February, 1978, till his retirement from the Indian Administrative Service. Thereafter, he continued as a Member of the Committee. In his place as Secretary of the Committee, Shri M.K. Kukreja, a Joint Secretary in Department Company Affairs was appointed in addition to his other duties in the Department, *vide* copy of Resolution dated the 27th February, 1978 at Appendix 'V'.

1.22 Soon after the assumption of charge by the new Chairman, a general notice was issued on the 31st August, 1977, in all the leading dailies and economic journals setting out the terms of reference of the Committee and eliciting the views of the interested sections of the public, by the 6th October, 1977 (Appendix 'VI'). A suitable Press Note was also issued drawing attention to the notice (Appendix 'VII').

1.23 The first meeting of the Committee was held on the 19th September, 1977 and subsequently at frequent intervals. At the first meeting, the Committee decided, *inter alia*, to issue a detailed Questionnaire drawn up so as to cover the various aspects of the matters coming within the scope of the Committee's terms of reference. This Questionnaire containing 230 questions was issued to 194 bodies/associations/individuals (Appendices 'X' and 'XII') with the request to submit their replies to the Committee by the 31st October, 1977. A copy of the Questionnaire and the letter forwarding it are at Appendices 'VIII' and 'IX'. Simultaneously, the Chairman addressed a personal letter to all the Chief Justices of the High Courts (*vide* Appendix 'XI') requesting their views on matters coming within the scope of the Committee's terms of reference more specially on the provisions relating to winding up of companies in the Companies Act. The last date for the receipt of replies to the Questionnaire had subsequently to be extended to the 30th November, 1977, in specific cases in deference to representations received by the Committee about the short time allowed to them for submitting their replies. Notwithstanding the extension, memoranda continued to be received from the various bodies addressed by the Committee till January/February, 1978.

1.24 Though the Committee in its anxiety to complete the work assigned to it at the earliest date, had originally decided that it would not go out of Delhi for oral hearings, it was pressed by outside bodies who felt it would be very inconvenient for all of them to come over to Delhi for tendering oral evidence before the Committee. The Committee recognised the justification for this request and decided that it should visit at least some important centres of commercial and business importance to hear the bodies orally. These hearings were held in the month of January-February, 1978 from 16th January to 22nd January, 1978 at Madras, Calcutta and Bombay. The oral hearings in Delhi were held from the 2nd to 5th February, 1978. The names of the various bodies and their representatives who appeared before the Committee to tender their evidence are given in Appendix 'XVI'. The names of bodies which submitted written Memoranda in reply to the general notice and the printed Questionnaire issued by the Committee are given separately in Appendices 'XIII' and 'XIV' respectively. Particulars of the number of bodies which sent in written Memoranda and the number of pages thereof are given in Appendix 'XV'. The Committee held all its sittings in New Delhi except one at Bangalore from the 12th to 16th June, 1978. In all, the Committee held 19 sittings lasting 53 full days (*vide* Appendix 'XVII'). The sittings were sometimes held for prolonged spells of a week in order to be able to consider matters brought before it in detail and in depth. The report was finalised at its meeting from the 21st to 23rd August, 1978 and is presented in two parts—Part 'A' dealing with the Companies Act and Part 'B' dealing with the MRTP Act.

1.25 Considering the fact that the terms of reference of Committee were vast and varied and dealt with a lengthy legislation like the Companies Act, on the one hand, and a complicated Act, like the MRTP Act, 1969, on the other, we feel that the time taken by the Committee, viz., one year, for completing its work is reasonable. The Committee has tried its best to arrive at a consensus on all the issues raised before it and has endeavoured to deal with each of the items in its terms of reference. The approach followed by the Committee in dealing with the tasks assigned to it are dealt with separately in the succeeding Chapter.

1.26 Before concluding this introduction, the Committee would like to refer to one aspect in its terms of reference which enjoins it to consider and report on what changes are necessary in the form and structure of the Act "so as to simplify them and make them more effective, wherever necessary". The Companies Act has been amended over thirteen times since it first came into force from the 1st April, 1956. It has, therefore, become a complex piece of legislation and would possibly admit of a certain measure of simplification. In fact, some of the suggestions contained in Chapter XVII are designed to achieve such simplification. At the same time, we would like to caution that in the context of the social philosophy and the objectives underlying a regulatory legislation in a developmental economy such as ours neither too much of simplification nor any finality in the field of legislation can be expected. Sometimes too short a law especially on a social legislation like the Company Law may itself create problems of finding legislative intent and make the task of all including the courts complex and none too enviable. We cannot but make a reference in this connection to the following observations made by the Jenkins Committee in the United Kingdom reporting in 1960, viz.—

"We would gladly see a reduction in this unwieldy mass of legislation but have not found it possible to make suggestions contributing to that end to more than a very limited extent. The elaboration of the law can, generally speaking, be fairly justified

as having been found necessary in order to keep effective control over the growing and changing uses of the company system as an instrument of business and finance and the possibilities of abuse inherent in that system. It would be wrong in principle to disturb in any important respect long-standing provisions designed to serve these ends unless they have clearly outlived their usefulness or are demonstrably objectionable on other grounds. It, therefore, appears unlikely that the dimensions of any new Act (after allowing for our own recommendations so far as adopted) will in the end prove substantially less than those of the Act of 1948."

The size of contemporary enactments on Company Legislation in force in other countries has also shown a tendency to grow in recent years. The U.K. Companies Act, 1948, had 462 sections and 18 schedules. The 1967 Amendment Act had 130 sections and 8 schedules and the latest Amendment Act of 1976 had 45 sections and 3 schedules. The Australian Companies Act amended upto 1964 had 399 sections and 10 schedules. The German Stock Corporation Law 1965 dealing exclusively with one particular type of business corporations has 410 sections. These factors cannot, therefore, be ignored in considering the length or size of our own legislation.

1.27 Within the limited time at its disposal, the Committee has attempted to simplify the provisions of Act, remove the lacunae and loopholes noticed so far in their administration as also the obscurities in language, wherever necessary. Structural changes in some important respects have been suggested. In the field of governmental control, however, we have recommended the restructuring of the Company Law Board on the model of the Income-tax Appellate Tribunal which would exercise independent and quasi-judicial functions in respect of several matters provided for in the Act, with a view to facilitating a better and quicker administration of the provisions of the law. At the same time, we have also suggested that a greater measure of self-discipline be imposed on company managements, if they wish to be spared of the frequent need to obtain approval of governmental agencies on each and every matter which may sometimes be regarded as falling within the realm of internal management of a company. A greater measure of professionalisation of management, on the one hand, and increased protection of the interests of shareholders and creditors of a company have also been recommended. In the matter of winding up where the provisions of law have not undergone any significant change during the last few years and where the proceedings have tended to be tardy and time-consuming, measures have been suggested to expedite such proceedings. The adoption of these procedures and measures will, we hope, definitely result in quicker disposal of winding up matters.

1.28 As regards the MRTP Act, it does not at present provide for the important aspect of protection of consumer interests against unfair trade practices. The impact of these practices on the ultimate and unwary consumer is perhaps more vitally felt in every sphere of trading and marketing than in the case of restrictive or monopolistic trade practices. Accordingly, we have dealt with this subject in greater detail and recommended suitable measures for public and private remedies against damages suffered by the consumers by the indulging in such trade practices. This is, of course, apart from the recommendations we have made for the total prohibition of restrictive and unfair trade practices. We have also suggested measures designed to make the working of the MRTP Commission more effective and independent, as we find it had been assigned a very limited and purely advisory role in the past. We have suggested a mandatory reference of certain types of cases to the Commission which would be empowered to issue final orders in such matters. It is to be hoped that if these recommendations are accepted, the MRTP Commission would be able to play a very vital and active role in the matter of curbing concentration of economic power and the indulging in restrictive and unfair trade practices by the commercial and industrial undertakings.

1.29 Acknowledgment

We must take this opportunity to express our thanks and gratitude to the several public and private sector agencies for the unstinted co-operation extended to us at all time. We are also especially thankful to the State Governments which extended to us all possible assistance in the course of the Committee's visits to some of the cities for holding its sittings and for hearing oral representations at those places. Thanks are also due to the various bodies which organised seminars, the Chambers of Commerce, professional institutes and other bodies and individuals who have given us their valuable suggestions through written Memo-

randa and oral evidence. The fact that we are not acknowledging these various individuals and bodies by name does not mean that we have not benefited from their suggestions. It is only the lack of space which prevents us from doing so. We, however, assure them that the Committee has taken into account all their suggestions in coming to its conclusions. It may be that the Committee did not find it possible to accept some of their suggestions but we would like to assure them that it is not for want of due consideration.

1.30 On Shri K.K. Ray, who was originally the Member-Secretary of the Committee, fell the initial and arduous task of organising the secretariat of the Committee and getting the work of the Committee off the ground. This he did with commendable speed, efficiency and with an eye on each detail. Shri Ray, however, could not find it possible to continue as Secretary of the Committee after his retirement on the 28th February, 1978, though the Committee was fortunate to have his continued association as Member. Thereafter, Shri M.K. Kukreja, Joint Secretary in the Department of Company Affairs, took over from Shri Ray as Secretary. In spite of the fact that Shri Kukreja was also carrying on his other duties as Joint Secretary of the Department, he brought to the Committee's work a sense of urgency and attention to details so as to keep in trim the secretariat of the Committee. His dynamism and devotion to duty as well as his suggestions have helped the Committee considerably in its day-to-day work and also in completing the report. The various details about the arrangements of the meetings of the Committee, the preparation of the report and other innumerable details regarding the functioning of the Committee were superbly looked after by Shri Kukreja. The Committee must acknowledge its thanks for the same.

1.31 In the preparation of the report, voluminous materials and factual data and a large number of rough drafts had to be prepared. The burden of this inevitably fell on the various functionaries of the secretariat of the Committee. Each one of them has made a commendable contribution to the Committee's work, whether it was preparation of drafts, typing of the report, arrangements for the meetings or other various tasks. The Committee has no hesitation in saying that this collective assistance rendered by the secretariat has been of very great help in the final preparation of the report.

1.32 Directing, supervising and co-ordinating the work of the staff members were the officers who were in immediate contact with the Committee and had to carry out the various requirements of the Committee in the preparation of the report. The officers, namely, Sarvashri A.G. Sirsi, V.K. Venkataraman and A.M. Chakraborti have worked with single-minded concentration to make the work of the Committee successful. They had to bear the burden of providing the necessary material for the preparation of the report, sometimes at very short notice. They have undergone stress and strain with a smiling face and without complaint. We have found their assistance to be of immense advantage and the Committee must place on record its appreciation of the same.

1.33 We must also thank the Department of Company Affairs for having unreservedly made available all the information sought by the Committee. There was no material which was withheld from the Committee. The officers of the Department also extended individual assistance, whenever required by the Committee. Our thanks are due to all of them.

1.34 In the succeeding chapter, the Committee has indicated its broad approach which it has brought to bear in its examination of the two Acts. To say anything about the merit of the report is not for the Committee. It has done its work. Let the report speak for itself.

CHAPTER II

NATURE AND SCOPE OF THE TERMS OF REFERENCE AND THE APPROACH OF THE COMMITTEE

2.1 According to the Government Resolution dated the 23rd June, 1977, the Committee was appointed to consider and report on the changes that are necessary in the Companies Act and the Monopolies and Restrictive Trade Practices Act with particular reference to the modifications which are required to be made in the form and structure of these two legislations so as to simplify them and make them more effective. While suggesting the departures, if any, from the existing law, where necessary, we have, at the same time, to the extent the existing framework has been found to be useful, and has not come in the way of effective functioning of the corporate sector, considered it wise not to disturb it and have rather tried to modify it only to the extent necessary to accommodate the suggested departures. Thus, while recommending worker participation in or professionalisation of management we are not recommending, on the basis of what is to be found in other countries of Europe, the adoption of a two-tier board, thus giving representation to workers and part-time directors only at the supervisory level. Such a separation, we feel, would weaken the existing link between the shareholders and the Board and removed from management. Another major area calling for a departure from the existing framework of Company Law is the need for bringing about a reorientation of managerial outlook towards the discharge of social responsibilities by companies. Social responsibility of business is now an accepted concept and we feel that our country with its tradition of social service must now make it a part of legislation through Company Law.

2.2 Companies Act is by far the largest legislation on the Statute Book. Apart from the size, the Act has assumed complications and given rise to difficulty in interpretation owing to the successive amendments, related matters being dealt with in sections often far removed from each other, plethora of rules and forms and the growing volume of departmental clarifications in the form of a hybrid system of administrative law, whose authority is real, whether legally sustainable or not. We are, however, aware of the limitations which are inherent in the legislative process and do not, therefore, think that any law could be absolutely perfect. While it is somewhat easy to correct the mistakes of the past and arrest the trends if they appear to move in the wrong direction at present, it is always difficult to make the law a perfect instrument of future needs and policy and any amount of intuitive projection is bound to be limited to the horizon to which our mental faculties can reach. Aware as we are of these constraints, we have nevertheless made an attempt to review the provisions of the existing law in the light of the experience of all concerned during the last two decades of the working of the Act, suggested drafting changes to remove uncertainty of interpretation and lend clarity to the legislative language, wherever necessary. Our approach, therefore, towards simplification of the two important legislations has been directed to the need for making the law as easily intelligible as possible to those who are concerned with it, making changes in procedure to help decision making process both at the level of corporate enterprise and at the level of the administering department, rather than in an amputation of the present body of laws for the sake merely of reducing the bulk or the size. In some cases we have even suggested the incorporation of the essence of some of the existing rules and departmental clarifications in the statute itself. Besides, we have also suggested the deletion of many existing provisions which have either lost their significance or are considered by us to be redundant in the light of our other recommendations.

2.3 One essential feature which distinguishes the structure of the law in this country relates to the administrative machinery providing for a direct regulation of corporate sector by the Government. While there is Government regulation of business in every country and there is no question that such regulation is indeed necessary in the overall interest of pursuing the broad national objectives, policies and aspirations, the Committee has paid careful consideration to the nature of these regulations, the manner in which they are exercised and the purpose which they have achieved so far, keeping in view the present set up of the administrative machinery. While the right of Government to regulate private management in the sphere of managerial appointment, and remuneration, inter-corporate investment, etc., might be sometimes necessary, the Committee is of the view that by and large the companies

should be free to exercise managerial functions without Government intervention within certain constraints which can be laid down statutorily. Our approach in this report has, therefore, been one of Governmental intervention only in exceptional cases, leaving the corporate sector otherwise free to exercise managerial functions within certain constraints and criteria to be laid down statutorily. We have taken pains to see that wherever the existing Government approval is dispensed with, necessary and sufficient safeguards have been provided to ensure that these powers are exercised for the benefit of the company and the shareholders and in public interest. In our view, this is the major simplification of the present structure of the law intended to eliminate delays, promote growth, ensure the running of the companies on sound lines and also take away the present burden on the Government and the companies of unnecessary paper work.

2.4 There are, however, certain areas where the very nature of the power to be exercised makes it the business of the Government and the Government alone. Although we have suggested that powers of the Government in these specified areas shall continue to be exercised by the Government, necessary safeguards have to be in-built in the administrative machinery to ensure that the discretion which lies with the Government is exercised reasonably and for public good. All this has led us to the question of reviewing the present administrative machinery and to determine, on the basis of the nature of the power to be exercised, the authority or authorities which should exercise them and the means by which it can be secured that these powers are exercised independently with the application of a judicious mind, wherever necessary, and additionally with the application of specialised knowledge necessary to the enforcement of the laws governing companies and monopolies.

2.5 Delegation is the soul of efficient administration. We have had a closer look at the existing pattern of delegation of the powers and functions of the Central Government. The Company Law Board, except for the purpose of exercising powers under a few sections of the Act which it has to exercise by means of sittings of the Bench, operates virtually as the Central Government under a different name. We find that the Central Government have effectively delegated many of its powers and functions to senior officials at the regional level. The Committee is particularly anxious to see that this process of delegation is carried further so that except in special circumstances it does not become imperative on the part of the companies to run to Delhi at considerable cost of money, inconvenience and delay. Consistent with this approach, we have suggested greater decentralisation of the powers and functions of the Central Government and the court as far as small companies are concerned. We have also suggested general exemptions from various provisions of the Act to these small companies with a paid up capital of Rs. 5 lakhs, which constitute about 88% of companies in private sector. We are anxious to see that the centre of power, as far as administrative machinery is concerned, is not far removed from the actual seat of operation of the companies concerned.

2.6 While making a review of the present administrative machinery, we had had the opportunity of making a detailed review of the powers which are at present being exercised by the court, both as a court of prosecution and as a court exercising substantial powers under the Act. We have also reviewed the powers of the Central Government and the Company Law Board, and the courts under the Act. Some of the powers being at present exercised by the court are such as could be transferred from the court to an independently constituted quasi-judicial authority which, with specialised knowledge and ready access to records would be in a position to administer justice; at the same time this would take away some load from the courts. On the other hand, some of the powers at present being exercised by the Central Government are such as require the exercise of a judicial mind. We are, therefore, suggesting the transfer of these powers to such an independently constituted authority. While making the suggestion for constitution of such an authority, we have kept in view the present functioning of the Company Law Board both as a quasi-judicial and as an administrative adjunct of the Department and are of the view that unless the Company Law Board, in its functioning, is made legally separate and distinct from the Department of Company Affairs, confidence cannot be given to the public that the Board shall really function independently. While making the suggestion for the constitution of an independent Company Law Board to whom we have assigned some of the functions presently exercised both by the Central Government and the court, we have been guided by the consideration that the Act should be administered not only in a manner which gives the affected party a right to be heard, but that also it ensures speed, administrative efficiency and application of judicial mind uninfluenced by executive considerations. In Chapter XVI we have made detailed suggestions about the constitution, powers and functions of the Company Law Board as we visualise it under the new set-up.

2.7 Although it would be ideal to have a set of laws which is least invoked for purpose of dealing with violations, it would be an idle dream to think that there would be no violation of law in respect of about 50,000 companies coming within the jurisdiction of the Act. Indeed, the present machinery for keeping a watch over violation is rather inadequate and a few violations that are brought to the notice of the Department also go virtually unpunished because the same procedure which is applicable to the violations of the general law relating to any other crime is also made applicable in such cases. Prosecution before magistrates for violations of the provisions of the Companies Act has been found to be least effective and many a time the expenses incurred by the Department have been found to be proportionally far in excess of the small fines which the magistrates deemed fit to impose. Imprisonment, though provided for, has rarely been ordered. There may be many reasons for this and the magistrates may not have time and energy or even the necessary expertise to deal with violations of the Companies Act as effectively as normally they are used to do in the matter of other criminal offences. A perusal of the compliances under the law made by us also shows that the answer in many cases to these violations lies not in launching prosecutions with uncertain results but would probably lie in developing a more effective machinery to see that at least, as far as the future functioning of the companies is concerned, these violations do not recur. A small fine of few rupees imposed by the court after protracted prosecution is no answer to the fulfilment of the legislative intent that companies do comply with the provisions of the statute. We have, therefore, suggested the substitution of prosecution by imposition of penalty by the Registrar or the Company Law Board wherever we have felt that the purpose of the legislative provisions would be carried out better by the imposition of penalty rather than prosecution. It is only in respect of matters where guilty intent is the essence of violation that we have still left the matter of violation to be decided by the court.

2.8 The MRTP Act has been on the Statute Book for about 8 years. Within this short period, however, certain difficulties have been experienced in the administration of the Act. Certain criticisms have also been voiced about the dilution of the role given to the Monopolies Commission. In many cases the difficulties have arisen out of the present wording of many of the sections.

2.9 Our approach has, therefore, been to suggest changes which would make the law more effective as far as legislative intent and the object of the legislation were concerned. With this task before us, we have recommended certain modifications of the existing concepts and definitions so as to make them operatively more meaningful and practical. Thus, while streamlining the definition of interconnected undertakings, we have taken care to see that investment companies are treated as undertakings, a serious lacuna in the present legislation accounting for legal severance of inter-connection between undertakings which are factually interconnected. We have sought to appraise the problem as a whole and have suggested, while examining the provisions of the Companies Act and the MRTP Act, that some of the provisions in the former Act should logically form part of the MRTP Act. Our recommendation to transfer the concepts of 'group', 'same management' and the provisions of section 108-A to 108-H to the MRTP Act is the result of this approach.

2.10 Doubts have been expressed from the wording of sections 10, 31 and 37 of the Act as to whether the Commission has independent powers to examine into monopolistic trade practices. We have, therefore, recommended the removal of this apparent lacuna so that the Commission now would be in a position to pass final orders with respect to monopolistic trade practices, on the same pattern as restrictive trade practices. Some of the concepts in the present Act are only generally defined. Without disturbing the general concept, for example, of monopolistic and restrictive trade practices, we have suggested specific definitions with respect to each type of restrictive trade practice and we believe that in future this would make it easier to identify these practices for the benefit of all concerned. While suggesting changes in procedure to be followed by the Department administering the Act and the procedure to be followed by the Commission, we have been guided by the desire to ensure public confidence in these two administering agencies. Thus, we have taken into consideration the criticism that the role of the Commission to deal with matters relating to concentration of economic power in the present Chapter III of the Act has rather been diluted. We have, therefore, suggested that some of the matters falling in Chapter III should be compulsorily referred to the Commission. We have also indicated the circumstances in which the Government would have no option but to refer these matters to the Commission which would also be authorised to pass final orders. So as to allay the fear that reference to Commission would lead to delay in disposal, we have also reiterated the need to prescribe the time limit

within which orders have to be passed. We are aware of the fact that as a result of our recommendations the work-load of the Commission may increase in future. We, however, do not envisage any particular delay because of this increased work-load. The analysis of the disposal by the Commission for the period 1.6.1970 to 30.6.1978 shows that out of 46 references made to the Commission under sections 21, 22 and 23, twenty four were disposed of within a period of less than 6 months and another 15 were disposed of within a period of 6 to 9 months. Thus, out of 46 references 39 had been disposed of within a period of 9 months or so. We have also no doubt that if the circumstances so warrant the strength of the Commission can be increased to the number permitted by the Act i.e. 8 members besides the Chairman. At present the Commission consists of only a Chairman and one Member. So within the scope provided in the present Act we have no doubt that even with the increased work load disposal of references will not be delayed.

2.11 Taking into account the experience of the working of the MRTP Act in this country and the Monopolies and Anti-Trust Legislations in other countries of the world, we are suggesting the broadening of the scope of the Act. Thus, while all modern legislations on the subject accept the need for providing protection to the consumers, the present Act does not deal at all with what is commonly known as unfair trade practices namely, misleading advertisements, false information to dupe consumers etc., it also does not provide for any remedy against such practices by manufacturers or dealers. We are, therefore, suggesting the need for introducing a new chapter defining these practices and also providing for definite remedy to the consumers against these unfair trade practices. We are further suggesting that if an injury is proved to have been caused to a consumer by any trade practice which is prohibited, the same shall be actionable resulting in the recovery of damages by the individual concerned. Being aware of the fact that it may not be easy for an individual consumer to bear all the expenses to effectuate this remedy, we are providing for an alternative but effective forum in the form of class action which is really in the nature of a representative action meant to provide relief to the poorer sections of the population not otherwise in a position to incur the expenses of litigation. Such class action is an absolute necessity if any legislation to benefit the poor is to be meaningful. We are hopeful that the Government, in the legislation that it is contemplating for giving legal aid, would make a suitable provision for giving legal aid in the matter of class action of this nature.

2.12 At present, Government companies are outside the purview of the Act. We recognise the role of Government companies as countervailing force against concentration of economic power and would not therefore like to suggest any exception to be made in this regard (i.e. with reference to Chapter III) as far as the present provision is concerned. We are, however, at the same time recommending that there should be no exemption available to Government companies, as far as monopolistic, unfair or restrictive trade practices are concerned. This is because of our belief that consumers need protection against prohibited practices irrespective of the source from which they emanate.

2.13 Consistent with our general approach to see that procedural complexities are avoided and paper work is eliminated as far as possible, we are suggesting the deletion of the present provisions in the Act which require the registration of agreements listed out in section 33. Experience shows that by and large these agreements pile up in the office of the Registrar and it has been possible to examine only a fraction of these agreements. We believe that it is possible to obtain information about these prohibited practices, without this paper work. As in the case of the Companies Act, we are also suggesting the dispensing with Government approval where the same is unnecessary. Thus, we are suggesting that the cases of diversification within the licensed capacity through the utilisation of waste products and by-products, by the installation of balancing equipment etc., should not call for Government approval, for no useful purpose is served by compelling the undertakings to apply for permission and a statutory exemption in such cases would be in order.

2.14 As far as the administrative machinery under MRTP Act is concerned, the restructuring of the machinery that we have suggested is in keeping with our other recommendations. We feel that the present machinery which confers no powers on the Registrar of Restrictive Trade Agreements to conduct preliminary investigation into restrictive practices and at the same time fails to make full use of the powers of the Director of Investigation is rather unsatisfactory. We are, therefore, suggesting the merger of the functions of these two officials in a single office of the Director General of Trade Practices.

2.15 We are suggesting that the Commission should be a Court of record and should have the powers to punish for contempt so that it can really function as an effective body. We are also suggesting some provisions to ensure that the functioning of the Commission does not suffer from the application of certain technical rules of evidence or procedure. The other suggestions relate to ancillary relief or the remedy by way of injunction which the Commission may grant. At present any violation of the provisions relating to restrictive trade practices has to be tried before a magistrate. Keeping in mind the need for award of damages to the consumer, we are suggesting that the forum for dealing with these violations should be the Commission itself. We are of the view that this alone can bring about uniformity and better implementation of the Act.

2.16 The foregoing paragraphs indicate our general approach which is brought to bear on the consideration of the terms of reference given to our Committee. That general approach would be found reflected in the chapters of the report that follow.

CHAPTER III

CONCEPTS AND DEFINITIONS—COMPANIES ACT, 1956

3.1 Introduction

We have felt the need to suggest certain changes either in the existing concepts or introduce additional concepts, wherever necessary. Firstly, as part of the overall review of the Act, the Committee had gone into the existing concepts and definitions and their relevance to the new law that we have suggested. We have also paid attention to the need for more rational arrangement of the provisions of the Act and the consequent need for changes in the definitions. Some of the terms of reference like those relating to the workers' participation, managerial appointment and remuneration, social responsibilities of business, professionalisation of management, etc., have called for certain departures from the existing scheme and this, in turn, had given rise to the need for introduction of new concepts and definitions on the one hand, and modifications of the existing ones, on the other. In the following paragraphs we are giving our recommendations relating to the concepts and definitions by way of consolidation and rearrangement, modifications, additions and deletions.

3.2 Consolidation and re-arrangement

Section 2(1) and Section 2(29)—“Alter/modify” : The existing definition of ‘alter’ and ‘alteration’ and ‘modify’ and ‘modification’ may be combined in one definition. These concepts, even as defined in the present Act, are mutually inclusive.

Section 2(27) and Section 41—“Member” : At present, clause (27) of section 2 does not define a member and simply states that the bearer of a share warrant is not a member. It is suggested that this clause may be replaced by the definition of ‘member’ given in section 41 and consequently section 41 may be deleted from the Act.

Section 2(41), Section 6 and Schedule 1A—“Relatives” : At present for the definition of ‘relative’ one has to look at section 2(41), section 6 and Schedule 1A of the Act. Instead, we suggest that section 2(41) may be redrafted on the lines of the provisions of section 6 along with an explanation to the effect that if one is related to the other within the meaning of this clause, the latter shall also be deemed to be related to the former. The schedule of relatives may also be amended to include brothers and sisters of mother and father. Section 6 may be deleted.

3.3 Modifications

Section 2(2)—“Articles”/Section 2(28)—“Memorandum” : In view of the revised definition of ‘company’ suggested by us and in view of our further suggestions relating to compulsory regulations in the case of public companies and Government companies, we feel that the present definition of ‘articles’ in clause (2) of section 2 may be simply put as—

“ ‘Articles’ means articles of association of a company as originally framed or as altered from time to time including, so far as they apply to a public company or a Government company, the compulsory regulations contained respectively in Table A and Table B in the First Schedule to the Act.”

On the same lines, we also suggest that ‘memorandum’ may be simply defined as follows :—

“ ‘Memorandum’ means the memorandum of association of a company as originally framed or as altered from time to time”.

Section 2(6)—“Board” : That part of the definition which states that “Board of directors” means the Board of directors of a company is merely tautological. Hence, we

would suggest that the existing definition in clause (6) of section 2 be modified to read as follows :—

“ Board in relation to a company means the Board of directors of the company.”

Section 2(8) “Book and paper” and “Book or paper” : The present definition of ‘book and paper’ and ‘book or paper’ should include the words ‘and their records’ after the word ‘accounts’ appearing in clause (8) of section 2 and the expression ‘book of account’ should precede the words ‘including accounts’ occurring in the said clause. The revised definition will read as under :—

“ ‘Book and paper’ or book or paper’ and ‘book of account’ include accounts and their records, deeds, vouchers, writings and documents.”

Our suggestion is based on the fact that the expressions ‘book and paper’ for ‘book or paper’ and ‘book of account’ are used throughout the Act in such a way as to show mutual affinity between these expressions and it is desirable that these expressions are put in one place in the definition.

Section 2(10)—“Company” : At present, clause (10) of section 2 defines ‘company’ as a company defined in section 3. According to section 3, ‘company’ means *inter alia* a company formed and registered under the Act of 1956 or under any of the previous companies laws specified in that section. We, however, do not consider it necessary that a company should be defined through such elaborate reference to previous statutes. We, therefore, suggest that a company may simply be defined on the following lines :—

“ ‘company’ means a company formed and registered under this Act or a company formed and registered under any Act, Acts, ordinance or Laws for the registration of companies in force before the commencement of this Act in India including any territory now forming part of India.”

Section 2(10A)—“Company Law Board” : We find no particular justification for defining ‘Company Law Board’ as the Board of Company Law Administration. The definition in existing clause (10A) of section 2 may simply refer to the Company Law Board as the Company Law Board constituted under section.....

Section 2(11)—“Court” : In the proposed administrative set up, we have suggested that the Company Law Board and the Registrars of Companies should be clothed with power to impose penalties for contravention of certain provisions of the Act. We, therefore, suggest that the definition of ‘court’ may be amplified to include the Registrars of Companies and the Company Law Board as well by incorporating the following additional clause (c) :—

“(c) with respect to any penalty imposable under this Act, the Registrar or the Company Law Board, as the case may be, having jurisdiction to impose penalty under this Act.”

Section 2(12)—“Debentures” : The present definition of ‘debentures’ which includes the words ‘whether constituting a charge on the assets of the company or not’ allows companies to issue unsecured debentures. Issue of unsecured debentures is another form in which long-term borrowings may be made without the debenture holders getting any security for the money invested by them, thus making such debentures almost at par with company deposits. However, we feel that where convertible debenture bonds are issued, these bonds being convertible into equity, the provision for issue of such bonds without constituting a charge on the assets of the company may only be retained. We, therefore, suggest that clause (12) of section 2 should be redrafted as follows :—

“ ‘debenture’ includes debenture stock, bonds and any other securities of a company which constitute, except in case of convertible debenture bonds, a charge on the assets of the company”.

Section 372 (10) — “Investment Company” : At present, the concept of ‘investment company’ occurs in proviso to sub-section (10) of section 372 and Note (1) of the ‘General instructions for preparation of balance sheet’ below schedule VI, the concept being broadly to describe an investment company as a company whose principal business is the acquisition of shares, stocks, debentures or other securities. The definition of investment company is significant mainly from the point of view of granting certain exemptions from the provisions of section 372 dealing with inter-corporate investments. While we have retained the exemptions available to an investment company from the provisions of section 372, we have, at the same time, addressed ourselves to the problem of preventing the benefit of this exemption being availed of firstly, by certain private limited companies overcoming the barrier of the limit of 10 per cent applicable to the investee company while simultaneously claiming the exemption as regards the limit of 30 per cent applicable to its own paid up equity capital and free reserves and secondly, by certain companies calling themselves as investment companies but actually functioning as catalyst of corporate control, their investments being intended primarily for exercising control over companies rather than for doing genuine investment business. In order to achieve these twin objectives, we have made certain suggestions in our Report, which may be summarised as under :-

- (i) In our recommendations on MRTTP Act, we have suggested the specific inclusion of investment company within the meaning of the expression, ‘undertaking’.
- (ii) We have also suggested, in Chapter IX dealing with inter-corporate investments/loans, that an investment company shall not be allowed to invest beyond 10 per cent of the paid up equity capital of the investee company.
- (iii) We are also suggesting a new definition of ‘investment company’ which ‘excludes a private limited company and which is required to show that its business consists of underwriting or trading in shares, debentures and other securities, as distinct from a mere acquisition thereof.

Keeping the above considerations in mind, we recommend the inclusion, in the definition section itself, of the revised definition of ‘investment company’ on the following lines :-

“ ‘investment company’ means a public company limited by shares and carrying on business of only underwriting in or dealing in shares, debentures, or other securities”.

As a consequence of the inclusion of an investment company in the definition section itself, the proviso to sub-section (10) of section 372 and Note (1) to schedule VI, referred to earlier, may be deleted.

Section 2 (30)—“Officer” : We have suggested the deletion of the provisions relating to managing agents and secretaries and treasurers. Accordingly, the reference to managing agents and secretaries and treasurers in this clause may be deleted. The present definition of ‘officer’ does not include an accountant. As a result, it has become difficult to make the accountant, wherever there is one, liable for the consequences of default or for serious irregularities in the matter of accounts. We, therefore, suggest that the term ‘officer’ should also include an accountant for which we have suggested a definition in this Chapter.

Section 2 (31) “Officer in default” : Section 5 seeks to give a meaning to the expression ‘officer who is in default’. In the light of our suggestions relating to prosecution and penalties—separately dealt with in the new set up of the administrative machinery—it is necessary to spell out what constitutes default in the matter of imposition of penalty and what constitutes default in the matter of imprisonment or imprisonment as well as fine. Accordingly, it is suggested that the provisions of section 5 may be spelt out in two separate clauses, namely—

- (a) For the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable for punishment by way of imprisonment or fine or by way of imprisonment and fine, the expression ‘officer who is in default’ means any officer of the company who is knowingly in default for the non-compliance, failure, refusal or contravention mentioned in that provision, or who knowingly or wilfully authorises or permits such default, non-compliance, failure, refusal or contravention; and

- (b) for the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to penalty, the expression 'officer who is default' means any officer of the company to whom the responsibility attaches for the default, non-compliance, failure, refusal or contravention mentioned in that provision or who authorises or permits or may be deemed to have authorised or permitted such default, non-compliance, failure, refusal or contravention.

Section 2 (33)—“prescribed” : Clause (33) of section 2 dealing with the definition of 'prescribed' may be amplified to include the rules made by the Company Law Board. The revised definition will read as under :-

“prescribed’ means, as respects the provisions of this Act relating to the winding up of companies except sub-section (5) of section 503, sub-section (3) of section 550, section 552 and sub-section (3) of section 555, prescribed by rules made by the Supreme Court in consultation with the High Courts, and as respects the other provisions of this Act including sub-section (5) of section 503, sub-section (3) of section 550, section 552 and sub-section (3) of section 552, prescribed by rules made by the Central Government, and as respects the provisions of this Act relating to the powers of the Company Law Board, prescribed by rules made by the Company Law Board.”

Section 2 (46)—“Shares” : In view of our recommendations to the effect that the provisions which permit companies to convert paid up shares into stocks and reconvert stocks into fully paid up shares should be deleted, we suggest that the definition of 'share' in clause (46) of section 2 should omit reference to 'stock'.

“Turnover” : We have suggested in Chapter IV, deletion of section 43A of the Act. However, the concept of 'turnover' as defined in clause (b) of the Explanation to that section should be retained as we have recommended that private companies with certain size of turnover should be subject generally to the discipline of the Act in the same way as public companies. We are not suggesting a new definition of turnover but would recommend that the following existing definition of turnover' be retained and incorporated in the definition section itself :

“turnover’ means the aggregate value of realisation made from the sale, supply or distribution of goods or on account of services rendered or both, by a company during a financial year”.

3.4 Additions :

“Accountant” : At present the Act does not enjoin upon companies to appoint qualified accountants. However, it is inconceivable that a company which is required to comply with the provisions of the Act relating to the maintenance of accounts, including preparation of annual accounts, should be able to do so without hiring the services of a qualified accountant. It is equally inconceivable that a company which is required by the Act to maintain cost accounts and, consequently, required to appoint a cost auditor, can do so without hiring the services of a qualified cost accountant. The question of enjoining upon companies of certain size to have the services of certain professions including the services of a qualified accountant has also to be considered from the wider perspective of professionalisation of management, as mentioned by us in Chapter V dealing with management structure and professionalisation of management. At the same time, it is difficult to prescribe that all companies must appoint a Cost Accountant or a Chartered Accountant. We have, therefore, limited our recommendation as regards the compulsory appointment of qualified Cost Accountant or Chartered Accountant to companies of certain size. We are, therefore, suggesting a definition of 'Accountant' to include both Chartered and Cost Accountants. While suggesting a definition, however, it is difficult to confine the scope of the definition to only a segment of the corporate sector. A definition, by its very nature, must apply to all companies. It is for this reason that we are suggesting in the course of our recommendations in Chapter VIII dealing with Audit and Accounts that companies having a paid up capital of Rs. 25 lakhs or more and certain manufacturing companies must avail of the services of Chartered Accountants, Cost Accountants, etc. The following definition is suggested :-

“ ‘accountant’ means a Chartered Accountant within the meaning of Chartered Accountants Act, 1949, or a Cost Accountant within the meaning of the Cost and Works Accountants Act, 1959, and includes, unless there is anything repugnant to the context, any other person appointed by the company to perform the functions which may be performed by an accountant.”

Auditor : At present the term ‘auditor’ is defined only by way of prescribing qualifications in Section 226(1) or in Section 233B(1). We feel that the term should now be defined to include an auditor who can be appointed to perform audit of the financial accounts or cost accounts as per the provisions of the new Act. We, therefore, suggest that the term ‘auditor’ should be defined as follows :—

“ ‘auditor’ means a person performing the functions of an auditor under any provision or provisions of the Act.”

Free Reserves : This term has not been defined anywhere in the Act. There are references to free reserves in the Act. We suggest the following definition :

“ ‘free reserves’ means all reserves by whatever name called, including any statutory reserves created under any other law for the time being in force and credit balance to profit and loss account, but shall not include any sums set aside for redemption of preference shares (till such time as preference shares are not redeemed) or reserves created on revaluation of fixed assets or reserves created to meet any other liability, provided, however, balances under the head ‘miscellaneous expenditure’ in para 1 of Schedule VI of the Act including debit balance to profit and loss account, deferred revenue expenditure, statutory liabilities, arrears of depreciation and provision for doubtful loans, debts and advances, excess, if any, of the book value of aggregate investments in shares and securities over the market value of such investments, and other provisions required to be but not made in the books of account shall be deducted before determining the amount of free reserves.”

Explanation I : In respect of unquoted investments in shares, the value thereof will be arrived at on the basis of break up value as per the latest audited balance sheet of such a company.

Consistent with our recommendations made in para 17.75, we would also recommend an additional explanation along the following lines, namely—

Explanation II : Notwithstanding anything contained in the foregoing definition of free reserves, with respect to the liability to the payment of gratuity, one-seventh of such liability as is outstanding on 1st September, 1978, would be deducted in arriving at the amount of free reserves in respect of such companies which have not provided for or have not funded out any gratuity liability and in respect of such companies which have been reckoning the gratuity liability on cash basis. In respect of companies which have as on 1st September, 1978, already provided for or funded out gratuity liability, such companies shall not be entitled to reverse provisions already made for gratuity liability.

Managing Director/Whole-time Director : Consistent with our suggestions in Chapter V on ‘Management Structure and Professionalisation of Management’, we are also recommending the inclusion of the following definitions of ‘managing director’ and ‘whole-time director’—

“ ‘managing director’ means a professional manager appointed as a whole-time director by the company in general meeting to manage the whole, or substantially the whole, of the affairs of the company, or to exercise substantial powers of management, subject to the superintendence, control and direction of the Board, and includes a director occupying the position of a managing director by whatever name called.”

“ ‘whole-time director’ is a director who is in the whole-time employment of the company as a professional manager.”

Professional Manager : We have explained in detail our approach to professionalisation of management in Chapter V and in view of our suggestions therein, it is necessary that the term 'Professional manager' is suitably defined. The following definition, suggested by us, takes into account the three traits of professional management, namely, experience, specialization in specific skills and proven managerial ability:—

'Professional manager' is an individual who —

- (a) (i) belongs to the profession of law, accountancy, medicine, engineering or architecture; or
- (ii) is a member of a recognised professional body or institution exercising supervisory jurisdiction over its members; or
- (iii) is a holder of a degree or diploma in management from any recognised Institute of Management or from any recognised University; or
- (iv) is a holder of a post-graduate degree from any recognised University;

and possesses not less than five years' experience in an executive capacity in a company, corporation or a body corporate or in the Government;

or

- (b) possesses a minimum of ten year's experience in an executive capacity in a company, corporation or a body corporate or in the Government."

Shareholders' Association : In Chapter VII dealing with the 'Protection of Shareholders' Interest' we have suggested that the Government should recognise certain shareholders' association who should be entitled to act on behalf of the shareholders. We, therefore, suggest the following definition of a 'recognised shareholders' association' :—

" 'recognised shareholders' association' means, in relation to any provision of this Act in which it occurs, a shareholders' association which is notified by the Central Government in Official Gazette as a recognised shareholders' association for the purposes of that provision".

This definition is on the same lines as the definition of recognised stock exchange in the present clause (39) of section 2.

Worker/Worker Director : We have explained in detail our approach to workers' participation in management in Chapter XI and in view of our suggestions therein, it is necessary that the terms 'worker' and 'worker director' are defined suitably as follows :—

" 'worker' means a workman as defined in the Industrial Disputes Act, 1947".

" 'worker director' is a director appointed in accordance with the provisions of this Act"

3.5 Deletions :

Some of the existing definitions have become obsolete consequent to the abolition of the system of managing agent and secretaries and treasurers. We, therefore, recommend that clauses (25) and (44) dealing with the definition of 'managing agents and secretaries and treasurers' and clauses (3) & (4) dealing with 'associates' of managing agents and secretaries and treasurers may be omitted from the present section 2 of the Act. However, as it is necessary to still retain the essence of the provisions of section 324A to the extent of prohibiting future appointment of managing agents, etc., in the new law, we have suggested in Chapter XVII dealing with overall review of the Act certain safeguards in the form of provisions dealing with 'repeals and savings' in the new law.

In the light of the revised definition of 'company' suggested by us, there is no need to retain the definition of 'existing company' in clause (16) of section 2 which we, therefore, recommend to be deleted.

Further, in the light of our suggestion to transfer some of the existing provisions in the Companies Act dealing with inter-company transactions to the MRTP Act, we also recommend the deletion of the definition of 'group' in section 2(18A) of the present Act.

In the management structure that we have suggested, we do not visualise the need for retention of the category of managerial personnel called 'manager' and hence we recommend the deletion of the definition of 'manager' occurring in clause (24) of section 2.

The definition of 'previous companies laws', occurring in clause (34) of section 2 has only relevance for the purpose of including existing companies within the meaning of 'company'. In the light of the suggested re-definition of 'company', this definition also appears to be redundant and may be dropped.

For facility of reference, we would suggest that for those definitions and expressions occurring elsewhere in the Act which could not be suitably brought within section 2 itself, attention should be drawn in section 2 to such definitions and expressions. Examples in this category are definitions of "equity share capital" and "preference share" and "equity shares" in section 85, the different types of resolution defined in section 189, definition of "contributory" in section 428, definition of "joint stock company" in section 566, etc. The suggested cross referencing may be done on the same lines as in the present clause (18) of section 2 defining a "Government company". Also, we suggest that reference to words and expressions which have become redundant by now may be suitably changed or omitted from the existing definitions. Thus, in clause (5) reference to 'Banking Companies Act, 1949 (10 of 1949)' may be substituted by reference to 'Banking Regulations Act, 1949 (10 of 1949)'.

CHAPTER IV

CLASSIFICATION OF COMPANIES

4.1 One of the terms of reference of the Committee is to consider the provisions of the Companies Act with respect to the classification of companies. The Committee is required to consider and report on what adaptations and modifications are necessary in the provisions of the Act in their application to entrepreneurs in medium and small scale sector carrying on business as joint stock companies. We are also required to indicate what further changes are necessary to be made in the Companies Act regarding the establishment of places of business and operation of foreign companies in India. Keeping in mind the terms of reference, the Committee decided to have a fresh look at the question of classification of companies. At present, companies are classified as under :—

- (a) companies limited by shares (sub-divided into public, deemed public and private companies);
- (b) companies limited by guarantee (either with or without share capital); and
- (c) companies with unlimited liability (either with or without share capital).

The Act also mentions three special types of companies, e.g., holding and subsidiary companies, Government companies and investment companies. Our recommendations covering these special types of companies will be found respectively in Chapters XVII, XIV and III. We think that while the basic classification of companies into public and private limited may be retained, a few structural changes within this broad classification are nevertheless called for.

4.2 Unlimited companies

Although the present Act provides for the formation of unlimited companies, the latter have hardly had any useful career in the growth and development of the corporate sector. According to data available for the year ended on 31st March, 1978, out of 51,080 companies (including 473 foreign companies and 1,381 guarantee companies) at work in India as on that date, there are only 47 companies with unlimited liability. We feel that the concept of a company with unlimited liability of its members does not conform to corporate concept which necessarily postulates a limited liability. We, therefore, suggest that this type of companies should be abolished from the statute book. As a result, clause (c) of sub-section (2) of section 12 and section 32 should be deleted. It is also suggested that the existing unlimited companies should be compulsorily required to convert themselves into limited companies. For this purpose, the total assets of an unlimited company as reduced by its outside liability should be taken as the capital which should be deemed to be paid up and the company concerned should be made to file an annual return, on this basis, within a period of six months from the commencement of the new Act.

4.3 Guarantee companies

Although guarantee companies (1,381) constitute a very negligible fraction of less than three per cent of the total companies (51,080) at work in India, they still do have a useful role to play as companies for furthering the objects of commerce, art, science religion, charity or some other useful objects and usually formed as a company which does not apply its profits or rather income except for these desirable objectives. It is, however, inherent in the very nature of these objectives that such companies be formed as public limited companies. We, therefore, feel that in future, guarantee companies must be required to be formed as public limited companies limited, by guarantee only and for the purposes enumerated in the present section 25 of the Act. As regards the existing guarantee companies, which numbered 1,381 as on 31st March, 1978, the Central Government should be empowered to issue any directive for either getting themselves registered under provisions corresponding to the present section 25 of the Act or converting themselves into companies limited by shares.

4.4 What constitutes a public limited company

At present a public limited company is defined simply as one which is not a private limited company. In order to constitute a private limited company, it is only necessary to provide certain restrictions and prohibitions in the articles of association, namely, restriction on the total number of members, restrictions on transferability of shares and prohibition of invitation to the public for subscribing to shares and debentures. The Committee felt that while the basic criteria for classification of companies into public and private limited need not be disturbed, it is certainly difficult to ignore the larger consideration of what really lends public character to a company and go simply by the declaratory statement of a few simple set of restrictions and prohibitions. It was felt that there are a few fundamental considerations of public interest which cannot be easily overlooked in regulating the working of public and private companies. The Committee, for example, considered, among others, the question as to how far it is justifiable to allow private companies to invite or accept deposits from the public when, on probably similar considerations these companies are already prohibited from inviting the public to subscribe to debentures, public deposits being hardly any different from unsecured debentures; and also as to whether the size and consequent extent of operations of a company, necessarily affecting a segment of the economy and the consuming public, should not automatically make a private company ineligible to continue as such and rather make it amenable to the discipline of a public limited company. In this context, the Committee also considered the concept of a deemed public company appearing in the present section 43A of the Act and was of the view that the three essential ingredients of a deemed public company, namely, a certain size of turn-over, a certain proportion of investment by a private company in the subscribed capital of a public company and lastly, a certain proportion of investment by a public company in the subscribed capital of a private company, can as well form part of the larger consideration in making certain private limited companies amenable, so long as these ingredients are present, to the overall discipline of public limited companies, thus doing away with the need for the deeming provisions of section 43A in the Act.

4.5 Several suggestions were considered by the Committee on the question as to which companies should (or should not) be classified as public or private companies. Views were expressed that authorised or paid up capital, as indicator of size, and value of turn-over or sales, as indicator of the extent of operations, could also form the basis for such classification. We feel that authorised or paid up capital may not constitute a true test of the size of the company and, as such, any monetary ceiling in terms of authorised or paid up capital for the purposes of classification may not be desirable. However, we subscribe to the view that 'private companies which are less capital intensive but have considerable consumer and employee interest because of its high turn-over' should be subject to the discipline of specified provisions of the Act which are at present required to be complied with by public companies. Similarly, private companies in which there is significant financial interest of public companies or which by themselves have a substantial stake in public companies should be subject to certain specified regulatory provisions which are applicable to public companies. Further, we feel that private companies should confine their activities to a limited sphere and should essentially be formed for running small business as for instance, ancillary industry. Such private companies should, therefore, be prohibited from placing any reliance on finances from the public in any form or on long-term borrowings. We have reviewed the concept of a private company in the light of these considerations and we recommend as follows :—

- (1) 'Private company' will remain as defined in section 3(1) (iii) of the Companies Act.
- (2) Private companies will be prohibited from
 - (a) accepting deposits or borrowing money from members of the public, except from their own directors, shareholders and their relatives; and
 - (b) borrowing long-term loans of more than three years from public financial institutions in excess of ten lakhs of rupees.

It is clarified that this will not prevent private companies from raising short-term loans from public financial institutions or from raising funds from other financial institutions including licensed money-lenders.

- (3) whenever any of the conditions mentioned in clause (4) are fulfilled in respect of a private company, then notwithstanding anything contained in the Act, all the provisions of the Act applicable to public companies—except the (present) sections.

70, 81, 171-186, 255-257, 259, 264-266, 270, 300 and 400—shall apply to such a private company.

- (4) The conditions mentioned in clause (3) which would attract the provisions applicable to public limited companies would be —
- (a) whenever the turn-over of a private company exceeds in any financial year one crore rupees the provisions mentioned in clause (3) above would apply on and from the expiry of the period of three months from the last date of the financial year during which the private company had the said annual turn-over; or
 - (b) whenever in any financial year twenty-five per cent or more of the paid-up share capital of the private company is held by one or more public limited companies; or
 - (c) whenever in any financial year twenty-five per cent or more of the paid-up share capital of a public company is held by the private company. The provisions mentioned in clause (3) above would apply only from the date on which either of the aforesaid events [in (b) or (c) above] has taken place.
- (5) The provisions applicable to public limited companies would continue to apply to such private companies once the conditions at (a), (b) and/or (c) mentioned in clause (4) have been attracted.
- (6) It shall be the duty of every private company to intimate the Registrar of Companies, alongwith its balance-sheet and profit and loss account whether the provisions in clause (4) above became applicable during the year in question and, whether the company has complied with the provisions applicable to such private companies as a consequence thereof.
- (7) Default in compliance will be visited with penalties.

4.6 Consistent with this, we would recommend that the proviso to sub-section (1) of section 31 be deleted and it be made clear that it will not be permissible for a public company to convert itself into a private company.

4.7 Companies in the small scale sector

Most *small* companies are not only registered, but are in fact, registered as private limited companies. We have anxiously considered whether it is possible to extend the scope of exemptions and privileges now enjoyed by private limited companies to such private limited companies as are of a small size: in the medium and small scale sector—the corporate badge of the modest entrepreneur. We think it is. By doing so we think corporate growth in the medium and small sector would be greatly encouraged. One must, however, safeguard against adjuncts or appendages of large scale business creeping into the exempted fold. Quite often, exemptions from the provisions of an enactment are regarded by the unscrupulous as loopholes in the law.

4.8 What should be the criteria for 'private limited companies of a small size'? The following considerations are pertinent :—

- (a) An analysis of the capital structure of the companies of India shows that it is essentially pyramidic, the base being much broader than the apex. Less than five per cent of the total number of companies have a paid-up capital of more than twenty-five lakh rupees each; in other words, out of a total number of 46,856 companies limited by shares in India as on 31st March, 1977, about 44,000 have a paid-up capital of less than twenty-five lakh rupees each. Out of these 44,000 companies, the non-Government private limited companies account for 38,000 companies of which ninety per cent have a paid-up capital of less than five lakh rupees each.
- (b) According to present policy, investment in plant and machinery upto ten lakh rupees qualifies for registration in the various State Directorates (of Industries) in the small scale sector. Such investment is permitted to go upto fifteen lakh rupees for ancillaries.

4.9 Having regard to these parameters, we feel that private companies may be further classified into small private companies and other private companies. Small private companies would be those private limited companies which have a paid-up capital of not exceeding five lakh rupees—this would cover the pre-ponderant majority of non-Government companies at present functioning as private limited companies. Such private companies would be eligible to further exemptions and privileges as shown in the Annexure. In order, however, to enjoy these exemptions and privileges, the small companies must satisfy the following two conditions :—

- (a) the small company does not have a body corporate other than a Government company or statutory body, or a public financial institution or a bank, as its shareholder; and
- (b) the small company does not invest in the shares of another body corporate.

We would also recommend certain additional provisions with respect to such small companies as follows :—

- (i) As far as the powers of the Central Government are concerned, whether executive or judicial, the same may be varied to the extent that the matters requiring judicial consideration may be disposed of, as far as the small companies are concerned at local and regional levels of the Central Government, the Company Law Board or any officer thereof with necessary delegation of powers. Thus, powers of a purely executive nature may be exercised by the Registrar or the Regional Director, with certain exceptions being provided depending on the nature of the power to be exercised. A complete delineation of these powers and functions, indicating the scope of decentralisation proposed has been indicated separately by us in Chapter XVI dealing with administrative machinery.
- (ii) As regards meetings and proceedings, the provisions of the Act relating to private limited companies may apply to such companies subject only to the provisions in their own articles.
- (iii) The powers of the Court, if any, under the Act shall be exercised by the District Judge of the District in which the registered office of the company is situate.
- (iv) It should be possible to have a division of undertakings by suitable arrangement or compromise, without Court intervention, if seventy-five per cent of all shareholders have agreed to the compromise or arrangement and if there are no creditors to be satisfied.

4.10 Foreign companies

The expression 'foreign company' has a special meaning assigned to it under the present Act. It does not fall within the definition of a company which, according to the Act, must be a company which is either registered under the present Act or is an existing company, that is, a company registered under any of the previous Company Laws. It simply means a company which is incorporated outside India, the term 'company' in this case being understood in the general sense and not in the special sense in which it is defined in the Act. In this sense, it satisfies the definition of a body corporate under the Act, although it is a special type of body corporate, which is not only incorporated outside India but has also established a place of business in India. At present, there are a large number of subsidiaries of multinationals carrying on business in this country although they are registered under the Indian Law. There are also some companies, registered under the law of this country, which have a pre-dominant non-resident interest ranging from anywhere between twenty-five per cent to seventy-five per cent. These companies are Indian companies although they are sometimes referred to as foreign companies in popular parlance. The provisions of the Foreign Exchange Regulation Act do, however, equally apply to both categories of companies, that is, companies registered under the Companies Act, 1956, or any other previous company law but, having a non-resident interest and also companies incorporated outside India and having place of business in this country. The present Act uses both the expressions, 'body corporate' and 'company', throughout the Act, and strictly speaking, wherever in any section of the Act the word 'company' is used, foreign companies would appear to remain outside the scope of that section. In actual practice, difference in the expression used may create difficulties of interpretation. Thus, in section 598 penalties are prescribed for officer or agent of the company who is in default in respect of non-compliance by foreign companies of the provisions of sections 592 to 597. As regards sections 599 to 602 of Part XI dealing with foreign companies

and also as regards other provisions of the Act which apply to foreign companies as bodies corporate, it may be difficult to decide the question of penalty. This is because section 5 which defines 'officer who is in default' refers to companies only. In some sections of the Act, although the expression used is 'company', a separate sub-section appears to have been added to include foreign companies by implication. Thus, in section 4, which defines holding company and the subsidiary, a separate section has been added, namely, sub-section (5) which states that the expression 'company' in that section also includes a body corporate. Similarly, in sub-section (4) of section 394 dealing with reconstruction and amalgamation of companies, the expression 'transferor company' has been defined to include a body corporate, thereby including a foreign company by implication. There are, however, a large number of sections where the expression used is 'body corporate' thereby including a foreign company. These sections are sections 42, 43A, 49, 89, 108A to 108C, 112, 159, 187, 202, 204, 209, 209A, 212, 220, 221, 233A to 251, 253, 261, 370, 372, 391 to 394, 432, 457, 544, 584, 615, 635B. These sections deal with the following matters :—

- (a) holding-subsidary relationship;
- (b) loans and investments made by the company;
- (c) certification of transfers;
- (d) annual return to be filed with the Registrar;
- (e) representation at meetings as members;
- (f) right of undischarged insolvent of managed companies;
- (g) appointment of body corporate to office or place of profits;
- (h) right of members to obtain balance sheet etc. and duty of officer to make disclosure;
- (i) maintenance of inspection of books of accounts, cost records and cost audit and special audit;
- (j) power of the Registrar to call for information and investigations;
- (k) prohibition against the appointment of bodies corporate to certain offices;
- (l) mergers and amalgamations;
- (m) winding up provisions (partly).

4.11 On the other hand, advantage can be taken of the provisions of the Act which are applicable to foreign companies, specifically or by implication, by some persons forming themselves into a company under any foreign law and carrying on the entire business in this country as a foreign company. The Amendment Act of 1974 has, therefore, made a provision in the present section 591 of the Act to the effect that where not less than fifty per cent of the paid-up share capital of a company incorporated outside India and having a place of business in India, is held by one or more citizens of India or by such citizens and partly by such bodies corporate, the provisions of the Act as a whole would apply to such a foreign company as if it were incorporated in India. The Amendment Act of 1974 has also extended the provisions of the Act further, in respect of certain matters, to all foreign companies. Thus, foreign companies are now required to file an annual return with the Registrar besides being subjected to the provisions relating to maintenance of accounts, cost audit and special audit, and in respect of investigation, etc. Thus, the present position with regard to foreign company may be summarised by saying that—

- (a) they are not companies within the meaning of the Act and the provisions of the Act would not, in general, apply to them unless any section in the Act either specifically refers to a foreign company or refers generally to bodies corporate;
- (b) in some of the sections of the Act, the provisions have been made specifically applicable to foreign companies, e.g., sub-section (2) (b) of section 202;
- (c) some sections of the Act apply to foreign companies because of the use of the expression 'body corporate' in those sections, e.g., sections 4, 42, 43A, 370, 372, etc;

- (d) by the Amendment Act of 1974, a new clause, viz., clause (b) of sub-section (3) of section 600 has been added and by virtue of this clause, sections 159, 209, 209A, 233A, 233B and 234 to 246 have been made applicable to foreign companies;
- (e) the specific provisions which are applicable to a foreign company are incorporated in a separate part, namely, Part XI, that appears in the present Act in sections 591 to 602;
- (f) a new sub-section, viz., sub-section (2) of section 591 has been added by the Amendment Act of 1974 by which a new class of foreign companies, namely, 'deemed' companies, has been created.

4.12 In our view, the present position with regard to foreign companies as summarised in the foregoing paragraphs, is rather unsatisfactory. We are particularly against the practice of first allowing certain bodies corporate incorporated outside India to be registered as foreign companies and then apply a large number of sections in the Act, not otherwise applicable to them by making indirect provisions here and there and from time to time. Instead, it would be desirable to lay down certain conditions under which all bodies corporate desirous of establishing place of business in India must necessarily subject themselves to the discipline of law of this country by following the normal procedure of registration and incorporation under the law of the land. We are aware of the fact that advantage has been taken and is likely to be taken in future by persons incorporating themselves as a company under the very liberal laws obtaining in some countries and by operating their business from this country as foreign companies. This practice is particularly objectionable when the real persons in the control of these companies happen to be Indian citizens. We are also unable to appreciate as to why registration under the Company Law of this country should not be insisted upon where the activities of the company in this country are confined to agriculture including plantation, mining, processing, manufacturing, production of energy, etc., especially when there are large number of instances where the registration under the law in this country has been effected to carry on activities in these fields by way of forming of subsidiaries of companies incorporated outside India. At the same time, we are conscious of the difficulties in insisting on compulsory registration of every branch of a foreign company operating in this country irrespective of the field of operation as well as the extent of operation. Thus, there is, in our view, certain justification for allowing airlines, shipping or insurance companies to establish their branches in this country for registration as companies under the Indian statute. Banking is also another field where possibly an exemption is justified from compulsory registration although we suggest that this exemption should not be extended to non-banking financial companies registered outside India and operating as branches in this country. In general, companies operating in the tertiary sector may still be allowed to continue as foreign companies. In the case of trading companies, however, such exemption should not be allowed. Mostly, these trading companies work as associates of Indian subsidiaries of well-known multinationals and operate as branches in India for purpose of solely marketing products of these Indian subsidiaries. We, therefore, suggest that the law relating to foreign companies should be rationalised on the following lines :—

- (1) In section 11, a new sub-section, viz., sub-section (3) should be added to read as follows :—
 - “(a) No body corporate incorporated outside India shall be allowed to establish or operate any place of business in India for the purpose of engaging in agriculture including plantation, production, processing, manufacturing or mining activities or for the distribution of goods produced in India or for generation of electricity or power of any kind or in construction activities, unless it is registered as a company under this Act;
 - (b) No body corporate incorporated outside India of which not less than fifty per cent of the paid-up share capital (whether equity or preference, or partly equity or partly preference) is held by one or more citizens of India or by one or more bodies corporate incorporated in India, or by one or more citizens of India and one or more bodies corporate incorporated in India, whether singly or in the aggregate, shall be allowed to establish or operate a place of business in India unless it is registered as a company under this Act.”
- (2) Sub-sections (3), (4) and (5) of section 11 may be redrafted as sections (4), (5) and (6) respectively.

- (3) Sub-section (2) of section 591 may be deleted.
- (4) All existing foreign companies which fall within sub-section (3) of section 11 must register themselves under the new Act within a period of six months from the commencement thereof.
- (5) The existing provisions relating to foreign companies should be streamlined to remove the existing obscurities on the lines indicated above and should then be made applicable to the existing foreign companies which do not fall within any of the categories mentioned in sub-section (3) of section 11. For example, the provisions contained in sections 603 to 608 dealing with prospectus issued by foreign companies may be deleted and suitable provisions made in section 600 including the prospectus provisions contained in Part III of the Act. In future, foreign companies should be exempted from registration as a company under the Act only if they do not fall within those categories. However, it is our recommendation that the provisions of clauses (c), (e) and (f) of section 433 should be made applicable to foreign companies and all the provisions relating to winding up of companies, following the applicability of those clauses of section 433, shall apply to foreign companies.

4.13 Multinationals

The formulation of a code of conduct for multinationals is a complex process and involves the consideration of a number of inter-related issues. It involves coordinated action by home country, host country and international organizations/agencies. Presently, the formulation of a code of conduct for multinationals is under consideration by the United Nations Commission on Transnational Corporations. The code of conduct, when eventually formulated, is expected to cover various aspects including disclosure of information by multinationals. Of the several Groups of Experts going into the formulation of a code of conduct, the one on International Standards of Accounting and Reporting is understood to have submitted its report which, accompanied by a report of the Secretary-General of the United Nations, came up for discussion before the Commission in Vienna in May this year. An Inter-Governmental Working Group of Experts is likely to be set up under the aegis of the Economic and Social Council of the United Nations to consider the further follow-up action to be taken in the field of International Standards of Accounting and Reporting in the context of formulation of a code of conduct for multinationals. This process and the eventual adoption of recommendations in this regard by the United Nations Commission and the Member-States is likely to take quite some time. At this stage, the Committee thinks that the Government may like to await the recommendations of the Commission and may meanwhile consider such matters as require urgent attention for suitable incorporation in the law as regards the additional disclosures or compliances to be made by multinationals in public interest.

ANNEXURE
(Vide Para 4.9)

EXEMPTIONS AND PRIVILEGES FOR SMALL COMPANIES

1. Sections 15/30/40

Printing of memorandum and articles of association shall not be obligatory. Small companies may cyclostyle the documents, each page signed by Secretary. Since the documents are required to be maintained for a number of years, whenever any alteration is effected, the companies shall be required to file afresh the revised documents.

2. Section 17

Alteration of the memorandum having the effect of change in place of registered office from one State to another may be effected without the approval of the Company Law Board but with special resolution, if factory or factories of the company or other principal place of business are located in the State to which the registered office is proposed to be shifted.

3. Section 21

No approval of the Central Government shall be necessary if not less than seventy-five per cent of the shareholders holding not less than seventy-five per cent of the voting power agree to the change of name of the company. Such change should be publicised in national and local dailies.

4. Section 77(1)

The need for obtaining Court's confirmation is recommended to be done away with; instead, approval of the Company Law Board will be sufficient.

5. Section 159

A considerably simplified form is recommended to be prescribed as regards annual returns to be filed by small companies.

6. Sections 205(2A)/205A/205B

Small companies shall be exempt from the provisions of these sections. Consequential changes will be made in section 205B.

7. Section 211/Schedule VI

A considerably simplified form should be prescribed regarding contents of balance sheets and profit and loss account; and for this purpose, sub-section (3) of section 211 is recommended to be replaced to provide for this exemption specifically.

8. Section 217(2A)

Small companies shall be exempt from the provisions of this section dealing with disclosure of particulars relating to employees.

9. Section 228

Proviso to sub-section (2)—'or a small company' may be inserted after the words 'a banking company'.

Sub-section (4)—Provision should be made for specific exemption from branch audit for small companies.

10. Section 292

Specific provision enabling small companies to pass all resolutions of the Board of directors by circulation is recommended for insertion in this section.

11. Sections 294—294AA

The prohibition against selling arrangement or agreement in notified industries should not be made applicable to small companies.

12. Sections 391—407

The powers under these sections, now vested in Court, are to be given to the Company Law Board.

13. Section 408

Powers of the Central Government under this section shall not be exercisable in respect of small companies.

14. Section 425

Power to entertain application for winding up of small companies may be conferred on the District Courts.

15. Section 560

Registrars of Companies are to be empowered to strike off names of small companies after declaration accompanied by an affidavit from all directors in a printed form is filed with the Registrar to the effect that the companies have satisfied all debts or that there are no debts.

CHAPTER V

MANAGEMENT STRUCTURE AND PROFESSIONALISATION OF MANAGEMENT

Background

5.1 In the Government resolution appointing the Committee, it has been rightly pointed out that some of the provisions of the Act "have proved to be ineffective to meet the present day need of corporate management and administration". We have been specifically requested to consider, in this connection, the following important aspects of the corporate management structure:

- (a) exercise of managerial powers;
- (b) workers' participation in management;
- (c) professionalisation of management; and
- (d) reorientation of managerial outlook.

5.2 It would be a valid generalisation to say that managerial powers should be exercised not merely for the interest of the shareholders or a section thereof but also in the interest of the creditors, the consumers, the overall growth of the company and also keeping in view the consideration of public good. Efficient corporate management is not only conducive to bringing about harmonious industrial relations, giving a square deal to the consumers, protecting corporate capital while ensuring an adequate return thereon and continuously striving towards increased productivity, but also in the overall interest of the working of the national economy. Thus, a company which is continuously ill-managed not only does harm to the shareholders of the company but is also likely to become a burden on the economy.

5.3 In the changed development of the structure of the corporation, a wide gap has arisen between control and ownership on the one hand and management and ownership on the other. An average shareholder, in recent times, can be viewed, more often than not, as an investor rather than as one who is interested in control. Nevertheless, the law must see to it that the gap between the shareholders, who are the owners, and the directors, who are in control of the destiny of the company, does not become so wide as to endanger the interest of the shareholders. Size of the companies now generally is such that their management requires certain professional expertise, apart from entrepreneurial skill. Professionalisation of management is, therefore, not a mere concept but is, in fact, an inevitable necessity for the well-being of the company itself.

5.4 In our country, the development of a distinct managerial class cannot be said to have taken place in any systematic manner. In most cases, the managing agents represented the controlling group of shareholders of the company and the divorce between ownership and management in managed companies was more illusory than real. Reflecting their awareness of this situation, the Joint Select Committee of Parliament, in relation to Companies Bill, 1953, had recommended an alternative system of management, called, the management by secretaries and treasurers, in the hope that this system would usher in a new class of professional managers not having anything to do with the ownership of the companies. However, even at that time, apprehensions had been voiced both inside and outside the Parliament that the new system of secretaries and treasurers would only help the managing agents to put on a new garb. Within less than a decade, these apprehensions proved to be correct and the Managing Agency Inquiry Committee, having found that there is no distinction between managing agents and secretaries and treasurers, recommended the abolition of this class as well.

5.5 While there is no doubt that even when the system of managing agency was prevalent, there were companies relying on people who had developed expertise in corporate management and who we may describe as professional managers, it is the abolition of

the managing agency system itself which has had a salutary effect in helping companies to reorientate themselves to the changed situation which called for management by the technostructure. There is growing evidence that, in order to cope with the complexities of modern business, more and more professional people are taking up positions in companies previously held by owner-managers. One important step which the Government had taken right in 1956 was to conceive of the profession of company secretaries. Finally, the Amendment Act of 1974 provided for compulsory appointment of whole-time secretaries in companies of certain size, namely, companies having a paid up capital of Rs. 25 lakhs or more. This process of professionalisation of management needs to be carried forward.

5.6 We, however, agree with the views generally expressed in this connection that it is difficult to legislate fully on professionalisation of management without defining what professional management is. There are certain areas of management which are, beyond doubt, within the competence of such professionally qualified people as chartered accountants, cost accountants, company secretaries, engineers and people having specialisation in management sciences. On the other hand, it has been pointed out to us that professional approach to management is something which does not necessarily follow from the possession of certain professional qualifications and that instances are not rare where such professional approach to management has been developed and applied by people not necessarily having professional qualification but having considerable experience in a particular field of corporate management. We are, accordingly, suggesting a definition of 'professional manager' which takes into account the element of specialized knowledge as well as specialized experience, more intensive or extensive experience being insisted upon for a professional manager not possessing certain qualifications. Our suggested definition is as follows:

"A 'professional manager' is an individual who :—

- (a) (i) belongs to the profession of law, accountancy, medicine, engineering or architecture; *or*
- (ii) is a member of a recognised professional body or institution exercising supervisory jurisdiction over its members; *or*
- (iii) is a holder of a degree or diploma in Management from any recognised Institute of Management or from any recognised University; *or*
- (iv) is a holder of a post-graduate degree from any recognised University; and possesses not less than five years' experience in an executive capacity in a company, corporation or a body corporate or in the Government;

or

- (b) possesses a minimum of ten years' experience in an executive capacity in a company, corporation or a body corporate or in the Government".

We are also providing for certain safeguards with regard to the minimum and maximum age limits (para 5.12).

Complexity of the problem—Two-tier Board-workers' participation

5.7 We had recognised from the beginning the complexity of the problem arising out of the inter-dependence of all the important aspects of management rendering it difficult to make recommendations in respect of any one of these matters without reference to the others. We have more fully dealt with the conceptual and the practical aspects of the problem of workers' participation in ownership and management in Chapter XI and it may suffice here to observe that the final conclusion of the Committee has been against the compulsory adoption of a two-tier board in this country.

Representation of Minority on the Board

5.8 The generally suggested solution for giving an effective voice to the minority—as a countervailing force—has to grapple with two most practical difficulties. The system of proportional representation by cumulative voting, or by single transferable vote, apart from the complexity it introduces in the election of directors, is unlikely to be effective in bringing

about genuine participation by the large mass of shareholders, not interested in politicking and dispersed throughout the country. The other difficulty is to have a satisfactory definition of 'what constitutes a minority'. The definition of minority shareholders as constituting that group of shareholders which is not represented on the Board, whether constituting the actual majority of the shareholders of the company or not, though theoretically acceptable, is nevertheless difficult to identify in practice for any meaningful purposes. We, therefore, consider the question of the 'minority' having a say in the management of the affairs of a company independently of providing for any representation in a certain proportion on the Boards of companies. We are, therefore, recommending a number of safeguards against erosion of shareholders' rights in Chapter VII dealing with "Protection of shareholders' interests".

Certain companies to have managerial personnel

5.9 As the Act stands today, a company can appoint three types of managerial personnel, namely, a managing director, a whole-time director, or a manager. However, as there is no compulsion on any public company to nominate or designate a person as manager, managing director, etc., the object of securing governmental approval for appointment of managerial personnel has sometimes been by-passed by companies. In para 5.12 we are suggesting that all appointments of managerial personnel must be approved by the shareholders by special resolution. We are anxious to see that this proposed requirement is not similarly by-passed by companies in future. We would, therefore, recommend that, as far as large public limited companies are concerned, that is companies having paid up capital Rs. 50 lakhs and more, it should be made obligatory to have a managing or whole-time director. The company can, of course, have more than one managing or whole-time director. This suggestion is based on the Committee's belief that large size companies with diversified nature and complexity of operations cannot be successfully managed without somebody being specifically charged with substantial powers of management.

Review of the existing provisions

5.10 While suggesting the necessary legislative measures in order to incorporate the above provisions in the Act, we have also been guided by a few additional considerations. We have, for example, found that the form of management by manager, though provided for in the statute, has not found much favour with companies in general. The appointment of a manager by the company is so rare that it is as good as not being there at all. We have, therefore, suggested the deletion of the definition of 'managers' in clause (24) of section 2. Consequently, we suggest that reference to 'directors who are managers' occurring in section 318 should be dropped. The provisions of sections 384 to 388A relating to 'manager' would become redundant and should be deleted from the Act. We are, however, retaining a definition of 'managing director' in the Act although we have suggested that a whole-time director should include a managing director as well. The effect of this suggestion is that when a company has only one whole-time director or managing director, he will be deemed to have the management of the whole or substantially the whole of the affairs of the company. Where, however, there are more than one managing director or whole-time director in a company, the individuals appointed should be deemed to have been entrusted with substantial powers of management only. We suggest that section 197A may be suitably redrafted to provide for the above suggestions.

5.11 In the light of our suggestions for appointment of certain proportion of the Board from among the workers, we also recommend certain consequential changes in the provisions of the Act relating to constitution of Board of directors besides the new provisions recommended by us in Chapter XI dealing with "workers' participation in ownership and management". Thus, it should be provided in section 265 that the provisions made therein are subject to any proportion which the company is required to maintain as regards the worker-directors. Also, it should be clarified that there shall be no stipulation in the articles of the company as regards qualification shares to be obtained by worker-director. Suitable reference in this respect should be specifically made in sections 266 and 270.

Appointment of managing and whole-time directors

5.12 Consistent with our general approach to insist on Governmental approvals only in exceptional cases and to allow the companies to function freely within the limits of certain

statutory safeguards, we suggest the replacement of the provisions of section 269 by provisions to the following effect :—

(1) A public limited company may appoint a whole-time or managing director or one or more whole-time or managing directors, by passing a special resolution if the following conditions are satisfied :

- (a) The whole-time or managing director proposed to be appointed —
 - (i) has completed the age of 30 years and is not above the age of 65 years; and
 - (ii) is not a relative of any director; and is not a shareholder or a relative of a shareholder of the company holding, in either case, more than two per cent of the paid up equity capital of the company;
- (b) A return has been filed with the Registrar in the prescribed form containing a certificate as may be prescribed; and
- (c) In the Explanatory Statement sent to Members along with the notice for the annual general meeting/general meeting, all material particulars relating to the appointment of the managing or whole-time director, including information now contained in Forms 25A to 26, as may be relevant to the circumstances of the case, should be incorporated in accordance with the rules to be prescribed in this behalf. However, in so far as Forms 25A to 26 are concerned, reference to "proceedings in which the person concerned has been involved" should be changed to "prosecutions launched against him".

(2) Where, on an application made to the Central Government by 100 members or by persons holding 10 per cent of the total voting power, or on its own information, it appears that the person appointed as managing or whole-time director has been prosecuted and convicted of an offence specified in the Economic Offences (Non-application of Limitation) Act and of the provisions of the Companies Act and the Monopolies Act, and that the Central Government is *prima facie* of the opinion that by reason that the offence of which the person concerned is convicted is such that he is not fit to be appointed as managing or whole-time director of a public company, the Central Government may refer the same to the Company Law Board with the request that the Company Law Board may inquire into the case and record a decision as to whether or not, by reason of the said conviction such person is not fit and proper to hold the office of managing or whole-time director.

Provided that before the Central Government decides to refer and state a case for the decision of the Company Law Board, it shall give the person concerned an opportunity of being heard.

(3) The person against whom the case is referred to the Company Law Board under this section shall be joined as a respondent to the reference and no order shall be passed by the Company Law Board without giving an opportunity to the person concerned of being heard.

(4) An order passed by the Company Law Board that, by reason of the prosecution and conviction of the person concerned of the offences referred to in clause (2) above, the person appointed as managing or whole-time director is not fit and proper to be appointed as managing or whole-time director shall be appealable to the High Court if it satisfies the provisions of section 100 of the Code of Civil Procedure.

(5) The High Court, on hearing an appeal under section 100 of the Code of Civil Procedure, shall, in addition, have the power to order removal from office of any managing or whole-time director, and in the event of there being no appeal from the decision of the Company Law Board within the time prescribed, the Company Law Board may order the removal of such person as managing or whole-time director of the company.

(6) The Company Law Board shall have power, on a reference being made to it, to pass such interim orders as the nature of the circumstances of the case may require provided that no such order restraining a person to act as managing or whole-time director shall be passed without giving an opportunity of being heard.

In view of our recommendations set out above, we consider that the provisions of section 268 are no longer necessary and should be deleted.

(7) Where the whole-time or managing director proposed to be appointed does not fulfil the conditions laid down in para 5.12, the appointment by special resolution can be made only with the previous approval of the Company Law Board.

(8) Notwithstanding anything contained in the foregoing provisions, the Company Law Board may approve the appointment of any whole-time or managing director, on an application made by the company, on such terms and conditions as it may deem fit, if it is shown to the Company Law Board that it would be in the interest of the company to accord such approval. The Company Law Board may reject the application if it is of the opinion that, keeping in mind the interest of the company, it would be proper to reject the application.

5.13 We would further recommend that the existing provisions of section 316 should be amended on the following lines :

No public company shall, after the commencement of the Act, appoint or employ any person as managing director if he is already a managing director of one public company unless —

- (a) in the case of holding—subsidiary companies, the appointment is approved by special resolutions passed by both the companies;
- (b) in the case of any other public companies, the following conditions are fulfilled :—
 - (i) the company in which the person concerned is already a managing director approves of his continuance as managing director of the company;
 - (ii) the second public company which proposes to appoint the person as managing director approves of the appointment by special resolution; and
 - (iii) the approval of the Company Law Board is obtained by the second company proposing to appoint the person as managing director.

Additional provisions regarding directors

5.14 Directors are appointed to act in the interests of the company and an important area of their legal responsibility stems from the law of trusts—they have a fiduciary relationship with the company. The duties arising from this relationship are well defined viz. to exercise their powers for the benefit of the company, to avoid a conflict of interests, and a duty not to restrict their right (by contract or otherwise) to freely and fully exercise their duties and powers. In addition to their fiduciary duties, directors also owe a duty of care to the company not to act negligently in the management of its affairs—the standard being that of a reasonable man in looking after his own affairs. Is it necessary or desirable to include a general statement of the duties of directors in the statute? In England, the view recently taken is that it is desirable (See the Cmnd Paper No. 7037 : the Conduct of Company Directors presented to the British Parliament by the Secretary of State for Trade). We do not think that the statutory prescription of a general statement of duties is either helpful or desirable, much less necessary—in our opinion the cases define with sufficient prescription the parameters of responsibility; the difficulty of prescribing duties by statute law would be that of stating them precisely and completely; even when formulated with great care, we apprehend that the consequence of enacting statutory duties, would be counter-productive—since a statement of director's duties and responsibilities cannot possibly cover all situations and all circumstances.

5.15 There are, however, certain areas where the existing law can be effectively altered so as to ensure a greater degree of effective participation by directors. These areas are delineated below along with our proposals.

Retirement age of directors

5.16 It is, in our opinion, necessary to re-introduce provisions relating to the retiring age of directors [sections 280 to 282 which were repealed by the Companies (Amendment)

Act, 1965 (31 of 1965)]. At present, there is no age limit for a director. In many countries, company legislation insists on retirement age of directors; thus section 185 of the English Companies Act provides that ordinarily no person should be capable of being appointed a director of a company if at the time of his appointment he has attained the age of 70 years. We consider that 70 years is an appropriate age beyond which a person ought not to be ordinarily appointed a director of the company unless a general meeting, of which special notice has been given, specifically approves of his appointment and declares that the age limit should not apply to him.

Our proposals —

- (a) The re-introduction of the provisions contained in sections 280 to 282 of the Act prior to their deletion by the Companies (Amendment) Act, 1965, with suitable modifications (the age being 70 years).
- (b) A specific clause should be added in the provision for vacation of office of director that the director of the company shall vacate his office at the conclusion of the annual general meeting commencing next after he attains the age of 70 years, but that acts done by a person as director would be valid notwithstanding that it is afterwards discovered that his appointment had terminated by virtue of his reaching the age limit.

Total number of directorships

5.17 To effectively ensure that directors will have adequate time to devote to the affairs of the company and protect the interests of the shareholders, we think that there should be a ceiling on the number of directorships which we would maintain at the existing level of 20, but we would recommend that the aggregate of 20 directorships should include alternate directorships and directorships in private companies also. Whilst therefore recommending the retention of the provisions contained in sections 275, 276 and 277, we would provide that the exclusions in computing the 20 directorships mentioned in sections 278(1) (a), (b) and (d) should be deleted. We would, however, restrict the number of directorships held by a managing or whole-time director to ten—obviously a managing or whole-time director would not be able to devote adequate time and attention to a large number of other companies.

Our proposals—We would recommend that:

- (a) a new provision be inserted after sections 276 and 277 to provide for the number of directorships that can be held by a managing or whole-time director—they would be restricted to ten and consequential provision along the lines of sections 276 and 277 would have to be made;
- (b) in section 278(1), sub-clauses (a), (b) and (d) should be omitted, and sub-section (1) should read as follows :

“(1) In calculating for the purposes of sections 275, 276 and 277, the number of companies of which a person may be a director, the directorship of an association not carrying on business for profit, or which prohibits the payment of a dividend shall alone be excluded”;
- (c) suitable modifications would have to be made in section 278(2) and section 279;
- (d) it should be provided that a period of four months (from the date when the new provisions commence) should be given to a person to make his choice—under our proposal the 20 directorships (or ten in the case of a managing or whole-time director) cover both private and public companies and also alternate directorships.

Better disclosure of corporate information

5.18 Recent developments in corporate law both in this country and elsewhere have been characterized by a strong emphasis on increased disclosures by management. Openness in company affairs is the best way to secure responsible behaviour. Most of the disclosure requirements are primarily in the matter of preparation and presentation of balance-sheets and profit and loss accounts and details of this are given in Chapter VIII.

Persistent defaults

5.19 There is a tendency by the companies not to file various statutory returns with the Registrar which the Act requires. A great deal of public time is wasted in proceeding against those at fault. But the underlying object—the disclosure of full information—is still not achieved.

5.20 We are of the view that if there is persistent default in filing the relevant documents, the consequences should be visited on those who are (or ought to be) responsible viz. the directors. The English Companies Act of 1976 has provided in section 28 that a person shall not be director or be concerned in the management of a company if he has been persistently in default in relation to the filing of the relevant statutory returns/documents.

5.21 Under our Act, section 614 empowers the court to direct the company to make good the default in filing with the Registrar any return etc. Section 614A further empowers the court trying an offence to require a company or its officers to file or register with the Registrar any return, account or other document as may be specified in the order. The non-compliance with such an order is penal. But penalties do not often result in material information being made available—for non-furnishing of which penalties are imposed. We would, therefore, suggest that section 283 should be extended further to provide as follows :

- (a) If after the time specified in the order made by the Registrar the documents (mentioned below) are not filed, the directors of the company will be deemed to have vacated their office on the expiry of sixty days after the time fixed by the order for compliance unless, within the said period of sixty days, the directors apply to the Company Law Board for relieving them of the disqualification, the Company Law Board may thereupon pass such orders (including interim orders) as it may deem fit and the question as to whether the director concerned has or has not vacated office for non-compliance with the directions will be determined by the Company Law Board. Such orders should be passed only after hearing the Registrar.
- (b) It should be clarified that vacation of office on this ground would arise only in case of default in respect of non-filing of the following documents viz. annual return, balance-sheet, profit and loss account.

Other disqualifications

5.22 In section 283, mention should be made of the additional grounds on which a managing or whole-time director or a worker-director may be disqualified from holding the office of director. For example, a worker director may be disqualified from holding the office as such on the happening of an event which would take away the conditions which are required to be fulfilled in order to make him eligible to be appointed as worker-director. Similarly, a managing or whole-time director may be disqualified to hold office as such if it is proved at any point of time that he does not either fulfil the conditions necessary to qualify him as a professional manager or is shown to be in office in violation of the conditions laid down in the statute in order to make him eligible to hold that office.

Matters to be discussed at Board meetings

5.23 One of the criticisms of the functioning of the Board is that as it is required to meet once in three months, the Managing Director usually takes decisions with respect to all the important matters, and the Board's functioning is one of ratification of his actions. We feel that the members of the Board should have more opportunity in decision-making in important matters concerning the company. With this in view, we recommend that board meetings should be held once in every two months.

Our proposals

The following matters should statutorily be required to be placed before the meeting of the Board in respect of transactions between the end of the last board meeting and the current meeting :—

- (i) investments;

- (ii) borrowing;
- (iii) lending; and
- (iv) a quarterly statement of profit and loss account and the working of the company.

5.24 We further recommend that at each meeting of the board of directors, a statement containing the statutory liabilities of the company like provident fund, gratuity liability, employee's state insurance and other liabilities should also be placed for the information of the directors and if necessary, for necessary action or directions by the board.

Assent by directors

5.25 In any action taken against a Director, one of the usual defences is that he had not assented to the action taken by the company. We would suggest the enactment of a clause raising rebuttable presumption subject to safeguards. A Director who has not agreed to a particular course of action at the Directors' meeting should be able to place his dissent on record so that when occasion arises, the same can be used by him in his defence. We find that Article 48 of the Model Business Corporation Act (prepared by the American Bar Association) is a wholesome provision in this regard and we would suggest that the said provision (which is reproduced below) be incorporated in suitable terms in the Act :

"A director of a corporation who is present at a meeting of its Board of Directors at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless his dissent shall be entered in the minutes of the meeting or unless he shall file his written dissent to such action with the Secretary of the meeting before the adjournment thereof or shall forward such dissent by registered mail to the Secretary of the corporation immediately after the conclusion of the meeting. Such right to dissent shall not apply to a director who voted in favour of such action".

Special resolution regarding certain matters

5.26 Certain powers can be exercised by the board without any reference to the shareholders (Section 292). Under section 293 of the Act the powers of the board in respect of matters mentioned in clauses (a) to (e) can be exercised by the board only with the consent of the Company in general meeting. An ordinary resolution is sufficient for this purpose. Some of the items in the said section specially with regard to sale, lease or disposal otherwise of the whole or substantially the whole of the undertaking, investment and borrowing powers are of an important nature and it would be more appropriate if these powers are exercised by the general meeting by passing a special resolution instead of an ordinary resolution. We would accordingly recommend an appropriate amendment to section 293.

Notice of meetings of the board

5.27 Under section 286 of the Companies Act, notice of every meeting of the Board of directors of the company is required to be given in writing to every director for the time being in India and at his usual address in India to every other director. There is no minimum time limit provided in the said section. We recommend that at least 7 days' notice prior to the date of the meeting should ordinarily be given to the directors. However, shorter notice may be given only in specially urgent cases and the minutes should record the reasons for dispensing with or curtailing the 7 days' notice.

Prevention of undesirable management

5.28 Section 203 empowers the Court to direct that a person shall not, without its leave, be a director of a company, where the person has been convicted of an offence in connection with the promotion, formation or management of the company, or where, in the course of winding-up of a company, it appears that the person had been guilty of an offence punishable under section 542, or has been guilty, while being an officer, of any fraud or misfeasance in relation to the company or of any breach of duty to the company. Section 203(b) suggests that it is only in the course of winding-up that such an order can be passed. We see no justification why such a power should be so limited. We would, therefore, recommend that this section should be amended so as to clarify that the court could exercise

such powers even when the winding-up proceedings are not pending before it. The idea is that if a person has acted in a manner which amounts to fraud or misfeasance in relation to the company or in breach of his duty to the company he should not be allowed to be a director of the company irrespective of the fact whether the knowledge is made available to the court during the winding-up or otherwise.

5.29 Section 203 further suffers from another lacuna—that an order can only be passed if a person is convicted of an offence involving fraud or misfeasance in relation to the company. We see no reason why it should be so limited and we would recommend that the Court should have powers to disqualify a person who has been convicted of any offence involving fraud or dishonesty whether in relation to the company or otherwise.

5.30 We also feel that if the court for any reason finds that a person is not competent to act as a director, powers under section 203 should also be conferred on the court to disqualify such a person from acting as a receiver, manager or liquidator for the same reason, and in the same manner as a director of the company.

Changes in sections 314 and 322

5.31 In section 314, a provision should be incorporated to the effect that a worker holding the office of a director shall not be deemed to hold any office or place of profit. Section 317 may be deleted and the provisions thereof, if necessary, taken care of along with the provisions of section 269.

5.32 Section 322 deals with an enabling situation where directors may make their liabilities unlimited. We have not been able to lay our hands on any company having such directors. In our opinion, this section in the Act has virtually become a dead letter. We, therefore, recommend the abolition of this section and the related section, namely section 323.

Workers director—Changes in the other sections

5.33 Elsewhere we have suggested workers' participation at the board level. As a result of this recommendation certain consequential changes will have to be made in Sections 255, 257, 262, 263, 270, 272, 283 (1) (a), 284, 299, 300 and 314 which have been detailed in Chapter XI.

CHAPTER VI

MANAGERIAL AND EXECUTIVE REMUNERATION

6.1 The terms of reference of the Committee require it to report, *inter alia*, on measures to promote professionalisation of management and regulation of managerial and executive remuneration.

6.2 The regulation of managerial appointment and remuneration is a special feature of the Company Law in this country. The present Act (Section 198) provides for an overall ceiling of 11 per cent of the net profits as the maximum managerial remuneration that can be paid by a company. Within this ceiling, a single managing director or a whole-time director as per Section 309 can be paid managerial remuneration upto 5 per cent of the net profits and if there are more than one managing director or whole-time director, upto 10 per cent of the net profits. These maximum percentages represent a kind of sub-ceiling within the overall ceiling of 11 percent. The present law also permits the directors other than the managing or whole-time director to receive by way of remuneration, for all of them together, a remuneration upto 1 per cent of the net profits. Where a company has not appointed any managing or whole-time director, the directors of the company may be paid collectively a remuneration not exceeding 3 per cent of the net profits. It is also permissible within the existing law to pay remuneration beyond these ceilings provided the payment of such remuneration is by way of minimum remuneration and is also approved by the Central Government. The ceiling for minimum remuneration which is payable in case of loss or inadequacy of profits is fixed at Rs. 50,000/- for all managerial personnel together and the payment of minimum remuneration whether within or beyond this ceiling is required to be approved by the Central Government. The present provisions of the statute and the rules also require the Central Government to take into account the size of the company's capital, its operations and its profitability on the one hand and the qualifications and experience as well as the integrity of the individual to be appointed as managing director or whole-time director, on the other.

6.3 Within the statutory limits laid down by the Act on managerial remuneration, the Central Government has laid down certain administrative guidelines prescribing the monetary ceilings in respect of salary, commission and perquisites. Under these guidelines which were issued in November, 1969, the administrative ceilings are, however, liable to be exceeded in deserving cases depending on merits. Thus, higher remuneration drawn by the person appointed as managing or whole-time director in his previous employment is taken into consideration. Exceptions are also made in case of expatriate directors in Indian subsidiaries of foreign companies or in the case of Indian companies having foreign collaboration arrangement. As a general rule the Central Government does not approve the appointment of the same individual as managing director of two companies on the ground that the same person may not be in a position to adequately discharge his responsibilities in two companies. Exceptions are made to this rule only where the companies are either small ones or engaged in more or less similar or allied business or are located contiguously and the appointment of the same individual as managing director of two companies would be in the interest of these companies. Even so, the remuneration drawn by such an individual in two companies is suitably regulated. A whole-time director is not allowed to take up paid directorship in another company, other than ordinary Board directorship. In 1972, the Central Government also came out with guidelines for approval of minimum managerial remuneration. Under these guidelines the Central Government had decided to allow minimum remuneration in the event of absence or inadequacy of profits and for compelling reasons and in public interest, beyond the ceiling of Rs. 50,000/-. Under these guidelines, salary not exceeding Rs. 5,000/- per month including dearness and other fixed allowances may be paid. Certain perquisites are allowable in addition to salary.

6.4 Under the present law all managerial appointments and remuneration require previous approval of the Central Government. Under the Companies (Central Government's) General Rules and Forms, 1956, the Central Government have prescribed Forms 25A, 25B, 25C and 26 for making application for approval of appointment, re-appointment, remuneration payable to managing/whole-time directors or manager and for effecting any change in appointment and remuneration. These forms elicit information which gives an idea of the

criteria or considerations which the Government have in mind while approving any appointment or while fixing any remuneration. The essential information solicited from the companies pertains to the following :—

- (a) Size of the company and its capital structure ;
- (b) nature and form of management ;
- (c) remuneration proposed to be paid and the manner of payment including the details of the perquisites proposed ;
- (d) considerations on which proposed remuneration is fixed by the company ;
- (e) direct or indirect interest of those in management in distribution arrangements;
- (f) remuneration paid to relatives ;
- (g) past employment and remuneration of the proposed appointees ;
- (h) disqualification, if any, of the proposed appointees under sections 267 and 385 of the Act ;
- (i) particulars of any appointment held or remuneration receivable from any other source by the proposed appointees ;
- (j) involvement of the proposed appointees in the violation of certain economic legislations like the Companies Act, the Income-tax laws, the Foreign Exchange Regulation Act, the Imports and Exports and Excise Laws, etc. ;
- (k) effective capital of the company, which gives an idea of the capital employed by the company and which is calculated in the following manner :—

(i) Paid up capital	Rs.
(ii) Share Premium	Rs.
(iii) Reserves and Surplus (excluding taxation reserves, depreciation reserves, gratuity etc.)	Rs.
(iv) Long-term loans (including deposits, if any)	
(a) Secured	Rs.
(b) Unsecured	Rs.

Less

Investments	Rs.
Total accumulated losses and preliminary expenses not written off	Rs.
Amount of depreciation provided for up to	Rs.....Rs.

- (l) working results of the company.

6.5 As far as the public sector companies are concerned, the Bureau of Public Enterprises (BPE) which is responsible for prescribing guidelines for managerial appointment and remuneration in public sector undertakings has prescribed four pay scales for the Chief Executives including Managing and Whole-time Directors in the public sector undertakings according to the size and importance of the undertakings.

6.6 Keeping in mind the existing background and the terms of reference, the Committee gave anxious thought and consideration to the various aspects of the problem of regulating managerial and executive remuneration. Several views expressed by Committee members on the subject were as follows :—

- (i) The remuneration which the top executives including Managing and Whole-time Directors in the corporate sector of our country get in the shape of salary, perks and commission is much more than the country can afford. Added to this, at some places, top executives are obliged by allowing fat salaries in the name of their better halves under some pretext or other even though the ladies do nothing towards the industrial growth of the nation. And what about the workers! Almost everywhere they are paid meagrely. This is not only opposed to the ideology which

our country professes but has been resulting in more and more dissatisfaction in the working class.

Ours is a Socialist Republic—a Republic in which there should be a freedom from all forms of exploitation, social, political and economic. Unfortunately, more than half of our population lives below poverty line. There can, therefore, be no justification for the top executives of any company being so lavishly fed.

The argument that one should be paid according to his ability is in the present circumstances not only mischievous but not at all tenable in a Socialist Republic. We must first see whether the toiling masses get their minimum needs or not. When millions of working masses are half starved and half naked, how can top executives claim for more remuneration—nay even the existing one. There must be a ratio say 1 to 10 between the income of the lowest paid worker of a company and its top executive head.

After all what is the worth of industrial working which on the one hand manages a very luxurious life to its top heads but on the other hand hesitates to provide even necessities of life to its workers.

It is, therefore, urged that the glaring disparity in pay, salary, etc. between the workers and top executives of a company should be urgently minimised. Sooner this is done the better it would be not only in the interest of our nation but in the interest of the corporate sector and the top executives as well. Otherwise how can one justify our nation to be a socialist Republic?

- (ii) While there is no ceiling either on wages or income from profession or business, there appears to be no rationale to control remuneration of the managerial personnel and that too of corporate sector only. While control of remuneration to employees by those who own the enterprises is rational and universal, attempt to put a ceiling on the remuneration in the garb of safeguarding the 'public interest' appears to stem from a sense of frustration on the part of powers-that-be. The problem should be viewed really in the context of the ceiling that has been imposed in section 198 of the Act which refers to the *overall* managerial remuneration and not remuneration to any particular individual.

It is often argued that the 'public interest' is sought to be guarded through control on remuneration and that exploitation of the consumers should be avoided. Anyone who takes a cursory glance at the published accounts will note that salaries to the managerial personnel form a very small percentage of the total cost of production and, in any case, if at all such public purpose is to be served it should be with reference to the 'total' managerial remuneration, which is rightly regulated by section 198 of the Act, and not with reference to the remuneration to an individual or a few individuals. In our country a higher price is paid by consumers more often because of shortages rather than because of high 'cost of production'. Regulating the remuneration of one or a few individuals cannot be justified even if one were to imagine that 'cost of production' is the only factor that determines the 'price'. After all, the element of 'cost of production' is *total* managerial remuneration, which is regulated by section 198, and not what an individual gets within this overall ceiling.

Remuneration to an individual is relatable to (a) ability of the person who is remunerated and/or (b) ability of the company (we could say prosperity of a company) to pay for such ability, and/or (c) relationship of the person to either those who are in control of the management or those who hold a substantial percentage of the shareholding in the company. One could perhaps say that a further check is necessary if the person sought to be remunerated is either related to those in control of management or to those having substantial shareholding in the company and who can influence the decision in a General Meeting. When the persons sought to be remunerated do not fall into either of the above two categories, such an interference by an outside agency is wholly unwarranted. One could rationally conclude that neither those in control of management

nor the shareholders would like to gift away to an outsider what they could get into their own pockets through dividends or otherwise. One should expect therefore that remuneration to an individual should be consistent with his abilities and, considering the scarcity of the managerial personnel, one could say that the market forces would bring about an appropriate scale of remuneration for a given person.

Lack of adequate remuneration results in the managerial personnel leaving the country in large numbers—particularly recently to Middle-East and European countries—and depleting this scarce resource at a time when the country is about to make rapid strides in its economic activities. Another undesirable development of such artificial restriction, which in particular pegs the remuneration at a given level, is that having reached the level—most of the managers reach the maximum in their forties—there is no incentive for further efforts. One could relate, to a large extent, failure of the public sector undertakings to the fact that the remuneration to the top men in that sector has been hopelessly inadequate and not at all consistent with the responsibility shouldered by them. This has resulted in hordes of managers doing a job which could otherwise be done by a single manager properly motivated and remunerated.

Having said this, one ought to recognise the fact that if remuneration is also based on the prosperity of a company—it is so based in most of the companies—then one ought to logically share the prosperity with all those who have directly put in the effort resulting in that prosperity. Therefore, there ought to be a relationship between the lowest paid and the highest paid persons in a company. Obviously such relationship should be established with reference to 'take home' remuneration, i.e. remuneration after deduction of taxes but not provident fund, etc. This is very urgently necessary in a country which has dedicated itself to the ideology of bringing about parity in income within a reasonable length of time. Instead of fixing a maximum remuneration, which unfortunately the present guidelines do, if the highest remuneration in a company is related to the lowest, the following desirable results will follow :

- (1) There will be no stagnation at any level in a prospering company;
- (2) There will be a much more egalitarian atmosphere within at least an organisation;
- (3) There will be a sense of belonging amongst all those who are within a company and who have put in their collective efforts for attaining the company's objectives.

It is desirable, therefore, that :—

- (1) there should be only an over-all ceiling of the total managerial remuneration as in the present section 198;
- (2) there should be a special procedure like that of a Special Resolution, if anyone substantially interested is sought to be remunerated or is related to those who have substantial interest in the company;
- (3) there must be a relationship between the highest and the lowest remuneration paid within the company, remuneration being calculated after taking into account perquisites but after deducting tax, if any, that is payable; and
- (4) the ultimate decision in such matters must rest with only the shareholders of the company.

- (iii) Another view has been that though some limitation in public interest may be desirable, the existing limits which already operate today are totally insufficient to attract competent persons/professional managers whom the company with the consent of the shareholders wish to employ or engage—this inhibits the growth of the corporate sector. Indian managers are the lowest paid managers in the world. The protagonists of this view consider that if there be a ceiling, it should be raised and not lowered and that it is necessary for the growth of the corporate sector that incentive be provided for better performance even amongst managerial personnel.

Any ceiling that may be provided has to be such that Indian managers are not lured by higher salary which they are liable to obtain abroad. India has lost many able managers in the last three years. In the determination of the remuneration that should be paid to the whole-time directors, it should be emphasized that it is they who contribute greatly to the growth of the corporate sector. Sophisticated equipment and technology has fruitful meaning only when men are able to put them to best use, obtaining maximum results from these resources to serve the community at large. Employment and economic growth is inter-twined and inter-linked. One cannot brush aside easily the need for more and more employment in a country which is striving to obtain a better way of life for its citizens. It is these men who bring about this growth in an enterprise of a combined effort and for this effort they have to be rewarded for their skills. With more and more professionalism of management, the whole approach to the managerial remunerations has to be looked at in the overall context of the prevailing situation and the times to come when industries will be wholly manned by professional managers. In this context, the following suggestions have been made :—

- (1) The relevance of section 198 no longer exists. This was introduced as a hang-over of the managing agency system. This should be deleted. With the professionalisation of management, more and more professional persons would be appointed as Managing Directors or whole-time Directors, number of such persons depend on the size of the company and, therefore, the above suggestion has been made.
- (2) The present system of salary, commission and perquisites causes confusion and creates impressions not always correct. It is suggested that this may be replaced by the following.
 - (a) Salary not exceeding Rs. 10,000 per month;
 - (b) Perquisites equal to half the salary, computable on a cash basis. These perquisites can be taken in any form whatsoever;
 - (c) In the general course, no commission except as suggested under clause (3) below;
 - (d) All other conditions of service at par with those applicable to the senior executives in the company;
- (3) The contracts of whole-time directors normally are for a period of five years. In order to provide incentives to them, it is necessary that they share in the prosperity that they have brought about. It is, therefore, suggested that they be offered :
 - (a) Stock options in the company and
 - (b) Receive a commission based on the average profits for five years—the term of the tenure of the whole-time director—such payment to be received in the sixth year or at the end of the five years—and such payment to be in the form of a deferred annuity.
 - (c) Section 309 to be amended to permit such payments upto 1½ per cent of the profits to individual whole-time directors with a total ceiling of seven per cent to all the whole-time directors calculated together.
 - (d) In any consideration for the managerial remuneration, it is not the gross value of the remuneration that has to be looked at and the consideration should be on the basis of a remuneration net of taxes i.e. take-home pay since in the tax structure as is operating in the country for the last several years, individual taxation goes up and down significantly. It is necessary that the amount net of tax should be taken into account in any scheme of remuneration. The above suggestion regarding gross remuneration has been made before tax and, therefore, it has to be considered in that light.
- (iv) The Bhoothalingam Committee has done a public service by pointing out that management remuneration goes upto over Rs. three lakhs even where workers get starvation wages. This is due to commission and perks. The commission, Bhoothalingam Committee rightly points out, is a hangover of managing agency days. A

salaried person has no business to expect commission. He may at most get profit bonus along with workers at the same rate. His perks should not be more than twenty per cent of salary. Most abused item is free furnished house wherever he goes. It should be rigidly fixed at ten per cent of salary, and within twenty per cent of the ceiling. The salary should bear relation to the public sector where responsibilities are higher. Salary in public sector is Rs. 4,000/-, in private sector it may be Rs. 5,000/-. The present system of unlimited remuneration makes management greedy, sets it against workers and society. In order to maximise its share, it starves workers through low wages, and fleeces customers through high profits. Once his remuneration is curbed and he finds that their fleecings do not profit him so much, his exploitative tendency will be reduced.

In order to bring this about, another ceiling would also be necessary. The proportion of one to ten between minimum wage in the particular industry or unit and the managerial remuneration should be rigidly enforced. This proportion is for now, and not for some future occasion. If this proportion is rigidly enforced, management will first raise the minimum wages in order to raise its own. This will be in-built framework for social justice.

Real management often avoids the ceiling by assuming the post of executives whose salaries are not controlled, and naming some lesser man for managerial post who works according to his direction.

The salaries of executives should be curbed, excepting those of technical and foreign personnel. This should be kept in check by making it obligatory to disclose all salaries of executives more than those of management, in Directors' Report.

6.7 Despite these different views, the Committee, after further discussion, would have made an attempt to come to some definite conclusions. But events which have happened since the constitution of the present Committee would appear to make it proper that we make recommendations which would not run counter to the Government Policy enunciated in the Resolution dated the 30th October, 1977, appointing a Study Group to undertake a comprehensive study on Wages, Incomes and Prices Policy. In the Resolution it has been clearly stated that any rationalisation of the existing pattern of wages and income in different sectors should be attempted only as an element of an integrated policy on Wages, Incomes and Prices. The Study Group have made their recommendations (which have been made public) on 'top managerial salaries' in the 'private sector'—that is the corporate sector.....A national debate has been initiated by the Government on the findings of the Study Group. It has also been indicated that after taking into account representations of the concerned sectors, an integrated policy on wages, incomes and prices would be decided upon and determined. In these circumstances, while recommending measures to promote professionalisation of management, the Committee feels that the only regulation that they would recommend with regard to the managerial and executive remuneration would be to provide that such remuneration should be left to the determined by the company in general meeting after adequate safeguards by way of special resolution and within the guidelines of November 11, 1969 laid down by the Government which are in operation at present, till such time as Government announces its decision, in the light of its consultations with various interests, as mentioned above.

6.8 We, however, feel that broad guidelines should be so fixed by the Government that as far as possible the companies should within the statutory guidelines be able to appoint the managing director and the whole-time director without having to come to the Government in each individual case. The classification, according to size, may be into four categories, viz., A, B, C, and D and the maximum salary payable to the managerial personnel of each category of company may be fixed accordingly. In the statutory guidelines, the Government may also indicate the minimum salary which the companies in different categories could pay to their managerial personnel in the years in which the company does not have adequate profits or incurs losses. The guidelines may further indicate the maximum period upto which such minimum remuneration would be allowed by the companies with the approval of shareholders by a special resolution and beyond which approval to Government will, in any case, be necessary. For purpose of classification of companies into different sizes, effective capital of the company may be taken into account. The method at present being followed by the Department including in the case of trading companies to determine effective capital is already mentioned in para 6.4.

6.9 System of approval/sanction

Prior to the Companies (Amendment) Act, 1974, the Act provided for certain guidelines on managerial remuneration and the Government approval was required only in the case of first appointment of managing directors and whole-time directors. By the amendment of the law referred to above, the Government approval has now been made mandatory not only in every case of first appointment but also re-appointment of managing and whole-time directors. Recent amendments also stipulate that even if the re-appointment is on the same terms and conditions, the Government approval will be necessary. These amendments have imposed heavy burden on the companies as also on the Department of Company Affairs.

6.10 The Committee has given careful thought to this question and feels that by requiring every public company to approach the Central Government for approval of all proposals for appointment and re-appointment of their managerial personnel, which could be regulated by proper statutory guidelines themselves, both the Department and the companies and their personnel are made to undergo avoidable stress and strain. By dispensing with the requirement of approval in majority of the cases, we will not only do away with avoidable paper work but would also enforce a greater sense of responsibility on the Board of directors and the shareholders. On the face of it, the power of the Government to refuse approval to the appointment of managing or whole-time directors, every time such an appointment comes up for consideration, looks like a wholesome discretionary power to keep away aberrant and irresponsible persons from occupying positions of power in a company. However, in practice, the tremendous difficulties which any Government agency would face in dealing with thousands of companies and in coming to any clear judgement about their efficiency, suitability or fitness of management on the basis of any valid and universally applicable criteria, cannot be overlooked. Any refusal of managerial appointment leads to repeated approaches to the Government for reconsideration and in most cases, companies finally succeeded in explaining the position to the Department; in the process, however, a good deal of time and energy is wasted. We have obtained information from the Department with regard to the number of cases which had come up for approval and the number of cases disposed of by the Department under section 269 of the Companies Act, for the calendar years 1976 and 1977. From the figures furnished to us, we find that in the year 1976, 883 applications were received of which 879 were disposed of. Out of these, 858 were approved and only 21 were rejected. Thus the rejected applications constituted a bare 2.4 per cent of the total number of cases disposed of by the Department. For the year 1977, of the 712 applications received, 693 applications were disposed of, out of which 666 were approved while only 27 were rejected. The rejection percentage thus works out to 4 per cent only. This small percentage of rejection also lends support to our recommendation that the object of approval of each individual appointment by the Government does not serve any worthwhile purpose.

6.11 It is needless to point out that any proved misconduct would necessarily bar any appointment or re-appointment. Through various measures over the years, the Government has also acquired powers to put an end to mismanagement in companies and even to take over their management. The Committee has elsewhere recommended strengthening of measures to contain mismanagement. If these various measures are faithfully resorted to, this should greatly assist in keeping up the healthy functioning of the corporate sector. The Committee has, therefore, come to the conclusion that the wide powers now given to the Government in the matter of approval in any appointment and re-appointment of working directors may, therefore, be modified to provide for such approval only in special circumstances, such as, in case of relatives of directors or where the proposed appointee is himself a shareholder or a relative or a shareholder holding in either case more than two per cent of the paid up equity capital of the company, as indicated by us in Chapter V dealing with management structure and professionalisation of management. Another exception would be in case of appointment of expatriate directors as mentioned later by us.

6.12 We have, while considering professionalisation of management, recommended certain qualifications, experience and conditions of appointment, the fulfilment of which will dispense with the approval of the Central Government. Appointment of managerial personnel would thus be left, barring exceptional circumstances, to discretion and judgement of the companies. We would, however, suggest that these powers within the statutory provision and guidelines, should be exercised by a company at a general meeting in the form of special resolution and as special business. The purpose is to ensure that the persons who are being appointed are fit and proper persons and their appointment would be in the interest of the

company. The explanatory statement on such resolutions should contain the full particulars and justification in terms of the present requirements of sub-section (3) of section 269, section 309 and section 637AA of the Companies Act, 1956. This internal safeguard is being recommended in the light of the withdrawal of the powers of the Central Government in this regard: There should also be included in such explanatory statement, a statement as to whether or not the proposed managing director or whole-time director was at any time involved in any prosecutions under the various economic offences as described in the Companies (Central Government's) General Rules and Forms, 1956. In future, therefore, approval of the Law Board to the appointment of managing/whole-time director will be necessary in exceptional cases. In order, however, to keep a watch over the managerial appointments within statutory guidelines it is recommended that the annual report of the Board of directors should contain a statement to the effect that these statutory guidelines have been complied with. It is further recommended by us that the Company Law Board be empowered to take cognizance of any breach of the guidelines on the complaint of a member entitled to make a complaint under sub-sections (1) and (4) of section 399 as if the member or members concerned had a right to apply under sections 397 and 398. Subject to these recommendations, the powers with regard to amendments of any condition relating to the appointment or re-appointment of a managing director or a whole-time director or their remuneration which are now being exercised by the Central Government under sections 268, 310 and 311 of the Companies Act, 1956, should be exercised in future by the companies themselves.

6.13 Expatriate directors

There is a special category of directors, namely, expatriate directors who are appointed as managing or whole-time directors in foreign companies. Some of them are appointed on the strength of collaboration agreements as technicians. Their appointment requires the approval of the administrative ministries and the Department of Company Affairs accords the approval on the strength of the clearance given by the former, the clearance extending to tax exemption as well in suitable cases. There are also certain other expatriate directors appointed at the instance of foreign shareholders in the Indian branches of multinationals. Because of the high salaries in foreign countries and the comparatively high emoluments already drawn by such directors, the proposed ceilings may be found to be inadequate. Nevertheless, the appointment of all expatriates should be scrutinised by the Government on account of the need to regulate the business of foreign companies in India. It is, therefore, desirable that all such appointments and remuneration should be submitted to the Government for approval and suitable provisions should be incorporated in the guidelines.

CHAPTER VII

SHAREHOLDERS' PROTECTION AND PREVENTION OF MISMANAGEMENT

7.1 It is essential to maintain a proper balance between the rights of majority and minority shareholders for the smooth functioning of a company. This equilibrium has been maintained by the Courts by drawing a distinction between individual membership right and corporate membership rights. By his contract with the company (and other members) a shareholder undertakes, with respect to most rights which his membership carries, to accept as binding on him decisions arrived at by a majority of shareholders if they are arrived at in accordance with the law and the articles of association. These membership rights are referred to as "corporate membership rights". There are other rights of the shareholder which cannot be taken away from him unless he consents or the statute expressly permits: rights of this type are referred to as "individual membership rights". Both individual and corporate membership rights are recognised in various provisions contained in the 1956 Act. The right of a shareholder not to be compelled to take or subscribe for more shares or to have his liability increased without his consent in writing (section 38), the right to apply to Government for the calling of an annual general meeting if the company defaults in holding of that meeting (section 167), the right to object to the appointment of two or more directors by a single resolution (section 263), the right of a member to use his votes differently on a poll (section 183), the right to insist that a general meeting shall not be held unless at least twenty-one days' notice in writing has been given (section 171), the right to petition for a compulsory winding up of the company (section 439), the right to make representations to the Court where the sanction of the Court is sought to a scheme of arrangement whether by way of amalgamation or otherwise (sections 391 to 394), the right to object to a compulsory transfer of his shares (section 395)—all these are statutorily recognised rights of an individual shareholder as they enable a member to maintain himself in full membership with all rights and privileges appertaining to that status. The 1956 Act also qualifies certain individual rights of shareholders by requiring for their exercise the consent of a particular number of shareholders or a percentage of shareholding; thus the right to call an extraordinary general meeting on requisition, though an individual membership right will be effective only when the prescribed number entitled to requisition a meeting so express their will (section 169), similarly the right of a dissentient shareholder to have a variation of shareholders' rights cancelled by the court can only be exercised if the holders of not less than ten per cent of the aggregate of the issued shares (belonging to that class) consent or vote in favour of the resolution (section 107), the right to demand a poll at a general meeting of a public company, though, an individual right of a shareholder can only be exercised if five members having the right to vote for the resolution either by person or proxy make a demand for a poll (section 179), the right to apply for an investigation of the affairs of the company can only be maintained if the prescribed statutory number make the application (section 235), the right to apply to the Court for relief of oppression and mismanagement is maintainable only where not less than one hundred members of the company or members holding not less than ten per cent of the issued shares of the company apply (section 399).

7.2 Where the will of the majority is expressed at company meetings properly called—either by ordinary resolution or by special resolution (where the law so required)—the shareholder must submit to the decision of the majority: these are matters connected with the membership of the company and are referred to as "corporate membership rights". But the law is so zealous of the rights of shareholders that even with regard to corporate membership rights, where the principle of supremacy of the majority applies, it has strived to engraft exceptions—thus an act which is *ultra vires* of the company or illegal, an act which constitutes a fraud against the majority where the wrong-doers are themselves in control of the company, an act sanctioned by a resolution which requires a qualified majority but has been passed by a simple majority: these have all been considered sufficient to justify interference on the application of an individual shareholder. They constitute exceptions to the century-old rule in *Foss v. Harbottle*: the rule that it is for the majority to decide what is for the benefit of the company. Over the years there has also been engrafted—by judicial dicta—a further general residuary exception: cases

in which justice requires that the court should intervene to assist an otherwise helpless minority shareholder; courts would not refuse to set right the wrong even though the majority has willed otherwise. The aim of each Committee, whether in India or in England, appointed to revise or simplify company law has been to devise means of making it easier for shareholders to exercise more effective general control over the management of their companies. This was what inspired the appointment of the Company Law Committee in 1950 (The Bhabha Committee)—its task was to consider and report what amendments were necessary in the Indian Companies Act, 1913, having due regard *inter alia* “to the desirability of adequately safeguarding the interests of investors and of the public”. The terms of reference of the present Committee also require us to consider the provisions of the 1956 Act and report *inter alia* on protection of Shareholders’ and Creditors’ interest.

7.3 It is notorious that a large number of small shareholders are apathetic—they have neither the time, money nor experience to make use of their rights and are too numerous and widely dispersed to be effective in exercising control over management. We do not subscribe to the pessimistic view that it is useless to provide further safeguards to shareholders which they will not use. Past experience has shown that weapons placed in the armoury of minority shareholders; for instance by the 1956 Act on the recommendations of the Bhabha Committee, have been often used to great effect. That they have not been used even more frequently is, we believe, because most shareholders are not organised to embark on litigations to enforce rights conferred by section 397 and/or section 398 of the Act and also because these provisions are hedged in with unnecessary conditions precedent.

7.4 As we conceive it, a public limited company must be left free to deal with and regulate its own internal affairs with a minimum of external control. But in order that it should do this effectively, there must be a more effective and meaningful participation by its own shareholders. With this end in view we would provide a broad pattern of investor’s control coupled with provisions ensuring better management at Board level. Our recommendations are under the following heads :

- (A) more effective and meaningful participation by shareholders at general meetings and extraordinary general meetings of the company;
- (B) ensuring better management at Board level;
- (C) better and quicker remedies for oppression and mismanagement;
- (D) promotion of co-ordinated activities of shareholders;
- (E) miscellaneous.

A. More effective and meaningful participation by shareholders at meetings

7.5 The common law does not recognise voting by proxy but the articles of Association of a company generally confer such a right—since it is extremely inconvenient that a member, especially when residing at a distance, should be obliged personally to attend every meeting. The statute now guarantees this right. In every public company, a member who is entitled to attend and vote at a meeting is entitled to appoint another person (whether member or not) as his proxy to attend and vote instead of himself. [Section 176 (1)]. In England, a proxy appointed to attend and vote in a private company has the same right as the member to speak at the meeting [Section 136(1) of the English Companies Act, 1948]. The same recommendation was made by the Bhabha Committee (para 77 of the Report)—but in the 1956 Act as enacted a proxy appointed by any member of a company whether public or private does not have any right to speak at the meeting. A body corporate which is a member of a company is entitled to be represented at meetings of that company by a person authorised by resolution—such person has the same right and power on behalf of the body corporate which he represents as that body could exercise as if it were an individual member (section 187). The representative of a body corporate thus has a right to speak at meetings of the company of which the body corporate is a member. We do not see any reason for depriving individual members who are not able to attend meetings of the company of which they are members from appointing proxies who could more effectively represent them if they were also entitled to speak at such meetings. It would help towards a more effective participation if the proxy were conferred a right to speak, as well as a right to vote on show of

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hands. With the same object in view we would also recommend the two-way proxy form as a mandatory requirement. But we think that a proxy should not be effective in forming a quorum and, therefore, no alteration is proposed in section 174. Our proposals under this head accordingly are :

- (i) In sub-section (1) of section 176, the words "but a proxy so appointed shall not have any right to speak at the meeting", shall be substituted by the following, namely—

"and a proxy so appointed shall also have a right to speak at the meeting".
- (ii) In sub-section (2) of section 176 the words 'or' the articles of which provide for voting by proxy at the meeting' should be deleted.
- (iii) In the proviso to sub-section (1) of section 176, clause (c) should be deleted.
- (iv) For sub-section (6) of section 176, the following shall be substituted:

"An instrument appointing a proxy shall be in Form II set out in Schedule IX and it shall be the duty of the Board of Directors to circulate proxy forms to all members entitled to attend and vote at the meeting along with the notice convening the meeting."
- (v) The Form II of the form of proxy in Schedule IX should be suitably amended so as to enable the member to utilise the proxy form in respect of every resolution to be voted on at the meeting. This two-way proxy form—which we recommend for compulsory adoption by public companies—is the nearest to a postal ballot. The reason why we do not recommend a postal vote is because it would be antithetical to the basic principle of Company Law which is that all resolutions must be passed "at a meeting"—which means that the member or his proxy must attend and vote.
- (vi) Consequent to our proposal for substitution of section 176(6), section 172 (3) should be amended to provide for the safeguards against accidental omission to circulate the proxy form along with the notice.

7.6 To have a more effective participation by shareholders, it is also necessary to take a further look at section 291 of the Act, which deals with general powers of the Board of Directors. This section provides that the Board of Directors of a company shall be entitled to exercise all such powers and to do all such acts and things as the company is authorised to exercise and do, except in relation to powers, acts and things directed or required by the Act or the Memorandum or Articles to be done by the company in general meeting. The second proviso to section 291 (1) reads thus:

"Provided further that in exercising any such power or doing any such act or thing, the Board shall be subject to the provisions contained in that behalf in this or any other Act, or in the memorandum or articles of the company, or in any regulations not inconsistent therewith and duly made thereunder, *including regulations made by the company in general meeting*". (Emphasis supplied).

It is quite plain that textually, "regulations" by shareholders in general meeting could control acts of directors. But the textual meaning is not always the accepted judicial meaning.

7.7 Section 291 follows closely its English counterpart (Article 80 in Table A of the English Companies Act, 1948). It is now established by a series of decisions of English Courts that the language used in article 80 of Table 'A' does not enable shareholders, by resolution passed at a general meeting, without altering the Articles, to give directions as to how the company's affairs are to be managed nor to over-rule any decision arrived at by the directors in the conduct of its business, even as regards matters not expressly delegated to the directors by the Articles. (*Buckley on the Companies Acts, 13th Ed. p. 860*). The word "regulations" are confined to procedural matters. In a recent English case (*John Shaw & Sons Ltd. Vs. Shaw*) the Court even spoke of the "sovereignty of the directors" within the limits of the powers conferred on them by the Articles, overlooking the rule established over a century ago in *Foss Vs. Harbottle* that in a dispute of any matter between directors and shareholders, it is the latter who are sovereign. A conceivable reason for such interpretation is that the English Companies Act, 1948, contains no

provisions corresponding to section 90 of the English Companies Clauses Act, 1845, which had provided that the exercise by the Board of their powers shall be subject to the control of any general meeting specially convened for the purpose. The Indian Company Law also contains no such salutary provision. But the notion that directors are "sovereign" in matters entrusted to them by the Articles runs counter to a long line of authority both in England and in India that directors are agents of the company and stand in a fiduciary relationship with its shareholders. To avoid future litigation and controversy we would recommend an amendment to the second proviso to section 291 (1) so that it would read (when amended) as follows (without the emphasis):

"Provided further that in exercising any such power or doing any such act or thing, the Board shall be *controlled by* and *be* subject to the provisions contained in that behalf in this or any other Act or in the Memorandum or Articles of the company or in any regulations not inconsistent therewith, including *resolutions passed by the company at any general meeting specially convened for the purpose*".

Section 291 when amended as proposed by us would furnish a legal right of intervention to shareholders in exercising control over and issuing directions to the Board—at the same time it would not disturb the managerial autonomy of the Board of Directors or be an impediment to its day-to-day management.

B. Ensuring better management at Board level

7.8 To ensure adequate protection to the shareholders' interest it is, in our opinion, necessary to re-introduce provisions relating to retiring age of directors, imposing a ceiling on the number of directorships an individual can have and more effective participation by directors at Board meetings. Our recommendations in this regard are contained in the Chapter dealing with Management Structure and Professionalisation of Management.

We have also taken note of the recent development in corporate law in the matter of better and more meaningful disclosures of corporate information to the shareholders and others having dealings with companies. We have accordingly made several recommendations regarding matters to be disclosed both in the report of the directors to the shareholders and also in the accounts. These recommendations are contained in the Chapter on Accounts & Audit. An additional feature to be noticed in this regard is the requirement of all public companies whose shares are listed in any stock exchange to publish an abstract in a summarised form once in six months of their unaudited accounts of company together with a brief report thereon.

These additional measures recommended by us should be helpful to a great extent in enabling the shareholders to understand better the affairs of the company.

C. Better and quicker remedies for oppression and mismanagement

7.9 Chapter VI of the Companies Act (sections 397 to 409) contains provisions designed to prevent oppression and mismanagement. They are divided into two parts—part "A" being powers conferred on the Court (sections 397 to 407) and part "B" being powers conferred on the Central Government (sections 408 and 409). This distinction is, in our opinion, necessary to be maintained. But we consider that the over-riding power in cases of alleged oppression and mismanagement should be that of the Court and would accordingly recommend that all final orders passed by the Central Government under section 408 and/or section 409 should be revisable in appeal by the High Court. We are at the same time conscious of the fact that the emergent powers under section 408 are on occasions necessary and unless shown to be exercised *mala fide*, are really in the interests of the shareholders. We would, therefore, propose that whilst the order of the Central Government may be appealed against on certain grounds to the High Court, the order itself ought not be disturbed until a final adjudication of the appeal by the High Court. In view of the seriousness of the consequences of an order passed under section 408 and in view of the various provisions of the Companies Act relating to the holding of annual general meetings, appointment of directors at such meetings etc., it would be necessary to further provide that such appeals to the High Court should be

disposed of as expeditiously as possible—and it is for this reason that we are providing for a period of six months for the disposal of the appeal.

7.10 With regard to the powers of the Central Government to prevent change in the Board of Directors likely to affect the company prejudicially (section 409), we are of the opinion that this power should be retained but here-afterwards be exercised by the Company Law Board as reconstituted. The reasons for this suggestion is that proceedings under section 409 start on a complaint, and necessarily involves a right of parties. It would, therefore, be appropriate that the powers under this section are exercised by a quasi-judicial body. We would also recommend additional safeguards as indicated in our proposal for the redraft of section 409. We would further recommend that the complaint specified in section 409 (1) should not be restricted to those in management but that the provisions of section 409 (1) may also be available to the shareholders of the company provided they fulfil the qualifications of members having the right to apply under section 397.

7.11 We are also of the opinion that the requirement* of clause (2) (b) of section 397 impose as an essential condition of intervention by the Court a state of facts often difficult to establish. We see no sufficient reason for making out a case of oppression that the facts should also justify the making of a winding up order.

7.12 There are certain other features in section 397 requiring correction. Under the existing law, in order to justify intervention of the Court (under section 397), it is necessary that there must exist at the date of the petition a course of oppressive conduct; there must be continuous acts on the part of the majority shareholders continuing upto the date of the petition showing that the affairs of the company are being conducted in a manner burdensome, harsh and wrongful. In our opinion, these conditions are too onerous. In our view the section ought to be available even where the complaint concerns a single act of oppression not necessarily a continuing one. This would enable effective action to be taken through the medium of a section 397 petition—which the rule in *Foss Vs. Harbottle* would prevent in a suit at the instance of a shareholder. The rule in the said decision establishes that in order to redress a wrong done to a company or to the property of a company or to enforce the rights of the company, the proper plaintiff is the company itself and the Court will not ordinarily entertain an action brought on behalf of the company by a shareholder. The basic principle underlying this rule is the right of the majority shareholders in a company to decide how they should be managed and the fact that the company is a separate legal person at law, and is an entity different from the totality of its shareholders. If each individual member was allowed to sue in respect of a wrong done to the company, there would be no end to fruitless and vexatious litigation—besides if the thing complained of was one which in substance the majority of the company were entitled to do, there would be no use in having a litigation about it when the ultimate end would only be that a meeting be called where the will of the majority would prevail. The rule in *Foss Vs. Harbottle* thus prevents an action by a minority where what is complained of is:

- (i) a breach of fiduciary duty by promoters or directors;
- (ii) negligent mismanagement of the company's affairs;
- (iii) procedural irregularities which an ordinary resolution could put right.

There are, however, a number of exceptional cases in which minority shareholders have been held to be entitled to ask the Court for protection in civil suits against the actions of the majority. These are briefly as follows:

- (i) where the act complained of is *ultra vires* and could not, therefore, be cured by an ordinary resolution;
- (ii) where those in control of the company have acted in breach of the company's constitution, that is, the Memorandum and/or Articles of Association;

* that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up.

- (iii) where the member complains of a fraud on the minority—either where the controlling shareholders have abused their power in order to gain a benefit for themselves at the expense of the minority or where the company itself is defrauded by the action of the controlling shareholders. In the latter case, the member brings a derivative action on behalf of the company whereas in the former, he sues on his own behalf;
- (iv) where there is inadequate or insufficient notice of a resolution passed at a general meeting or where the explanatory statement required to be annexed to the notice is tricky or inadequate.

In spite of these exceptions, the rule in *Foss Vs. Harbottle* has often proved an obstacle in the way of minorities.

Whilst we do not desire to recommend legislation in any way affecting the hallowed rule (*in Foss Vs. Harbottle*)—or in any way affecting the judicially engrafted exceptions thereupon—we think that the time has come when, without affecting rights of action by suit by individual members (either on behalf of themselves alone or as representing the company), an *additional* avenue of relief is afforded to minority shareholders entitled to apply under section 397 or 398. We would, therefore, recommend that persons having a right to apply to the Court under section 397 may also complain of acts of mismanagement on the part of those in conduct of the affairs of the company, and the Court may in its discretion having regard to the nature of the acts complained of, grant such relief as it may think fit. Our proposals under this head are:

- (i) In place of section 397, the following new section shall be substituted:

“397 (1). Any members of a company who complain that the affairs of the company have been or are being conducted in a manner prejudicial to public interest or to the interest of the company or in a manner oppressive to any member or members (including any one or more of themselves) or that those in conduct of the affairs of the company have been or are guilty of mismanagement of its affairs may apply to the Court for an order under this section, provided that such members have a right so to apply by virtue of section 399.

(2) If, on any application under sub-section (1), the Court is of the opinion:

- (a) that the company's affairs have been or are being conducted in a manner prejudicial to public interest or to the interest of the company or in a manner oppressive to any member or members or that the company's affairs have been or are being mismanaged; and
- (b) that it is necessary, just and equitable so to act;

the Court may, with a view to bringing to an end the matters complained of and/or with a view to prevent the recurrence of the acts of oppression and/or mismanagement alleged or any of them, make such orders as it thinks fit.

(3) In passing orders under clause (1) above, the Court may restrain the commission or continuance of any act and may, if it thinks it necessary so to do, examine into the conduct of any person, director, or officer of the company who has misapplied, retained or become liable or accountable for any money or property of the company or has been guilty of any misfeasance or breach of trust in relation to the company and allow him to pay or restore the money or property or a part thereof respectively, with interest at such rate as the Court thinks just, or to contribute such sums to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the Court thinks just.

(4) An order against delinquent directors, other officers, and other persons shall not be maintainable in respect of any misapplication, retainer, misfeasance or breach of trust committed more than five years prior to the filing of the application under sub-section (1).”

(ii) For section 398(1), substitute the following:

“398 (1). Any members of a company who complain that a material change (not being a change brought about by, or in the interest of, any creditors including debenture holders, or any class of shareholders, of the company) has taken place in the management or control of the company, whether by an alteration in its Board of Directors or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or in a manner prejudicial to the interest of the company, may apply to the Court for an order under this section, provided such members have a right to apply in virtue of section 399”.

Section 398(2) will remain as it is.

(iii) In sections 408 and 409 of the Act, the following changes are recommended :

(a) (i) In section 408 (1), for the words—

“that it is necessary to make the appointment or appointments in order to prevent the affairs of the company being conducted either”.

the following words shall be substituted:

“that it is necessary to make the appointment or appointments in order to prevent or bring to an end the conduct of the affairs of the company, which have been or are being conducted either in a manner”

(ii) At the end of the first para of section 408 (1), add—

“Provided that no such order shall be passed until after an opportunity is given to those in management of the company to be heard in the matter. Reasons will be recorded in writing for every order passed under this section”.

(b) In section 408 (1), the existing proviso should form a separate sub-section [numbered as sub-section (2)] and the present sub-section (2) should be part of recommended sub-section (2).

(c) The company or any party aggrieved by any order passed under section 408(1) may move the High Court where the registered office of the company is situated, in appeal on the ground that the impugned order is not in the interest of the company or in the interest of its shareholders, or in the public interest or has occasioned a miscarriage of justice:

(d) The appeal will be filed within a period of thirty days from the date of the order complained of.

(e) The order passed by the Central Government under section 408(1) shall be effective and in operation from the date of the order until set aside by the High Court in the appeal filed under clause (c) above.

(f) The appeal filed under clause (c) above will ordinarily be disposed of by the High Court within a period of six months from the filing of the appeal.

(g) The present sub-section (7) should be re-numbered as 7(a) and a new sub-clause (b) should be added as follows:

“(b) Such directors so appointed under this section shall, whether required to report or not under sub-clause (a), report to the Central Government once at least in every three calendar months on such matters and aspects relating to the company's working which they consider the Government ought to know or should be made aware of. In case there is more than one such Director, a joint report may be forwarded in place of individual reports”.

Consistent with our recommendations in para 7.10, present section 409 needs to be changed. The suggested changes are as under :

(h) (i) in section 409 substitute the word ‘Company Law Board’ for ‘the Central Government’;

- (ii) in section 409 (1) after the words "where a complaint is made to the Central Government" (to be read as Company Law Board), the following words shall be added—"by members of a company having the right to apply under section 397 or 398 or"
- (iii) After sub-section (1) of section 409, a new sub-section [sub-section (2)] should be added which will read as follows :

"The final order under section 409 (1) will be passed within a period of six months from the date of the first interim order, if any, passed under section 409 (2), or from the date of the filing of the complaint, whichever is later".

"The company or any party aggrieved by the final order passed under section 409 (1) may move the High Court, where the registered office of the company is situated, in appeal on the ground that the impugned order has occasioned miscarriage of justice or is not in the public interest or in the interest of the company or of its shareholders. The appeal will be filed within a period of thirty days from the date of the final order and the appeal will ordinarily be disposed of by the High Court within a period of six months from the filing of the appeal. The final order passed by the Company Law Board under section 409 (1) shall be effective and in operation from the date of the order unless set aside by the High Court in the appeal."

- (iv) At the end of the present sub-section (2) of section 409 [to be renumbered as sub-section (3)], the following clause should be added :

"Provided that such interim order shall only operate in the first instance for a period of two months, within which period the Company Law Board may continue the interim order, if the circumstances so justify, only after giving an opportunity to the complainant and the affected parties of being heard in the matter."

- (v) Sub-section (3) of section 409 should be re-numbered as sub-section (4).

D. Promotion of co-ordinated activities of shareholders

7.13 We have received a number of representations for giving statutory status to associations of shareholders who could ventilate grievances of the large non-vocal body of members in every public company. We have considered this matter carefully. We do not think that associations of shareholders as such should be permitted to participate in the affairs of a public company. It is a settled principle of company law that a person who is not a member of the company is not entitled to seek information from the company or participate in the deliberations of the company in general meeting—unless he claims to represent such member. Permitting an outside body (even though it be a body representing shareholders generally) would be to set at naught this well-settled principle—if accepted, other bodies and associations affected by a public company's activities namely, consumers' associations, labour unions etc. would with equal justification seek to participate in its affairs. However, we are conscious of the fact that in every large public company whose shareholders are scattered all over the country, it is difficult always to ensure effective participation. We are of the opinion that a responsible shareholders' association in each region would contribute much towards ventilating the legitimate grievances of shareholders and promote a more meaningful relationship between management and members. Such a shareholders' association would also act as an agency through which information about the affairs of public companies would be channelised.

Our proposals under this head accordingly are—

- (a) Every association of shareholders satisfying the criteria mentioned in the Annexure would be eligible for recognition by the Central Government.
- (b) The criteria of eligibility would be akin to the criteria adopted for recognition of Stock Exchanges in the country.

- (c) Upon recognition by the Central Government, every recognised shareholders' association would be entitled to purchase one or more shares in every public company whose shares are listed on any Stock Exchange and notwithstanding anything contained in the Articles of Association of that public company, registration of the transfer of shares to the name of such recognised shareholders' association shall not be refused.
- (d) Such recognised shareholders' association would be entitled to avail of the rights prescribed in Chapter VI (section 397 to 409) in place of the members having a right to apply, provided that the recognised shareholders' association has obtained the consent in writing of the requisite number of members of the company as required under section 399. Once that consent is obtained, the recognised shareholders' association would be entitled to make application to the Court/Central Government as the case may be and to pursue the matters under relevant sections in its own name.
- (e) The provisions of clause (4) of section 399 should be altered to enable the High Court (and not the Central Government) to authorise any member or members to apply to the Court notwithstanding that the requirements of section 399 (1) (a) or (1) (b) not having been complied with. This would also enable recognised shareholders' associations, which are members of a public limited company, to apply to the court for dispensing with the minimum requirement prescribed for a right to apply under section 397 and/or section 398. The Court, which would have to finally adjudicate upon the fact of oppression and/or mismanagement would be in a better position than the Central Government to determine whether or not to grant such permission notwithstanding that the consent of the requisite number of members has not been obtained.
- (f) As a start, we would recommend that there should be one recognised shareholders' association at the place where there is a recognised Stock Exchange and that it should be a condition of recognition of the shareholders' association that none of the office bearers be concerned with the management either in the capacity of directors, lawyers, solicitors, cost accountants, chartered accountants, internal auditor, secretary, stock broker or any officer of the company. He will also not hold shares more than the face value of Rs. 1,000/- each in any single company. The membership of shareholders' association should be open to all the shareholders.

E. Miscellaneous

7.14 Inspection

Section 209A dealing with inspection of books of account of companies was inserted in the Act by the Companies (Amendment) Act, 1974. This section replaces clauses (b), (c) and (d) of sub-section (4) of section 209 and gives some additional powers to the person carrying out inspection of books of account of companies. Section 209A has widened the scope of inspection, and the Inspecting Officers have been invested with the powers of Civil Courts in the matter of summoning, examining witness and production of documents. A Directorate of Inspection was set up in the Department of Company Affairs with a team of officers headed by the Director of Inspection and Investigation. Inspection of companies is taken up primarily to find out whether companies conduct their affairs in accordance with the provisions of the Act, and whether their affairs are prejudicial to the company, its members, creditors and to public interest. Sometimes inspection is also necessitated on complaints received from persons who are interested in the affairs of the company. Inspection in that sense really serves a purpose, and it is, therefore, necessary that the inspection should not only be adequate but should also proceed smoothly.

7.15 We have, while suggesting amendments in section 212 of the Act, recommended in para 8.10 of the chapter on Accounts and Audit that in cases where a company has entered into partnership or joint venture, the balance-sheet and profit and loss account of such firm or joint venture should be attached to the balance-sheet of the company and a statement be made in regard to any material changes in the affairs of such partnership or joint venture which have occurred between the end of the financial year of such partnership or joint venture and the end of the company's financial year. This requirement proceeds only half way. At times, it becomes necessary for the Inspectors to examine the manner in which the funds of

the company have been utilised outside, either by way of capital, or by way of advances, to the said partnership firm or joint venture. In such cases, without an inspection of the books of account and other connected papers of the partnership firm or joint venture, the inspection will not be complete. As the provisions of section 209A are not clear with regard to the powers of Inspectors to have access to the books of account of the partnership firm or joint venture, it is necessary to amend section 209A to authorise the Inspecting Officers to also inspect the accounts of the partnership firm or joint venture. We, accordingly, recommend that a provision should be added to section 209A, empowering the Inspecting Officers to inspect the accounts of partnership firms or joint ventures if found necessary.

7.16 The proviso to sub-section (1) of section 209A dispenses with the requirement of giving previous notice. We feel that reasons for not giving previous notice should be recorded in writing by the Regional Director concerned. We, therefore, recommend that the existing proviso to sub-section (1) of section 209A should be substituted by the following proviso :

“Provided that such inspection shall be made after giving previous notice to the company or any officer thereof, except where the Regional Director is satisfied for reasons to be recorded by him in writing that it is necessary that inspection should be made without previous notice.”

7.17 Investigation

Sections 235 to 251 of the Companies Act, 1956 deal with matters connected with investigation into the affairs of companies and other allied matters. The appointment of Inspectors for the purpose is to be made by the Central Government. Under section 235, the Central Government can order investigation if a specified number of members of a company apply for such investigation, or where the Registrar makes a report under sub-section (6) or (7) of section 234. We are of the opinion that the powers under sections 235 and 236 should be exercised by the Company Law Board, as reconstituted, and the Central Government should appoint Inspectors to investigate only after the Company Law Board orders investigation. We recommend that sections 235 and 236 should be amended accordingly.

7.18 Under section 237 (b) the Central Government has *suo motu* power to order investigation, if the circumstances referred to in clause (b) thereof exist. Under the same section the Central Government shall order investigation if the company by special resolution so desires or if the court makes an order for investigation. The *suo motu* exercise of power under clause (b) of section 237 by the Central Government has often been challenged by the companies in the courts. In several cases *ex parte* stay of the order of investigation is obtained. This jeopardises the objectives of investigation. The law on this subject has been laid down in *Barium Chemicals Ltd. v. The Company Law Board** by the Supreme Court. The majority in this case held that the formation of the opinion by the Central Government about the existence of circumstances which led to the ordering of investigation under section 237 (b) is subjective but the existence of such circumstances as such must be demonstrable. We are of the opinion that situation cannot be improved further than by a proper exercise of discretion by the Central Government of its powers of investigation. We, however, find that there are no specific powers for investigation even if the company is guilty of persistent default. We, therefore, recommend that the scope of clause (b) of section 237 should be enlarged by adding the following clause :

“That the company has been guilty of persistent default in complying with the provisions of the Act.”

Our recommendation regarding sections 235 and 236 would require a consequential amendment in clause (a) of section 237 i.e. in the said clause, after sub-clause (ii), another sub-clause, viz. “(iii) Company Law Board by order” should be added.

7.19 Section 239 gives power to an Inspector to investigate also the affairs of a related company if he thinks it necessary for the purposes of his investigation. Sub-section

* A.I.R. 1967 SC 295

(2) of section 239 requires prior approval of the Central Government for the Inspector to exercise such powers. We are of the opinion that such approval should be given only after notice to other body corporate. We, therefore, recommend that the proviso to sub-section (2) of section 239 should be amended to provide that approval should be given after hearing by the Central Government in case of investigation under section 237 (b) and by the Company Law Board in case of investigations under sections 235 and 237 (a).

7.20 Special Audit

The provision relating to special audit under section 233A is one of the sections in the Act conferring power on the Central Government of an extraordinary nature, which, in our view, has not been utilized frequently. During all these years, the Department has ordered special audits only in nine cases. The reason for this is perhaps due to there being other provisions like 209 which is equally effective. Moreover, the scope of section 209 has also been enlarged by section 209A. That apart, while the special auditor appointed under section 233A has the same powers and duties as that of an auditor of the company under section 227, the Inspecting Officer carrying out inspection of books of account under section 209A has wider powers including powers of Civil Court. In view of this position, it may not be worthwhile to have a provision like section 233A and we, accordingly recommend, its deletion.

7.21 Transfer of Shares—Section 111

- (1) Many public companies whose scrips are listed on the stock exchanges do not generally refuse registration of transfer of their shares. Since shares are movable property, they ought to be freely transferable. Whilst it may still be necessary to retain and recognize the right of directors to refuse registration of transfers if so authorised by a company's Articles of Association, this right, we think, should be hedged in with adequate safeguards. Under the law as it stands, the company is not immediately required to give reasons for refusal to register transfers and it is only the right of the final adjudicating body [under section 111 (5A)] to require the company to disclose its reasons at an appellate stage. This, in our opinion, is unsatisfactory. Under the existing law, there are two remedies open to an aggrieved person—to file an appeal under section 111, or to apply to the Court for rectification of the share register under section 155. We think that these two remedies should now be assimilated and provision be made (at one place) for a person aggrieved (including any person aggrieved by a refusal of the Board of Directors to register a transfer or transmission of shares) to apply to the Company Law Board—as proposed to be constituted—for rectification of the share register on any of the grounds mentioned in sub-clause (a) or (b) of sub-section (1) of the present section 155.

Our proposals are—

Accordingly, we would recommend as follows :

- (a) Sections 111 and 155 should be assimilated into a single statutory provision;
 (b) The said statutory provision would read thus :

“111(1). Nothing in sections 108, 109 and 110 shall prejudice any power of the company under its articles to refuse to register the transfer or transmission by operation of law of the right to, any shares or interest of a member in, or debentures of, the company but such power shall be subject to the provisions of sub-sections (2) to (7).

- (2) (a) If a company refuses whether in pursuance of any power under its Articles or otherwise, to register any such transfer or transmission of shares, it shall, within two months from the date on which the instrument of transfer or the intimation of such transmission, as the case may be, was delivered to the company, send notice of the refusal to the transferee and the transferor or to the person giving information of such transmission, as the case may be, along with the statement of reasons for refusing to register the transfer or transmission.

- (b) If default is made in complying with this sub-section, the company and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees for every day during which the default continues.
- (c) If no intimation is given within the time prescribed in sub-clause (a) above, the company shall be bound to register the transfer or transmission as the case may be.
- (3) If—
- (a) the name of any person—
- (i) is without sufficient cause entered in the register of members of a company; or
 - (ii) after having been entered in the register is, without sufficient cause, omitted therefrom, or
- (b) default is made or unnecessary delay takes place in entering in the register the fact of any person having become or having ceased to be a member (including a refusal under sub-section (2) above);
- the person aggrieved, or any member of the company, or the company, as the case may be, may apply to the Company Law Board for rectification of the register.
- (4) The Company Law Board after hearing the concerned parties may either reject the application or order rectification of the register, and in the latter case, may direct the company to pay damages, if any, sustained by any aggrieved party. In either case, the Company Law Board in its discretion may pass such order as to costs as it thinks fit and may also pass all incidental or consequential orders including orders regarding payment of dividend, and allotment of bonus shares.
- (5) The Company Law Board will have power, pending the disposal of the application under sub-section (3), to pass such interim orders and injunctions as it may deem fit and just.
- (6) On any application under this section, the Company Law Board—
- (a) may decide any question relating to the title of any person who is a party to the application to have his name entered in, or omitted from, the register;
 - (b) generally may decide any question which it is necessary or expedient to decide in connection with the application for rectification.
- (7) From any order passed by the Company Law Board on the application, or any issue raised thereunder and tried separately, an appeal shall lie on the grounds mentioned in section 100 of the Code of Civil Procedure 1908, to the High Court within whose jurisdiction the registered office of the company is situate.
- (8) The provisions of sub-sections (3) to (7) shall apply in relation to the rectification of the register of debenture-holders as they apply in relation to the rectification of the register of members.
- (9) If default is made in giving effect to the orders of the Company Law Board, then subject to the right of appeal, the company and every officer of the company who will be in default shall be punished with fine which may extend to Rs. 1,000/- and with a further fine which may extend to Rs. 100/- for every day after the first day after which the default continues.

The existing provisions of section 111(4A) and 111(8) dealing with prescribing fees on appeals and transmission of shares of private companies by Court sale or other public authority should be retained.

(II) Irredeemable preference shares

We have separately dealt with the position of irredeemable preference shareholders and have recommended that their rights should be brought in conformity with modern commercial reality.

(III) Members' resolution—sections 188 and 190

Section 188 of the Companies Act confers a right on shareholders, if backed by a certain percentage in number and in value of shares to give notice of their intention to move any resolution at a general meeting and to circulate a statement in support thereof. There is no evidence that this section has been widely used. Sub-clause (b) of sub-section (2) of section 188 requires fulfilment of two conditions before the benefit of section 188(1) can be invoked viz., at least one hundred members must support the requirement and the value of their shareholding should be not less than Rs. 1 lakh in the aggregate. This appears to be too stringent, specially where the paid-up capital of many companies is not large. Whilst clause (a) of the said section would normally take care of small sized companies, we recommend that sub-clause (b) should be amended so as to provide that the benefit of section 188(1) could be availed of by one hundred members or by members whose holdings of the aggregate paid-up capital is at least Rs. 1 lakh.

While section 188 of the Act deals with resolutions which members of a company desire to pass at general meetings, section 190 of the Act deals with the manner in which special notice has to be given. There are at present only three sections viz. sections 225(1), 261(2) and 284(2) which require special notice. *Prima facie*, section 190 appears to be an independent section providing a special procedure with regard to the limited matters (under the said three sections). A doubt has been expressed as to whether in order to avail of the benefit of section 190 the requirements of section 188(2) are also to be complied with. This doubt must be removed.

We feel that in section 190 it should be specially provided that special notice of resolutions under sections 225, 261 or 284 or under the Articles can be given by a single shareholder.

Our proposals accordingly are—

For sub-section (2)(b) of section 188 substitute the following :

- (1) "(a) not less than one hundred members having the right aforesaid; or
(b) by such number of members holding shares in the company on which there has been paid up an aggregate sum of not less than one lakh of rupees in all."

- (2) After sub-section (2) of section 190, add :

"(3) where special notice is required of any resolution the notice of intention to move such resolution may be given by a single shareholder of the company."

(IV) Refund of application money—section 69

Under section 69, no allotment shall be made of any share capital of a company offered to the public for subscription unless the minimum subscription has been received, and any sum payable on the application so stated has been paid to and received by the company in cash or by cheque. In case such amount is not received by the company within one hundred and twenty days, all moneys received from the applicants should be forthwith repaid without interest. Interest is payable after the expiry of one hundred and thirty days.

We are of the opinion that the period of 120 days laid down for refund of applicants' money is adequate and should not be changed and that interest should be paid at 12% per annum instead of at 6% per annum from the expiry of the 130th day.

Our proposal accordingly is—

In sub-section (5) of section 69, substitute the following :

“at the rate of 12% per annum”
for “at the rate of 6% per annum”

(V) Minutes of general meetings

In keeping with the concept of increasing participation by the shareholders, we would suggest that copies of minutes of general meetings of companies should be supplied by companies on request to the shareholders and recognized shareholders' association free of cost.

(VI) Blank Transfers

Section 108 (1A), (1B) and (1D) was originally added by the Companies (Amendment) Act, (31 of 1965) pursuant to recommendations of the Vivian Bose Enquiry Commission. That Commission acknowledged the prevalence of the “widespread practice of blank transfers and noted that it was based upon a variety of legitimate reasons and necessary business purposes”. Since the said Commission was of the view that the practice lent itself to “certain abuses” they recommended making suitable statutory provision with a view to permit shares being held on blank transfer only for a limited period. Statutory recognition was given to this recommendation by the Companies (Amendment) Act (31 of 1965). Its object was to regulate and control the currency of blank transfer of shares. The Stock Exchanges and the capital market objected to the stringent provisions then enacted and by an Ordinance promulgated on 21st September, 1966 [later replaced by the Companies (Amendment) Act, (37 of 1966)], it was made clear that the object underlying these new provisions was not to prohibit transfers altogether but only to restrict their currency. All the Stock Exchanges in the country who have had the experience of working of these provisions have strongly pleaded for deletion of sub-sections (1A) to (1D) of Section 108. The Bombay Stock Exchange has gone a step further and even suggested that the transferee's signature on transfer deeds be dispensed with in the case of fully paid-up shares.

We have considered the justification for the continued retention of Section 108 (1A) to (1D) in the light of the representations made to us especially by the Stock Exchanges, and the practical utility and experience of the working of these provisions, as also the administrative burden imposed on the Registrars in their administration.

We are satisfied that these provisions in their working have discouraged investments and made even procuring of transfer forms difficult. We have been informed that between April to December, 1977, the monthly demand for properly stamped transfer forms in Bombay alone was of the order of two lacs whereas the supply was less than one lac fifty thousand only. Besides, the necessity of properly stamped transfer forms impedes fluidity in transactions on the stock exchanges. The volume of such transactions is staggering, e.g. over twenty lacs share scrips valued at over Rs. 8 crores are being delivered every month in the Bombay Stock Exchange alone. All these factors have compelled us to inquire into the necessity of maintaining these provisions which do not fulfil any public purpose but greatly impede the free flow of transactions on recognised stock exchanges. We are of the view that investments in shares should be encouraged and not impeded by needless revalidation of transfer forms and the time-consuming procedures. Whilst we do not subscribe to the suggestion that the signature of the transferees on transfer forms should be done away with we do feel that if people are to become stock-minded existing procedures must be simplified. Safeguards against the abuses referred to by the Vivian Bose Commission can in our opinion be provided for in a simpler and as we believe, more effective manner.

Our proposals accordingly are—

- (i) We would recommend that the provisions in sub-sections (1A) to (1D) of section 108 be deleted as they greatly impede the free flow of transactions on recognised stock exchanges, make the negotiability and transferability of shares more cumbersome and are no longer justified by any over-riding public advantage.

- (ii) We feel that suitable provision should be made in the Act to prevent abuses of blank transfer. We would suggest a provision on the following lines :—

“Where on a complaint received by it, or otherwise, the Company Law Board is satisfied that shares are being dealt with on a recognised Stock Exchange for a period of more than six months without the same being lodged for registration with the company and that there is reasonable ground to believe that this is being done with a view to indirectly acquire control of the affairs or of the management of the company or for other collateral purposes, the Company Law Board may after making proper enquiries in the matter, including enquiries with necessary Stock Exchanges, direct that so long as such shares are not lodged for transfer with the company, voting rights in respect thereof shall not be exercisable by any person, whether as a member or as a proxy”.

- (iii) Though we have dispensed with the presentation of transfer forms to the prescribed authority for dating, we feel that it would not affect the free flow of transactions in the Stock Exchanges (and would help detect abuses) if a statutory requirement is introduced that the transferor when he signs the transfer form should also insert the date of his signature, and that failure to do so will be visited with penalties.

(VII) Expulsion of members

One or two cases have been brought to our notice in which public limited companies have altered their Articles of Association enabling the Board of Directors to expel one or more members in certain circumstances. We are firmly of the opinion that this is a trend which ought not to be encouraged. Even assuming that this is within the scope of a company's power to prescribe in its Articles of Association that a member may be expelled, we think that such a power ought not to apply to public companies. Accordingly, we would recommend the insertion of a suitable provision in the Act prohibiting a company from expelling one or more of its members. It should, however, be clarified that this prohibition would not be applicable either to private limited companies or to section 25 companies.

RECOGNISED SHAREHOLDERS' ASSOCIATION

Application for recognition of shareholders' association

(1) Any shareholders' association which is desirous of being recognised for the purposes of this Act may make an application in the prescribed manner to the Central Government.

(2) Every application under sub-section (1) shall contain such particulars as may be prescribed, and shall be accompanied by a copy of the Articles of Association and also a copy of the Rules relating, in general, to the constitution of the association, and in particular, to—

- (a) the governing body of such association, its constitution and powers of management and the manner in which its business is to be transacted;
- (b) the powers and duties of the office-bearers of the association;
- (c) admission into the association of various classes of members, the qualifications for membership and the exclusion, suspension and re-admission of members therefrom or thereinto.

Grant of recognition to shareholders' association

(1) If the Central Government is satisfied, after making such inquiry as may be necessary in this behalf and after obtaining such further information, if any, as it may require,—

- (a) that the articles and/or rules of the shareholders' association applying for recognition are in conformity with such conditions as may be prescribed with a view to ensure fair dealing and for *bona fide* protection of the interests of investors;
- (b) that the association is willing to comply with any other conditions (including conditions as to the number of members) which the Central Government, after consultation with the governing body of the stock exchange and having regard to the area served by the stock exchange and its standing may impose for the purpose of carrying out the objects of this Act; and
- (c) that it would be in the interest of the trade and also in the public interest to grant recognition to the association;

it may grant recognition to the association subject to the conditions imposed upon it as aforesaid and in such form as may be prescribed.

(2) Every grant of recognition to a shareholders' association shall be published in the Gazette of India and also in the Official Gazette of the State in which the principal office of the association is situate, and such recognition shall have effect as from the date of its publication in the Gazette of India.

(3) No application for the grant of recognition shall be refused except after giving an opportunity to the association concerned to be heard in the matter, and the reasons for such refusal shall be communicated to the association in writing.

(4) The articles and rules of a recognised shareholders' association shall not be amended except with the prior approval of the Central Government.

Withdrawal of recognition

If the Central Government is of opinion that the recognition granted to a shareholders' association should, in the public interest, be withdrawn, the Central Government

may serve on the governing body of the association a written notice that the Central Government is considering the withdrawal of the recognition for the reasons stated in the notice, and after giving an opportunity to the governing body to be heard in the matter, the Central Government may withdraw, by notification in the Official Gazette, the recognition granted to the association.

Power of Central Government to call for periodical returns or to direct inquiries to be made

(1) Every recognised association shall furnish to the Central Government such periodical returns relating to its affairs as may be prescribed.

(2) Every recognised association shall maintain and preserve for such periods not exceeding five years such books of account and other documents as the Central Government may prescribe in the interest of the trade or in the public interest, and such books of account and other documents shall be subject to inspection at all reasonable times by the Central Government.

(3) Without prejudice to the provisions contained in sub-sections (1) and (2), the Central Government, if it is satisfied that it is in the interest of the trade or in the public interest so to do, may, by order in writing—

- (a) call upon a recognised association or any member thereof to furnish in writing such information or explanation relating to the affairs of the association or of the member in relation to the association as the Central Government may require; and/or
- (b) appoint one or more persons to make an inquiry in relation to the affairs of the governing body of the association and submit a report of the result of such inquiry to the Central Government within such time as may be specified in the order.

(4) Where an inquiry in relation to the affairs of a recognised association has been undertaken under sub-section (3) —

- (a) every director, secretary or other officer of such association;
- (b) every member of such association;
- (c) if the member of the association is a firm, every partner, manager, secretary or other officer of the firm; and
- (d) every other person or body of persons who has had dealings in the course of business with any of the persons mentioned in clauses (a), (b) and (c), whether directly or indirectly;

shall be bound to produce before the authority making the inquiry all such books of account and other documents in his custody or power relating to or having a bearing on the subject matter of such inquiry and also to furnish the authorities, within such time as may be specified, any statement or information relating thereto as may be required of him.

In case of failure or neglect by any of the persons mentioned in clauses (a) to (d) to produce such books of account or other documents and/or to furnish any such statement or information to the authority, he should be liable for punishment as may be prescribed.

Annual reports to be furnished to Central Government by association

Every recognised association shall furnish the Central Government with a copy of the annual report, and such annual report shall contain such particulars as may be prescribed.

CHAPTER VIII

ACCOUNTS AND AUDIT

8.1 Sections 209 to 233B and Schedule VI of the Companies Act deal principally with matters relating to accounts and audit though in different parts of the Act there are many other sections dealing with matters concerned with accounts and audit.

8.2 Elsewhere in our Report, we have pointed out the need for professionalisation of company management and have given suggestions towards this end. We have made suggestions in different parts of the Report aimed at simplification of the Act. We have also dealt with the protection of rights of shareholders in the appropriate places. We are recommending certain changes in the sections and schedule dealing with accounts and audit principally keeping in view the objectives of simplification, adequate and meaningful disclosures for the benefit of the shareholders, the workers and the community at large, and the objective of professionalising the management for the purpose of improving the working of the companies. It also follows that such disclosures should not be a mere confusing mass of figures. They should assist the uninformed in drawing meaningful conclusions. But the information collection process should be commensurate with the purpose for which the information is required.

8.3 A company should provide the basic economic services to the society at the lowest possible price, which would mean objectives of higher productivity, lower cost and better quality and provide adequate return to its shareholders. While recognising the above concept, we have made an attempt to emphasise that the objective should not merely be of making of profit but the corporate activity must also subserve the overall aspirations and interest of the society.

8.4 In the changed development of the structure of the companies, a wide gap has arisen between control and ownership on the one hand and management and ownership on the other. An average shareholder in recent times can be viewed, more often than not, as an investor rather than as one who is interested in control. Nevertheless, the law must see to it that the gap between the shareholders who are only the owners, and the Directors who are in control of the destiny of the company, does not become so wide that the interest of the shareholders can be ignored totally. The size of the companies now is such that its management requires certain professional skills including the skills of an entrepreneur. Professionalisation of the management is, therefore, not a mere concept but is, in fact, an inevitable necessity for the well-being of the company itself.

8.5 In the light of the above and after considering the views expressed before us, we recommend the following regarding accounts, audit and the requirements of appropriate disclosures in the Directors' Report and annual accounts.

8.6 Section 209

We have observed that some companies maintain all or certain accounts on 'cash' basis. In such cases, a true and fair picture of the state of affairs of the company may not always be reflected. We recommend that section 209 be suitably amended so as to make it obligatory on all companies to maintain accounts on mercantile system of accounting only.

8.7 Section 210 (4)

At the moment, a 'Financial Year' can consist of fifteen months. The Registrar of Companies has power to extend this to eighteen months. Under the Income-tax Act, there is a provision pursuant to which the Income-tax Officer can permit extension of the 'Financial Year'. To simplify the law and to reduce the paper work in the office of the Registrar of Companies, we recommend that, where the appropriate Income-tax Officer has so permitted, the 'Financial Year' for the purpose of section 210 of the Act may include any period upto eighteen months.

8.8 Section 211

This section requires that the balance sheet of a company should be in the form set out in Part I of Schedule VI of the Act or as near thereto as the circumstances admit unless some other form is approved by the Central Government. Preparation of balance sheet in vertical form has become a common practice now. We, therefore, recommend that the vertical form of balance sheet should also be incorporated in Part I of Schedule VI of the Act so that a company may use either of them. We have suggested a model form for the vertical balance sheet at the end of this Chapter.

8.9 We further recommend that the companies be allowed, at their discretion, to round off the figures in the balance sheet to the nearest thousand or hundred or ten rupees. We believe that this will facilitate publication of accounts in a more intelligible form. A provision to this effect may be made in Schedule VI itself.

8.10 Section 212

Under this section, it is incumbent on a holding company to attach to its own balance sheet a copy of the balance sheet, profit and loss account, report of the Board of Directors and report of the Auditors relating to its subsidiary companies. It has been brought to the notice of the Committee that some companies enter into partnerships/joint ventures, but under the existing law, there is no requirement for a full disclosure of the affairs of such partnerships/joint ventures to the shareholders of the company. It is essential for the shareholders to know how the funds of the company are utilised by such partnerships/joint ventures. We, therefore, recommend that the provisions of section 212 be made applicable to the accounts of such partnerships/joint ventures—to the extent that the company should attach to its balance sheet a copy of the last balance sheet and profit and loss account of those partnerships/joint ventures and a statement be made in regard to any material changes in the affairs of such partnerships/joint ventures which have occurred between the end of the financial year or of the last of the financial years of such partnerships/joint ventures and the end of the company's financial year. This provision is necessary, in our view, since the company incurs unlimited liability by reason of its acquiring an interest in a partnership/joint venture.

8.11 Section 215

We have referred elsewhere in our Report to the need to professionalise the management of companies. There is an urgent need to move in this direction, particularly in regard to matters relating to the financial affairs of the company, as the expectations of shareholders, creditors, consumers at large and revenue-collecting agencies of the Government depend entirely on the authenticity of accounts, both published and otherwise of a company.

8.12 It was brought to the notice of the Committee that it would be well-nigh impossible for any management to perpetuate a fraud on the company except with the connivance of personnel in charge of financial affairs of the company. It has been pointed out that this happens more often through the device of obtaining bogus invoices, over-charging or under-charging in invoices, frittering away the funds of the company by way of rebates on sales which are not warranted, inflating the expenses manipulation of stock and assets, etc.

8.13 We are of the view that, for better management and discipline, all the companies whose paid-up capital is not less than twenty-five lakh rupees, should be statutory required to employ a Chief Accountant or a Financial Controller and, if such a company is engaged in any manufacturing or other specified activity, should also employ a Cost Accountant. The Manufacturing and Other Companies (Auditors' Report) Order, 1975 requires that the statutory auditors should report on the adequacy of both internal control and internal audit systems in case of companies having a paid-up capital of twenty-five lakh rupees or more. We, therefore, suggest the following in respect of companies having a paid-up capital of twenty-five lakh rupees or more :—

- (i) Accountant, who is in charge of the financial books of account of the company, should be one who is a member of the Institute of Chartered Accountants of India. However, any individual, who is holding such an office at the time this provision

is enacted, shall continue to function as such though he may not be a member of the Institute of Chartered Accountants of India.

- (ii) If such a company is engaged mainly in the construction of ships or in the manufacture or processing of goods or in mining or in generation and distribution of electricity, it should have in its employment a Cost Accountant who is a member of the Institute of Cost and Works Accountants of India. However, any individual, who is holding such an office at the time this provision is enacted, shall continue to function as such though he may not be a member of the Institute of Cost and Works Accountants of India.
- (iii) A company referred to at (ii) above should also have an internal Auditor.

8.14 We suggest that in respect of companies engaged mainly in the construction of ships or in the manufacture or processing of goods or in mining or in generation and distribution of electricity and having a paid up capital of twenty-five lakh rupees or more, in addition to the Management, the Cost Auditor, if cost audit for that industry has been ordered, should certify in the balance sheet the figures shown as stock-in-trade, stores, spares, raw materials, tools and work-in-progress.

8.15 Requirements of section 215 are complied with as long as the balance sheet and the profit and loss account are signed by the Secretary and not less than two Directors of the company, one of whom should be a managing director, if any. We are of the view that many malpractices relating to published accounts flow from the fact that those who are primarily responsible to maintain the accounts are not held responsible for the figures shown in the published accounts. Auditors visit the companies for a short period during the year and it should be a fair defence for them to say that they depended upon the authenticity of the accounts prepared under the supervision of qualified persons. Section 19 of the Companies Act, 1976, in the United Kingdom, purports to impose a penalty on an officer of the company who makes a misleading statement to an Auditor (orally or in writing). To be guilty of an offence under this section, an officer should have made, knowingly or recklessly, a statement which was misleading, false or deceptive in a material particular. The interim report of the Commission on the Auditor's responsibilities in the United States also emphasises the need for recognising the basic responsibility of the Directors with regard to the accuracy and validity of the financial statements.

8.16 In this matter, we are of the view that the statements of accounts of the company with a paid-up capital of twenty-five lakh rupees or more should be authenticated, prior to the Directors submitting the accounts for audit, by the Accountant or Financial Controller of the Company, and additionally in respect of stock-in-trade, stores, spares, raw materials, tools and work-in-progress by a Cost Accountant if such a Company is engaged mainly in the construction of ships or in the manufacture or processing of goods or in mining or in generation and distribution of electricity.

8.17 Section 217

The report of the Directors should contain the following additional information :—

- (i) Amount of deposits received from the public during the year and the total repayment made and outstandings with a break-up of dues within one or more years.
- (ii) Brief particulars of prosecutions launched against the company which resulted in a fine of one thousand rupees or more in any one case or which resulted in imprisonment of any of the Directors or officers of the company.
- (iii) Particulars as regards unclaimed and unpaid dividends.
- (iv) Details of investments in other bodies corporate, firms or joint ventures exceeding five per cent of the company's paid-up capital and free reserves as have not yielded any returns during the year and the reasons therefor.
- (v) Information relating to any material liability that the company may have incurred from the date of closing of the accounts to the date of adoption of such accounts by the Directors. It should also contain information relating to any matters that are likely to adversely affect the profit and loss or asset and liability position of the company during the current year.

- (vi) Statement showing the commitments and liabilities for which no provisions have been made in the accounts as well as an explanation detailing the reasons for not making such provisions.
- (vii) Steps taken by the company in various spheres with a view to discharging its social responsibilities towards different segments of the society, quantifying wherever possible and monetary terms. The Board should also report on the future plans of the company towards the discharge of its social responsibilities and duties.
- (viii) Statement indicating losses, if any, incurred by the company in any division of its activities. For this purpose, an activity shall be considered as belonging to a division if such an activity relates to a distinct product or group of products which account for not less than ten per cent of the total turn-over of the company.
- (ix) Accounting ratios, viz., ratio of Current Assets to Current Liabilities; of Inventories to Sales; of Trade Receivable to Sales; of Net Income to Net Sales and Net worth; of Return on total Capital Employed; of Profit before interest and tax to total Assets; and of Net Profit after tax to Shareholders' Equity.
- (x) Key-limiting factors that have prevented the full utilisation of installed capacity of plant and machinery.
- (xi) Number of shares held by each Director in the company so long as such shares carry not less than two per cent of the total voting rights.
- (xii) Particulars of any contract with the company that subsists at the end of the financial year or subsisted at any time during the year in which a Director or his spouse or dependent children have or had any significant interest. A Director or his spouse or his dependent children should be considered as having a significant interest in a contract or contracts with the company if the interest in such contracts shall, in aggregate, represent in amount or value a sum equal to or more than one per cent of the company's total purchase, sale, payment or receipt. A contract with subsidiary of the company should be deemed to be a contract with the company. Contracts need not be mentioned individually if they are substantial in number but should be disclosed sufficiently to constitute a fair disclosure. A reference to a contract for this purpose should not include a Director's or his spouse's or dependent children's contract of service or a contract between the company and another body corporate in which any of them has or had an interest by virtue only of being a Director of the other body corporate so long as any of them, singly or in aggregate, does not hold more than two per cent of the paid up share capital in that body corporate.
- (xiii) Statement indicating that the statutory norms and guidelines have been complied with in respect of
 - (a) managerial appointment and remuneration; and
 - (b) inter-company investments and loans.

8.18 Section 217 (2A)

This sub-section was introduced by the Companies (Amendment) Act, 1974. Disclosure of the information pursuant to this section does not appear to have served any purpose. We are of the view that it will suffice if information relating to employees drawing a remuneration of three thousand rupees or more per month is filed with the Registrar of Companies along with the Annual Return so that such information is available at the disposal of the Government at all times and is open for inspection by members of the public who might be interested in knowing such details. The Committee also recognizes that, should any shareholder require the information regarding all executives who receive remuneration in excess of that drawn by managing of whole-time directors, the company will be bound to furnish such information.

As far as the information that is required to be published along with the balance sheet, we suggest that it be limited to :

- (i) The particulars of Directors and their relatives drawing a remuneration of not less than three thousand rupees per month if they were employed for a part of

- the financial year or not less than thirty-six thousand rupees during a financial year if employed throughout the year.
- (ii) The particulars of executives of the company in receipt of remuneration in excess of that drawn by managing director or whole-time director if such executive by himself or along with his spouse and dependent children holds not less than two per cent of equity shares of the company.
- (iii) Statement of number of employees in each category, i.e., number of employees drawing a remuneration of less than five hundred rupees per month; number of employees drawing a remuneration between five hundred rupees and one thousand rupees per month; number of employees drawing a remuneration between one thousand rupees and two thousand rupees per month; etc.

8.19 We have suggested under the heading "General instructions for preparation of profit and loss account" that particulars of all payments, including remuneration, salaries and perquisites to managing director/whole-time director, directors and employees drawing three thousand rupees or more per month should be quantified in monetary terms of outgo of the company and shown separately in profit and loss account and not on the basis of income-tax rules.

8.20 Section 224

It is brought to the notice of the Committee that Chartered Accountants who are in whole-time employment elsewhere are admitted as partners in the firms of auditors so that the firms could take credit for the specified number of audits provided in section 224 of the Act. It is recommended that provision in section 224(1C) be amended by adding Explanation III as under :—

Explanation III. —In computing the specified number, a person who practices as a Chartered Accountant singly and who is in full-time employment elsewhere, and a partner in a firm of Chartered Accountants who is in full-time employment elsewhere, shall not be entitled to be included in computing the specified number under Explanation II.

8.21 Section 233B

We are of the opinion that maintenance of Cost Accounting Records in certain types of industries and their continuous audit by an appropriate Cost Auditor will not only be a step in the direction of consumer protection but also will be an advantage to the company itself. We feel that the present practice of conducting Cost Audits intermittently is not of any particular assistance to the companies or to the consumers at large. We must add here that managements of progressive companies have, as a matter of prudence, instituted Cost Accounting Systems and have also authorised Cost Audits even when not so ordered in any appropriate order. We recommend that, when Cost Audit is ordered in respect of any particular industry under the provisions of section 233B, such audit should be continued every year unless the Central Government, for reasons to be specified, decides to discontinue such audit in any particular industry.

8.22 Under the provisions of the Act, a Cost Auditor should be appointed by the Board of directors of the company with the previous approval of the Central Government. We see no reason for a distinction in the procedure followed for the appointment of a Financial Auditor and a Cost Auditor. Besides, in keeping with our recommendations to confer greater rights on the shareholders, we suggest that all the provisions relating to the appointment, resignation, etc. of a statutory auditor under section 224 of the Act by the shareholders be made applicable for the appointment of a Cost Auditor also by amending suitably section 233B(2).

8.23 Section 307

Unfair profits can, on occasions, be made in share dealings by the use of confidential information not generally available to the investing public. There are existing statutory provisions which ensure that more knowledge is made available to shareholders about tran-

sactions in the sale or purchase of shares in the company (sections 307 and 308). This, however, does not help to solve the problem. An insider—like a company's Director, Statutory Auditor, Cost Auditor, Financial Accountant or Financial Controller, Cost Accountant Tax and Management Consultant or Adviser, and whole-time Legal Adviser or Solicitor—would generally have access to price-sensitive information not available to outsiders. It is often difficult to prove whether or not this material information has been used to put through what apparently is a normal transaction. We think that the law should provide that an insider—belonging to any of the categories mentioned above—should be prohibited from purchasing or selling shares of the company, either directly or indirectly, two months prior to the closing of the accounting year of the company and for a period of two months thereafter. This is roughly the period when the confidential information would be available to the insider. We also think that the law should provide that where it is proved that a deal by an insider has resulted in one party taking advantage over the other by misusing the information relating to the company, he is liable at law to the other party: the person with whom the insider has dealt, the company in whose shares he has dealt or whose information he has used in so doing. The law should confer a remedy on persons who can establish that by reason of the misuse of materially significant information they had suffered identifiable loss; in addition, an insider should be held to be accountable to the company for his profits, if unjustly made.

8.24 Under the provisions of section 307, every company is required to keep a register showing, as respects each Director, the number, description and amount of any share in, or debentures of the company or any other body corporate, being the company's subsidiary or holding company, or a subsidiary of the company's holding company, which are held by him, or in trust for him; or of which he has any right to become the holder whether on payment or not.

8.25 We are of the view that the provisions of this section should, apart from the directors who are already covered, be extended to cover not only the shareholdings of the directors, employees of the company drawing a remuneration of not less than rupees three thousand per month, statutory auditors, cost auditors, financial accountants or financial controller, cost accountant, tax and management consultants or advisers, whole-time legal advisers or solicitors, but also of their spouses and children as also the shareholdings of private companies, partnership firms, joint ventures or trusts in which the above categories of persons have any pecuniary interest. The provisions of this section should be further extended to cover the shareholdings of a public limited company holding shares in the company in case any director, or any of the aforesaid persons along with his or her spouse or children holds shares amounting to not less than ten per cent of the paid-up share capital of such a public limited company.

8.26 We further feel that the above register should also contain details relating to purchase and sale of shares of the company, its holding company and its subsidiary companies, by the above category of persons.

8.27 Our recommendations in this regard are two-fold—one relating to fuller disclosure of transactions by those who have price-sensitive information and another prohibition of transactions by such persons during certain specified period unless there are exceptional circumstances.

8.28 We recommend the following modifications in section 307 with a view to achieving the objectives mentioned above:—

- (i) Any Director, Statutory Auditor, Cost Auditor, Financial Accountant or Financial Controller, Cost Accountant, Tax and Management Consultant or Adviser and whole-time legal Adviser or Solicitor of the company and any private company, partnership firm/joint venture or trust in which the above category of persons have any pecuniary interest should, prior to actual purchase or sale, notify in writing the Board of Directors of the company his or their intention to buy or sell the shares of the company.
- (ii) Full disclosure as to the number of shares, price at which they were bought or sold shall be made by persons mentioned at (i) above to the shareholders of the company by annexing a suitable statement to the published accounts:

- (iii) The requirements of (i) and (ii) above should apply to the spouse and dependent children of persons mentioned at (i) above.
- (iv) Any Director, Statutory Auditor, Cost Auditor, Financial Accountant or Financial Controller, Cost Accountant, Tax and Management Consultant or Adviser and whole-time Legal Adviser or Solicitor and any private company, partnership firm/joint venture or trust in which the above category of persons have any pecuniary interest should be prohibited from either purchasing or selling the shares of the company, two months prior to the closing of the accounting year of the company and for a period of two months thereafter. Such prohibition should extend for a period of two months prior to any Rights issue or Bonus issue also.
- (v) If for any compelling reasons the Director, Statutory Auditor, Cost Auditor, Financial Accountant or Financial Controller, Cost Accountant, Tax and Management Consultant or Adviser and whole-time Legal Adviser or Solicitor and any private company, partnership firm/joint venture or trust in which the above category of persons have any pecuniary interest, desire to buy or sell the shares of the company within the prohibited period, he or they must give prior intimation in writing of the proposal to purchase or sell to the Board. If the Board does not, within the period of fifteen days from the date of receipt of such notice at the registered office of the company, refuse permission, the person concerned would be entitled to sell or purchase shares in the company within the prohibited period, as proposed.
- (vi) The spouse and dependent children of the persons referred to at (i) above should also be subject to similar disability during the specified periods.
- (vii) In addition to the existing provisions of disclosure, we consider that it is necessary that all public companies should maintain a register disclosing dealings in shares of the company by the above category of persons or any private company, partnership firm/joint venture or trust in which the above category of persons have any pecuniary interest. The said register should additionally disclose dealings in shares of the company by the spouses and dependent children of the above category of persons and also by those in full-time employment of the company and drawing a salary of not less than three thousand rupees per month. This disclosure should be full and should include the number of shares, the price at which the shares are sold or purchased and the date of the transaction—we would recommend that the information in a summarised form be published as a part of the published Annual Report of the company.
- (viii) Suitable provision should be made for assuring a civil remedy to persons who can establish that by reason of the misuse of significant information by any of the above category of persons, they have suffered an identifiable loss—the remedy should be by way of an application to the Company Law Board. Accountability should also be ensured by adequate provision.

8.29 Section 308

Section 308 casts a duty on Directors to give notice of the transactions in the shares of the company and of its subsidiaries. Information contained therein will enable the company to maintain the register required to be maintained pursuant to provisions of section 307. Provisions of section suffer from a disability inasmuch as there is no time limit within which such a notice must be given. We recommend that :

- (i) Such notices must be given by all persons referred to at 8.28 above.
- (ii) Such notices must be given within fourteen days of conclusion of the relevant transaction or within fourteen days from the date when the concerned person has entered into a contract for such purchase or sale of shares of the company or of its subsidiary companies.
- (iii) Such notices should also contain the details relating to the price that was actually paid or received for the shares and, if the shares were listed in any Stock Exchange, the rate quoted in the Official List of the Stock Exchange for the shares on the date of transaction or the latest quotation that was available on the date of transaction.

8.30 The recent developments in Corporate Law both in this country and elsewhere have been characterised by a strong emphasis on increased disclosures by management. Openness in company affairs is the best way to secure responsible behaviour. Most of the disclosure requirements are primarily in the matter of preparation and presentation of balance sheets and profit and loss accounts. The present practice is to publish the financial affairs of the company once in a year. From the point of view of increased disclosures, this practice is not quite satisfactory. We would, therefore, recommend that a provision be made in the Companies Act to the effect that all public limited companies, whose shares are listed in any Stock Exchange should publish an abstract in a summarised form of half-yearly unaudited accounts of the company and a brief report thereon. Such a report should be published within sixty days of the close of the half-year and it should highlight the important developments in the company during the half-year under report. We feel that this would be beneficial to the investing public, creditors and others connected with the affairs of the company. This recommendation should become applicable in two years after 1st September, 1978.

8.31 We recommend that in the accounts of the companies there must be a specific provision relating to gratuity to its employees, if any such amount is payable under any law or agreement with the employees.

8.32 Free Reserves

This expression has not been defined anywhere in the Act. In view of references to this expression at several places in the statute, we have suggested a suitable definition in Chapter III *vide* para 3.4.

8.33 Replacement Reserve

An examination of the price levels over the past few decades all over the world indicates that there is a continuous increase in the prices. In this context, providing depreciation on 'historical cost' will not be adequate to replace an asset when it becomes old or obsolete. We recommend that a provision should be made requiring the companies to set aside ten per cent of their profits after tax as a Replacement Reserve, provided that such a Reserve should be treated on par with depreciation under the statutes of the country.

8.34 Resignation of auditors

Cases are not unknown where Auditors appointed by the shareholders have resigned from their duties on the grounds that the circumstances governing their work in the company have become so intolerable that they will be unable to discharge their responsibilities to their satisfaction. In all such cases the Auditors take the easy way out by resigning. While there are certain provisions in the Act designed to protect the independence of the Auditors, there are no provisions to cover the cases of resignation of Auditors.

8.35 In the United Kingdom, section 16 of the Companies Act, 1976, dealing with the subject of resignation of Auditors, has introduced suitable clauses to cover such circumstances. We feel that the Act should be amended suitably to cover the situation of resignation by an Auditor. We recommend the following in this regard :—

- (i) An Auditor in future should be able to resign his office by depositing a notice in writing at the registered office of the company containing either (a) a statement to the effect that there are no circumstances connected with his resignation which he considers should be brought to the notice of the members or creditors of the company; or (b) a statement of any such circumstances as may exist.
- (ii) When an Auditor's notice of resignation states that there are circumstances connected with his resignation which he considers worthy of being brought to the notice of the members or creditors, he should be entitled to call upon the Directors to convene an Extraordinary General Meeting of the company to consider his statement. The auditor should also be empowered to request the

company to circulate to its members a written statement of reasonable length and, in such a circumstance, his request should be complied with.

We feel that the above provisions should protect the Auditor against undesirable pressures by managements of the companies.

8.36 Depreciation

It has been a practice in many companies, particularly during the initial years of their operations or when losses are incurred, not to provide for depreciation but to indicate it as only a note to accounts. Depreciation is a charge in the sense the assets would have depreciated and would have suffered diminution in value either because of efflux of time or because of usage. We, therefore, recommend that profit and loss account should be made up only after providing for depreciation and there should be no provision to indicate *unabsorbed* depreciation. We have discussed elsewhere in the appropriate place (while discussing section 205) in the Report the method to be followed to ascertain depreciation.

8.37 Schedule VI

We have gone through the three parts of Schedule VI relating to balance sheet and profit and loss account. We are of the view that the general instructions for the preparation of balance sheet and profit and loss account have grown in bulk over the years through successive amendments. In the process, while certain duplications and ambiguities have crept in, certain necessary requirements as to details for the preparation of profit and loss account have been missing. The result is that the true profit of the company cannot often be discerned without reference to the notes by directors and auditors. Keeping in mind the broad requirements of including appropriate changes in Schedule VI so as to reflect the true state of affairs in the company's accounts, we are making the following suggestions for modification of the requirements of Schedule VI :—

(I) Schedule VI : Part I : Balance Sheet

General

Reference to same management and managing agents, secretaries and treasurers should be deleted in all places.

ASSETS

Fixed Assets

Marginal note regarding change in rate of exchange should be specific and clarify that this should apply only to official devaluation or revaluation of currency and not to normal fluctuation in rates of exchange or variations in floating rates. Additionally, it may be provided that normal fluctuation in exchange rates of \pm five per cent over any period should be adjusted in the balance sheet.

Land and Buildings

Land and buildings should be classified into the following :—

Factory and Office Buildings and Residential Buildings including flats in ownership premises.

Investments

Distinction between trade and other investments should be done away with as it has no significant meaning. Investments in the capital of partnership firms/joint ventures should be split up into :

Contributed capital
Loans
Profit/Loss (including interest)

Item 8 (a) : Advances and loans should be termed "Loans and Advances".

Item 8 (b) : Advances and loans should be termed "Loans and Advances".

Item 10 : The following words should be deleted :

"e.g. rates, taxes, insurance, etc."

Item 11 : Should be deleted.

Item 12 : Should be deleted but covered by item 10.

A separate item should be provided for "Deposits" which should be shown separately from Advances. Advances recoverable in cash or kind should be bifurcated in outstanding for six months and outstanding for more than six months as provided in note (o) (ii). Loans shall include deposit other than deposit for specific purpose.

LIABILITIES

Share Capital

Shares issued against credit balances in the form of Loans and Advances should be considered as issued against cash.

Debit balances in profit and loss account—the presentation in the form is correct, but note (h) creates difficulties on account of reference to uncommitted reserves. The word 'uncommitted' should be deleted.

Item 6 : The word 'proposed' should be deleted from 'proposed additions to Reserves' as there is no such thing as 'proposed additions to Reserves'. Directors are competent to effect the transfer.

Secured Loans

There should be sub-division between 'Short-term Loans and Advances' and 'Other Loans and Advances' as in the case of Unsecured Loans.

Specific item should be provided for loans under 'deferred payment arrangements'.

Unsecured Loans

Specific item should be provided for loans under 'deferred payment arrangements'.

The particulars under fixed deposits may be sub-divided as under :

(i) Deposits under Rule 3 (1) of the Companies (Acceptance of Deposits) Rules.

(ii) Deposits under Rule 3 (2).

(iii) Interest accrued and due.

(Amounts of overdue deposits may be indicated by way of a note together with the reasons for non-payment.)

Current Liabilities and Provisions

Item 8 : 'Provision for taxation' should be less 'Advance Payment of Tax'. It should, however, be clarified that the advances to be adjusted should be only against that provision for taxation regarding which advance was paid.

Item 10 : 'For contingencies' should be deleted since it is covered by Item 13.

Items 11 and 12 should be grouped together.

The amount due as interest on term loans is generally merged with the loan amount itself or is separately shown as an accretion to term loan. Since interest is a current liability

and as the payment of interest is not directly related to the repayment of the loan, the amount of interest may be shown separately under 'Current Liabilities'.

The amounts collected by the company on behalf of the Government, for example, tax deducted at source, Provident Fund recovery, Employees State Insurance recoveries, etc., and not paid over to the Government within the statutory period shall be shown separately.

General instructions for preparation of balance sheet

Note (h) should be amended to read : debit balance in the profit and loss account shall be shown as deduction from free reserves other than statutory reserve required to be created under any law.

Note (l) which provides for classifying separately trade investment and other investment should be deleted as this classification has no significant meaning. Instead, investment should be classified into long-term and short-term investment. Short-term investment would mean investment sought to be held for less than twelve months.

Note (m) should further provide that the Board of Directors shall state the amount that is expected to be realised and also whether provision in respect of loss has been made in the accounts arising therefrom.

Note (o) should further provide in respect of Sundry Debtors outstanding for more than six months. They should be classified into outstanding from one year, two years, three years and above three years. In case of debts outstanding for more than two years, Directors shall state the steps taken by them to recover the same and the reasons for such outstanding.

Note (o): (i) Classification of Loans and Advances should follow the pattern suggested above in respect of Sundry Debtors. They should be classified under separate heads as follows :—

- (a) to holding/subsidiary companies ;
- (b) to partnerships/joint ventures of which companies and/or its subsidiary companies are partners/co-sharers ;
- (c) to companies in which directors are interested.

Note (o): (ii) Amounts to be shown in Sundry Creditors should be classified into outstanding payable for more than one year, two years, three years and more than three years. Directors shall explain the reason for non-payment of Sundry Creditors outstanding for more than one year.

Further Notes

1. Stock-in-trade shall disclose slow moving stocks including stores which are on hand for two years or more and the Directors shall give reasons for the same being not written off and, in the event the consumables are of two years or more on hand, the reasons for further purchase and keeping larger stock shall be explained.

2. Directors shall state contingent liabilities and notes which have a bearing on the company's interest in respect of company's interest as partner in a partnership firm or joint venture. Notes should be such that the shareholders shall be informed about the true state of affairs of the partnership/joint venture.

(II) Schedule VI : Part II : Profit and Loss Account

The requirement of furnishing quantitative details as per provisions of sub-clauses (i) and (ii) of clause (3) may be dispensed with as the same is already required to be furnished as per the requirement of clause (4C).

Clause 3 (iv) : Provision for depreciation including arrears of depreciation should be compulsorily provided and not by way of notes on accounts. The second and third paras of this clause should, therefore, be deleted.

Clause 3 (vi) : The words 'amount of charges' should be replaced by the words 'the amount to be provided for'.

The amount of charge of income-tax is to be debited to the profit and loss account. The meaning of the word 'charge' has been a subject matter of controversy and some have contended that an income-tax will become a 'charge' only when all stages of assessment and appeal are completed. If this line of thinking is followed, the balance sheet as at a period will not reflect the true and fair view of the affairs of the company. With a view to removing doubts, we recommend that the words 'charge for' be deleted.

Clause 3 (vii) : The words 'the amount reserved for' should be substituted by the words 'the amount set aside for'.

Clause 3 (viii) (a) : The word 'proposed' should be deleted.

Clause 3 (x) (f) : Note 2 should be deleted. The details required should be included in the Directors' Report in the revised form suggested by us. It may be noted here also that the definition of remuneration under this clause is not in line with the definition for the purpose of the information to be given in the Directors' Report.

Clause 3 (x) (i) : The proviso under this clause requires that any item of expenditure which is in excess of one per cent of the total revenue or five thousand rupees *whichever is more* shall be shown separately and not under Miscellaneous Expenses. In big companies one per cent of the total revenue would come to a few lakhs and hence it is not advisable to club huge amounts under one head of Miscellaneous Expenses. The basis provided in the aforesaid proviso may be revised to the effect that expenses exceeding one per cent of the total revenue expenditure or one lakh rupees *whichever is less* may be shown separately.

Clause 3 (xi) (a) : The words 'distinguishing between trade investments and other investments' should be deleted.

Clause 3 (xi) (b) : The words 'specifying the nature of the income' should be deleted.

Clause 3 (xi) (c) : This clause should be amended and it should be specifically provided that the income should always be shown gross and the tax deducted should be shown separately.

Clause 3 (xii) (a) : This clause should be modified to include the expression 'joint venture' after the expression 'partnership firm'. The existing note below this clause should be numbered as (1) and the following further note should be added as (2) :

(2) Adjustments should be made in the profit and loss account to provide for expected losses. Sub-clauses (b) and (c) under this clause should be numbered as (c) and (d) and the following clause, namely, clause (b) should be added after the notes :—

(b) Provision for depletion in value of investments, as arrived at by taking the excess of the book value or cost of investments over the market value of such investments, should be made.

The existing sub-clause (b) which is to be re-numbered as clause (c) should be modified to read as follows :—

(c) Profits, losses, incomes or expenses in respect of transactions of a kind, not usually undertaken by a company or undertaken in circumstances of an exceptional or non-recurring nature.

Clause 4 : The words 'manager' and 'and any other person' should be deleted in the first sentence. Sub-clauses (ii), (iii), (iv) and (v) should be deleted and in sub-clause (viii) the existing words should be substituted by the words 'all retirement benefits'.

Clause 4 D : The existing clause 4 D should be numbered as 4 D (1). After clause 4 D (1), the following clause should be added, namely—

- (2) A note shall be appended to the published accounts if there is a change in the method of accounting followed during the year in respect of valuation of stock-in-trade or in respect of any other matter, provided, because of such a change in the method of accounting, the profit or loss has varied to an extent of at least ten per cent of what the profit would have been had the company followed the accounting method of the previous year.

Provision for Bad and Doubtful Debts and Advances

There is no specific requirement at present to compel a company to provide for bad and doubtful debts and advances in the accounts. For better appreciation of the working results and net worth of business as disclosed in the Annual Accounts, it is necessary to provide in full for the bad and doubtful debts and advance in the accounts. Hence it is suggested that making provision for bad and doubtful debts and advances in the accounts should be a compulsory requirement.

(III) Schedule VI : Part III : Interpretation

Under clause 7(1), the following sub-clauses namely, sub-clauses (d) and (e) should be added :—

- (d) the expression "provision" shall also include all provisions in respect of employees and other provisions to the contingencies, if Directors are of the opinion that provision for contingencies is necessary ;
- (e) the expression "provision" shall shall also include provision for bad and doubtful debts, loans, and advances.

The expression "and in this sub-clause the expression "liability" shall include all liabilities in respect of expenditure contracted for and all disputed or contingent liabilities" occurring at the end of clause 7(1) shall be substituted by the following :—

"and in this sub-clause the expression "liability" shall include all liabilities, including statutory liabilities in respect of any commitment or expenditure contracted for and all disputed or contingent liabilities."

The following clause shall be added in this para, namely—

9. No item of income, expense or receipt should be explained by way of a note if the same is required to be provided for or adjusted in order to determine the true and fair state of affairs of a company.

MODEL FORM FOR VERTICAL BALANCE SHEET

[vide para 8.8]

Balance Sheet as at 31st March, 19

	<i>This Year</i>		<i>Previous Year</i>	
	Rs.	Rs.	Rs.	Rs.
I Fixed Assets (Schedule 1)	
II Investments (Schedule 2)	
III Net Current Assets	
Current Assets, Loans & Advances, Stocks (Schedule 3)	
Sundry Debtors etc. (Schedule 4)	
Loans & Advances (Schedule 5)	
Cash & Bank Balances (Schedule 6)	
<u>Less :</u>				
Current Liabilities and Provisions—				
Sundry Creditors etc. (Schedule 7)	
Sundry Deposits	
Taxation (Net of Advance Payments)	
Proposed Dividend	
Provision for Leaving/Retiring Benefits Gratuities	
<u>Total Assets/Funds employed</u>	<u> </u>	<u> </u>	<u> </u>	<u> </u>
Financed by				
IV Share Capital (Schedule 8)	
Reserves & Surplus (Schedule 9)	
V Loan Capital and Bank Overdrafts	
Secured Loan (Schedule 10)	
Unsecured Loan (Schedule 11)	
Deferred Payment Liability (Schedule 12)	
<u>Capital Expenditure Commitments</u>	<u> </u>	<u> </u>	<u> </u>	<u> </u>
VI Contingent Liabilities	

- Note :** I. The Schedules referred to above form an integral part of the balance sheet.
- II. All particulars required to be disclosed as per provisions of Schedule VI in respect of the other form of balance sheet should be disclosed in the vertical form also, either in the balance sheet itself or in the Schedules. Notes required to be appended as per Parts I and II must also be appended here.

CHAPTER IX

INTER-CORPORATE INVESTMENTS AND LOANS

9.1 Although the present Act is based largely on the provisions of the English Companies Act of 1948, it has certain special features not found elsewhere. Restrictions on inter-company loans and investments constitute one of the departures from the English Law and found their place in the present Act mainly as a result of the recommendations of the Bhabha Committee which formed the basis of the present law, though the essentials of these restrictions were by no means unknown even in the law obtaining at that time, namely, the Act of 1913. The 1913 Act was amended in 1936 by the Companies (Amendment) Act—sections 87E and 87F sought to control respectively the making of or guaranteeing loans between companies under the management of the same managing agents and the purchase by a company of shares and debentures of a company under the management of the same managing agents. However, these provisions did not apply to all companies nor were there any limits imposed as to the quantum of investments or loans which could be made. The Bhabha Committee, therefore, thought of widening the scope of the restrictions on inter-company loans and investments and, in doing so, they were guided mainly by the consideration of tackling “the wide spread evils which have followed from many reckless inter-company investments in post-war years”. The Government, however, was guided by the still broader consideration of checking undue concentration of economic power, inter-corporate investment being an important instrument of gaining corporate control.

9.2 In making, therefore, a review of the present provisions dealing with inter-company investments and loans, we have addressed ourselves to the following issues :—

- (a) the lacunae in the present provisions which are likely to defeat the legislative intent;
- (b) the feasibility of adopting similar criteria for calculating the limits of inter-company investments as well as inter-company loans;
- (c) the need for allowing inter-company loans and investments in the interest of the companies and also in the interest of the growth of the economy;
- (d) the need for preventing the abuse of inter-company investments and loans, keeping in mind the fact that a company's funds ought primarily to be deployed in the activities of the company itself;
- (e) the need for providing a self-regulatory mechanism which companies may adopt in place of the existing requirement of Central Government's approval ;
- (f) anticipating the consequences which are likely to result from the proposed transfer of the existing provisions in the Act dealing with the definition of ‘group’ [section 2 (18A)], as also the provisions relating to the transfer and acquisition of shares of companies registerable under the MRTP Act, 1969, (sections 108A to 108H) to the MRTP Act; and
- (g) the feasibility of providing a simpler but more effective alternative to what is sought to be achieved by the existing provisions relating to ‘group’, ‘same-management’ and ‘investment company’ in sections 370 and 372 of the Act.

9.3 We are suggesting the transfer of sections 108A to 108H to the MRTP Act and shall be dealing with the provisions of these sections separately. The concept of the same group for the purpose of regulating inter-company investments is almost synonymous with the concept of same management as given in section 370 (1B). The rationale behind statutorily curtailing the power of companies under the same management to invest in the shares of other companies beyond certain limits is to prevent the extension of corporate control over new companies, giving rise to further concentration of economic power in the hands of the companies which are already under the same management. Once, however, the provisions of sections 108A to 108H are incorporated in the MRTP Act with the modification, as

suggested by us, it would no longer be necessary to have any special provision in the Companies Act relating to inter-company investments by companies under the same management. Consequently, we suggest that all references to the expressions 'same group' and 'same management' may be omitted from the present Act. Even otherwise, experience suggests that the concept of 'same management' did not have the desired effect—only a little rearrangement of shareholdings and directorships was required to circumvent it. The reason why we are not suggesting the retention of the concept of 'group' and 'same management' in the Companies Act is that basically these expressions have a bearing on the objectives underlying the MRTP Act rather than the Companies Act.

9.4 Experience shows that the provisions of section 372 have at times been circumvented by recourse being had to one or more of the following expedients :—

- (i) forming a Board-controlled subsidiary, one of the alternative methods now available for formation of subsidiaries, and there making investments without Government's approval by taking advantage of the present provision of the law which dispenses with approval in the case of investments made in subsidiaries; and
- (ii) forming an investment company as a catalyst for corporate control. An investment company can invest, without limit, as to its own capital and at the same time without any limit, if it is a private company without the necessity of Government approval. The additional advantage of forming such investment company is that the companies controlled by such a company remain outside the purview of the MRTP Act, 1969, an investment company having been held as not to be an 'undertaking' as defined in that Act. In our view, the present definition of investment company is unsatisfactory inasmuch as a company which merely holds certain shares with the avowed intent of exercising control over other companies is by definition also an investment company. With a view to preventing this trend, we have suggested a revised definition of investment company in Chapter III as to provide that an 'investment company' means a public company limited by shares and carrying on business only of under-writing in or dealing in shares, debentures or other securities.

9.5 At present, the provisions of section 372 also extend to investment in preference shares and, in the case of investments made by companies under the same management, to investments in debentures as well. In the light of our recommendations to make all preference shares redeemable within a period of twelve years, we feel that there is no need to include preference shares within the ambit of the redraft of section 372. Sub-section (12) of section 372 which brings debentures within the ambit of inter-company investments, as far as companies within same management are concerned, may be deleted in view of the fact that, in future, the concepts of 'same management' and 'same group' will find their place only in the MRTP Act. We, however, feel that debentures are essentially long-term loans and should be included for the purpose of regulating inter-company loans (though not inter-corporate investments). We are, however, in favour of widening the meaning of investment to include contribution by way of capital participation to firms, joint ventures or other association of persons; for, investments this type tend to deplete the funds available for deployment outside the business in the same way as investment in shares of companies.

9.6 At present, a private company in which twenty-five per cent of the paid-up capital is held by a public company, or a private company which has invested not less than twenty-five per cent in the paid-up capital of a public company, is deemed to be a public company and is subject to the regulatory provisions of section 372. We have already suggested that such companies, instead of being treated as deemed public companies, would be required to comply generally with the provisions governing a public limited company. We are, therefore, of the view that the present exemption available to private companies in the matter of inter-corporate investments should continue.

9.7 We also feel that the limit, if any, on the capacity of the investing company to invest in shares or by way of loans including deposits should be related to free reserves and not to subscribed capital or net worth as at present. Subscribed or paid-up capital which should normally be invested by the company in its own fixed capital assets cannot really form the basis for making investments or loans. However, with regard to the limit upto which investments may be made in the share capital of the investee company, the same would

have relevance, in view of our recommendations, only as far as investment companies are concerned. We are, thus, making a departure with regard to the criteria to be followed in respect of both these limits from the existing provisions of the Act. While providing for a somewhat rational basis for determining surplus for the purposes of the extent limit upto which inter-corporate investments or loans could be made by a company, we are of the view that an absolute ceiling should also be prescribed beyond which no company should make investments or give loans. We are also of the view that while inter-company investments should not be allowed to operate as instruments of insidious corporate control, it is in the interest of the growth of the economy that such investments be permitted in certain cases. The Committee is, therefore, of the view that, in the future, inter-company investments should be restricted to the following categories :—

- (a) promoting a new company either independently or jointly with any person;
- (b) taking over a sick unit; and
- (c) taking over an existing company after making an offer to buy shares from all the shareholders of such a company on terms and conditions equally applicable to all of them and after obtaining the approval of the Company Law Board.

Once such an absolute ceiling is placed and investments are not ordinarily permitted to be made other than for the purposes specified above, we feel that the requirement of approval (under the existing sections 370 and 372) should be dispensed with and companies should be free to make investments or advance loans within the limits prescribed. The following suggestions for suitable legislative provisions with regard to inter-corporate investments and loans are being made by us, keeping in view the twin objectives of checking such investments as are calculated to foster corporate control and providing a built-in flexible mechanism for freely permitting such investments in the interest of corporate growth. We are also anxious to see that the borrowed funds of a company are not diverted for providing financial assistance to other companies by way of investments in shares or granting loans and that such assistance is rendered only out of funds which are genuinely available with a company. The nearest approximation to the availability of funds outside the business may be arrived at by taking a certain proportion only of the free reserves of the company. A revised definition of free reserves is also being suggested by us. It is possible that some of the existing companies are already holding investments which would be in excess of the limits now being suggested by us. In order to prevent dislocation and maladjustment, we would recommend that a provision should be made, while introducing the new limits, to save these existing investments. Of course, as a necessary corollary, future investments and loans will have to take into account the existing investments and loans and any future investment or loan will have to comply with the amended law. As a result of our suggestions, sections 370 and 372 would have to be redrafted and our recommendations assimilated into a single section. We would suggest the following redraft (in place of the existing sections 370 and 372) :—

- (1) No company shall make any investment or loan (whether by itself or by any individual or association of individuals in trust for it or for its benefit or on its account) except to the extent and except in accordance with the restrictions and conditions specified in this section.
- (2) On and from the commencement of the Companies (Amendment) Act, 19, investment by a company shall be restricted to—
 - (a) promoting a new company either independently or jointly with any person;
 - (b) taking over a sick unit; or
 - (c) taking over an existing company after making an offer to buy shares from all the shareholders of such a company on the terms and conditions equally applicable to all of them and after obtaining the approval of the Company Law Board.
- (3) The Board of Directors may make investments and loans upto but not exceeding in the aggregate sixty per cent of its free reserves and that part only of the paid-up capital which is represented by capitalisation of profits made after the commencement of the Companies (Amendment) Act, 19— :

Provided that the aggregate of investments made by a company shall in no event exceed thirty per cent of free reserves and such part of paid up capital regenerated by future capitalisation of profits :

Provided further that any investment or loan, as the case may be, by the company beyond ten per cent but within the aforesaid limits may only be made if the company, by special resolution, so resolves.

- (4) No investment or loan shall be made by the Board of directors unless sanctioned by resolution passed at a meeting of the Board with the consent of all the directors present at the meeting except those not entitled to vote thereon and unless the notice of the resolution to be moved at the meeting has been given to every director in the manner specified in section 286.
- (5) In computing at any time the limits upto which the investments and loans can be made, while the aggregate of such investments and loans, whether made before or after the coming into force of the Companies (Amendment) Act, 19—, shall be taken into account, such existing investments or loans, if they are in excess of the limits prescribed in this section, shall not be affected by reason only of those limits.
- (6) For the purposes of this section, investments shall not only include subscription for or purchase of shares of a body corporate but shall also include contribution by way of capital participation to firm, joint venture or association of persons and loans shall not only include deposits with and subscription to or purchase of debentures of any other body corporate but also loans to and deposits with firm, joint venture or association of persons and will include the giving of guarantee or the providing of any security by the company.
- (7) Notwithstanding anything contained in the foregoing provisions, the Central Government may, in public interest and for such reasons to be recorded in writing, permit investments to be made by a company.
- (8) The provisions of this section shall not apply to—
 - (a) any government company;
 - (b) any banking or a private company;
 - (c) any public financial institution;
 - (d) an investment company whose investments in each body corporate do not exceed ten per cent of the paid-up equity capital of that body corporate;
 - (e) any company whose main object and principal activity is financing of industrial enterprises :

Provided that this clause shall not apply to a company which accepts loans or deposits from any other company;

- (f) subscribing to right shares taken *pro rata*;
- g) investment in preference shares except for the purpose of computing the percentage specified in the first proviso to sub-section (3); and
- (h) investment by a holding company in its subsidiary other than a subsidiary within the meaning of clause (a) of sub-section (1) of section 4 of the Act.

Explanation : For the purpose of computing the percentage specified in the first proviso to sub-section (3), the investment in right shares already held by the company shall be taken into account.

9.8 We are anxious to see that our recommendations in this Chapter relating to inter-company investments and loans are put into effect immediately. We would, therefore, recommend that the Government may introduce at the earliest legislation for amending the existing sections 370 and 372 on the lines recommended by us.

CHAPTER X

PUBLIC DEPOSITS—PROTECTION TO DEPOSITORS

10.1 Acceptance of deposits by companies on a large scale from the public had its beginning in early sixties, when companies engaged in textile manufacture in Coimbatore and Ahmedabad started issuing advertisements openly inviting deposits from the public offering attractive rates of interest. This practice afforded to the companies an additional source of financing their projects. It has been roughly estimated that as a result of aggressive campaigning, public deposits with companies at present is over Rupees one thousand three hundred crores. Until 1966, there were no restrictions of any kind over this practice and, hence, all types of companies started accepting deposits. In the recent years, there have been several instances of failure by many companies to refund the deposits on their maturity. In other cases, there has been default by companies even in the payment of interest due periodically on the deposits. Therefore, the Reserve Bank of India in exercise of the power vested in it under Chapter III-B of the Reserve Bank of India Act, 1934, had to step in and regulate this practice. Separate directions applicable to both non-banking financial, non-banking non-financial companies were issued in January 1966 and to miscellaneous companies in the year 1973.

10.2 There are broadly three classes of companies that invite and/or accept deposits from the public.

They are :—

- (i) banking companies,
- (ii) non-banking financial companies, and
- (iii) those accepting deposits for financing their own business such as manufacture or trade known as non-banking non-financial companies.

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The protection of the depositors thus made a beginning with the Reserve Bank of India giving necessary instructions and framing the directions from time to time. For the first time protection of a singular class of unsecured creditors viz., the depositors was provided in the Companies Act, by the Companies (Amendment) Act, 1974, by incorporating sections 58A and 58B. The depositors as ordinary unsecured creditors have the normal rights available to them under the general civil law. Under the Companies Act, 1956, a right to apply to High Court under section 433 (e) to have the company wound up on the ground of commercial insolvency is also available to depositors.

10.3 By virtue of the powers vested under sub-section (1) of section 58A, the Central Government in consultation with the Reserve Bank of India has framed separate rules called Companies (Acceptance of Deposits) Rules, 1975 which came into force with effect from 3rd February, 1975. The said rules incorporate a part of the Reserve Bank of India directions applicable to non-banking non-financial companies. Section 58A authorises the Central Government in consultation with the Reserve Bank of India to prescribe—

- (a) the limits upto which,
- (b) the manner in which, and
- (c) the conditions subject to which deposits may be invited or accepted by a company, either from the public or from its members.

The Companies (Acceptance of Deposits) Rules, 1975, provide for the form, and the manner in which advertisements issued by companies inviting or accepting deposits should be made, and also the limits upto which companies can accept deposits. The primary object of regulating acceptance of deposits by non-banking non-financial companies is to keep the

magnitude of these deposits within limits and to control and handle deposits received outside the banking system not only in the interest of depositors themselves but also in the general and wider interest of public. It has, therefore, become necessary to protect the unwary and gullible depositors who are drawn by the attractive rates of interests offered by companies. Necessity of providing protection to the depositors has assumed importance not because of ethics, or of any inherent defect in the practice, but because of complaints of defaults committed by some of the companies in re-payment of principal and or the interest in accordance with the terms of deposits. At the same time, because of the magnitude of the deposits with the non-banking sector companies, and several complaints from public, there has been some uneasy apprehension in the minds of both the depositing public and the Government.

10.4 A Study Group (Raj Companies) was constituted by the Reserve Bank of India in June 1974 for examining in depth the provisions of Chapter III-B of the Reserve Bank of India Act, 1934, and the directions issued thereunder. This committee has gone in detail into the problem and examined the existing efficacy of the monetary and credit policy of the country and the protection of the depositors who put their lives' savings with non-banking companies. The Government will no doubt consider the recommendations of the said Committee. We are, therefore, not touching on the various aspects in our report. Apart from other reasons, the major one being that the terms of reference to that Committee were much wider and broader than that of ours, we feel it is unnecessary to burden our Report with any further recommendations which have already been made in the Report of the said Group and which in any case are available to the Government. We will only be referring to certain other aspects which we feel have not been dealt with by the report of the said Group.

10.5 Public deposits with companies primarily establish the relationship of creditor and debtor. There is already sufficient provision in the general law for enforcing right of creditors against defaulting debtors. In case of default by a company to repay its debts, a petition for its winding is also available to the creditors. Any further amount of legislative control can necessarily give limited relief to the depositors. It is doubtful if full protection to the depositors can be given especially to the illiterate and gullible, who perhaps are attracted either by the high rate of interest offered or fall an easy prey to the persuasion of brokers in making their choice of companies in which they put their life savings. It must, however, be mentioned that payment of high rate of interest invariably carries with it an element of risk. The law must, nevertheless, try to educate and caution the depositors about such risk in depositing indiscriminately. We may also mention here that the position under the Protection of Depositor's Act, 1963 in England today is the statutory obligation on companies accepting deposits to disclose more information.

10.6 The major element in the regulation of deposits from the view point of safeguarding the interest of the depositors has so far been to make it obligatory on the part of deposit-accepting companies to disclose the relevant information about their management and financial position in their advertisement. The rationale or philosophy of disclosure has been that the depositors would be able to assess the risk attached to those deposits with the non-banking companies. With this end in view, the Central Government has framed elaborate rules referred to earlier, and the said rules have been further amended very recently by a notification No. GSR 200(E), dated 30th March, 1978 which came into force on the 1st day of April, 1978. As a result of the amendments now made there will be progressive reduction in the limits upto which a company can accept deposits against unsecured debentures or deposits from share-holders, or any deposit guaranteed by a director of the company. There will be reductions in the over-all limits also with effect from 1st April, 1980. Yet another important change that has been made by the recent amendments in the Rules as a condition of acceptance of deposits is the necessity of maintaining by companies, liquid assets equal to a sum which shall not be less than ten percent of the amount of the deposits maturing during the year ended on the 31st day of March, in the form of bank deposits, unencumbered securities of State and Central Governments, or unencumbered approved securities. These requirements in our view are very salutary and afford considerable protection to the depositors.

10.7 The contents of advertisement which companies desire to issue at the time of acceptance of deposits have also been improved further by the recent amendment. The statement of financial position of companies required to be included in the advertisements gives more relevant information about the credibility/solvency of the companies. Three new

sub-clauses have been added to rule (4). As a result, the advertisement has now to state— (a) the amount of deposit accepted on the last day preceding the financial year, (b) a statement of over-due deposit, and (c) a statement that the compliance with the rules does not necessarily imply that the re-payment of deposit is guaranteed by the Central Government, and that the deposits rank *pari passu* with other unsecured creditors of the company. The return which companies are required to file with the Registrar of Companies pursuant to rule 10 of the Rules similarly requires the company to mention in Part B of the return, the details of amount of deposits repayable during the year which though claimed, have not been repaid by the company, and the aggregate amount of the deposits remaining so unpaid. We also felt that it should be made incumbent on companies to provide this information in all the advertisements inviting deposits. This has also been provided in the Rules. We would also further recommend that the directors' report and the application for deposits should also contain this information. There will, thus, be greater publicity and disclosure for the benefit of the prospective depositors.

10.8 We have given our anxious consideration to the problem of public deposits and have considered various suggestions made to us either in the memorandum or in reply to the questionnaire, or in oral hearing before us. One of the suggestions made to us was that insurance coverage should be provided to the deposits. In this connection we have obtained the views of the General Insurance Corporation of India (GIC) which has stated that in view of certain practical difficulties in giving insurance coverage to the deposits held by companies it was not possible to take up this kind of business.

10.9 The question of insurance coverage to company deposits was also considered by the Raj Committee. The said Committee in its report submitted in 1975, however, did not recommend insurance coverage to the deposits accepted by companies as is applicable in the case of bank deposits under the deposit insurance scheme, on the ground that the latter scheme was extended to the bank deposits only after the banking system had been rationalised and consolidated. Further, the acceptance of deposits by commercial banks is under the scrutiny of and subject to regulation by the Reserve Bank of India. But, there is no such uniformity in the case of company deposits. Also the risk involved in the company deposit varies from company to company depending upon its financial soundness. Taking all aspects into consideration, we cannot but agree with the recommendations made by the said committee. We, therefore, are unable to recommend, in the present circumstances, insurance coverage to public deposits with companies.

10.10 Another suggestion made to us and also to the said Committee was to ban altogether companies from accepting deposits from the public. We have partly accepted this suggestion by recommending a revised definition of "private company", in Chapter IV dealing with classification of companies which definition prohibits private companies, if they desire to retain their character as private companies, from accepting deposits from the public in future. However, it would be necessary to give sufficient time to such private companies which have already accepted deposits from the public prior to the coming into force of the new provision, to pay off the deposits in a phased manner.

10.11 As section 58A now exists, there is no penalty in case of default by companies in paying deposits as and when they mature for payment, if the deposits were accepted in accordance with the RBI directions. Sub-section (5) which is the penal section would not cover cases of such default. It is a glaring and a serious lacuna. Therefore, it would be appropriate to make suitable provision to take care of such a situation. As observed earlier the depositor has the usual civil remedy to enforce his rights, but such a course is not only costly but also time consuming, which many depositors may not be able to afford. Even applying for winding up of the company on the ground of its inability to pay its debts is a costly exercise.

We recommend that section 58A should be amended to provide for the following :

- (i) in cases where ten percent of deposits which have matured for repayment, and in respect of which, in spite of claims having been made by the depositors, the same have remained unpaid for over a period of six months, the company and the directors should be deemed to be in default, and the company should be subjected to penalties unless, before the expiry of the said period the company applies to the Court and makes out a case that in spite of all reasonable efforts by the directors, the company may not be able to repay the debts and therefore, seeks extension of

time for repayment. The Court at that stage should hear the Registrar and the depositors who are affected and make appropriate orders which the Court may in the circumstances, and having regard to all the matters considers it necessary. The Company should bear all costs and expenses in giving effect to the order of the Court. In the event the company and its directors neglecting to apply to the Court, it should be also treated as default for which the company should be penalised.

We may make it clear that this provision of a company in default in case where ten per cent of the matured deposits have not been repaid would not be capable of being avoided by moving the Government under any of the powers under section 58A. Sub-section (8) of Section 58A which permits the Central Government to grant exemption to any company from all or any provisions of section 58A, in our opinion, only deals with a situation of a company having accepted deposits in excess of the prescribed limits. There is no power to deal with or to give exemption or relaxation to the company for payment of the deposits which have matured for repayment. In our view, such applications do not fall under any of the powers given to the Central Government under section 58A. It may, however, be better to be specific and make this position clear so that the public and the companies in general do not remain under any misapprehension.

- (ii) A depositor who has not been paid either the interest or the principal or both should have a right to move the Court without any authorisation as presently required under section 621 of the Companies Act, 1956.
- (iii) Companies which have defaulted in paying either the interest or the principal, or both should be prohibited from inviting or accepting further deposits notwithstanding that the further deposits so invited or accepted are within the prescribed percentage. No company should be allowed to invite or accept deposit only with a view to pay off the earlier deposits accepted by the company.

In the Chapter on winding-up, we have recommended that a company which accepts further deposits only with a view to pay-off the earlier deposits should be deemed to be unable to pay its debts, and on this ground liable to be wound-up on a petition by the Registrar.

- (iv) At present the limit for acceptance of the deposits is worked out on the basis of paid-up capital plus free reserves. In the Chapter on Accounts and Audit, we have given a definition of "free reserves". In the Chapter on Inter-Corporate Investments, we are laying down that the ceiling on the inter-corporate investment should be worked out with reference to "free reserves" unlike the existing pattern which is worked out on the basis of subscribed capital in case of investment and paid-up capital plus free reserves in case of loans. We see no justification why there should be separate criteria in the matter of inter-corporate investment, loans and for deposits. In all these cases the overall consideration is to take into account the health of the company. We would, therefore, suggest that the percentage for acceptance of deposits should be worked out with reference to "free reserves".

10.12 There is one disquieting thing which we have been told in the matter of deposits. It has been brought to our notice that the big responsibility for prevailing upon the unwary depositors to put their deposits even in the companies which cannot be said to be financially sound, falls on a broker. This unfortunately is done with a view to earn their brokerage which, in case of companies which are not so well-known, is high. We feel that these activities need to be curbed rather strongly than they are at present. We feel that the Stock Exchanges in the country should take responsibilities for looking after activities of the brokers and seriously apply their mind to this problem. It is necessary that this aspect may be looked into by the Government and remedial measures taken immediately.

10.13 We feel that the requirement of better and greater disclosures coupled with our recommendations in the previous paragraphs, in addition to the normal rights of the depositors, would give sufficient safeguards to this class of persons.

CHAPTER XI

WORKERS' PARTICIPATION IN MANAGEMENT OF THE COMPANIES

11.1 Constitution of India in its Directive Principles on State Policy has directed in Article 43A that "The State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry".

11.2 Earlier the second Five Year Plan document had also laid down, "a socialist society is built not solely on monetary incentives but on ideas of service to society and the willingness on the part of the latter to recognise such services". It is because of this mandate in our Constitution that the terms of the reference to the Committee require us to report the measures by which—and not whether—workers' participation in the share capital and management of the companies is to be brought about.

11.3 Accepting this mandate of the Constitution, the Committee now proceeds to deal with the various steps, the modality and the measures by which such participation by the workers on the board of the companies could be meaningfully brought about. We may at once state that our recommendations on this aspect would apply both to Government as well as non-Government companies.

11.4 The recognition that the workers should be associated in a meaningful way in the running of the institutions in which they are working is in consonance with the modern thought throughout the world. A number of business chambers who gave evidence while accepting in theory the idea of workers' participation were at the same time strong in their views that time is not yet opportune in introducing this experiment of workers' participation. ASSOCHAM has stated that though it is necessary to associate workmen to an increasing extent in the ownership and management of the companies and that further labour must be given opportunities to participate meaningfully in the ownership of capital as well as in decision-making level where their contribution would be meaningful and useful, it felt that the country should move slowly and heed and listen to the experience of other countries though it hastened to add that they were not against the progressive attainment of the ideals of industrial democracy.

11.5 Similarly, the Federation of Indian Chambers of Commerce and Industry, though having no objection to this concept developing and being practised voluntarily and hoping that if it catches on and is successful it is well and good, feels that it is not advisable to rush through legislation without properly preparing the way by ensuring that the concept of workers' participation is readily accepted before it is introduced in the Act. It also notices that the concept of workers' participation in management has received wide publicity especially in Europe but it is of the view that the difference in the level of literacy and consciousness of the trade unions was different to that in our country and therefore, wants the introduction of this concept to be considered with great caution until the trade union movement is properly organized and the phenomenon of multiple unions in the same industry disappears. The business Chambers, therefore, though not opposing generally in principle workers' participation in management as an ideal, have very serious reservations in the manner of its implementation and the timing of its enforcement.

11.6 The Indian National Trade Union Congress (INTUC) in its memorandum has taken the view that workers by virtue of the investment of their labour are equal partners in the establishment and therefore should have equal representation with the shareholders on the Board to ensure co-determination as is found in coal and mining industries in Federal Republic of Germany. They want workers' participation in management to be at all levels of management, i.e. from the lowest shop-floor level to the highest decision-making level.

11.7 The Centre of Indian Trade Unions (CITU), Calcutta, in its written memorandum dated January 19, 1978, though maintaining its reservation that general participation

of workers in management of industry is not possible so long as the primary motive of production is an individual profit and also maintaining that no scheme of workers' participation can be successful without changing the basic direction of economic policy, has despite this rigid position stated that it may examine any proposal where participation of the workers' representative in management of a company of an undertaking can be made meaningful and workers' representatives are given equal status and elected through secret ballot by the workers and they (workers' representatives) are given full scope and opportunity to deal with all matters connected with production.

11.8 About 8 countries in Western Europe have some schemes of one kind or another in operation which secure and make possible the representation of the workers on the Boards. West Germany, of course, is the earliest to have introduced this scheme. In 1975, the European Economic Community Commission published a proposal for a European Company statute for the creation of European companies. These will be subject to certain requirements regarding employee participation.

11.9 The first question that naturally arises is as to which of the companies should be covered by the scheme of workers' participation. In the Committee's view the criteria can only be with reference to the size of the workers employed in a company. It is evident that the concept of workers' participation on Board naturally assumes that there are sufficient number of them working in a company so that individual contact with each worker being difficult, it is necessary at least to provide that their representatives should find place on the Board of the company so that they are able to participate in the total overall management of the company along with the shareholders' representatives. The criteria of number of employees in the company as a determinant factor for the applicability of this scheme is being accepted in other countries in Europe where workers' participation is in practice. A study was got made by this Committee of the companies with a paid up capital of Rs. 5 lakhs to Rs. 10 lakhs and companies with a capital of Rs. 10 lakhs and above as on 31st of March, 1976. It appears that there is a positive co-relation between the size of the company as measured by the paid up capital and the number of employees in the company. The great majority of companies having 500 or more employees are public limited and are engaged in the processing and manufacturing. Thus of 1360 companies which have furnished the requisite information, 565 companies had 500 or more employees. 523 or 92.6% of the companies out of this which had more than 500 employees were public limited type. The companies with a paid up capital of Rs. 5 lakhs or less (though they constitute 88% of the total number of companies registered) were not addressed because it was very unlikely that such small companies would be having employees more than 500. Thus, the total estimated number of employees in the country as a whole in size Groups I and II employing 500 or more workers would be as under as on 31st March, 1976 :

**Total estimated number of companies in the country as a whole in size
Groups I and II employing 500 or more workers.**

	<i>Employing 500 to 999 workers.</i>	<i>Employing 1000 or more workers.</i>	<i>Total for Group</i>
Size Group I (10 lakhs and more)	975	1629	2604
Size Group II (5 lakhs to 10 lakhs)	202	13	215
Grand Total :	1177	1642	2819

11.10 There were a total of 43853 companies in the private sector at work on 31st March, 1976. Of these, 5083 companies had a paid-up capital of Rs. 10 lakhs or more. In addition, there were 3937 companies at work in the country on that date in size group II, i.e. with a paid-up capital of Rs. 5 lakhs to Rs. 10 lakhs. It follows then that there were 9020 companies at work as on 31-3-1976 with a paid up capital of Rs. 5 lakhs or more. Of these, 2819 or 31.3 per cent were companies which employed 500 or more workers. However,

as the above method has been used with a response rate of 25.20% and 13.1% in respect of size Group I and size Group II companies, the all-India figures mentioned above would have some variation. All told therefore, the companies which would be employing workers over 1000 may be in the range of upto 1800 and companies with employing between 500 to 999 would be upto 1200-1300. We are of the view that to start with, the workers' participation may be limited to companies which are employing 1000 or more employees. We would, to start with, not make it applicable to companies with lesser number of employees. Of course, it does not in any way prevent the corporate sector employers from themselves agreeing to have a scheme of workers' participation in a company even when the employees are less than 1000.

11.11 It is next necessary to specify the categories who are to be treated as workmen for this purpose. So far as the expression employees of the company in a loose sense is concerned, this would cover every category barring the Board of Directors. But it will be readily conceded that the object of workers' participation is really to associate that large category of employees which constitute the bulk force in any company so that the majority of employees have a genuine feeling of being associated with the management. Though the definition of workmen and employee is to be found in various Acts like the payment of Gratuity Act, the Employees' Provident Fund Act, the Employees' State Insurance Act, and other similar labour legislations, we feel that for the purpose of determining who is an employee for the purpose of a scheme of workers' participation on Board, the definition given in the Industrial Disputes Act, 1947, of "workman" would be appropriate. We would, therefore, recommend that any company which employs 1000 or more workmen, as defined by Industrial Disputes Act, 1947, would be covered within our proposals for the scheme of workers' participation on the Board level. It is, therefore, recommended that a provision be made in the Companies Act for providing for workers' representation on the Board level in companies employing 1000 workmen (excluding casual or badli workers).

11.12 In the normal course, our recommendation should immediately become applicable to all companies with a strength of 1000 or more employees. But there is some problem in straightaway mandatorily applying the above scheme to all such "covered companies". The hesitation arises from the fact that during 'oral evidence' the committee was pressed with, amongst others, by Chambers for not suggesting the introduction of workers' participation on the ground that the workers were themselves not keen on having such representation. Now this view was put forth not only by Chambers but also some professional bodies. Obviously that cannot be taken to be the view of working class. In this aspect, we were also unfortunately hampered by the small response from the organisations of the workers. A copy of the printed questionnaire issued by the Committee was sent to all the eleven Central Trade Union organisations in the country, at the same time, as to the other organizations. Reminders were also subsequently sent to the trade union bodies twice specifically requesting them for their views on matters concerning the interests of workers in the corporate sector. Later, when the Committee visited the cities of Madras, Calcutta and Bombay for taking oral evidence from interested parties, the trade union organizations were also requested to depute their representatives to appear before the Committee. The response to these attempts of the Committee to elicit the views of the working class in the country was meagre. Out of the eleven bodies addressed, only two namely INTUC and CITU (Calcutta) sent written memoranda, and out of the eight bodies requested to appear before the Committee, only two namely CITU and Rashtriya Mill Mazdoor Sangh gave oral evidence at Calcutta and Bombay respectively. Thus we have not had the advantage of having the views of large body of trade unions. The two written memoranda received by the Committee, however, expressed themselves in favour of workers' representation on the Board. Thus it is not possible to accept the suggestion of Chambers that workers are not in favour of workers' participation. Yet we feel that to apply mandatorily without more our proposal to these 'covered companies' may not be correct. On the other hand equally, there is no reason to treat our proposals optional at the instance of the companies—we feel there should be statutory support for our proposals. We feel that a proper step in this connection would be to devise a measure by which the workers of each covered company could be given an opportunity to express their views whether they are in favour of or against workers' representation on the Board of the company. We would, therefore, recommend that each such company will arrange to hold, under the supervision of the labour department of the State concerned, a secret ballot in which all "workmen" who have been in service of the company for 6 months, will be provided an opportunity to vote whether or not the company should have workers' participation. The ballot will be restricted to a single question of 'Yes' or 'No' i.e. in favour of having workers' representation on the Board level or against it. The ballot would be held at the company's expense and in company's

premises at the places where its work-force normally carry out their duties in the company. This will give full opportunity to the workers to participate in the ballot. We would also suggest that the ballot be held on two consecutive days so that the workers who had not participated in the first day should be able to participate on the second day. This should ensure in having a large turn out at the ballot and also to account for normal absenteeism. We are so laying down because we are suggesting that only if 51% of the eligible workmen of the company vote in favour of having Board representation will the company be legally bound to provide workers' participation at the Board level. We are suggesting this initial ballot because we feel that it is necessary to dispel any impression (even if based on surmises) that representation on the Board is being forced on the workers without their consent. We also feel that as workers' participation is meant to advance their rights and give them a feeling of association in the management, they must express their views affirmatively in favour of it if they are keen on participation. Of course, there would be no bar to the management whether in public or private sector providing for workers' participation in terms of our proposal on its own without going through this mechanism. We are saying this because it seems to us that workers' participation does amount to sharing some power along with the shareholders' management and if the management voluntarily wishes to associate workers in the exercise of these managerial rights, we find no reason why law should hinder such wholesome eventuality.

11.13 Once the workers have voted affirmatively for board representation, there should not be any avoidable delay in implementing the proposals further for having workers' representation on the Board.

Proportion of Worker Directors

11.14 One of the important questions for implementation of the scheme is the proportion of the worker Directors on the Board. There are various formulae prevalent in various countries. It is possible that a particular formula of number of worker Directors may be more desirable than some other. We feel that the decision regarding the number of worker Directors on the Board requires more detailed consultations with companies and trade unions and the workers representatives than it has been possible for this Committee to do. We feel that this exercise should be done under the overall initiative and guidance of Central Government. We expect and hope that the Central Government will immediately initiate talks with the concerned parties and announce its decision regarding the proportion of the worker Directors on the Board. We may emphasise that we expect the proportion fixed by the Government to be applicable to all the covered companies. It would, therefore, not be necessary for the Government to hold talks with each company. Its consultation will be limited to Employers and Workers representative organisations. The speed is important in this social experiment because once workers have affirmatively voted for board representation, delay can only spoil industrial relations. We would, therefore, suggest that the Government initiate talks immediately after our report is submitted so that implementation of our proposals could be carried out within as short a period as possible.

Selection of workers' representatives and their qualifications

11.15 If there was an ideal trade unionism in the sense of single trade union in each company we would have had no hesitation in putting the responsibility for electing the worker representatives on the union. But unfortunately in our country, like many other countries, multiplicity of trade unions in one company is a common occurrence. It is not, therefore, practicable that the unions be given the responsibility of selecting the representatives for the Boards. Such a course could lead to inter-union rivalry and may create problems which might vitiate the industrial relations. As it is, the percentage of total unionised working force can liberally be termed between 30% to 35% of the total urban workers in the organised set up. The National Labour Commission in its report has noted that in 1962-63 the proportion of union membership was 24% in sectors other than agriculture. Of course, union membership varies from industry to industry.

11.16 According to 1971 census, out of 180,485,000 working population, 32,006,000 were of urban category. Since most of the organised industries are concentrated in the urban areas and as the traditional trade union base is also confined to these organized urban industries, we can make a safe guess about the unionisation on the basis of the figures of urban working population and the claimed membership of unions, viz. the important trade

unions (including the new trade unions) in the country have claimed a membership of nearly 70 lakhs in 1970 out of 320 lakhs working population. Percentage-wise it is about 22%.

11.17 It may be pertinent to point out here that though there existed over 20,000 trade unions in the country, not even half of them filed their annual returns giving their membership. We may guess they must have had some amount of membership. Therefore, even if we add the figure of 22% unionisation arrived at earlier to these unclaimed membership of several thousand unions, the percentage of unionised workmen will be only between 25-30 of the total urban workers in the organized sector and that too divided in a number of unions. In that view, we are not in a position to suggest that only unions should have the right to select workers' directors. The only other method then is to permit the nominations for elections to be made by workers. But as we are keen that a person standing for election should have some reasonable support, we suggest that no worker will be eligible to stand for election unless his candidature is proposed by at least 10 workmen of the same company. This will check frivolous candidatures being put forth. Though unions will not be nominating the workmen, they would inevitably be associated with the elections—after all the unions are the natural support of workmen including the worker director.

11.18 The company will properly publicise the programme of election in all the premises of the company. Nominations will be filed within a fortnight of the issue of the election programme by the company. Elections will be held not earlier than 21 days thereafter. The company will fix dates for holding of the elections for electing representatives of the workers on the Board. All workmen of the company who have been in service for a period of 6 months will be entitled to vote at such election. The election will, as mentioned above, be held on company's time, company's premises and at the work place of workmen. The worker directors will be elected by the workmen of the company through the method of secret ballot with cumulative voting rights. We are suggesting this mode because it is quite usual for a company to have many establishments not necessarily at the same place. Then there are various groups of workmen in the company and it is not practicable to devise constituencies for each group. All this makes us suggest the method of cumulative voting because this method provides an opportunity for effective exercise of voting power for all workmen, including small groups. The arrangement for voting must be made at the place of their work whether it is in the same State or more than one State.

11.19 One of the problems posed was that the employees may be working in different establishments belonging to one company at different places and as to how to provide facilities for them to vote. We find no such difficulty. As we have indicated the elections will take place at the premises of the company and all that is required is that the arrangement for ballot will be made at various places where the company has its establishments. It is common knowledge that the shareholders of the company are spread all over the country. Provision has been made for permitting the shareholders to receive their proxies and then to send it back to the company. This permits the shareholder to vote without attending meeting at head office. Similarly arrangement for casting vote can be made conveniently at each establishment. The counting and the result can then be tabulated at one particular place. Our country has enough experience of voting in the local and municipal and State elections, to have any apprehension that the companies would face any great problem in holding elections. The election should be held under the supervision of the labour department of the State concerned so as not to give rise to any suggestion of any undue interference with the election.

11.20 The next question is about the persons who should be eligible for being elected as worker directors. It has been suggested that the unionisation in this country owes a lot to the assistance and pioneer work done by the outsiders and that they should also be eligible for being elected as worker directors. We are not inclined to so recommend because we feel that trade unionism now has developed to a fairly advanced stage and the employees in the company have sufficient awareness of their rights and duties and of the complexities of the work, to be able to perform effectively their work as directors. The whole object of the workers being on the Board is to associate those persons whose well being and prosperity are mainly linked with the company. The workers who spend best part of their life with the company would show greater sensitivity to the working and well being of the company which an outsider may not be able to appreciate. A certain kind of rapport between the workers and the management is bound to be built up by the very process of their working together. We, therefore, feel that it would be appropriate to limit the choice of the worker directors

only from amongst the workmen belonging to the company and we would so recommend accordingly. Any workman who is eligible to vote would be eligible to offer himself for election as worker director.

11.21 Section 255 of the Act says that unless the articles provide for the retirement of all directors at every annual general meeting not less than two-third of the total number of directors of a public company or of a private company which is subsidiary of a public company shall be persons whose period of office is liable to determination by retirement of directors by rotation. Section 256 provides for retirement of 1/3rd of directors by rotation. The result is that except for the first elections, a director holds office for a period of three years. We do not feel that the method of retirement by rotation should apply to the worker directors. We are of the opinion that it is essential that a worker director should have some fixed period so that there is continuity of association with the Board. We would suggest that the tenure of worker directors should be for the same period, i.e. for a period of 3 years. This would necessarily require consequential changes in sections 255 and 256.

11.22 All vacancies in the office of the worker directors will be filled by the Board of Directors as casual vacancy but resolution of the board for filling up such a vacancy shall have to be approved by the sitting worker directors. However, if when the vacancy of worker director occurs and there is no other worker director on the Board, election to the vacancy should be held within three months.

11.23 There may be a holding company which may be having 1000 or more employees. It is possible that the subsidiaries may also be having more than 1000 or more employees. In these cases, the workers representation will be on the Board both on the subsidiary as well as on the holding company. In short, whenever a company whether subsidiary or holding has 1000 or more employees workers will be entitled to have representation on the Board.

11.24 With regard to the companies which are registered outside India but are having business in India, there does not seem to be any reason why they should be excluded from being covered by our proposal provided the number of persons employed exceed 1000. We would, therefore, recommend their coverage also by this scheme of workers' participation at Board level.

11.25 In Europe, where employee representation on the board is quite common, the management structure follows the two-tier pattern initially evolved in Germany. Essentially the system consists of a management board and another the advisory or the supervisory board. Workers are represented on the supervisory board and the management board consists of senior executives of the company exercising substantial managerial powers. In Europe the advantages of the two-tier Board are broadly accepted. In 1978 White Paper on Industrial Democracy presented to U.K. Parliament has also noticed that the two-tier Board structure can offer certain advantages over a unitary Board whether or not employees are represented on Board level.

11.26 Suggestion was made that probably in India we could also introduce a two-tier Board. Though two-tier Board has certain advantages, yet it cannot also be denied that it also raises problems of demarcating precisely the functions of the two Boards. We have given our reason in Chapter V, why we are not in a position to recommend the adoption of two-tier Board in our Company Law. Another additional reason for not recommending two-tier Board is that we would not have in any case found it possible to recommend its adoption for Government companies. The reason is that the constitution of a two-tier Board is said to have the advantage of having a supervisory Board where policy and strategic decisions are made while leaving day to day work to Management Board. In the case of Government companies, however, we are suggesting elsewhere that certain high level policy decisions will be reserved for the Government. In such a case, the introduction of a Supervisory Board would be to introduce three formal layers of authority with inevitable overlapping. This may not be conducive to efficiency and quick decision-making.

11.27 The workers' representation on company Board makes it necessary to provide that companies must ensure that certain decisions are necessarily taken at the Board level and the Board do not delegate the powers in respect of these matters to committees or other

functionaries in the organisation, otherwise the participation of workers at the Board level is likely to prove ineffective. The powers and functions which cannot be delegated by the Board, and which must be within the exclusive jurisdiction of the Board to take policy decision are in respect of the following matters :—

- (a) winding up of the company ;
- (b) changes in the memorandum and article of association ;
- (c) changes in the capital structure of a company (e.g. as regards the relationship between the Board and the shareholders, a reduction or increase in the share capital ; as regards the relations between the Board and senior management, the issue of securities on a take-over or merger) ;
- (d) disposal of a substantial part of the undertaking ;
- (e) the allocation or disposition of resources to the extent not covered in (a) to (d) above ; and
- (f) the appointment, removal, control and remuneration of management, whether as members of the Board or in their capacity as executives or employees.

The suggestion regarding (a) to (e) above is on the same line as the present power of the Board to declare dividend. In other words, the shareholders will not be able to exercise powers mentioned in (a) to (e) above unless recommended by the Board. We would, therefore, suggest that section 292 be amended to provide for the exercise of the foregoing powers of the Board of a company which is required by law to ensure participation of workers in management.

11.28 As a result of the worker being represented on the Board some further consequential changes will have to be made in the Act.

As already said, sections 255 and 257 will have to be modified to provide for elections of the workers directors by the workers.

Section 262 will have to be modified for filling up casual vacancy in the manner indicated above.

Section 263 will have to be modified to provide election of worker directors to be made by the method of cumulative voting and not individually as is provided for elections by the shareholders.

Sections 270 and 272 will have to be modified to dispense with the share qualification even if the articles so provide, so far as the worker director is concerned.

Sub-section (a) of section 283(1) will also be not applicable because of section 270 being made not applicable to worker directors.

Section 284 which provides for removal of directors by ordinary resolution will not apply to the worker director.

11.29 Worker Director should not, because of sections 299/300, be barred from participating in the Board meeting on the items concerning the terms and conditions of employment including questions of wages, bonus, etc. which would be common to other employees of the company. Because if that was so, we would be debarring him from participation in the most important aspects with which the workers are concerned. If their representative is not to participate in such matters, the concept of workers' participation will have no meaning.

In the case of worker director, his wages; salary and other benefits will not be treated as office of profit and will not thus attract section 314 of the Act.

11.30 Conditions must be created where the worker directors are able to play a helpful and effective role. It is apparent that as a member of the Board, worker director will require to familiarise himself with the subject with which he was not associated before. Involvement of the employees with the work of the board following our proposals will require them to have the knowledge and familiarity of subjects like commercial law and little accountancy. In order, therefore, that the worker director should perform his duties properly, training facilities will have to be provided. The Government must take the lead in meeting this requirement. Though the training concerned with the business of the company will be provided within the organisation itself, the more general training will have to be provided by the Government. Much of it will fail to be funded by the Government. The type of training required by the workers on the Board will have to be decided in consultation with the various professional institutes. We feel that the Government should start such training even earlier than the other steps are taken for workers' participation as indicated by us above. The knowledge and the experience gained by such training are in any case matters which will be helpful to make the employees understand the affairs of the company in a better and sympathetic manner. Awareness of the industrial relations and the business techniques will certainly make the workers more aware of the actual problems faced by the companies in the modern society. The training of the employees must, therefore, be immediately taken in hand.

11.31 Some hesitation is voiced in some quarters whether the presence of worker director on the Board may not lead to the breach in the confidentiality of the information which is vital to the company. We feel that the risk mentioned is sometime exaggerated. The concerned workmen in the company have even without being on the Board sufficient information as to the actual working of the company. If the confidentiality is not breached by him at present, we see no reason why a breach may be caused by him, with the burden of the responsibility of the Board thrown on him. After all it may not be forgotten that the workers' major part of life and welfare is associated with the welfare of the company and they are not likely to resort to irresponsible behaviour which may damage the company and inevitably their own interest and future. If the board consisting of the shareholders' representatives can be expected to act with restraint and not to harm the interest of the company even though the interest of the shareholder may be very small, so far as the individual welfare is concerned, there is every reason to hope and expect that the worker representative whose major part of life and welfare is intimately concerned with the development and welfare of the company will not act in any manner detrimental to the interest of the company.

11.32 We believe and hope that participation of the workers on the top management level i.e. the Board level will lead to greater industrial harmony and mutual trust and genuine endeavour by both the management and labour to work in the larger interest of the economy and welfare of the country. It is in this faith that the Committee is recommending various measures for the participation of the workers at highest level of the companies' decision making Board. We have every hope that our faith will be justified. Of course, future alone can show how right the Committee's assessment was but knowing the basic and essential reasonableness and spirit of accommodation and understanding of our people, we have every reason to be optimistic.

Workers' participation in share capital

11.33 Workers' participation in equity and their participation in management are in some sense interrelated from the point of view of attaining the ultimate goal of co-partnership in industry. Schemes for participation by workers in share capital as well as management are quite common in most of the European countries, although such schemes do not enjoy equal degree of popularity in all countries.

11.34 In favour of workers' participation in share capital, it has been said that besides giving a sense of dignity and status to workers as co-partners, equity participation secures a share for the workers in the company's future prosperity while holding out promises for improved industrial relations and steady growth of internal finances for the company's operations. It is further said that improved performance of industry and harmonious industrial relations pave the way for ultimate gain to the community as well as to the State.

11.35 The question of equity participation by workers, however, is a vexed one and not easy of solution. The memoranda received by the Committee and also in the oral hearing,

strongly divergent views have been expressed by the Chambers, the business representatives and the labour representatives. The Chambers were of the view that broadly there was no need for specifically reserving any part of the equity shares for the workers and that it was open to them to buy it in market just like any other person; some expressed the view that possibly a part of the amount of bonus payable to the workers may be converted into shares. But generally the Chambers did not approve of conversion of part of bonus into the shares because according to them capital has to be serviced and it may turn out to be expensive feature.

11.36 The labour of course was vehemently opposed to any suggestion that the bonus payable to the workers should be payable in part in equity shares. On the other hand, labour representatives stressed that whenever any bonus shares are declared certain percentage of it should automatically be distributed free as equity shares to the workers.

11.37 It is apparent that the equity participation by workers in order to be successful has to have mutually acceptable formula. This Committee was not able to obtain any such agreement from labour and management and is, therefore, unable to suggest any mandatory participation in equity by the workers.

11.38 There was, however, quite a majority view in favour of suggestion that in all future issues of shares by the companies, they should reserve a portion of new shares say about 10 to 15% exclusively for the workers to be called workers' shares. These shares in the first instance must be offered to the employees of the company and failing that only they should be offered to the existing shareholders or to the public. For that purpose, section 81 of the Act should be suitably amended. The Committee has already suggested amendment of section 77 of the Act permitting the companies to give to the employees a loan upto 12 months' salary or wages not exceeding Rs. 12,000/- for the purpose of purchase of the shares of the company. We feel that a beginning in this proposal may be watched before some other suggestion of equity participation by the workers could be spelt out.

CHAPTER XII

SOCIAL RESPONSIBILITIES OF COMPANIES

12.1 In the development of corporate ethics, we have reached a stage where the question of social responsibility of business to the community can no longer be scoffed at or taken lightly. In India, an international seminar on social responsibility of business was held as far back in 1965 which was inaugurated by the then Prime Minister, Shri Lal Bahadur Shastri. The seminar issued a declaration and defined social responsibility of business as 'responsibility to customers, workers, shareholders and the community'. The declaration co-related Gandhian concept of trusteeship with social responsibility of business.

12.2 Mr. George Goyder, the author of 'Responsible Company' while delivering the C.C Desai Memorial Lecture on February 18, 1978, reiterated his plea made nearly two decades ago that if the Corporation has to function effectively, it has to be accountable to the public at large. He has sought to equate the suggestion of a responsible company with the trusteeship concept advocated by Gandhiji, the aim of which was to ensure that private property is used for the common good.

12.3 As at March 31, 1977, there were 46,155 companies in the Private Sector in our country with a total paid-up capital of Rs. 2,769 crores. Of this paid-up capital, as much as Rs. 2,085 crores was accounted for by only 7,746 public limited companies in private sector. As on the same date, there were over 68.04 lakhs* people employed by the non-Government companies in private sector. Investment of five financial institutions in the total paid-up capital of 388 companies with a paid-up capital of Rs. 1 crore or more each, comes to a little above 18%. It will be appreciated that with so much public amount involved and so many lakhs of employees the companies can no longer be accepted as a private domain, the working of which would be of no concern to the society. On the contrary, the very impact of the corporate sector in terms of finance and employment shows that the well-being of the corporate sector is of considerable significance to the society. This is because the well-being of corporate sector has vital effect on the employment, and economy of the community and the health of the society.

12.4 In the environment of modern economic development, corporate sector no longer functions in isolation. If the plea of the companies that they are performing a social purpose in the development of the country is to be accepted, it can only be judged by the test of social responsiveness shown to the needs of the community by the companies. The company must behave and function as a responsible member of the society just like any other individual. It cannot shun moral values nor can it ignore actual compulsions. The real need is for some focus of accountability on the part of the management not being limited to shareholders alone. In the modern times, the objective of business has to be the proper utilisation of resources for the benefit of others. A profit is still a necessary part of the total picture but it is not the primary purpose. This implies that the claims of various interests will have to be balanced not on the narrow ground of what is best for the shareholders alone but from the point of view of what is best for the community at large. The company must accept its obligation to be socially responsible and to work for the larger benefit of the community.

12.5 The acceptance of this concept of social responsibility must be reflected in the information and disclosure that the company makes available for the benefit of the various constituents like shareholders, creditors, workers and the community. Disclosure of information is an essential part of the working of a free and fair economic system. Obviously there are limits imposed, for example, by the need to preserve commercial confidentiality in a competitive situation. But the bias must always be towards disclosure, with the burden of proof thrown on those who defend secrecy. The more people can see what is actually happening, the less likely are they to harbour general suspicions—and the less opportunity will there be of concealing improper activities. Openness in corporate affairs is the first principle in securing responsible behaviour.

* Source: Statistical Outlines of India, 1976 (Tata Services Limited).

12.6 In this connection, the Committee is happy to note that some of the enlightened business houses in our country are showing a recognition of the social responsibility owed by the corporate sector. While accepting that management must operate on principles borne out of deep-rooted philosophy and individual culture, it is recognised that these in turn must have a direct relationship to the ethical, moral and commercial values. It is recognised that management must operate with regard to the needs of the society and indeed of a nation as a whole. Survival with public sanction and growth seems to be more proper objective and these are possible only if the organisation satisfies the needs of its public. Necessity to obtain willing co-operation from employees for their own benefit and progress as well as that of the organisation is accepted. Providing safe working conditions and agreeable work relation programme, a training programme to develop employees' talents and of their children are accepted. Management must also participate increasingly in many community and social services. No enlightened management can remain aloof to the national problems such as unemployment, over-population, rural development, environmental protection including the conservation of resources, control of pollution and provision for clean drinking water. Corporate sector must accept the fact that although profits are indicative of sound business health, contribution to social progress is equally becoming a measure of corporate achievement. Business and industry have knowledge and skills which should be a powerful force in the solution of these various problems facing the society.

Thus, the question of the social responsibility of the business is no longer in dispute. The only relevant consideration is how far and in what manner can the business discharge its undoubted social responsibility.

12.7 Companies in the public sector which are very much part of the total corporate sector and account for about 70% of the total investment in the corporate sector must reckon with the social costs and social benefits arising out of any given investment. As a matter of fact, social costs benefit analysis is accepted as one of the prime considerations for making any investment in the public sector. It is natural, therefore, to expect from the private corporate sector that in the matter of investments it will also have similar consideration of social cost and social benefit. The accountability of the public sector to the people through Parliament must find its parallel in the private sector in the form of social accountability, at least to the extent of informing the public about the extent and the manner in which it has or has not been able to discharge its social obligations in the course of its own economic operations. It is in this sense that social responsibility of business, as far as the private sector is concerned, is but social accountability and is, in our view, a mere extension of the principle of public disclosure to which the corporations must be subject. It is also being repeatedly emphasised that the report on the social responsibility from the company should not be in a vague general manner but should have an element of particularisation and certainty. The view is that if a business man claims that he is acting as a trustee, this claim must be examined by having an account of stewardship by an outside appraisal. Mr. Goyder would even have it that social audit should be done by a body representing the workers, the consumers, the shareholders and the management. Thus there are degrees of social responsibility; if a corporation chooses a course which it knows will not advance the public cause, it must be said to be socially irresponsible. Social responsibility as a factor has to be evaluated at the point of time when decision is made. Results alone are not the measure for judging the extent of social responsibility because it is possible that socially desirable effects may result (by chance) from socially neutral or even anti-social decisions just as socially responsible decisions may have unfortunate social consequences.

12.8 Every company apart from being able to justify itself on the test of economic viability will have to pass the test of a socially responsible entity. In this context it will be judged by various tests dependant upon the circumstances in each company, and in each area. Thus a chemical company which may declare very high dividend may yet be responsible for polluting the water and air and would have to be named as a socially irresponsible company. Similarly the waste discharged from the factories resulting in loss of fish and thereby depriving large number of fishermen of their livelihood and also posing a risk to those eating fish, would certainly be ranked as an irresponsible act. No company in these days can disown its responsibility.

12.9 No doubt compulsion for further production in the country requires setting up of as many industries as possible. Still the aspect of the health and safety of its employees, the discomfort of the congested locality and the strain on the existing resources and facilities

of public utility cannot be ignored by any responsible company when finalising its planning. There may be other aspects on social responsibility which is peculiar to a country like ours which is mainly an agricultural one. Setting up of the new industries or dispersal of existing ones, wherever possible consistent with economy of production in the rural area would be an act in recognition of the social responsibility of a company to the public. The Government may offer various concessions to the industries proposed to be set up in the backward or less developed regions and the corporate sector will no doubt take note of these concessions and evaluate the various choices from a business point of view. But a socially responsible company will not have considerations of profitability alone as a determining factor. In this aspect, the responsible company will naturally take into account as to how many more jobs it will result in creating in an area in which unemployment is at the maximum. It is now well recognised by businessmen even that a corporation cannot disassociate itself from its surroundings.

12.10 Realising that the majority of the population of this country live in the rural area and the well being of that population is essential for the development of the country, a company which consciously and with deliberate choice starts its business in the said area will certainly be held to have played a more socially responsible role even though in terms of its return on investment, it is less profitable than some other sister companies. The companies will also have to be judged from their policy of employment so far as the socially handicapped and the weaker sections of the community are concerned. One of the tests for judging the consciousness by a company of its duty to the public may have to be tested by the interest it takes in the area of its work, the welfare of its employees and their families including the spread of adult literacy. Some may think that all these are the functions of a Government and a company should not be expected to have anything to do with it. We are afraid that this attitude completely misses to note a very vital role that the corporate sector has come to play in our national economy. The resources and manpower as well as raw material which the corporate sector has necessarily to employ inevitably cast a responsibility on it to see that the balance between the need of the company and the requirement of the society are maintained at even level. The present financial information is meant to process together and report financial result and other statistics. It does not concern itself with the social performance information—an aspect of acceptance of the social responsibility of the company to the society. Some of the organisations abroad have even evaluated the corporations with respect to their contributions to social responsibility test like environment, consumers' health, well-being and safety, and employment of minority, backward, and women personnel. Various names have been given to this social information like socio-economic accounting, social accounting, socially responsible accounting, but most prevalent word for all the social information which is now accepted is social audit.

12.11 One further and important question also arises with regard to the acceptance of the concept of social responsibility. That relates to the manner in which it is to be implemented. There is no dispute that the corporate sector in recognition of its social responsibility must inform the shareholders and the public about the contribution made by it not in a general manner but as far as possible its social report must be cast both in quantity and monetary terms. The details which should be given would be guided by the need for having integrated picture of the working of the company in real terms as far as possible and for providing information which can serve as an aid to policy making. Though there may be some difference amongst the various bodies and institutes as to the exact manner in which the quantification and verification is to be done by the companies, there is no dispute about certain well accepted areas and items, which directors must disclose as an additional information every year. Thus it should be possible, rather it should be obligatory, on the company to give a social report every year showing to what extent it has been able to meet its social obligation in terms of amongst others, the specific objects and items mentioned above. It was suggested that it may happen that though apparently activities may be shown by the company towards its social obligation, the benefit of these may have gone to those concerned with the management of it and if that happens, the whole concept of social responsibility becomes perverted. We would, therefore, require that while quantifying the contribution that the company claims to have made towards the social obligation it will also specify that no part of the benefits from the contribution made by the company have gone either to the directors or their relatives or to any other association in which the directors or their relatives have any personal interest. We are providing this not because we have any suspicion about the misuse of those funds but rather as a greater assurance to the public that what is claimed to have been spent by the company towards its obligation to the social responsibility has really been done towards social benefit and not for the benefit of those who are in control or management of the affairs of the company.

12.12 On these and other similar matters, it should certainly be possible for the corporate sector to indicate with sufficient precision the contribution it has made both in terms of money and manpower. Whether the Social Report must actually be quantified and verified in terms of method of social accounting which Ralph W. Estes on Corporate Social Accounting defines to mean 'the measurement and reporting, internal or external, of information concerning the impact of an entity and its activities on society', or in some other manner are matters which can be worked out by mutual consultation between the corporate sector, the various professions and the Government. The need for making a start, however, is immediate and brooks no delay. We would, therefore, suggest and recommend that a provision may be made in the Act that every company along with director's report shall also give a Social Report which will indicate and quantify, in as precise and clear terms as possible, the various activities relating to the social responsibility aspect mentioned above which have been carried out by the company in the previous year.

12.13 It is possible that a company may be required to alter its memorandum with respect to the objects of the company so as to carry out its activities as obligation to the concept of social responsibility. We do not envisage any difficulty in such a course because we have no doubt that shareholders themselves are conscious of the responsibility of the company to discharge its social obligation and it will be very cooperative to assist the management in permitting alteration to be made so that this obligation is discharged by the company without the risk of this action being declared to be *ultra vires* as being beyond the objects of the company.

12.14 We believe that if our suggestions given above are carried out it will help the companies in discharging their socially responsible role with the consequence of improving the image of the corporate sector.

CHAPTER XIII

POLITICAL DONATIONS—SECTION 293A—PROHIBITION REGARDING MAKING OF POLITICAL CONTRIBUTION

13.1 In a Committee constituted as the present one to undertake, amongst other matters, a comprehensive review of the Companies Act, 1956, it is inevitable that the question of contribution of any amount by companies to political parties or for political purposes to any individual or body must figure as one of the important items to be answered.

13.2 In the earlier Companies Act of 1913, there was no specific mention whether companies could contribute to political parties or give any donations for political purposes. Some of the companies may have provided in their Memorandum of Association that they could make contributions to political parties. But it appears that by and large, companies had not so provided in their Memoranda of Association. Apparently, those in charge of management of companies saw no urgent necessity to so alter their memoranda for the purpose of better and efficient working of their business.

13.3 The first General Elections in 1952 seems to have passed off without raising much public debate about the political contribution. Possibly for this reason, the Companies Act, 1956, as originally enacted did not contain any provision regarding political contribution by companies. It appears, however, that by the time of the second General Elections in 1957, the pressure for political contribution had increased. But as most of the companies had no provision in the Memoranda of Association permitting it to contribute to political parties or to any political candidate, they sought to amend their Memoranda of Association. This naturally led them to apply to the High Courts for seeking such alterations. Thus the matter came to be examined in depth by the Courts, especially with reference to the dangers posed to the growth of free elections and democracy. In 1957, the Bombay High Court, in the case of *Tata Iron & Steel Co. Ltd.* (A.I.R. 1958 Bombay 155), speaking through Chagla, C.J., felt considerable uneasiness of mind and sinking feeling of heart, at this development but nevertheless in view of the law then prevailing, had no option but to allow the amendment permitting political contribution to be made by the companies. The Judges' uneasiness was borne of the fact that they were of the view that any attempt on the part of any business house to finance a political party is likely to contaminate the very spring of democracy. Democracy would be vitiated if decisions were to be arrived at not on their merits but because of money influence. The judges thought it fit to bring this matter to the notice of Parliament with the words "It is our duty to draw the attention of Parliament to the great danger inherent in permitting companies to make contribution to the funds of political parties. It is a danger which may grow apace and which may ultimately overwhelm and even throttle democracy in this country. Therefore, it is desirable for Parliament to consider under what circumstances and under what limitation companies should be permitted to make these contributions".

13.4 A similar problem was also posed before the Calcutta High Court in the case of *Indian Iron and Steel Co. Ltd.* (A.I.R. 1957 Calcutta 234). Though in view of the position in law, the alteration was allowed, the danger posed in such cases was pointed out by the learned Judge when he said "Its dangers are manifold. Joint Stock Companies are not intended to be adjuncts to political parties and possible sources of revenue for these parties. They are statutory bodies working under statutory conditions for different purposes. Secondly, it will induce the most unwholesome competition between business companies by introducing the race, who could pay more to the political funds of the political parties. In that competition business interest is bound to suffer in the long run. In the bid for political favouritism by the bait of money the company who will be the highest bidder may secure the most unfair advantage over the rival trader companies. Thirdly it will mark the advent and entry of the voice of the big business in politics and in the political life of the country."

13.5 The Parliament did take note of this danger. But it was not yet ready to ban political contribution completely. So it added section 293A to the Companies Act by Amendment Act 65 of 1960. The said section permitted the companies to contribute to political parties or for political purpose an amount restricted in the aggregate in any financial

year to Rs. 25,000/- or 5% of the average net profit, whichever was greater. Provision was made to disclose information about these contributions in books of the company, apparently on the assumption that this was a sufficient safeguard against the evil power of money swamp-ing elections. That this was not even a short-lived satisfaction became clear when Santhanam Committee's Report on Prevention of Corruption in 1962 stated "The public belief in the prevalence of corruption at high political levels has been strengthened by the manner in which funds are collected by political parties, especially at the time of elections. Such suspicions attach not only to the ruling party but to all parties, as often the opposition can also support private vested interests as well as members of the Government party. It is, therefore, essential that the conduct of political parties should be regulated in this matter by strict principle in relation to collection of funds and electioneering." It called for total ban on political contribution and recommended "that in Indian conditions, companies should not be allowed to participate in politics through their donations. It is true that this matter was debated at length during the discussion on the Companies (Amendment) Act of 1960 and it was decided to permit such donations subject to restrictions of amount and conditions of publication. We do not think that this is sufficient and feel that nothing but a total ban on all donations by incorporated bodies to political parties and purposes will clear the atmosphere."

13.6 Though the debate about the propriety of permitting political contribution by the companies continued, no change in legislation was brought about. Grievance about this was voiced in the Parliament in November 1967 when Shri Madhu Limaye, M.P., moved a Private Member's Bill seeking to ban company donations. He quoted figures of political donations, made by companies, supplied to him by the Government. According to the figures quoted (p. 1228-Lok Sabha Debates—3rd Session, Fourth series-Vol. IX), during August 1962 to March 1966, Rs. 126 lakhs were contributed as political donation by the companies. Out of it Rs. 109 lakhs was given to Congress, Rs. 15 lakhs to Swatantra and a few thousands each to other political parties. Similarly for the period March 1966 to February 1967, Rs. 6, 40,000/- was given out of which Rs. 6,27,000/- was given to Congress, the then ruling party. The debate revealed great concern amongst the legislators. The Minister for Company Affairs, late Shri Fakhruddin Ali Ahmed, (later the President of India) himself had this to say so far as contributions to political parties are concerned; "I entirely agree that a time has come when a decision should be taken by all parties concerned that political donations from these companies should not be taken for the purpose of elections." On an assurance that the Govern-ment agrees in principle with M. Limaye's motion, the Private Member's Bill was withdrawn. The Government in pursuance of the assurance given earlier by the Minister moved the Company Amendment Bill in 1969. During the debate Government's own figures showed that between 1962-63 and 1967-68, the Indian National Congress Party had received a total sum of Rs. 2,05,22,790/- as donations from the companies [vide page 304 of the Lok Sabha Debates Vol. 29, 4th series No. 49 and Rajya Sabha debates Vol. 69, No. 16, p. 3582 (speech of Mr. Pitamber Dass). This speech also contains the following information :

Between 1966 to 1969, 75 companies paid down Rs. 1.87 crore out of which Rs. 144 lakhs were given to the ruling party. The fact that the contribution by the political parties will go to the ruling party was again highlighted in the debate wherein it came out that the Congress Party in 1967 alone received Rs. 87 lakhs. We do not find this phenomenon in any way unusual. Those who advocate the giving of political contribution frankly mention as a reason and a justification that the company needs to be on the right side of ruling party because its profitability and other advantages are dependent on the goodwill of the ruling party. It is not, therefore, surprising that though the Act permitted contribution to be made to any political party, the main if not almost the sole beneficiary of this contribution was the then ruling party. After a great deal of debate, the Parliament substituted section 293A by the present section 293A (by Act 17 of 1969) by which a total prohibition regarding contribution by the companies to political parties or for political purpose, was imposed. The present position, therefore, is that there is a ban on giving donations to political parties or for any political purposes to any individual or body.

13.7 It is relevant to mention that an attempt was made by the previous Government "when it presented the Companies (Amendment) Bill (No. 80 of 1976) to permit the giving of political donations by the companies as was permitted under the Amendment Act 65 of 1960 though continuing the prohibition in the case of Government companies only. This Amend-ment Bill No. 80 of 1976, however, did not become law and lapsed. This has not been revived by the present Government. Thus a total ban on contribution by companies to political parties continues.

13.8 In the course of representations and oral hearing before the Committee, there was near unanimity of view that contribution by companies to political parties was not desirable, but the unanimity ended there. The Chambers by far and large though they indicated that they would be happy if the ban on political contribution continues nevertheless urged that the ban should be removed and gave practical necessity and the recognition of the facts of life, as a reason for their suggestion.

13.9 The facts of life when pressed to explain turned out to be pressure which was said invariably to be put on the company management from political parties for donations notwithstanding that section 293A prohibits such a contribution. It was sought to be impressed upon the Committee that the ban had the result of forcing the company management against its wishes to resort to devious methods to raise funds; that if this ban was removed it will at least save the company management the embarrassment and humiliation in resorting to such methods. Of course, they agreed that there should be a limit, but different views were expressed about it. Some suggested that the limit should be 5% of net profits or Rs. 50,000/- whichever is less; some suggested whichever is more. On the other hand, representatives of Trade Unions and shareholders and some other bodies advocated complete ban.

13.10 We realise that sometimes pressure may be put on the companies to give political contributions notwithstanding the ban. We can also sympathise with the company management in such a situation. But having said that, we cannot proceed further and assume that the people in authority and other political parties will resort to acts which are plainly unlawful and against the mandate of law. We would be justified in expecting that the people in authority and other political parties will follow the law. We have also a firm faith in public opinion to expose the transgression of law and thus to hope that if the ban on contribution is there, it will not be sought to be avoided directly or indirectly. We have no doubt that public opinion in our country has earned the right to be trusted to see that transgressors of law do not escape the consequences of their action with impunity. The argument that the company is interested in seeing that the political philosophy of a ruling party is such as would help the continuation and expansion of the business of the company and therefore, it should be permissible to provide funds to such a political party, is an argument which, if accepted, would permit money to play an unhealthy role in our political life. The argument that the companies which contribute are not influencing the policies of political parties is illusory. It would be difficult to distinguish between the contribution being made so that the present policy of a political party continues and to maintain that this amount will not itself influence the political party to continue following a policy which will help it to obtain large funds from the company. Once this is permitted, the danger the democracy can be well visualised; namely, politics being dictated by the interests of large companies which by the very nature of it, would be able to contribute more funds as compared to the smaller companies. Removal of the ban thus could only benefit the larger companies because whether the limit is placed by percentage, or profit or otherwise the bigness of the company will determine the bigness of contribution and necessarily more unhealthy interference.

13.11 The danger of permitting money to play any important role in elections has been recognised by our Election Law. That is why section 77 of the Representation of Peoples Act, 1951 lays a limit on the maximum election expenses which can be incurred by a candidate. Judicial decisions have laid down that if a political party incurs an expense in connection with the candidate's election, the same would be deemed to be incurred by him, as political party acts as an agent of the candidate. This served as a wholesome check on unlimited funds being spent on elections by a candidate under the cover of expenses by the political party. This law continued till the Act was amended by adding Explanation to section 77 by the Amendment Act 58 of 1974 by which expenses incurred by a political party shall not be deemed to be expenditure in connection with the election incurred by the candidate. There was, however, a wide public out-cry against this amendment. It was presumably in realisation of this danger that the present Government has introduced Election Laws (Amendment) Bill No. 153 of 1977, by which the Explanation I added by the Amendment Act 58 of 1974 is sought to be omitted. In the Statement of Objects and Reasons, it was mentioned that the amendment made in 1974, "far from ensuring free and fair elections, may have the effect of increasing money power and it is, therefore, proposed to amend the said Act to restore the position that obtained earlier." Thus the danger of money power has been clearly realised in the latest Amendment to the Election Law.

13.12 The role of money power in the electoral process of a democratic country continues to disturb the minds of people and various efforts have been made at various times to see that the fountain of democracy is not polluted by permitting the inflow of large money to determine the election prospects of any candidate or political party. All the democratic countries have, therefore, placed limits on what a candidate or a political party can spend on elections. As a matter of fact, some of the European countries in order that money may not play a significant part in elections have passed laws requiring the State to bear part of the election expenditure of the candidate and political party. Whether such a law providing for some part of the election expenses to be borne by the State should not be passed in our country also is a matter which may usefully be examined by the Parliament. That raises a larger question and not being within our terms of reference we do not deem it necessary to deal with this aspect. We are only concerned with the limited question of contribution by the companies to political parties or for the political purpose.

13.13 In countries where free and fair elections prevail, unrestricted flow of money is not permitted. In U.S.A., expenses which could be incurred on elections for the Federal Office or for Presidential or Vice-Presidential or Senator's elections are limited by the Federal Election Campaign Act of 1971 as amended by the Amendment Act 1976. Section 320 of 1976 Amendment Act imposes limitation on the amount of contribution and expenditure which can be lawfully incurred for such candidates and their political committees. The position in America broadly is against permitting political contributions to be made by the corporation and violation of it is treated as an offence as would be clear from the following extract from Fletcher's Cyclopaedia Corporations Vol. '6A' Section 2940 Page 642, "In most States, the question of the legality of contribution as a matter of corporate law must be determined by derivation from general provisions as to powers and purposes. However, the corporate problem need not be laboured because express statutory prohibitions against political contributions exist in many jurisdictions. The basic federal law on the subject provides that the making of such contributions by national banks and nationally chartered corporations is a criminal offence in certain cases". So far as Federal Election Campaign Act, 1971, as amended in 1976 is concerned, Section 321 says "it is unlawful—for any corporation whatever, or any labour organisation to make contribution or expenditure in connection with any election at which Presidential and Vice-Presidential candidate or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for or for any candidate, political committees, or other persons knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labour organisation to consent to any contribution or expenditure by the corporation, national bank, or labour organisation as the case may be, prohibited by this section". The modern trend and practice is thus clearly to make it unlawful for the companies to make any contribution to political parties or for a political purpose.

13.14 Apart from the above fundamental objection, there are other equally weighty reasons against removing the ban on political contribution. A serious controversy, assuming political contributions were permitted, would arise as to who should have the right to determine which political parties should be the recipient. On this point there was a sharp divergence of views during the oral hearings, the Chambers insisting it would be for the Board of Directors to so determine, while the others maintained that the decision should be with the shareholders and should be expressed not by the usual majority through a special resolution but by actual majority of the total voting power of the company. This will immediately raise complicated problems. It is well-known that though the company is a person by fiction of law, it necessarily must function through human agency. In the usual course of business, no doubt the Board takes the decisions. But in the matter of preference amongst political parties, can we reasonably say that the corporate funds should be allowed to be dealt with by the political thinking of the members of the Board rather than that of the majority of the shareholders? There does not seem any justification in denying the shareholders the right to decide directly this matter because the problem is a human one and is tied to the social philosophy, the political thinking of each of the individuals concerned. Question of vote cannot be computerised or dealt with mechanically in a Board room. The choice has to be left to each individual. Of course even choice by individual shareholder does not conclude the vexed issues which will arise. Assuming 51% or 60% of the total number of shareholders are in favour of contribution to political party 'A' and the rest want a contribution to political party 'B', is it good for the health of the company that the total contribution should be given to 'A'? Will not such a course raise a serious discontentment amongst the rest of the shareholders; or should the total contribution be shared in proportion to the votes cast by the shareholders; would such a

system be a workable proposition? To mention these problems is at once to highlight the vexatious issues which necessarily will arise, once it is decided to permit companies to make political contribution.

13.15 A further question that is bound to arise is the voice that the workers in the company should or should not be given in this matter. It is now universally accepted that the workers form an important part of the companies, and have a vital stake in them. Would company managements agree that the question of political contribution be determined after ascertaining the wishes of workers? Understandably the Chambers' reaction was unfavourable to such a suggestion. The Committee has no doubt, that even at the minimum the removal of ban on political contribution would throw up many more insoluble and complex problems which are at present avoided because of the prohibition. In our view, the only safe and proper course is to treat the company's fund as a trust fund in which various parties have a stake and if that be so, the only correct course is that the present prohibition on the companies regarding making of political contribution should continue.

13.16 We find that though the prohibition in section 293A extends also to making contribution for political purpose, there is no explanatory clarification of 'political purpose'. We realise that it is not possible to give an exhaustive definition of the word 'for political purpose'. But we feel that it would serve better and more effectively the purpose behind section 293A if an Explanation somewhat similar to sub-section (3) of section 19 of the English Companies Act, 1967 is added to section 293A. We would, therefore, suggest that sub-section (3) be added to section 293A to read as follows :

For purposes of this section, a company shall be treated as giving money for political purposes if directly or indirectly—

- (a) it gives a donation or subscription to a political party;
- (b) it gives a donation or subscription to a person who, to its knowledge, is carrying on, or proposing to carry on, any activities which can, at the time at which the donation or subscription was given, reasonably be regarded as likely to affect public support for such a political party as aforesaid.

As the attempt is to prohibit donations being made to political parties in any manner, it is evident that the law should try to plug loopholes wherever possible. One of the ways in which political donations have been made is in the nature of souvenirs, brochures etc. That this is so is recognised in 'Taxation Laws (Amendment) Bill No. 91 of 1978, which has been introduced in the Parliament providing that any income by way of voluntary contribution received by a political party from any person shall not be included in the total income of previous years of such political parties. The Bill has, however, specifically provided that no allowance shall be made in respect of expenditure incurred by an assessee on advertisements in any souvenirs, brochures, pamphlets and/or the like published by a political party. The reasons for not granting such exemption are stated in Statement of Objects and Reasons to be :

"Payments made for advertisements in souvenirs, brochures and the like published by political parties are not made on considerations of commercial expediency, but are in the nature of disguised donations made with the twin objective of circumventing the ban on company donations and for securing their deduction in the computation of taxable profits. It is, therefore, proposed to provide that expenditure incurred by a tax-payer for purposes of advertisement in any souvenir, brochure and the like published by a political party will not be allowed as a deduction in computing the taxable profits".

We also feel that as our object is to make law as stringent as possible with a view to prohibiting any contribution being made to political parties by the companies, it should be clarified by amending the law, by adding clause (4) to section 293A to the effect that any expenditure incurred by a company on advertisement in souvenirs, brochure, tract, pamphlet or the like published by a political party directly or indirectly or by any one on its behalf or for its advantage will be deemed to be a contribution for a political purpose.

13.17 A point was made before us that while the company and its officers are liable to punishments, if they contravene section 293A, there is no such corresponding liability put

on the recipient of the contribution. We accept the justification of this criticism. We see no reason why if a political party or any of its office-bearers or any other individual or a candidate knowingly accepts or receives contribution for political purpose from a company in contravention of section 293A, they should not also be held similarly liable for the punishment in the same manner like the officers and the company. There is also nothing unusual about this suggestion. Section 321 of the Federal Election Campaign Act, 1971 (as amended in 1976) (USA) makes it unlawful for any candidate or other person knowingly to *accept* (emphasis supplied) or receive any contribution prohibited by the said section. Section 329 further lays down that any person who knowingly and wilfully commits a violation of any provision of the Act which involves making, *receiving* (emphasis supplied) or reporting of any contribution or expenditure shall be fined and also be liable to imprisonment or both. We would, therefore, recommend the amendment by way of addition of a sub-section (5) to section 293A so as to provide that if any member or office bearer of a political party or any other person receives from the company directly or indirectly any amount by way of contribution for a political purpose in contravention of section 293A of the Act, such person shall be liable to punishment with imprisonment for a term which may extend to three years and shall also be liable to fine, in the same manner as the officers of the company under the said section.

13.18. We would, as a result, recommend that the prohibition regarding making or political contribution in section 293A should in addition to continuing as at present be further strengthened in the manner indicated below :—

“293A. (1) Notwithstanding anything contained in any other provisions of this Act, neither a company in general meeting nor its Board of Directors or any person on its behalf shall directly or indirectly after the commencement of the Companies (Amendment) Act, 1969, contribute any amount or amounts, whether in cash or in money's worth—

- (a) to any political party, or
 - (b) for any political purpose to any individual or body.
- (2) If a company contravenes the provisions of sub-section (1)—
- (i) the company shall be punishable with fine which may extend to five thousand rupees; and
 - (ii) every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine.
- (3) For purposes of this section, a company shall be deemed to have made contribution for a political purpose directly or indirectly if—
- (a) it makes a donation or subscription or payment in whatever form to a political party; or
 - (b) it makes a donation or subscription or payment or causes to be given on its behalf or on its account to a person who, to its knowledge is carrying on, or proposing to carry on, any activities which can, at the time at which the donation or subscription was given, reasonably be regarded as likely to affect public support for such a political party as aforesaid.
- (4) Any expenditure incurred directly or indirectly by a company including expenditure on advertisement in souvenirs, brochure, tract, pamphlet or the like published by a political party or by any one on its behalf or for its advantage will be deemed to be a contribution for a political purpose.
- (5) If any member or office bearer of a political party or any other person receives from the company directly or indirectly any amount by way of contribution for a political purpose in contravention of the provisions of this section, he shall be liable to punishment with imprisonment for a term which may extend to three years and shall also be liable to fine.”

CHAPTER XIV

GOVERNMENT COMPANIES

14.1 Introduction

Government companies, as a separate class of companies, were recognised for the first time in the Companies Act, 1956. Even when the Company Law Committee (Bhabha Committee) submitted its recommendations which formed the basis of the consolidating law of 1956, there was no reference made to Government companies. It is only when the Bill was introduced in 1953 that a clause was inserted dealing with Government companies. At that time, there were only a handful of companies in which Government was known to have held majority shares. In the course of the last two decades, public sector have come to occupy a pivotal place in the corporate sector.

14.2 The provisions relating to Government companies are contained in sections 617 to 620 of the Act. Section 617 defines a Government company as a company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments and includes a company which is a subsidiary of a Government company thus defined. As on 31st March, 1977, there were 46,856 companies limited by shares at work in the country. Out of this, Government companies were only 701. In numerical terms, therefore, Government companies account for only 1.5 per cent of all companies at work. In terms of paid-up capital, however, they represent 72 per cent of the paid-up capital of all companies at work as on 31st March, 1977. The paid-up capital of Government companies was Rs. 7,184 crores and of non-Government companies was Rs. 2,769 crores as on that date. In terms of size of paid-up capital, there were 273 Government companies in the range of one crore rupees or more with an aggregate paid-up capital of Rs. 7,080 crores. The 520 non-Government companies in the comparable range had a total paid-up capital of Rs. 1,758 crores.

14.3 Legal Background and Developments

Basically, Company Law provides the necessary framework in the formal functioning of a corporate entity and incidentally serves as an instrument of Government's economic policy towards the corporate sector. While it was probably easier for the legislature to provide the basic framework with classification of companies primarily into private and public limited, it was not found quite easy to incorporate such detailed provisions in the law as would best serve as an instrument of policy for all occasions and in all circumstances. As a result, even when the law was subsequently amended several times, laying more and more emphasis on public interest, certain basic issues continued to remain as unclear and unresolved as they had been at the time of the passing of the Companies Act, 1956.

14.4 It appears that although the realisation that Government companies stand out distinctly as a special type was not lacking, this realisation did not unfortunately permeate through the entire structure of Company Law in all its roots and branches. It was no doubt realised that every citizen of India has a vital stake in a Government company and, accordingly, Government companies were subjected to the system of supplementary audit. It was also realised that the public though concerned had no direct means of exercising control over the functioning of the Government companies. As a result, Government companies have also been subjected to the glare of the scrutinizing eye of the Parliament, the State Legislatures and the various Committees thereof. Over the last two decades, Government companies have also been functioning as a part of the State machinery for economic administration.

14.5 All companies, whether in the public or in the private sector, must work in public interest. The objective which is common to both includes not only a reasonable return on capital but also a concern for the interest of the consumers, the interest of labour and an overall interest of the nation. However, the dichotomy between the corporate personality and the individual personalities of the share-

holders which is markedly present in the case of private sector companies does call for a greater degree of vigilance on the part of the shareholders and the Government over the affairs of these companies. The provisions relating to appointment and remuneration of directors, appointment of related persons, the need for special resolution in certain cases, or those relating to oppression and mismanagement have practical relevance in the case of private sector companies. So also the provisions relating to inter-company loans and investments, issue of shares at premium and discount, reduction of share capital, compromise and arrangements, whether for splitting or amalgamation are equally relevant. In the case of Government companies, decisions regarding these matters have to be scrutinised by Administrative Ministries and other public bodies and it would appear superfluous to put Government companies under the discipline of Company Law Department when another equally responsible wing of the same executive has already given its approval of those decisions.

14.6 It appears that an attempt was made by the Government even at the time of framing of the Companies Bill in 1953 to exempt Government companies from a large number of provision in the Companies Act. The Central Government had presented to the Joint Select Committee a set of clauses from which the Government companies could be exempted in the statute itself. The Joint Select Committee, while examining the Bill and the list of provisions from which Government companies were sought to be exempted from, felt that while it would be inappropriate to apply those clauses of the Bill which imposed a penalty in respect of failure to do various things by directors, managers, etc., it would be equally difficult to extend wholesale exemption to Government companies from a large number of provisions in the Act especially where there are also private shareholders in a Government company. Notwithstanding the reservation which the Joint Select Committee had as regards the desirability of granting wholesale exemptions from certain sections of the Act to Government companies, the Central Government under the powers conferred on it by section 620 of the Act has so far notified a number of exemptions and modifications. These are indicated respectively in Annexures IA and IB. In spite of all these exemptions, however, scrutiny of the functioning of Government companies, continues. It may be conceded that objectionable features in their working do come to light from time to time. But then this only highlights the public accountability of Government companies.

14.7 There is nevertheless a real distinction between Government and private sector companies. Government as a guardian of public interest is the owner of Government companies. Any guidelines laid down by Government are bound to be followed by all Departments or undertakings owned by Government and their managers including directors. There is no conflict between private and public interest in the case of Government companies. It is for this reason that the clarification issued by the Company Law Board making the provisions of Sections 187C and 370(1B) being made inapplicable to Government companies can be meaningfully understood. Again, although the Companies Act provides for the appointment and remuneration of the directors of the company to be approved by the general body of the company and the Central Government, it would be patently superfluous to insist on these approvals when the directors have already been appointed and their remuneration has been fixed by an order issued in the name of the President of India or the Governor of a State.

14.8 In a very broad sense, Company Law encompasses not only the Companies Act but also several other legislations affecting the companies, especially on matters dealt with by the Companies Act itself. The Capital Issues (Control) Act, for example, modifies the applicability of the provisions in the Companies Act relating to issue of shares in respect of a Government company, although the Companies Act itself does not make any provision to this effect. Similarly, the Monopolies and Restrictive Trade Practices Act, 1969, gives an overall exemption to the Government companies from the operation of its provisions. While it would be an easier expedient to suggest a separate part or schedule in the new Companies Act on the same lines as was suggested by the Central Government before the Joint Select Committee at the time when the present law was enacted, the whole question of first applying the Act in its entirety to Government companies and then exempting the latter from a large number of provisions thereof is to be viewed in the context of the structure and the shape of the new law that we are proposing. Thus, if the law is simplified in the manner recommended by us, the whole case for Government companies claiming exemption from the provisions of the present Act on the ground that they are irksome, shall no longer have any foundation. Moreover, it would be inappropriate to first apply the law relating to the public limited companies to all Government companies on the reasoning that the criterion of public interest

applies with equal force to Government companies and public limited companies in the private sector, and then exempting the former from a part of the law itself.

14.9 Autonomy of Government companies

The question of autonomy of Government companies cannot be considered independently of the other more important question of making these companies work within the overall framework of national policies and plans of economic development. In practice, however, this point is too often over-emphasised and the administrative ministries or departments which promote these companies make them function as mere appendages. In course of time, the Government company happens to become no more than an extended arm of the Government department, so much so that it becomes difficult to distinguish between a Government company and a departmental undertaking. The point that is often over-looked is that in this way the very purpose of introducing "Government company" as a separate class functioning within the overall scheme of the Companies Act is frustrated. Time and again, it has been emphasised by Committee of Public Undertakings, the Planning Commission in its plan documents and also in the Industrial Policy Resolution that Government companies as an institution will not succeed unless a reasonable degree of autonomy is ensured to its managers. The Third Five Year Plan document has rightly pointed out that efficient conduct of industrial and business enterprises requires that operational decisions should be prompt and that there should be far greater delegation of authority than at present, and flexibility of operations, to enable the management of public enterprises to produce results. In the words of the Planning Authority, "if an enterprise does not have real autonomy, it is not likely to be effective". We are, however, fully conscious of the limits beyond which autonomy of Government companies cannot be extended. The necessity of operating the public sector to supply the consumer goods at reasonable prices and the overall requirements of the economy to so allocate the resources as to subserve the common good are weighty considerations determining the bounds of this autonomy.

14.10 In many cases, the articles of association of a Government company is found to provide a clause by which the administrative ministry is authorised to give directions as regards management of the affairs of the company to its managing director. In the ultimate sense, there is in this probably nothing to cause alarm since the administrative ministry issues these directions on behalf of the President of India or the Governor of State in whom the shares of the company vest—although the following of such a course of action cannot certainly be described as consistent with the second proviso to clause (26) of section 2 of the Act which provides that a managing director of a company shall exercise his powers subject only to the superintendence, control and direction of the Board of Directors. By implication this excludes the shareholders' representative as the appropriate authority entitled to issue instructions or directions.

14.11 From the evidence that we have gathered, however, we are convinced that in many cases this provision in the articles of association of a Government company is being used by the administrative ministries and departments more frequently than what the circumstances would warrant. This is a cause for alarm for if we allow unbridled power in the hands of the officers of the Government to issue directions in the name of the President or Governor, as the case may be, we apprehend that time will not be far off when these directions will be issued with increasing frequency resulting in complete or virtual erosion of the autonomy of Government companies, thus, defeating the legislative intent to separate commercial activity of the Government from bureaucratic intervention. We feel that there is need to provide certain safeguards which, in our view, should be in-built in the functioning of Government companies. According to us, this can be achieved by prescribing certain model regulations which should be compulsorily incorporated in the memorandum and articles of association of a Government company. If this is done, it would be difficult in future for the administrative ministries/departments to over-step their authority and thus, erode the autonomy of Government companies. Since it is necessary, in the interest of not disturbing the vital role assigned to Government companies in the national economic affairs, to retain certain powers to issue directions with the Government, we had invited a select number of Government companies, administrative ministries, Bureau of Public Enterprises, Standing Conference on Public Enterprises and the State Governments to give their views on the demarcation of authority and responsibility as between the Government companies them-

selves on the one hand, and the administrative ministries, on the other. The Committee was particularly anxious to know—

- (a) the extent to which directions can reasonably be given by the administrative ministry and the same can be specifically spelt out in the memorandum and/or articles of association of a Government company;
- (b) the nature of the powers which the administrative ministry would like to reserve for itself, also spelling out the extent to which the undertaking might act on its own in such matters subject to ratification and the extent to which it can act only when previous sanction is given by the ministry/department; and
- (c) the specific areas where the undertaking should be able to function independently and according to its own discretion.

The views that we have received in response to our request are almost unanimous as regards the areas to be delineated between the Government companies and the controlling administrative ministries or departments. Following these suggestions, we have drawn up a set of regulations which can serve as model for Government companies. We would recommend that this model set of articles should be prescribed by the statute itself by way of compulsory regulations for all Government companies. The list is given in Annexure 'II'.

14.12 Suggested Reforms

It would appear from the foregoing discussion that it is necessary to place Government companies on a different footing from private or public limited companies in the private sector. In other words, the definition of a Government company should make it explicit that a Government company is a public limited company of a separate type by itself. In the case of Government companies, the distinction between public and private limited had, in fact, never existed. The present privilege of Government companies by which they are entitled to dispense with the word 'Private' in their names is in fact a rational outcome of this principle.

14.13 Considering the special nature of Government Companies, we recommend that certain special provisions, in addition to those contained in the present law, should be incorporated on the following lines :—

- (1) *Definition.* The provisions of the present section 617 should be numbered as sub-section (1) and a new sub-section (2) should be added to read as follows :

“(2) For the purpose of this section, a company in which not less than fifty-one per cent of the paid-up share capital is held jointly or severally by the Central Government, by one or more State Governments by one or more Government companies as defined in sub-section (1), or by any one or more bodies corporate owned by or controlled by the Central or State Government, shall be deemed to be a Government Company”.

Another sub-section, viz., sub-section (3) should be added to make it clear that all Government companies are public limited companies.

- (2) *Formation.* A model set of memorandum and articles of associations should be provided in a separate schedule to the new Act. This should specifically provide the extent and the manner of control over the Government company by the administrative ministries. A suggested model is given in Annexure 'II'.
- (3) *Shares and Share Capital.* About shares held by Government in Government companies through nominees and officials, a special type of transfer procedure may be laid down with share transfer form separately prescribed and giving exemption from stamp duty and lodgement within prescribed period. We really find no justification for insisting on the compliance of the procedure prescribed for transfer of shares in section 108 of the Act in respect of those transfers which are supposed to take place automatically on the transfer, removal, resignation or

death of a Government Official holding shares on behalf of the President or the Governor, as the case may be. We, therefore, suggest that suitable provisions should be made in the Act for facilitating automatic transfer to be recorded in the register of members notwithstanding any other provisions in the Act to the contrary.

- (4) *Meetings and Proceedings.* Similarly, it may be provided that where the entire share capital is held by the Government, the provisions in the Act relating to the meetings and proceedings shall apply only subject to the articles of association of the company.
- (5) *Investigation.* It may be provided that the provisions relating to the investigation shall be applicable to a Government company.
- (6) *Managerial Appointment and Remuneration.* The Government companies may be exempted from provisions relating to managerial appointment and remuneration. It should also be provided specifically that no compensation for loss of office is payable to directors of a Government company. The provisions relating to appointment of relatives, should, however, continue to apply to Government companies.
- (7) *Audit.* We considered the question of audit of Government companies with reference to the provisions contained in section 619 of the Companies Act and the complaints of delay in the appointment of auditors brought to its notice by certain bodies. We suggest that a panel of Chartered Accountants may be maintained by the Comptroller and Auditor General of India from which the Government companies should be free to appoint auditors subject to such conditions with respect to the period etc. which the Comptroller and Auditor General of India may like to impose. In order to ensure that no Chartered Accountant selected by a Government company as its auditors has large number of such audits on his hand, we would recommend the retention of the existing statutory restrictions on the number of audits which a firm of chartered accountants can take at a time and also the principle of rotation of auditors after a specified period as per guidelines laid down by the Comptroller and Auditor General and also would be subject to such further restrictions on the number of Government companies whose audit may be taken by a firm of chartered accountants as the Comptroller and Auditor General may lay down in the guidelines. We are also of the view that it would not be advisable to disturb the existing scheme in sub-sections (4) and (5) of section 619 as it is necessary and desirable for the annual general meeting of a Government company to have before it, along with the annual accounts and the statutory audit report, the Comptroller and Auditor General's Supplementary report or comments thereon. At the same time, with a view to avoiding any possible delay on the part of Government companies in the holding of their annual general meetings on account only of the delay in the receipt of the Comptroller and Auditor General's Supplementary audit or comments, the latter should be requested to make available his report or comments within a given time-frame to enable the companies to conform to the time-limit of six months permitted under the law.
- (8) *Penalties and Prosecutions.* In so far as penalties are concerned, the provisions as applicable to non-Government companies should be applicable to Government companies as well. However, no court should take cognisance of any offence against this Act which is alleged to have been committed by any Government company or any officer thereof except on the complaint in writing of a person authorised by the Central Government in that behalf.

14.14 Partly-owned Government Companies

At one time the Committee considered the question of making a distinction as regards the exemptions to be made available to Government companies on the basis of difference as determined by the ownership pattern. It was, for example, thought that while in the case of wholly owned Government companies it was possible to transfer certain powers of the Court

to the Central Government such a privilege should not possibly be granted to companies in which there are many individual shareholders as well. A decision on this question not only concerned as question of principle so that the exemption is uniformly extended to all Government companies irrespective of the existence of any private shareholding, but also depended on our having an idea as to the magnitude of the problem viz. whether there were really many Government companies in this country with substantial private shareholding. A study was therefore carried out and it was found that while nearly 13% of Government companies had private participation in some form, the extent of the holdings of private individuals and other private parties in Government companies was infinitesimally small viz. only 1 per cent of the total paid-up capital of all Government companies. We are, therefore, not suggesting any distinction to be drawn between wholly owned Government companies and Government companies in which private participation exists, in the matter of extending the exemptions and modifications as regards the provisions of the Act.

14.15 Conclusion

Necessity it is said, is the soul of law. While the law is rigid, social necessities are more flexible and are often in advance of the changes in law. There is always some lapse of time before the law is able to catch up with the changing needs of society. The gap, even when bridged, is likely to reopen with equal promptitude. The impact of social and economic situation has already given rise to a kind of inchoate law, in respect of Government companies backed by corporate course of action and administrative sanction, waiting for the Legislature to put this inchoate law formally on the statute book.

**LIST OF SECTIONS FROM WHICH THE GOVERNMENT COMPANIES HAVE BEEN
EXEMPTED BY NOTIFICATION UNDER SECTION 620(1) OF THE
COMPANIES ACT.**

(Para 14.6)

S. No.	Section	Nature of Section
1	2	3
1.	187C	Declaration by person not holding beneficial interest in any share.
2.	198	Over all maximum managerial remuneration and managerial remuneration in the case of absence or inadequacy of profits.
3.	205A	Unpaid dividend to be transferred to special dividend account.
4.	255	Appointment of directors and proportion of those who are to retire by rotation.
5.	256	Ascertainment of directors retiring by rotation and filling of vacancies.
6.	257	Right of persons other than retiring directors to stand for directorship.
7.	259	Increase in number of directors to require Government approval.
8.	268	Amendment of provision relating to managing, whole-time or non-rotational directors to require Government approval.
9.	269	Appointment or re-appointment of managing or whole-time director to require Government approval.
10.	*295(1)	Loans to Directors
11.	297(1) Proviso	In companies having paid-up capital not less than Rs. 1 crore, contracts by interested directors requiring Boards sanction, will also require Government approval.
12.	309	Remuneration of directors.
13.	310	Provision for increase in remuneration to require Government sanction.
14.	311	Increase in remuneration of managing director or re-appointment or appointment after Act to require Government sanction.
15.	387	Remuneration of manager.
16.	388	Application of sections 269, 310, 311, 312 and 317 to managers.
17.	*370	Loans etc. to companies under the same management.

*The section does not apply to wholly owned Central/State Government companies and their nominees. Central/State Government approval is, however, required for making loan, giving any guarantee for security.

LIST OF SECTIONS MODIFIED IN RESPECT OF GOVERNMENT COMPANIES
BY NOTIFICATION UNDER SECTION 620(1) OF THE COMPANIES ACT, 1956

(Para 14.6)

S. No.	Section	Nature of section	Extent of exemption/modification
1	2	3	4
1.	13	Requirements with respect to memorandum	In clause (a) of sub-section (1) the words "in the case of public limited company and with 'private limited' company as the last words of the name in the case of private limited company" shall be omitted.
2.	17	Special resolution and confirmation by Company Law Board required for alteration of memorandum	For the word 'Court' where it occurs the words "Central Government" shall be substituted.
3.	18	Alteration to be registered within three months	—do—
4.	19	Effect of failure to register	—do—
5.	21	Change of name by company	To section 21 the following proviso shall be added "Provided that nothing in this section shall apply to Government company where the change in its name consists only in the deletion of the word 'Private' therefrom".
6.	23	Registration of change of name and effect thereof	In section 23, after sub-section (1), the following sub-section shall be inserted namely (1A) where the change in the name of a Government company consists only in the deletion of the word, "Private therefrom, that Government company shall, not later than 3 months from the date thereof inform the Registrar of the aforesaid change and thereupon the Registrar shall delete the word 'Private' before the word 'Limited' in the name of the company upon the register and shall also make the necessary alteration in the certificate of the incorporation issued to the company".
7	100	Special resolution for reduction of share capital, etc.	For the word "Court" wherever it occurs the words 'Central Government' shall be substituted.
8.	101	Application to Court for confirming order, objection by creditors and settlement list of objecting creditors.	—do—
9.	109	Order confirming reduction and power of courts making such order.	—do—
10.	103	Registration of order and minute of reduction	—do—

1	2	3	4
11.	166	Annual General Meeting	<p>(1) In proviso to clause (e) of sub-section (1) for the words "Registrar" the words "Central Government" should be substituted.</p> <p>(2) In sub-section (2) for the words "some other place within the city, town or village in which the registered office of the company is situated" the words "such other place as the Central Government may approve in this behalf" shall be substituted,</p>
12.	186	Power of Company Law Board, to order meeting to be called.	For the word "Court" wherever it occurs the words "Central Government" shall be substituted.
13.	391	Power to compromise to make arrangement with creditors and members	Sub-section (7) of section 391 shall be omitted.
14.	372	Purchase by company of shares, etc. of other companies.	The section is not to apply to any company established with the object of financing, where the State Government has made, or agreed to make, to the company a special advance or subscribing to the capital or private enterprise in India.
15.	392	Power of High Court to enforce compromise and arrangements	<p>(i) In sub-section (1) of section 392, for the words "High Court" the words "Central Government" shall be substituted.</p> <p>(ii) For the word "Court" wherever it occurs, the words "Central Government" shall be substituted.</p>
16.	394	Provisions for facilitating reconstruction and amalgamation of companies.	For the word "Court" wherever it occurs, the words "Central Government" shall be substituted.
17.	621	Offence against Act to be cognizable only on complaint by Registrar, shareholder or Government.	In sub-section (1), the words "the Registrar or a shareholder of a company" shall be omitted.

ANNEXURE II

(Vide paras 14.11 and, 14.13)

**PROVISIONS WHICH MUST BE INCLUDED IN THE ARTICLES OF
ASSOCIATION OF A GOVERNMENT COMPANY**

APPOINTMENT OF DIRECTORS/EXECUTIVES

I. Powers/Rights of the President

1. (a) The Directors shall be appointed by the President and subject to Section 314 of the Act, shall be paid such salary and/or allowances as the President may from time to time determine and such reasonable additional remuneration, as may be fixed by the President, may be paid to any one or more of the Directors for extra or special services rendered by him or them or otherwise.
 - (b) The President may, from time to time, subject to section 314 of the Act, appoint one of the Directors to be the Chairman of the Board of Directors and determine the salary and allowances payable to the Chairman and the period for which he will hold office.
 - (c) The President may, from time to time appoint one of the Directors as the Managing Director and determine the salary and allowances payable to the Managing Director and the period for which he will hold office.
 - (d) The President may also appoint one or more of the Directors to be Executive Director(s) and/or Functional Director(s).
 - (e) The Executive Director(s) and/or Functional Director(s) so appointed shall be whole-time employees of the company and shall be paid such salary and allowances as may be fixed by the President.
2. The President shall have the power to remove any Director including the Chairman, the Managing Director, Executive Director(s), and Functional Director(s) from office at any time in his absolute discretion.

Chairman of Directors' meeting

3. The President may nominate a Director as Chairman of the Directors' meetings and determine the period for which he is to hold office. If no such Chairman is nominated or if at any meeting the Chairman is not present within five minutes after the time for holding the same, the Directors present may choose one of their members to be Chairman of the meeting.
4. All posts carrying pay of Rs. 2,500/- or more per month will be created and appointments thereto made only with the prior approval of the President.

Right of President to appoint any person as his representative

5. (1) The President, or the Governor so long as he is a shareholder of the company, may from time to time, appoint a person (who need not be a member of the company) to represent him at all or any meetings of the company.
- (2) Any person appointed under sub-clause (1) of the Article who is personally present at the meeting shall for the purposes of the Act be deemed to be a member and shall be entitled to exercise the same rights and powers (including the rights to vote by proxy) as the President or the Governor could exercise as a member of the company.
- (3) The President or the Governor may, from time to time, cancel any appointment made by him under sub-clause (1) of this Article and make fresh appointment.

- (4) The production, at the meeting, of an order of the President or the Governor evidenced as provided in the Constitution of India shall be accepted by the company as sufficient evidence of any such appointment or cancellation as aforesaid.

Rights of President

6. Notwithstanding anything contained in any of these Articles, but subject to the provisions of the Act the President may, from time to time, issue such directives or instructions as he may consider necessary in regard to the conduct of the affairs of the company and in like manner may vary and annul any such directive. The Directors shall give immediate effect to directives or instructions so issued.

II. Powers of the Board of Directors subject to approval of the President

7. The Board of Directors of the company may, by resolution passed by the company in general meetings appoint, with the approval of the President, an alternate director to act for a Director (hereafter in this Article called "the original Director") during his absence for a period of not less than three months from the State in which meetings of the Board are ordinarily held and such appointment shall have effect, and such appointee whilst he holds office as an Alternate Director shall be entitled to notice of meetings of the Directors and to attend and to vote there at accordingly, but he shall *ipso facto* vacate office when the original Director returns to the State in which the meetings are ordinarily held or vacates office as a Director. If the terms of office of the original Director is determined before he so returns to the State aforesaid, any provision for the automatic re-appointment of retiring Director in default of another appointment shall apply to the original and not to the Alternate Director.

Dividends

8. The profits of the company available for payment of dividend subject to any special rights relating thereto created or authorised to be created by these presents and subject to the provisions of these presents as to the reserve fund and amortisation of capital shall, with the approval of the President be divisible among the members in proportion to the amount of capital paid-up by them respectively. Provided always that (subject as aforesaid any capital paid-up on a share during the period in respect of which a dividend is declared shall only entitle the holder of such share to an apportioned amount of such dividend as from the date of payment.
9. The Directors may, subject to the approval of the President, borrow and/or secure the payment of any sum or sums of money for the purposes of financing capital projects of the company by means of a resolution passed at a meeting of the Board.
10. Where repayment of moneys is proposed to be secured by issue of bonds, perpetual or redeemable debenture or debenture-stock or any part of immovable property of the company (both present and future), the approval of the President shall be necessary.
11. Subject to the approval of the President and the provisions of the Act any debentures, debenture-stock, bonds or other securities, may be issued at a discount, premium or otherwise and with any special privileges as to redemption, surrender, drawings, allotment of shares, attending general meetings of the company, appointment of Directors and otherwise.
12. The powers of Directors in relation to the following shall be subject to the approval of the President :
 - (i) sale, lease, or disposal otherwise of the whole or substantially the whole of the undertaking of the company ;

- (ii) formation of a subsidiary company;
- (iii) entering into foreign collaboration involving technical know-how with or without equity participation;
- (iv) wage revision and payment of bonus;
- (v) entering into joint sector collaboration;
- (vi) effecting any change in the object clause of Memorandum of Association.

III. Matters reserved for directions/decisions of the President/Central Government

13. (1) The Chairman shall reserve for the decision of the Central Government any proposals or decisions of the Board of Directors or any matter brought before the Board which raises, in the opinion of the Chairman, an important issue and which is on the account fit to be reserved for the decision of the Central Government and no decision on such an important issue shall be taken in the absence of the Chairman appointed by the President. In respect of matters reserved by the Chairman for decision of the Central Government, if the Central Government's views are not received within a period of two months, the Directors shall be entitled to act in accordance with the proposal or decision without further reference to the Central Government.
- (2) Without prejudice to the generality of the above provisions, the Chairman shall reserve for the decision of the President :
- (i) any matter relating to sub-lease, exchange, mortgage and/or disposal of the whole or substantially the whole of the undertaking of the company or any part thereof;
 - (ii) any matter relating to —
 - (a) the promotion of company/companies;
 - (b) entering into partnership and/or arrangement for sharing property;
 - (c) formation of subsidiary company/companies;
 - (d) taking or otherwise acquiring any holding shares in any other company; and
 - (e) division of capital into different classes of shares.
14. Subject to such directions, as may, from time to time, be issued by the President in this behalf, the Directors may, before recommending any dividend set aside out of the profits of the company such sums as they think proper as a reserve fund, to meet contingencies or for equalising dividends or for special dividends, or for repairing, improving and maintaining any of the property of the company, and for amortisation of capital and for such other purposes as the Directors shall in their absolute discretion think conducive to the interests of the company, and may invest the several sums so set aside upon such investments (other than shares of the company) as they may think fit from time to time, deal with and very such investments, and dispose of all or any part thereof for the benefit of the company; and may divide the reserve funds into such special funds, as they think fit, and employ the reserve funds, or any part thereof in the business of the company and that without being bound to keep the same separate from the other assets.
15. The Central Government shall have powers :
- (i) to approve the company's five-year and annual plans of development and the company's capital budget;
 - (ii) to approve the company's revenue budget in case there is an element of deficit which is proposed to be met by obtaining funds from Government;

- (iii) to give directions to the enterprise as to the exercise and performance of its functions in matters involving national security or social objectives, raising of capital, objective of the company—purchase policy and pricing;
- (iv) to call for such returns, accounts and other information with respect to the property and activities of the enterprise as may be required from time to time; and
- (v) to approve agreements involving foreign collaboration proposed to be entered into by the enterprise.

IV. Matters in respect of which the Board of Directors shall have full powers

Borrowing Powers

- 16. Subject to Article 9 the Directors may, from time to time, borrow and/or secure the payment of any sum of money for the purposes of the company by means of a resolution passed at a meeting of the Board.
- 17. Subject to Article 10 the Directors may secure the payment of such moneys in such manner and on such terms and conditions in all respects as they think fit.

Securities may be assignable free from equities

- 18. Debentures, debenture-stock, bonds or other securities, may be made assignable free from any equities between the company and the person to whom the same may be issued.

Persons not to have priority over any prior charge

- 19. Whenever any uncalled capital of the company is charged all persons taking any subsequent charge thereon shall take the same subject to such prior charge and shall not be entitled by notice to the shareholders or otherwise, to obtain priority over such prior charge.

Indemnity may be given

- 20. If the Directors or any of them or any other person shall become personally liable for the payment of any sum primarily due from the company, the Directors may execute or cause to be executed any mortgage, charge or security over or affecting the whole or any part of the assets of the company by way of indemnity to secure the Directors or persons so becoming liable as aforesaid from any loss in respect of such liability.

General Powers

- 21. Subject to the provisions of the Act and directives and the instructions, if any, the President may issue from time to time as contained in the Articles, the business of the company shall be managed by the Directors who may pay all expenses incurred in getting the company registered and may exercise all such powers of the company as are not, by the Companies Act or any statutory modification thereof for the time being in force or by these Articles, required to be exercised by the company in general meetings. The Directors shall exercise the powers subject nevertheless to the provisions of these Articles and to the provisions of the said Act and to such regulations being not inconsistent with the aforesaid provisions, as may be prescribed by the company in general meeting but no regulation made by the company in general meeting shall invalidate any prior act of Directors which would have been valid if that regulation had not been made.

22. Without prejudice to the general powers conferred by the last preceding Article and the other powers conferred by these Articles but subject to the provisions of the Act, the Directors shall have the following powers, that is to say, power :
- (1) To acquire property : to purchase, take on lease or otherwise acquire for the company property, rights or privileges which the company is authorised to acquire at such price, and generally on such terms and conditions as they think fit;
 - (2) (a) Works of capital nature :—to authorise without reference of Central Government the undertaking of works of a capital nature where detailed Project Reports have been prepared with estimates of different component parts of the Project and where such Project Reports have been approved by Central Government and to invite and accept tenders relating to works included in the approved, detailed Project Report, including variations if any, in the approved estimates, provided such variations are not more than 10% for any particular component part and do not substantially change the scope of the project.
 - (b) To authorise undertaking of works of capital nature not covered by clause 2(a) above if it is to be taken up in advance of the preparation of detailed Project Report or otherwise as individual works involving cost of less than Rs. 100 lakhs provided that —
 - (1) the funds required will be found within the budget allocation for the company for that year; and
 - (2) the expenditure on each works in the next year will be the first call on the receipts of that year.
 - (3) To pay for property in debentures, etc. :—to pay for any property, rights or privileges acquired by, or services rendered to the company either wholly or partially in cash or in shares, bonds, debentures or other securities of the company, and any such shares may be issued either as fully paid-up or with such amount credited as paid-up thereon as may be agreed upon; and any such bond, debentures or other securities may be either specifically charged upon all or any part of the property of the company and is its uncalled capital or not so charged;
 - (4) To secure contracts by mortgage :—to secure the fulfilment of any contracts or engagements entered into by the company by mortgage or charge of all or any of the property of the company and its uncalled capital for the time being or in such other manner as they may think fit.
 - (5) To appoint officers, etc :—to appoint and at their discretion remove or suspend such managers, secretaries, officers, clerks, agents and servants for permanent or temporary or special services, as they may, from time to time think fit, and to determine their powers and duties and fix their specific scale of pay and allowance of specific jobs for which there may not be any strict parallel in Government Departments, and to acquire security in such instances and to such amount as they think fit. Provided that no post, the maximum pay of which is Rs. 2500 or more per mensem and in the case of re-employed retired Government servants Rs. 2500 per mensem inclusive of pension or pensionary equivalent, shall be created or appointment made thereto without the prior approval of the President. Provided further that no appointment to the post of Financial Adviser and Chief Accounts Officer shall be made without the prior approval of the President.

- (6) To appoint trustees :— to appoint any person or persons (whether incorporated or not) to accept and hold in trust for the company, any property belonging to the company or in which it is interested or for any other purposes, and to execute and do all such deeds and things as may be requisite in relation to any such trust and to provide for the remuneration of such trustees or interests;
- (7) To bring and defend action, etc :—to institute, conduct, defend, compound or abandon any legal proceedings by or against the company or its officers, or otherwise concerning the affairs of the company and also to compound and allow time for payment or satisfaction of any claims or demands by or against the company.
- (8) To refer to arbitration :—to refer any claims or demands by or against the company to arbitration and observe and perform the awards;
- (9) To give receipts :—to make and give receipts, releases, and other discharges for money payable to the company, and for the claims and demands of the company;
- (10) To authorise acceptance etc :—to determine who shall be entitled to sign on the company's behalf bills, notes, receipts, acceptances, endorsements, cheques, releases, contracts and documents;
- (11) To appoint attorneys :—from time to time to provide for the management of the affairs of the company outside the mining/ manufacturing areas which in the context includes the town-ships and sites of operations of the company in such manner as they think fit, and in particular to appoint any person to be the attorney or agent of the company with such powers (including power to sub-delegate) and upon such terms as may be thought fit;
- (12) To invest moneys :—to invest in such securities as may be approved by the President and deal with any of the moneys of the company upon such investment authorised by the Memorandum of Association (not being shares in this company) and in such manner as they think fit, and from time to time to vary or realise such investments;
- (13) To give security by way of indemnity :—to execute in the name and on behalf of the company in favour of any Director or other person who may incur or be about to incur any personal liability for the benefit of the company such mortgages of the company's property (present and future) as they think fit and any such mortgage may contain a power of sale and such other powers, covenants and provisions as shall be agreed on;
- (14) To give percentage :—to give to any person employed by the company a commission on the profits of any particular business transaction, or a share in the general profit/profits of the company, and such commission or share of profits shall be treated as part of the working expenses of the company;
- (15) To make bye-laws :—from time to time to make, vary and repeal bye-laws for the regulation of the business of the company, its officers and servants.
- (16) To give bonus :—to give, award or allow any bonus, pension, gratuity or compensation to any employee of the company or his widow, children or dependents that may appear to the Directors just or proper whether such employee, his widow, children or dependents have or have not a legal claim upon the company;

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- (17) To create Provident Fund etc. :—before declaring any dividend and subject to the approval of the President to set aside such portion of the profits of the company as they may think fit, to form a fund to provide for such pensions, gratuity or compensation or to create any provident or benefit fund in such manner as the Directors may deem fit;
- (18) To establish Local Boards :—from time to time and at any time to establish any Local Board for managing any of the affairs of the company in any specified locality in India, or out of India, and to appoint any person to be members of such Local Board and to fix their remuneration and from time to time and at any time to delegate to any person so appointed any of the powers, authorities and discretion for the time being vested in the Directors other than their powers to make call and to authorise the members for the time being of any such Local Board or any of them to fill up any vacancies therein and to act notwithstanding vacancies, and any such appointment or delegation may be made in such terms, and subject to such conditions as the Directors may think fit and the Directors may at any time remove any person so appointed and may annul or vary any such delegation; and
- (19) To make contracts, etc :—to enter into all negotiations and contracts and rescind and vary all such contracts, and execute and do all acts, deeds, and things in the name and on behalf of the company as they may consider expedient for or in relation to any of the matter aforesaid or otherwise for the purpose of the company.

CHAPTER XV

WINDING-UP OF COMPANIES

15.1 For historical reasons matters relating to winding up of companies had been administered by Courts and grown under their protective umbrella. Elaborate provisions were made by the various High Courts in respect of procedure for winding up of companies. Till 1956, the administration of Companies Act, 1913 was entrusted to the States and the said Act was administered by the States under delegated authority. So far as the winding up of companies was concerned, various High Courts, as stated earlier, framed their own rules and procedures in this regard and there was no uniformity in these procedures or rules. This position changed with the introduction of the Companies Act, 1956.

15.2 Under the present Companies Act there are as many as 135 provisions which along with rules framed by the Supreme Court provide a uniform code for the whole country.

15.3 Corporate sector vis-a-vis Companies in Liquidation

The corporate sector in India has grown appreciably in the post-war period. As against 30,381 companies at the commencement of the Companies Act, 1956, there were as on 31st March, 1977, 46,155, non-Government companies alone at work. The number of companies that have gone into liquidation (both compulsory and voluntary) since the commencement of the Act has also been increasing. This is evident from the following table:—

Number of companies in liquidation

Year ended 31st March	Under compulsory liquidation	Under voluntary liquidation	Under liquidation subject to supervision of Courts	Total
1957	47	282	4	333
1962	982	1826	30	2838
1967	1037	1676	29	2742
1972	1116	1988	42	3146
1976	1202	1946	35	3183
1977	1261	1923	32	3216

SOURCE : Annual Reports on the Working & Administration of the Companies Act, 1956, Department of Company Affairs

The figure for 1957 excludes winding up cases under the 1913 Act. The total number of companies in liquidation under the 1913 Act were estimated to be 3,000.

15.4 Corporate mortality

Corporate mortality, unlike mortality in all living things, should not be a normal phenomenon. But one cannot, however, ignore the fact that corporate mortality does exist. It has repercussions beyond the confines of its members. It is, therefore, natural that it should receive attention of the community.

15.5 In terms of period of pendency, there are, as on 31st December, 1977, 250 companies in liquidation for over 15 to 25 years, and about 500 companies in liquidation between 5 to 15 years.

15.6 The winding up process is a long drawn affair and before the companies are finally wound up, it takes years for settlement of various matters viz. filing of statement of affairs, realisation of assets, finalisation of list of contributories etc. and for obtaining a final order of dissolution.

15.7 In this process, substantial corporate assets belonging to companies in liquidation remain under the control or charge of the Liquidators. The estimated value of assets which have actually come into the hands of Liquidators, as on 31st December, 1977, is over Rs. 48 crores. Besides, there are still substantial assets, yet to be realised by the Official Liquidators. It is, therefore, both appropriate and desirable that these corporate assets are realised quickly and distributed to the creditors and members so that they may be further channelised into the main stream of economic development. The Administrative Reforms Commission, therefore, rightly said that "the longer the winding up proceedings, the greater is the loss to the community" since "defunct companies conceal corporate wealth which is a national waste."

15.8 Since the enactment of the Indian Companies Act, 1913, the core and substance of the winding up provisions have almost remained same. No indepth study of the matter had been undertaken. The amendment introduced by the Indian Companies (Amendment) Act, 1936 and the Companies Act, 1956, no doubt, tried to improve the existing procedure to a certain extent and to make a beginning in certain areas not attempted earlier. But, experience of working of these provisions during the last two decades has shown that although most of the provisions are salutary, it has not led to an expedition of winding up proceedings.

15.9 We are, however, aware of the remarks of Shri C. D. Deshmukh, while piloting the historical Companies Act, 1956 that expedition of the winding up process "is difficult beyond a certain stage, and further the realisation of the assets of companies must of course await the process of law." This Committee, even though aware of such limitations, has nevertheless made an attempt to identify more important areas which deserve immediate attention, and which, if tackled properly, would help considerably in reducing the time spent in winding up proceedings, and the consequential wastage and blocking of corporate assets. The Committee is of the view that the following causes result in delays and in the completion of the liquidation matters, viz:—

- (i) Delay in obtaining the statement of affairs under section 454 of the Act to be prepared and submitted by the directors and/or principal officers of the company;
- (ii) Delay in obtaining the books and other records and identification of assets belonging to the company
- (iii) Delay in enforcement of debts and claims of the company against its debtors and delay in settling the list of contributories and enforcement of claims against them;
- (iv) Delay in subjecting the directors and other principal officers of the company for public examination under section 478 of the Companies Act, 1956 and delay in the conclusion of misfeasance proceedings filed against delinquent directors;
- (v) Delay in disposal of income-tax assessment cases pending against the company and delay in disposal of such cases filed by the company;
- (vi) Dearth of requisite staff.

15.10 With these difficulties in view, we would suggest changes in the existing provisions with a view to facilitate quicker disposal of liquidation matters. Our recommendations are under the following heads.

I. Quicker disposal of the winding-up process

- (A) More effective steps for obtaining the statement of affairs and other records of the company.

15.11 Getting the statement of affairs and obtaining the books of account and other relevant records from the company, and identifying the assets of the company is perhaps

the basic function of the Official Liquidator. In fact, it forms the very source on which all his further actions depend. This alone will enable the Official Liquidator to ascertain the nature, situation and other particulars of the assets and liabilities of the company.

15.12 The primary duty of the Official Liquidator is to take into custody or under his control, all the assets of the company (section 456). No Liquidator would be able to perform this very important duty unless he is able to go through the books and records and satisfy himself about the position of the assets of the company. It is for this reason that section 454 of the Act requires that a statement of the affairs of the company giving particulars about the assets of the company, the debts and liabilities and such other information as required should be submitted to the Official Liquidator within twenty-one days from the date of the winding up order. In spite of this salutary provision, in practice, Directors and other officers often disown their responsibility and plead ignorance about the availability of books, papers and assets. The result is that in spite of this time limit, the books are not produced before the Official Liquidator. On occasions, excuses are given as to why the statement cannot be filed within time and this further delays the submission of the books and the statement of affairs to the Official Liquidator.

15.13 The position is worse when there has been a deadlock in the Board because, in such a case, the responsibility for the possession of the books is passed on from one officer to the other. The outcome, in any case, is the non-availability of the books and other necessary records with the Official Liquidator. Even when books are ultimately made available to the Liquidator, they are often incomplete, and the Liquidator has to go through and reconstruct the records before taking further proceedings. The delay in getting over these preliminaries is one of the important reasons for the delay in disposal of the winding-up proceedings. We feel that this is a serious drawback and needs to be rectified.

15.14 We are of the opinion that the requirement of filing the statement as to the affairs of the company by the officers and directors is a very salutary provision. We are equally convinced that the omission, (which more often than not a deliberate one), needs to be controlled if winding up proceedings are to be expedited. The present section requires the statement of affairs to be filed after an order of winding up has been passed in case no provisional Liquidator has been appointed. But it is natural that by then the officers and directors have lost interest in the company and may not be keen to assist the Official Liquidator to rehabilitate the company, or to realise its assets. It is, therefore, necessary that a provision should be made which would ensure (with as much certainty as the law can provide) the location and the availability of books of account and other necessary information in a winding-up. In our view, the section should be so amended as to ensure the filing of the statement of affairs and provide information about the custody of books *before* the order of winding up is passed by the Court. Though the present requirement of filing statement of affairs after the winding up order is passed may be retained, some provisions need to be made to obtain additional information to serve the said object. We would, therefore, recommend that a declaration authorised by the Board of directors should be filed by the company (prior to a winding up order) setting out the persons responsible for the control of the books and papers of the company and who would file the statement of affairs in the event of the company being directed or ordered to be wound up.

15.15 Though the statement of affairs has to be submitted within twenty-one days as required under section 454(2), power is given to the Court or Official Liquidator to extend the time upto a period not exceeding three months from the date of the winding up order. We are of the view that if there is default in submitting the books of account or the statement of affairs within twenty-one days or within such time as may be extended under sub-section (3) of section 454, then not only the persons who have been named in the declaration as being responsible for delivering the book and filings the statement of affairs but also those persons who were directors of the company on the date of the filing of the winding up petition should be deemed to have defaulted in complying with the requirements of section 454 and be dealt with accordingly. Though this may appear stringent (that we are laying the responsibility on persons other than those who have been named in the declaration), such a provision is only consequential upon the undertaking filed in the declaration (given with the consent of the directors) not being fulfilled. Besides, this provision will act as a deterrent and will help in getting the statement of affairs filed in time and would also make the books of the company available to the Liquidator at the earliest.

15.16 One other excuse for delaying the filing of the statement of affairs by the officers and the directors is by invoking section 454(4). This section provides that any person making a statement as required by section 454 shall be paid by the Official Liquidator out of the assets of the company, costs and expenses incurred in and about the preparation and making of the statement. In many cases, there are no liquid assets available with the Official Liquidator and he, therefore, is not in a position to accept the estimate submitted to him in terms of Rule 129 of the Companies (Court) Rules, 1959. The directors usually take the plea that since no funds have been made available to them, they are not in a position to file the statement of affairs. We feel that this plea is unmeritorious so far as directors of the company are concerned—directors being in control of the company are under an obligation to render an account of its affairs when it is wound up. Whatever justification there may be for granting expenses to persons required to submit a statement of affairs, there is no justification for those who are directors at the commencement of the winding up being paid, as a condition for doing their duty to the company and the Court, viz. the duty of filing of the statement of affairs. We would, therefore, recommend that sub-section (4) of section 454 should be amended so as to make it clear that the payment of expenses by the Official Liquidator would not cover the case of directors.

15.17 The Committee is also of the opinion that the penalties prescribed in section 454(5) should be made more stringent and would recommend that sub-section (5) should be amended to provide that in case default is proved, a minimum fine of Rs. 1,000/- would be mandatory; the present fine of Rs. 100/- per day for every day during which the default continues should be raised to Rs. 500/- per day of default. Of course, the present provisions for imprisonment will remain.

15.18 The provisions of sub-section (5) of section 454 have occasioned controversy—whether the absence of reasonable excuse has to be shown by the Official Liquidator or by the person concerned. A full bench of the High Court of Delhi* has placed the onus—of proving that a person has without reasonable excuse made a default in complying with the requirements of section 454—on the Official Liquidator. Though the Court has also expressed the view that the burden is “very light”, we feel that in the interests of justice and of expeditious disposal of winding up proceedings, the onus to show reasonable excuse should be placed squarely on the person concerned. This is only fair because a person who has made default has special knowledge of the circumstances which might excuse his default, the onus should, therefore, be on him to show circumstances to justify his default.

15.19 Our proposals

We would recommend the following additions to be made in the provisions relating to statement of affairs (section 454) viz. :—

- (a) In case where the petition for winding up is filed by the company itself, the petition should be accompanied by a duly prepared statement of affairs complete in all respects with all the information required by section 454. Such a petition should clearly specify as to who has the custody of the books of account and papers and must name the officer and/or the directors who would produce the books of account, papers etc. after the order of the winding up is passed by the Court. The statement regarding custody and production of books must have been approved by the Board of Directors and the petition (for winding up by the company) must include this averment.
- (b) In cases where the petition for winding up is not filed by the company itself, provision should be made enabling the Court at the time of giving directions under Rules 96/99 of the Companies (Court) Rules, 1959 (or at any preliminary stage of the proceedings and before the final order is passed) to direct the company to file (within such time as the Court may allow) a declaration stating clearly—
 - (i) the place where the books, records and other papers of the company are kept; and

* Official Liquidator vs, B.K. Bedi & another (1974) 44 Comp Cas 499.

- (ii) the names, designation and addresses of the person/persons who is/are charged with the responsibility of maintaining the books, papers etc. of the company and as to who would file the statement of affairs (required under section 454) with the Liquidator and would hand over control of books, papers and other documents, in the event the company is ordered to be wound up.

Such a declaration should be approved and/or verified by the Board of Directors of the company as may be required by the Court. The declaration shall be accompanied by consent in writing of the person/persons charged with the responsibility for production of books of account and for filing the statement of affairs.

- (c) In the event of the company being wound up on a petition for winding up [under (b) above] and the books of account, papers, documents etc. and/or statement of affairs not being filed with the Official Liquidator within the period prescribed under section 454(2) (or any extended period), all persons who were directors of the company on the date of the filing of winding up petition (i.e. the commencement of the winding up) will be deemed to have been in default in complying with the requirements of the section and be dealt with as persons in default.

15.20 The other changes recommended in section 454 are as follows :—

- (a) In sub-section (3) of section 454, power should be left only with the Official Liquidator to extend time ; the words “or the Court” should be deleted.
- (b) In sub-section (4) of section 454, the provision for payment of expenses should not be applicable in the case of persons who were directors at the commencement of the winding up.
- (c) In sub-section (5) of section 454, provision should be made that the onus of proving that there was reasonable excuse would be on the person who commits the default.
- (d) In sub-section (5) of section 454, a minimum fine should be provided for viz. Rs. 1,000/- which should be mandatory; the daily-default fine should be increased from a maximum of Rs. 100/- to Rs. 500/-.

(B) Ensuring quicker realisation of assets

15.21 Section 456 has cast a duty on the Liquidator to take into his custody or under his control all the property, effects and actionable claims to which the company appears to be entitled. All the property and effects of the company shall be deemed to be in the custody of the Court from the date of winding up order. The task of taking into possession the assets of the company poses no less difficulties than obtaining the books, records of the company and the statement of affairs.

15.22 Section 446(2) of the Act states that the Court which is winding up the company shall have jurisdiction to entertain or dispose of any suit proceedings or any claim by or against the company. It is well known that large part of the proceedings by the Official Liquidator are devoted to the recovery of moneys due to the company and such proceedings are normally started by filing claims under sub-section 2(b) of section 446. Doubts have been raised as to the Court fee that is payable by the Official Liquidator when he files a claim for the recovery of money due to the company. The Karnataka High Court* held that when the claim is for recovery of money due to the company ‘ad valorem’ court fee has to be paid, and it makes no difference that the Official Liquidator had filed an application purported to be under section 446(2)(b) as the nature of the suit does not change or transform into a mere application or proceeding other than a suit. This view has not been accepted by a Full Bench of the Delhi High Court.** The Delhi High Court has taken the view that clause (a) of sub-section (2) of section 446 which permits the filing of suit and clause (b) which permits the filing of claim confer an option on the Official Liquidator so that if a suit is filed by the Official Liquidator ad valorem court fee would be payable in accordance with the Schedule I of the Court Fee Act, whilst if he files a claim under clause (b) a fixed court fee of Rs. 13/- only would be payable in accordance with Schedule II. The

*The Official Liquidator, High Court, Mysore vs T. Muniswamy & Others A.I.R. 1967 Mysore 1920.

**Jaimal Singh Makin Vs. The Official Liquidator A.I.R 1978 Delhi 169

High Court of Delhi has also taken the view that clause (b) is to be interpreted very widely and money claims are also covered by clause (b) even though they may be also covered by clause (a) of sub-section (2) of section 446. In view of the difference of opinion between High Courts about the court fee payable under section 446, we feel that the legal position should be clarified. In our view the beneficial scope of section 446 would be considerably weakened if the Official Liquidator is required to pay ad valorem court fee for bringing an action for recovery of money. The Official Liquidator of a company in liquidation has necessarily limited funds. We see no valid reason why court fees should depend on the fortuitous circumstance of which alternative is adopted by the Official Liquidator—a suit or a claim. Besides, we see no justification for payment of court fees depending upon the Liquidator's option i.e. filing a suit under clause (a) (rather than lodging a claim) and paying the ad valorem court fee (as interpreted by the Delhi High Court) or putting forward a claim under clause (b) and paying only the fixed court fee. In order, therefore, not to leave any scope for further controversy and to make the law certain, we suggest that section 446 be amended to provide that notwithstanding anything contained in the Court Fees Act if any suit or proceeding or claim is brought by or against a company in liquidation, a fixed court fee need only be paid.

15.23 Sub-section (1A) to section 456 enables the Liquidator to seek the aid of the Chief Presidency Magistrate or the District Magistrate within whose jurisdiction the property of the company is situate for the purpose of getting possession. Sub-section (1B) also authorises the said Magistrate to use such force as may be necessary. Though these provisions are useful, in actual practice, it has been found that the aid of the District Magistrate is not readily available. Consequently recovery proceedings are delayed. We feel that better results could be achieved if instead of the Liquidator having to approach the District Magistrate, power was conferred on the Official Liquidator himself to take possession of such books and property etc. This could be done by empowering the Official Liquidator with powers of search and seizure on the pattern of section 132 of the Income Tax Act, 1961, with necessary modifications. We would, however, recommend a check on the arbitrary use of such power by providing that it should be exercised by the Official Liquidator only after obtaining the leave of the Court. We would also suggest that a power similar to that given under the Income Tax Act, 1961 (enabling the authorised officer to seek the help of the police at the time of search or seizure) be also conferred on the Official Liquidator—here again after obtaining the leave of the Court. We believe that this suggestion will lead to quicker realisation as assets of the company.

15.24 Another problem the Official Liquidator faces is that in all proceedings before the Court he is required to produce the books of the company with the result that he is not able to make use of them so long as the litigation continues. Besides, there are the difficulties of proof. We feel that in the interests of expeditious disposal of winding up the technical rules of evidence should not be made applicable in liquidation proceedings and a provision similar to section 45-F of the Banking Regulation Act, 1949 should be adopted—so as to permit entries in the books of account of the company to be proved by a copy of the entry certified by the Official Liquidator without the necessity of production of the books in Court. We also recommend adoption of a provision similar to sub-section (2) of section 45-F of the Banking Regulation Act, 1949 (with appropriate safeguards) which makes the entries in the books of account *prima facie* evidence of the truth of the matters contained therein as against the directors and officers of the company.

15.25 Section 458 A of the Act provides that for purpose of limitation, the period from the date of commencement of the winding up of the company to the date on which the winding up order is passed and a period of one year immediately following the order of the winding up should be excluded in computing the period of limitation for any suit or application by or on behalf of a company being wound up. As we have already pointed out, the Official Liquidator has to make special efforts involving a great deal of time in recovering the books of the company. Even after the books are made available, they are often not properly maintained and the Official Liquidator would have to spend considerable time before he can use them for the purpose of making any claim. We feel that the period of one year is too short and should be increased. We, therefore, suggest that the exclusion of the period of one year from the date of the winding up order should be increased to three years. In the case of directors, however, we would suggest that there should be no period of limitation against directors for the enforcement by the company (in liquidation) of any claim based on a contract or other obligation. In case of any other claims against directors the period of limitation should be six years from the date of the winding up order. In this regard we would recommend adopting, with suitable modifications, the provisions of section 45-0 of the Banking Regulation Act, 1949.

15.26 One of the major reasons for delay in conclusion of the winding up proceedings is the delay in recovery of claims. Section 482 of the Act permits an order of the High Court to be executed at any place in India. However, experience has shown that execution through the Court takes a long time—the realisation of the fruits of a decree is often only a consummation devoutly to be wished! With a view to expedite matters, we recommend that if any amount be found due to the company the amount may, with the leave of the Court, be recovered by the Official Liquidator in the same manner as an arrear of land revenue. We would recommend adopting, with suitable modifications, the provisions of sub-section (3) of section 45 T of the Banking Regulation Act, 1949, for this purpose.

15.27 Our proposals under this head (quicker realisation of assets) are as follows :

- (a) Section 446 (2) be suitably amended to provide that notwithstanding anything contained in the Court Fees Act, in any suit, proceeding or claim brought by or against a company in winding up, a fixed court fee only need be paid—an appropriate amendment in the Court Fees Act would (we apprehend) also be required.
- (b) A provision similar to section 132 of the Income-tax Act should be enacted empowering the Official Liquidator to order search and seizure of books or property of the company in the hands of persons who have failed to produce them on a notice having been issued—this power should be exercised by the Official Liquidator only after obtaining the leave of the Court; the provision should also indicate that the Official Liquidator would be entitled to seek the help of the police authorities at the time of search and seizure, again with the leave of the Court.
- (c) A provision similar to sub-sections (1) and (2) of section 45F of the Banking Regulation Act, 1949 should be inserted providing for entries in books of account or other documents of a company in liquidation being admitted in evidence in legal proceedings, and entries in the books of account of a company being *prima facie* evidence of the truth of the matters contained therein in all proceedings against directors and officers of the company. In the latter case, the presumption would apply unless the Court, for reasons to be recorded in writing, directs otherwise—this would cover cases where books of account are not properly kept or the Court is otherwise not satisfied of the genuineness of the entries in such books.
- (d) Section 458A should be suitably amended so as to provide for an exclusion for a period of three years (instead of one year) from the date of the winding up order for the purposes of limitation. It should be further provided that in the case of directors (i.e. directors at the commencement of the winding up), there should be no period of limitation for the enforcement by the company of any claim based on contract against such directors, and in the case of other claims against a director (including claims based on contract against a past director), the period of limitation should be six years from the date of the winding up order.
- (e) In section 482 of the Act, a suitable clause should be inserted enabling the Official Liquidator to recover (with the leave of the Court) any amount found due from any person in the same manner as is provided for in the matter of recovery of arrears of land revenue: a provision similar to sub-section (3) of section 45T of the Banking Regulation Act, 1949 may be suitably adopted.

(C) Quicker disposal of Income-tax proceedings and priorities in the matter of preferential payments

(1) Income-tax Proceedings

15.28 Section 530(1)(a) provides that all revenues, taxes, etc. will have priority of payment, but limits the said taxes to those which have become due and payable within twelve months next before the 'relevant date'. The Income-tax Officer can only claim priority in respect of taxes for this limited period. However, section 178 of the Income-tax Act, 1961 empowers the Income-tax Officer to notify to the Official Liquidator the amount which in his opinion would be sufficient to provide for taxes which is then and which is likely thereafter to become payable by the company. Sub-section (3) of section 178 of the Income-tax Act, 1961 requires the Liquidator to set aside an amount equal to the amount notified, and debars the Liquidator to part with any amount in his hand until, he has set aside the notified amount. We have been

informed that the Income-tax Officer, for the sake of caution, often notifies to the Liquidator an amount of tax much more than what may be ultimately found to be due and payable. But, because of the mandate of law, there is no option with the Liquidator but to set apart such funds with the result that the balance available with Liquidator to carry on the affairs of the company or to meet the expenses for the purpose of winding up is not sufficient—and are blocked up. Sub-section (6) of section 178 further provides that the provisions of the section would have effect notwithstanding anything to the contrary contained in any other law for the time being in force.

15.29 Courts have had to decide whether section 530(1)(a) is controlled by section 178 of the Income Tax Act, 1961. The Gujarat High Court* has held that section 178 of the Income Tax Act, 1961 does not talk of priority of payment, and the priority is governed by section 530(1)(a), with the result that the priority will only be restricted to the payment of taxes for the period of twelve months next before the 'relevant date'. A similar view has also been taken by Karnataka High Court.** But a contrary view has been taken by Andhra Pradesh High Court† and also by the Kerala High Court††—these Courts have held that section 178(6) of the Income Tax Act, 1961 overrides section 530(1)(a) of the Companies Act, 1956 and the entire tax gets priority. This unsettled state of law naturally adds to the problem of expeditious disposal of winding up.

15.30 It is relevant to mention that when the Companies Act, 1956 was enacted, it was urged before the Company Law Committee that priority for arrears for income tax should not be limited to a particular period. This was specifically rejected by the Company Law Committee. They also referred to the English Companies Act of 1948, which also limits the priority for tax to amounts which had become due and payable within twelve months next before the 'relevant date'. Since Parliament has consciously provided for priority of payment of tax only for a period of twelve months, we find it difficult to accept that, when section 178 of the Income Tax Act was enacted (and though it did not specifically so provide), it should be taken to have effected an implied repeal (or alternation) of section 530(1)(a) in so far as the period relating to the preferential payment of taxes was concerned. In any case, we feel that such a blanket priority for payment of tax for any period is not in the interest of the company, its members or the creditors. To allow the tax for any period to have priority would really wipe out all the surplus of the company, and there may be nothing left for the payment to the employees or the small creditors. We must emphasize that if situation arises where arrears of taxes have accumulated for a number of years, the remedy for this is not the conferment of preferential right without limit to the income-tax authorities but energetic completion of assessment proceedings and vigorous measures for the collection of the taxes in arrears. We would, therefore, suggest that section 530 be amended to provide by way of clarification that notwithstanding anything contained in section 178 of the Income Tax Act, 1961, the priority for payment of taxes will be limited to taxes having become due and payable within twelve months next before the 'relevant date'.

15.31 We may also point out another anomaly created by section 178 of the Income Tax Act) which permits the Liquidator to spend only that amount for meeting the costs and expenses for winding up of the company as are in the opinion of the Commissioner reasonable—unless funds and property as notified by the Commissioner have been set apart for the payment of taxes. We see no justifiable reason why the Liquidator should obtain permission from the Commissioner of Income Tax for meeting the costs and expenses for winding up of the company. Liquidation proceedings are under the control of the Court and it is not in keeping with the dignity of the Court nor in consonance with the objective of early completion of winding up proceedings that any other authority should determine what costs and expenses are to be expended in the matter of the winding up of the company. We, therefore, recommend that subsection (3) of section 178 of the Income Tax Act, 1961 should be amended. We further recommend that it will be desirable that the assessment of the companies under liquidation (in each town or city) be placed under the charge of the same Income Tax Officer for speedy disposal of all assessment and tax matters.

*Sales Tax Officer vs. Rajratna Naraa Bhai Mills Co. Ltd. & others (1976) Vol 46 Comp Cas 25.

**Income Tax Officer vs Official Liquidator (1967) 63 ITR 810

†Income Tax Officer, Hyderabad vs Official Liquidator (1976) Vol 46 Comp Cas 46

††In Re Swaraj Motors P Ltd (in liq) CP 14 of 1969

(2) Priorities in the matter of preferential payments

15.32 Section 530 of the Companies Act, 1956 lays down the priorities for payment of debts. Clause (a) of sub-section (1) gives priority to all revenues, taxes, cesses, rates which have become due and payable within the twelve months next before the relevant date, over all other debts. Though we do realise that the payment of taxes must rank as one of the priorities, we are not satisfied that in the case of a company in liquidation, that priority of taxes should rank above that of the wages and salaries due to the employees of the company. We, therefore, suggest that clauses (a) and (b) of sub-section (1) of section 530 should be interchanged so as to give first priority to wages and salaries under section 530(1)(b), revenues, taxes, rates and cesses ranking next.

15.33 In the Dominion of Canada* and some of the States in the United States, the wages of employees enjoy a preferential claim in the event of insolvency of corporations. In the State of North Carolina, the wages for labour get precedence over mortgage and other lien on corporate property. The reason for this preferential treatment is stated to be two-fold, firstly "to prevent those persons whose labour is indispensable to the continuance of the business from abandoning it when alarmed by fear of losing their wages, and secondly to give protection to a class of persons who generally work for small compensation and to whom the product of their daily labour is their sole means of support."

15.34 Presently there is a limit upto which the arrears of wages and salary could be claimed, this being limited to four months. Besides there is also a further limit of Rs. 1,000/- in the case of any one claimant as can be claimed under the head 'arrears of wages or salary'. We feel that the limit of four months and also the overall limit of Rs. 1,000/- is grossly inadequate besides being unrealistic—it affords little relief to the employees. We would increase the limit to twelve months and the amount to Rs. 12,000/.

15.35 The priorities for wages and salaries are limited to one year on the basis that in the normal course having regard to the remedies available to workmen under industrial and labour laws, wages and salaries would not run into arrears for a period exceeding one year. We would, therefore, recommend the claim for priority for arrears of wages to be restricted to twelve months before the 'relevant date'.

15.36 Our proposals under this head are as follows :

(i) Income-tax proceedings

- (a) Section 530 of the Companies Act should be amended so as to provide by way of clarification that priority for payment of taxes would be limited to amounts which have become due and payable under this head within twelve months next before the 'relevant date' notwithstanding anything contained in section 178 of the Income Tax Act, 1961.
- (b) Provision be made in the Companies Act that the costs and expenses for winding up of the company shall be as determined by the court, notwithstanding anything contained in the Income Tax Act, 1961. We would, further recommend that sub-section (3) of section 178 of the Income Tax Act, 1961 should be suitably amended.
- (c) We would recommend that provision should be made in tax laws that the assessment of companies under liquidation (in each town or city) should be placed as far as possible under the charge of the same income-tax officer so as to facilitate a speedy disposal of assessment in respect of companies in liquidation.

(ii) Priorities in the matter of preferential payment

- (a) Clauses (a) and (b) of sub-section (1) of section 530 should be interchanged so as to give first priority to wages and salaries—revenues, taxes, rates and cesses ranking next only to wages and salary.

- (b) In the existing clause (b) of section 530(1)—which would under our recommendation be clause (a) of sub-section (1) of section 530—for the words “for a period not exceeding four months within the twelve months next before the relevant date”, the words “for a period not exceeding twelve months before the relevant date” be substituted; and
- (c) In sub-section (2) of section 530, for the words “shall not, in the case of any one claimant exceed one thousand rupees”, the words “shall not in the case of any one claimant exceed twelve thousand rupees” shall be substituted.

(D) Quicker settlement of list of contributories and their claims

15.37 The Supreme Court has framed elaborate rules for the settling of the list of contributories. These rules are found in Rules 180 to 189 and Rules 235 to 241 of the Companies (Court) Rules, 1959. There are also separate rules relating to proceedings before the District Courts for similar matters. Under the said Rules there are two stages. The first stage is the preparation of the provisional list of contributories by the Official Liquidator to be filed in Court; after hearing objections, if any, the second stage is the finalisation of the list of contributories to be prepared by the Official Liquidator and filed in the Court under a certificate. Upon filing of the certificate the Official Liquidator is to give notice to all those persons who have been placed on the list. Objections by any persons whose names have been put on the list have to be filed in the Court within twenty-one days from the date of service of notice—for removal of the name from the list. Subject to any order made by the Court, the list as filed becomes final after expiry of 21 days from the date of the service of the notice. After the final list has been settled, calls have to be made on the contributories whose names appear on the list.

15.38 The present procedure is not only time-consuming but also involves expenditure on postage and registration. Instead of having two stages, it would be appropriate to assimilate the settlement of list of contributories into a single proceeding. The Official Liquidator should himself prepare the list of contributories on the basis of the records of the company and make a call on persons placed on the list. He should file with the Court only a list of persons who dispute their liability and object to being put on the list. The Court after hearing the parties may make such orders as it thinks fit. Under the Rules framed by the various High Courts under the Indian Companies Act, 1913, there was only one stage in the preparation of list of contributories unlike under the present rules. We recommend that the power to settle the list of contributories as in the case of list of creditors under Rule 163 of the Companies (Court) Rules, 1959 should vest with the Official Liquidator and not with the Court as at present. Therefore, section 467 should be accordingly amended. In case of any dispute or objection, the matter should be referred to the Court for passing appropriate orders after hearing parties.

(E) Expediting misfeasance proceedings against delinquent directors

15.39 The provisions of section 542 (which correspond to section 332 of the English Act) represents a potent weapon in the hands of creditors and exercises a restraining influence on over-sanguine directors. Some textbook writers consider that of all the exceptions to the rule in Salomon's case, it is probably the most serious attempt which has yet been made to protect creditors generally from abuses inherent in the rigid application of the concept of corporate entity. The leading cases under section 332 of the English Act are in re: *Williams Leitch** and re: *Patric and Lyon Limited*** . In the first case, Maugham J. was prepared to give liberal interpretation to the word “fraud”—“if a company”, he said, “continues to carry on business and to incur debts at a time when there is, to the knowledge of the directors, no reasonable prospect of the creditor ever receiving payment of those debts, it is, in general, a proper inference that the company is carrying on business with “intent to defraud”. The Judge accordingly made a declaration that the director was personally liable. But in the latter case, the same Judge (Maugham J.) emphasized that “fraud” for the purposes of section 332 connoted “actual dishonesty” involving (according to current notions of fair trade among commercial men) real moral blame, and that the onus of proof was on those alleging it. This withdrawal from the liberal attitude revealed in the dictum in the earlier case has once again emphasized the difficulty of creditors in discharging the heavy burden of proving “fraud” in the sense of “actual dishonesty”. The only authoritative decision on section 542 of the Companies Act, 1956 is that of the Supreme

*1932 Ch. p. 71

**1933 2 Ch 786

Court in *Official Liquidator, Supreme Bank Ltd., vs. Tendolkar*[†]. In that case, however, the two leading English cases were not considered but instead, the following statement of the law appears :

“In *Palmer’s Company Law* [21st edition (1968), page 575], after a citation of the three cases mentioned above, we find the comment :

‘It is doubtful whether, if similar facts arose today, the Court would decide in the same manner, because now-a-days the Courts take a stricter view of the duties of a director than they took some twenty-five years ago’.

It is certainly a question of fact, to be determined upon the evidence in each case, whether a director alleged to be liable for misfeasance, had acted reasonably as well as honestly and with due diligence, so that he could not be held liable for conniving at fraud and misappropriation which takes place. A director may be shown to be so placed and to have been so closely and so long associated personally with the management of the company that he will be deemed to be not merely cognizant of but liable for fraud in the conduct of the business of a company even though no specific act of dishonesty is proved against him personally. He cannot shut his eyes to what must be obvious to everyone who examines the affairs of the company even superficially. If he does so he could be held liable for dereliction of duties undertaken by him and compelled to make good the losses incurred by the company due to his neglect even if he is not shown to be guilty of participating in the commission of fraud. It is enough if his negligence is of such a character as to enable frauds to be committed and losses thereby incurred by the company”.

The Jenkins Committee in England has recommended that the corresponding section of the English Act (section 332) should be *extended*—so as to apply to reckless as well as fraudulent trading. Thus, for instance, connivance at fraud and misappropriation taking place by a director personally associated with the management of the company could be brought within the scope of section 542—even though no specific act of dishonesty be proved against the director.

15.40 Our proposals under this head (expediting misfeasance proceedings) are [as follows

- (i) The section 542 should be suitably amended so as to restore the liberal interpretation given by Maugham J. in *Re. Leitch* thus making it clear that *actual dishonesty* is not a necessary ingredient of a charge under section 542.
- (ii) The section (section 542) should be extended to make directors and others directly responsible for carrying on the business of the company personally responsible for losses caused by their acting in a *reckless* manner, if the Court so declares on an application by the Official Liquidator or on application of any creditor or contributory of the company.
- (iii) The provision with regard to *reckless trading* should apply only in respect of civil liability and not criminal liability and in sub-section (3) of section 542 this should be clarified.
- (iv) In view of the long delay inherent in the disposal of applications in the nature of misfeasance, it is necessary that power should be conferred on the Court in an application made under section 542 (as well as under section 543) that the Court may pass such interim orders as it may deem just and proper so as not to render ineffective an order finally passed under these provisions. This would help to remove the attitude of complacency that generally prevails in the minds of directors of companies in liquidation and would also indirectly help to speed up the progress of liquidation. If directors of companies in liquidation which have been fraudulently managed or where there has been misfeasance or misapplication of funds, find that their private properties are frozen and dealings in respect of them are subjected to the company court’s scrutiny, they would inevitably be more active in the liquidation proceedings.
- (v) Sub-section (3) of section 542 should form a separate section. It has been held by a majority decision of the House of Lords that a prosecution under the English section (corresponding to section 542(3) of our Act) could be initiated only when the

[†] *Official Liquidator, Supreme Bank Ltd. vs P.A. Tendolkar* (1973) 43 Comp Cas P. 382

company was in liquidation and not when it was a going concern (*Director of Public Prosecution's vs. Schildkamp*)*. Although sub-section (3) of section 542 is wide enough to refer to the business of a company carried on whilst it is a going concern, since sub-section (1) of section 542 only refers to liability in the course of winding up it is necessary to clarify the matter by placing sub-section (3) in a separate section.

- (vi) Section 543 should be amended as follows :
- (a) After clause (b) of sub-section (1), add the following :—
“(c) has been guilty of gross negligence, that is of negligence of such a character as to facilitate or enable the money or property of the company to be misapplied or misappropriated”.
- (b) After the words “in respect of the misapplication, retainer, misfeasance or breach of trust” at the end of sub-section (1), add the following :—
“or gross negligence”.

The latter part of sub-section (1) of section 543 would thus read :—

“In respect of the misapplication, retainer, misfeasance or breach of trust or gross negligence, as the court thinks just”.

- (vii) Sub-sections (2), (3) and (4) of section 545 deal with the procedure to be followed with regard to misfeasance against any past or present officer or any member of the company who has been guilty of any offence in relation to the company. The procedure prescribed in these sub-sections is not only cumbersome but time-consuming—a voluntary liquidator has first to report to the Registrar, who may, if he thinks fit, refer the matter to the Central Government for further inquiry; and the Central Government is thereupon empowered to investigate the matter and if it thinks fit and expedient to apply to the Court for an order conferring on any person designated by the Central Government for the purpose of such powers of investigating the affairs of the company as are provided by the Act in the case of a winding up by the Court; where a report is made to the Registrar under sub-section (2) and if on such report it appears to the Registrar that the case is not one in which proceedings ought to be taken, the Registrar informs the Liquidator accordingly and only then the Liquidator is empowered to take proceedings against the offender. Since it is the Court which is ultimately to decide the matter, we would recommend that in the case of a voluntary winding up the voluntary liquidator be empowered to straightaway initiate action by applying to the Court for an order that the offender be prosecuted—notice of such application should be given to the Registrar and to the offending party and the Court after hearing all the parties concerned should be empowered to make such order as it deems fit in the matter. Accordingly, we would recommend that in place of sub-sections (2), (3), (4), (5) and (6) of section 545, the following section should be substituted :

“(2) If it appears to the liquidator in the course of a voluntary winding up that any past or present officer or any member of the company has been guilty of any offence in relation to the company, he shall forthwith refer the matter to the Court along with his report and notice of every such application to the Court shall be served on the Registrar and on the alleged offender. The Court may, after hearing the parties in a summary manner, direct the liquidator or the Registrar to prosecute the alleged offender”.

II. Supplementary Recommendations—“Ironing out the Creases”

15.41 Some of the provisions require modification and we have indicated our suggestions below under various provisions :

(1) Section 433—Additional grounds for winding up

- (i) An additional ground of winding up should be provided for, namely, that the company is unable to pay sums due and payable to its depositors or is able to pay such

sums only by obtaining additional deposits. This suggestion is on the lines of section 16(1) of the English Protection of Depositors Act, 1963.

- (ii) There should also be an additional provision in order to protect floating charges. If there is a floating charge of the company's property and/or undertaking and the Court is satisfied that the security of the creditor entitled to the benefit of the floating charge is in jeopardy, he should be entitled to a winding up order. The security of a creditor would be regarded or deemed to be in jeopardy if the Court is satisfied that events have occurred or are about to occur which render it unreasonable in the interests of the creditor that the company should retain power to dispose of the property which is the subject of the floating charge (See, for instance, the Companies Floating Charges and Receivers Scotland Act, 1972, section 4-Palmer's Vol. II-Part J).

(2) Winding up—Power to Registrar to petition on grounds of public interest

The Registrar is empowered to present a petition for winding up on the grounds mentioned in clauses (b), (c), (d), (e) and (f) of section 433. Wider power should be conferred, as in the English Act—section 35 of the 1967 Act. The position in England is summed up by *Palmer 22nd Ed. Vol. I pages 896, 897* as follows :

“The Secretary of State has power to petition the Court for a winding up order if it appears to him

- (a) from an inspector's report made under section 168 of the 1948 Act ; or
- (b) from information or a document obtained as the result of the inspection of the company's books or papers under Part III of the 1967 Act ; or
- (c) from information or a document obtained under section 18 or 19 of the Protection of Depositors Act, 1963 ;

that it is in the public interest that the body should be wound up. If the Court thinks it just and equitable for the company to be wound up, it will make a winding up order (section 35(1) of the 1967 Act).”

In *Re : Lubin, Rosen and Associates Ltd.** Megary J. indicated the special considerations which apply to a winding up petition by the Secretary of State in the following passage** :

“It seems to me that a petition presented by the Secretary of State under section 35 of the Act of 1967 is in a somewhat different category from a petition presented by a creditor or contributory. Creditors and contributories petition in their own interests as members of a class; under the section the Secretary of State petitions under a special statutory provision which comes into operation only when it has appeared to him that it is expedient in the public interest that the company should be wound up. The Secretary of State is necessarily acting not in his own interest but in the interests of the public at large...I think that the Court, without in the least abdicating any of its judicial and discretionary powers, ought to give special weight to his views.”

In view of the above suggestion, consequential changes in sub-section (5) of section 439 should be made. In proceedings for a winding up order in the petition of the Secretary of State the inspector's report is admissible as *prima facie* evidence but if there is evidence before the Court which casts doubt on the terms or conclusions of the report, the Court would listen attentively and then weigh the evidence before it.‡

(3) Vesting of property in the company

The existing Act does not provide for the vesting of property of the company in a Liquidator where a Company is being wound up by the Court. This is necessary for the purpose of effectually exercising his rights under section 457. At present under section 456(1) and (2), he

* (1975) 1 W.L.R. 122

** (1975) 1 W.L.R. 122 on pp. 128-129

‡ *Re: Armvent Ltd.* (1975) 1 W.L.R. 1679

is only entitled to the custody and control of all property and effects of the company and his control is as that of custodian of the Court. A provision like section 244 of the Companies Act, 1948 would enable him to more easily bring actions and effectively wind up the company. The effect of such an order is that it vests property in the Liquidator and not in his personal but in his official character—he does not become personally liable in respect of obligations attaching to the property (See *Greham v. Edge** and *Re: Ebsworth and Tidy—Tidy's Contract***).

(4) Rescission of winding up order

There is no power to rescind a winding up order after it has been duly drawn up and perfected even though obtained by mistake or is bad on the face of it (See *Palmer's Company Law 22nd Ed. Page 938*). But under the winding up procedure in Scotland, the Court has a discretion on the application of the Liquidator or any creditor or contributory to rescind winding up proceedings at any time and in exercising its discretion, the Court is required to consider the interests and the commercial morality and not merely the wishes of the creditors (See, for instance, *Telescriptor Syndicate Ltd.*†). It would be useful to have a provision enabling the recall of a winding up order.

(5) Appointment of Special Manager

It might relieve the strain on the Liquidator if a provision similar to section 263 of the English Companies Act, 1948 is incorporated—enabling the Liquidator to appoint a special manager of the estate and business of the company on such terms and conditions as the Court may direct. Section 263 of the English Act reads thus :

- “263. (1) Where in proceedings in England the official receiver becomes the liquidator of a company, whether provisionally or otherwise, he may, if satisfied that the nature of the estate or business of the company, or the interests of the creditors or contributories generally, require the appointment of a special manager of the estate or business of the company other than himself, apply to the Court, and the Court may on such application appoint a special manager of the said estate or business to act during such time as the Court may direct, with such powers, including any of the powers of a receiver or manager, as may be entrusted to him by the Court.
- (2) The special manager shall give such security and account in such manner as the Board of Trade directs.
- (3) The special manager shall receive such remuneration as may be fixed by the Court.”

(6) Section 536

Under this section, it has been held that transactions in the ordinary course of trade entered into and completed before the winding up order will in the discretion of the Court be maintained but to transactions which at the date of the winding up order rest only in contract, this section is not applicable (See *Ex parte : Pearson*).†† This at times causes great hardship.

Our proposal

- (a) Section 536 should be amended to empower the Court to validate (between the date of the winding up petition and the winding up order) any disposition of property of the company on such terms as it may think fit.
- (b) It should also be clarified that during this period the Court is empowered to sanction the carrying on of the business of the company and acts incidental thereto such as drawing up cheques, on its bank account.

*1888 20 Q.B.D 538 and 683

†1889 42 Ch.D. 23

††1903 2 Ch. 174

††1868 3 Ch. Appeals 443

- (c)¹ In view of the decision in *Re Aircraft Ltd** it has been doubted whether the powers can be exercised under such a provision before an order for winding up has been actually passed—this doubt should be removed and it should be clarified that orders under section 536(2) could be passed by the Court even though no order for winding up is actually passed.

(7) Sections 477 and 479

A provision similar to that contained in section 479 for arrest of absconding contributory should be made applicable to section 477 also. Section 477 should be amended accordingly so as to apply to the officers and directors of the company in liquidation. Further, sub-section (4) of section 477 should be amended to provide that the expenses incurred for the appearance before the Court should be borne by the person so summoned, and it is not for the Liquidator to pay or tender a reasonable sum to meet such expenditure.

(8) Section 494 (3)

In sub-section (3) of section 494 a right has been conferred on a member of the transferor company who did not vote in favour of the special resolution to express his dissent in writing addressed to the Liquidator and left at the registered office of the company within seven days after the passing of the resolution and to require the Liquidator either to abstain from carrying the resolution into effect or to purchase his interest at a price to be determined by agreement or by arbitration. We feel that this right should not be limited only to the members who did not vote but should also cover any member who desires his interest to be purchased. Accordingly, the words "who did not vote in favour of the special resolution" may be deleted from the sub-section (3) of section 494.

(9) Winding up of branch of foreign companies

Necessary modification should be made in section 584 to provide that in cases where the branch of a foreign company doing business in India is unable to pay its debts, the said branch should be deemed to be a company within the meaning of the Act and liable to be wound up under section 433 (c), (e) and (f). The winding up procedure provided for in Part VII should apply to the said branch as well.

(10) Committee of Inspection

Sections 464 and 465 of the Companies Act, 1956 provide for appointment and constitution of Committee of Inspection. The provisions in the Act with regard to the Committee of Inspection are only enabling, intended to assist and guide the Official Liquidator in discharge of his functions. But we are informed that the appointment of such Committees is rare and even in cases where such Committees have been functioning, the members do not take any interest at all since they are not aware of the affairs of the company, but are only interested in recovering their own dues. Moreover, after the incorporation of section 463 which provides for control of Central Government over the Official Liquidators and with the provisions regarding the discharge of his functions subject to the directions of the Courts, the provisions for further inspection by Committees of Inspection are superfluous. In view of these provisions in the Act, sections 464 and 465 have lost their significance and are no longer found to be useful by the Official Liquidators. We accordingly recommend that the sections relating to Committee of Inspection should be deleted. Consequently it may not be necessary to retain section 503 and section 504 also which deal with similar Committees in a voluntary winding up.

(11) Destruction of records

We are informed that some of the Official Liquidators have problems of suitable accommodation for sorting out of the old record of companies in liquidation. There are no separate rules for destructions of records in the custody of the Official Liquidators. Under the rele-

vant provisions of the Act, companies are required to maintain and preserve records for a period of not less than eight years. It may be considered whether the Official Liquidator could be instructed to keep only records for a period of ten years prior to the relevant date and destroy all other records. This is subject to any special circumstances that might necessitate the preservation for a longer period with regard to any civil or criminal action that might be taken in the particular case.

(12) Special Acts

Some of the States have passed legislations for wiping out the debts owed by persons like agriculturists, labourers and artisans if their income does not exceed Rs. 2,000/- in a year. These State legislations are in pursuance of the laudable object to wipe off those debts which were taken from the local money lenders and were in the nature of real usurious loans and were inequitable because of the weakness of the borrowers. The State legislatures while passing such laws have given exemptions to loans taken from Government companies and co-operative banks etc. (e.g. the Kerala Debt Relief Act). No such exemption, however, has been given to the loans due to the companies in liquidation. It would be readily accepted that the loans taken from the companies and the loans taken from individual money lenders stand on a different footing. Loans from companies are akin in this respect to loans from banks—and bank loans are normally exempted from debt relief legislation. The reason is that these debts were given in the normal course and were not given as usurious loans. Some of the laws have not wiped off but have provided a period of moratorium for repayment of loans in very small instalments. In such cases the Official Liquidator has greater difficulty because he cannot complete his winding up proceedings, as the instalments are in such small denominations. This unnecessary delay adds to the problems (and the costs) of winding up proceedings. We would, therefore, suggest that the Central Government may take up with the State Governments the question of exempting the loans taken from the companies on the same basis as exemption given to the co-operative banks and societies.

(13) Power to order inquiry of Official Liquidator's conduct

There is no provision in the Act for enabling the Court to hold an inquiry against the conduct of the Official Liquidator, although there is provision in section 463 of the Act for the Central Government to hold such an inquiry. This appears to be a lacuna which should be removed so as to provide that the Court may, for reasons to be recorded in writing or on an application made to it for the purpose, order an inquiry into the conduct of the Official Liquidator in connection with the affairs of the company which is being wound up by the Court, and make a report containing its recommendation as it may think fit to the Central Government and such report shall be acted upon by the Central Government.

(14) Liquidation expenses

The Committee has been told that expenses incurred by the Liquidators in connection with taking into his possession, the assets of the companies in liquidation and subsequent sale of assets are not allowed as a deductible expenditure by the income-tax authorities. In order to give a correct position of the amount realised by the Liquidators, it would be necessary to treat all such expenditure as liquidation expenses. This would enable Liquidators to distribute more to the creditors and contributories.

(15) Reducing the number of sections

There appears to be scope for reducing the number of sections by re-arrangement and also combining some of the sections into a single section. The manner in which this could be achieved is indicated in the Annexure.

III. Additional Suggestions

15.42 Some additional suggestions regarding winding up are made below:—

(a) Package offer of Assets

Although when a company is brought under liquidation, it is a recognition of sickness in the undertaking, it does not necessarily follow that the company as a living

entity must inevitably die and become extinct. Of course, if the situation has become beyond redemption there is no option but to finally dissolve the company. But, it is increasingly being recognised that the dissolution of companies not only affects the members, the creditors, but also the workers and the community at large. All efforts must, therefore, be made by the Court to see if it is possible to put the company back on its feet. A provision should, therefore, be made in the Act that notwithstanding the winding up proceedings, the Official Liquidator should prior to disposing of the assets of the company, try to dispose of the entire unit as a going concern. This will naturally depend upon the state of the company at that time. What we wish to emphasize, is that instead of treating the various assets of the company as separate units and that too only for the purposes of realising the cost, attempt should be made to see that an economic unit does not go out of production. A company which is about to be dissolved has its inevitable repercussions on the community. There would be large labour force, the company having engaged in the manufacture of essential goods for the community. All these have serious repercussions. Therefore, where the business previously carried on by the company in liquidation could be revived and continued and there are reasonably good prospects of re-establishing the company, every effort should be made by the Liquidator towards reconstruction of the company, under the directions of the Court. Our suggestion, that even if the company is being wound up effort should be made to run and restart it as a going concern is consistent with the object which the Legislature had in view when it enacted sections 15A and 18FA of the Industries (Development and Regulation) Act, 1951 which empowers the Central Government to take over the management of an industrial undertaking even if the undertaking is being wound up. If it is not possible to sell the undertaking as a going concern as one unit, there is no option but to dispose of various assets of the company separately. But that stage should come only after efforts to sell the undertaking as one unit or to restart it, have failed. Section 263 of the English Companies Act, 1948 enables the Official Receiver as the Liquidator of a company in liquidation to appoint a special manager of the estate or business of the company and even the business. The Court, if satisfied that the interests of the creditors or contributories generally require the appointment, may permit the business to be carried on by the special manager. Suitable provisions may be made in the Act which will relieve the Liquidator of considerable strain.

(b) Tenancy Rights and Sale of Undertakings

One of the ticklish problems which comes up in the disposal of the assets by the Court is of the tenanted premises of the company which is being wound up. In case the company itself owns the premises no problem arises. But in case the company was having tenanted premises, it would not be possible, in the present state of law, to sell the tenancy rights to third parties because of the prohibition contained in the Rent Restrictions Acts. A full bench of Delhi High Court* has held to a similar effect. Thus a valuable asset, viz. tenancy right which could bring a good deal of funds to the company is lost. We feel that this situation needs to be remedied. It will be seen that if the company had not been ordered to be wound up the landlord would not have been able to obtain possession of the premises, because of the Rent Act. The mere fact that the company is being wound up should not result in a bonanza for the landlord so that, he is able to get back possession of the tenanted premises in situation not contemplated by the Rent Act. As is well known, because of shortage of the accommodation the premises are fetching a great deal of premium. Most of the Rent legislations now recognize that even after the death of the contractual tenant, the tenancy rights will pass on to his legal representatives. We see no reason why some such principle be not applied in the case of a company which is being wound up. We feel that if the tenancy rights were allowed to be sold, it could bring in good amount to the company and help meeting its liabilities. We would, therefore, recommend that the law should be suitably amended as follows:—

- (i) It should be provided that in cases where the Court which has passed the order for winding up of the company apprehends that the liabilities of the company in liquidation would exceed its assets and that it is necessary in the interests of the general body of creditors, it may direct that the premises or space occupied by

the company in liquidation shall not be parted with or surrendered and on such direction being given, no person having any right, title or interest whatsoever in respect of such premises or space shall be entitled to claim or recover possession of such premises or space from the company in liquidation save and except by making an application to the Court (Company Judge) for that purpose. It should also be provided that the Company Judge would, after considering all the facts and circumstances of the case, including the question of hardship and inconvenience grant such permission on such terms and conditions as the Court deems fit and proper; such conditions may include direction for payment of such sums to the company in liquidation as the Court may think fit and proper. It would have to be further provided that this provision would have an overriding effect and would apply notwithstanding anything contrary contained in any other law.

- (ii) A further provision for expeditious winding up would be that where it is in the interests of the general body of creditors of the company, the Court may notwithstanding anything to the contrary in any other law for the time being in force, direct the Liquidator to sell as a going concern an undertaking of the company or a part thereof capable of being sold as a separate unit. Since such an order would necessarily include the premises or space in which such undertaking or unit is carried on and since it would affect the rights of the third parties, provision should be made that such third parties would be entitled to be heard before such an order is made. But on such order being passed by the Court (Company Judge), it should be provided that the purchaser would be entitled to use and occupy the premises and/or space in which such undertaking or unit is carried on. The Court would, after hearing all persons having an interest in the premises and/or space of whatever nature, pass directions for such sale and such sale may be effected on such terms and conditions as the Court may deem fit; the orders of the Court should also provide for the Court being empowered to make vesting orders in respect of such premises and/or space upon such terms as the Court may deem fit and such vesting order shall be binding on all persons having an interest or rights in such premises. If it is difficult to ascertain the nature or the number of persons having interests and rights in the premises and/or space, provision should be made for advertisements before passing appropriate orders.
- (iii) The above provision should also be made applicable only where the Court in which the company is being wound up, is of the opinion that the liabilities of the company will exceed its assets.

IV. Staff in the Office of Official Liquidator

15.43 With the coming into force of the Companies Act, 1956, the Official Liquidator is now in the whole-time employment of the Central Government. In his work, he is assisted by a regular complement of staff paid out of the Central Government funds. The staff provided to the bigger offices in Bombay and Calcutta is inadequate to cope up with the load of work. Rule 308 of the Companies (Court) Rules, 1959 enables the Liquidator with the sanction of the Court to engage special or additional staff on terms sanctioned by the Court. A number of persons have been appointed and their salaries are paid out of the funds of companies in liquidation. This has resulted in two different categories of employees, one being regular Government employees and the other being company paid staff without any regular grades and other benefits. This dual system creates its own tensions and problems and earlier it is dispensed with the better it is. We have made several recommendations in this Chapter which will increase the workload in the offices of Official Liquidators. Some of our suggestions also require qualified and trained assistants if the working of the offices of the Liquidators is to show any improvement. We would, therefore, recommend that the practice of employing company paid staff should be reduced to minimum and that these offices should be manned by regular Government employees only. In a phased manner, the non-Government staff should be absorbed in as convenient and expeditious manner as possible subject to their satisfying the prescribed requirements of age and qualification, etc.

V. Appeals in Winding Up

15.44 Section 483 of the Act provides that appeals from any order made or decision given in the matter of winding-up of a company by the Court shall lie to the same court to which, in

the same manner in which, and subject to the same conditions under which, appeals lie from any order or decision of the court in cases within its ordinary jurisdiction. This section corresponds approximately to Section 202 of the Indian Companies Act, 1913. As will be seen there is no definite indication given in Section 483 as to which order or decision is appealable. The matter has to be decided in each case. Different High Courts have interpreted the section in different ways. The Calcutta High Court* in *Madan Gopal Daga vs. Sachindra Nath Sen* had held that an order made in the winding-up of company by a single judge of High Court in order to be appealable under Section 202 of the Act of 1913, must satisfy the requirement of being a "Judgement" within clause 15 of the Letters Patent. The Rangoon and Allahabad High Courts have taken the same view. This view, however, was not accepted by the Bombay High Court in *Bachhraj Factories Ltd. Vs. Hirjee Mills Ltd.*** In arriving at this decision the Bombay High Court was influenced by the fact that most of the winding-up applications would be dealt with by District Court and a decision given by a District Judge was only appealable if the order fell within Order 43, of the Civil Procedure Code and, as, in its view, there were very few orders in winding-up which would fall within Order 43, it would mean that no order passed by the District Court would be appealable. In that case the order that was held to be appealable was an order of the Company Judge refusing to order the winding-up of the company and adjourning the petition as provided by Section 170 of the old Companies Act of 1913, which is section 443 of the present Act. This view of Bombay High Court was accepted by the Supreme Court in *Shankar Lal Aggarwala Vs. Shankar Lal Poddar*†. In the Calcutta case the order sought to be appealed against was an order by the Court summoning an officer for examination under Section 195 of the previous Act corresponding to Section 477 of the present Act. It will be seen that Supreme Court has not accepted the view that in order to be appealable the order should be judgment within the meaning of the Letters Patent or that it should fall necessarily within Order 43 C.P.C. It would be noticed that the difficulty which the Supreme Court found in accepting the argument that only those orders which fall within Order 43 C.P.C. should be appealable was for the reason that if the provisions of Section 104 and Order 43 C.P.C. were to be applied there would hardly be any orders which could be passed by the Court in winding-up proceedings which would fall under this category. This position was, no doubt, there under Section 171 of the old Act of 1913. But sub-section (2) of section 446 of the present Act provides for the entertainment of suit or claim before the Court which is winding-up the company. This provision did not exist in Section 171 of the Companies Act of 1913. The Court under the Act is defined as the High Court. In that view it is apparent that all orders which can be passed under Order 43 C.P.C. by the Court trying the original suit can now be passed by the Company Judge and there would be any number of orders which will come within Order 43 C.P.C. to satisfy the test of being appealable so that this particular difficulty is not there in view of expanded ambit of Section 446 (2) of the Act. Thus Section 483 as it is at present worded leaves it uncertain as to which orders are appealable or not. Different Courts could continue to take different view. Such a contingency is not in the realm of speculation because as noticed by the Supreme Court, the Courts in India have not agreed even after a century of consideration as to the exact meaning to be given to the word "judgment" in Letters Patent and the controversy has been left unresolved by the Supreme Court. To leave the question of competency of appeal in such an uncertain state is not desirable. We feel that there is urgent necessity to particularise the orders and decision which would be appealable under Section 483 of the Act rather than leave them to be spelt out and determined in each individual case.

Our proposal, therefore, is to amend Section 483 so as to provide that an appeal would lie from any order or decision given in the matter of winding-up of a company by the single judge in the following cases only :—

- (a) against a final order either admitting/allowing or dismissing the winding-up petition;
- (b) against an order which would fall within the ambit of Section 104 read with Order 43 of the Code of Civil Procedure;
- (c) against final orders in misfeasance cases awarding damages against directors/officers.

Section 446 of the Act provides for the suit or claims by or against the company to be decided by the Company Judge. At present a final order in each suit or claim becomes the subject matter of appeal. The result is that even decreeing of small amounts or claims would entitle a party to go

**Madan Gopal Daga vs. Sachindra Nath Sen* (1927) I.L.R. 55 Cal. 262

**57 Bombay I.R. 378

†(1965) 35 Company Cases 1 (SC)

up in appeal. We feel this to be unsatisfactory state of affairs. We see no justification why an appeal should be available against the order of single judge disposing of a suit or claim under Section 446 if valuation in dispute is less than rupees twenty thousand. We would, therefore, recommend that it should be provided that an appeal under Section 483 would lie against a final order passed under Section 446 of the Act only in case the amount or value of the subject matter of suit or claim before the single judge and amount or value involved in the suit or appeal is rupees twenty thousand or upward or that the order of the single judge involves directly or indirectly, property of like amount or value. This would thus, limit the appeal only in cases the valuation and claim was rupees twenty thousand or upward, it would also reduce the number of appeals and also correspondingly reduce the time that is spent in finalising winding up proceedings.

VI. General

15.45 We have been considerably agitated over the problems of delay in disposal of winding-up matters and thought of the ways and means to resolve it in order to expedite winding up proceedings. A suggestion has been made that a separate Tribunal should be set up for the purposes of dealing with winding up proceedings subsequent to the order of winding up and the powers vested in the High Courts should be vested in some other body or Tribunal. After carefully considering all the suggestions received including the one that has been mentioned, we feel that it will not be appropriate to create such a strict separate demarcation of keeping the High Court totally away from post winding-up order work. We would however suggest that if the following procedure is adopted it would help to expedite proceedings, namely :—

- (i) Section 435 of the Companies Act provides for the High Court delegating its powers to the District Court—in practice we find that this is rarely done. This could be more often invoked. We are providing for an autonomous Company Law Board. Section 435 should be amended to include the power of the High Court to delegate this power to the Regional Board. We cannot presume to suggest what powers should be delegated but, we can only hope that the High Courts would utilise this power and would delegate a large number of provisions to the Regional Boards, which we hope might help to expedite matters.
- (ii) Having regard to the recommendations in Chapter IV that all matters pertaining to small companies should be with the District Court, so that the large work load at present with the High Courts would be released.
- (iii) We would, however, like to suggest that apart from delegating the powers under section 435, it would be helpful for the expeditions disposal of the winding-up proceedings if one or more Judges of the High Courts where there are large number of companies in winding-up would throughout the week devote themselves exclusively to company matters. We make this suggestion in all humility and without detracting or attempting to detract the powers of the Chief Justices of the High Courts in many manner to make the order for distribution of work to the various Judges of the High Court.

VII. Voluntary Liquidation

15.46 Voluntary liquidation is of three types viz. (1) Members' voluntary winding-up (2) Creditors' voluntary winding-up and (3) Winding up subject to supervision of Court. Prior to 1936 there was only one type of voluntary winding-up. The distinction between the members' voluntary winding-up and creditors' voluntary winding-up was introduced in the Act by the Companies (Amendment) Act, 1936, with a view to enabling even solvent companies to go into liquidation if they so desire. Accordingly, two groups of sections, viz. Sections 208A to 308E and Sections 209A to 209H were added to the Indian Companies Act, 1913. This position continued even in the new Companies Act of 1956. The legal system prevailing in other countries which did not inherit the Anglo-Saxon laws like U.S.A., France and Japan has a much simple procedure on similar matters and there appears to be no difficulty being experienced in those countries. The Committee after examining the two sets of sections in the Act viz. Sections 489 to 497 and Sections 500 to 509 is of the view that there is no significant difference in the procedure for members' and creditors' voluntary winding up. The only difference being that a meeting of creditors under section 500(1) has to be convened and the creditors have a right to nominate a person of their choice as a liquidator. We feel that the procedure relating to the two types of voluntary winding-up could be combined

into one with such adaptations as might be necessary to meet the requirements of the existing two types of voluntary winding-up. We, therefore, recommend that the two separate sets of Sections 489 to 497 and Sections 500 to 509 should be combined to provide for one type of voluntary winding up. For this it should be provided that when there are no creditors at all or the assets are sufficient to pay off all the liabilities in full, then there should be no need to call a separate meeting of creditors. The declaration of solvency as required at present should be adequate. In all other cases, a separate meeting of creditors in addition to the meeting of the members of the company should be called earlier to the meeting of the members on the same day but at a different time to pass the necessary resolution taking the company into voluntary liquidation. It should also be provided that the person nominated by the creditors at their meeting shall be the liquidator of the company. In case no such person is nominated, or the meeting of creditors also approve the person to be nominated by the members at their meeting, then the person nominated by the members shall act as voluntary liquidator. In view of this recommendation some of the Sections e.g., Sections 495, 498, 502, 503 and 504 would become redundant.

15.47 The third type of voluntary liquidation, viz. winding-up subject to supervision of the Court (Sections 522 to 527) has been in the statute book for quite some time without any significant advantage. We have been informed that the number of such type of liquidations as on 31st March, 1977 is 32 only. In the majority of cases the official liquidators attached to the High Courts are acting as the liquidators. We also notice an anomaly in the legal status of the liquidator in this type of liquidation. While in majority of cases, it is the official liquidator who acts as liquidator, his status continues to be that of the voluntary liquidator in which event his powers are not enlarged, although, the Court might exercise more powers. This perhaps cannot be the intention in bringing on scene the official liquidator in place of the voluntary liquidator. That apart, there appears to be no special advantage in keeping this hybrid variety of winding-up specially, when there are other sections viz. Sections 440 and 515 to protect the interest of any person interested in liquidation. The views expressed by the various quarters in this regard recommend abolishing this distinction of voluntary winding-up. We may add that the Jenkins Committee also had occasion to examine the usefulness of retaining the corresponding provisions in the U.K. Companies Act. The said Committee has also recommended that this type of winding-up should be abolished. We are in agreement with the recommendation of the Jenkins Committee. We, therefore, recommend that the provisions in the Act relating to winding-up subject to Court's supervision (Sections, 522 to 527) should be deleted.

Declaration of solvency

15.48 Under section 488 a declaration of solvency has to precede a members' voluntary winding-up. The declaration has to be made jointly by the majority of directors at a meeting of the Board. The declaration verified by an affidavit must contain the particulars mentioned in sub-section (1) of Section 488. As in the case of winding-up by Court, the liquidator in voluntary winding-up must also be able to get the books of account of a company of which he is appointed as liquidator. We, therefore, recommend that the declaration of solvency in addition to the particulars required to be stated therein should also contain a statement regarding the address where the books and other records of the company are kept and also the name/names, address and designation of person/persons who is/are charged with the responsibility of producing books, records etc., and also statement of affairs if required by voluntary liquidator.

Report of Official Liquidator—Sections 497 & 509

15.49 In voluntary winding-up, the entire proceedings are carried out in accordance with the direction of the members, or creditors as the case may be. Unless, some aggrieved person applies to the Court for making suitable order, the entire process is not subject to scrutiny of either the Court or any other outside agency. Sometimes, it is likely that directors with improper and or dishonest motives put the company into voluntary liquidation, so that their mismanagement and/or misapplication of company's funds would be covered up, and the whole affair is quietly forgotten. The observations of the Commission of Enquiry* on the administration of Dalmia-Jain companies regarding the manner in which some

*Part 5 : Enquiry Report on the administration of Dalmia-Jain Group : Pages 433 and 810.

companies in the group had been wound up voluntarily, and the methods that were adopted by the management led to constituting Daphtary-Sastri Committee which recommended that sections 497 and 509 be amended to provide for scrutiny by Official Liquidator, and until that is done, company shall not be dissolved. Accordingly sections 497 and 509 were amended in 1965 by substituting new sub-sections (3), (4) and (5). As a result of this amendment, the voluntary liquidator now, after the final meeting, is required to file an account showing how the winding-up has been conducted, and the manner in which the property of the company has been disposed of with the Registrar and the Official Liquidator within one week after the final meeting.

15.50 The Official Liquidator under sub-section (6) of sections 497 and 509 on receiving the account, has to scrutinise the books and papers of the company. After such scrutiny, if the Official Liquidator is of the opinion that the affairs of the company have not been conducted in a manner prejudicial to the interest of its members, or to the public interest, he has to file a report in the Court to that effect. The company shall be deemed to be dissolved only thereafter. Prior to the amendment, three months after the laying of the accounts at the final meeting and filing copies of the same with the Registrar, the company was deemed to have been dissolved. This position exists even now in most of the other countries of the world.

15.51 The amendments introduced in 1965 have imposed a heavy and onerous burden on the Official Liquidators. After the affairs of the company are finally concluded, the Official Liquidators has to scrutinise the books, and other records of the company from the date of the incorporation upto the date of winding up, and also, carry out further investigation as may be directed by the Court; and then file his report. This duty on the Official Liquidators demand professional skill, which in the very nature of things can only be rendered by professionals like accountants and lawyers. In fact, it would be a virtual investigation into the affairs of the company since the incorporation of the company. Such an important task cannot be treated lightly, and cannot be discharged effectively unless the person entrusted with this work has the necessary expertise. We have been informed that the Department being aware of the difficulties of the Official Liquidators has provided certain guidelines for selecting companies for such scrutiny, and for confining their examinations covering the period of liquidation only. For the earlier period, the audited accounts could be taken as correct unless there are glaring irregularities or there are specific complaints against the company and or its officers. We are further informed that, the Official Liquidators with already heavy load of work, are not in a position to examine the books and files of companies and submit the necessary reports. As a result, there has not been any appreciable disposal of cases. There is a back-log of a number of cases in which final reports have not yet been filed by the Liquidators. This is evident from the following table ;

<i>Particulars</i>	<i>Year ended</i>		
	<i>31.3.75</i>	<i>31.3.76</i>	<i>31.3.77</i>
(i) Number of reports pending	794	778	758
(ii) Number of reports scrutinised	45	65	111
(iii) Number of reports in which adverse comments made	—	1	3

It will be seen from the above that the number of cases in which adverse reports have been filed is not even one per cent. Therefore, even assuming that the existing practice should be continued it is not likely that in many cases adverse reports would be called for. This is because of the existing law, which contains a number of regulatory provisions, which we presume has by and large improved the working of the corporate sector. The corporate sector is also subject to discipline now.

Views of Administrative Reforms Commission

15.52 The Working Group set up under the Administrative Reforms Commission on Company Law in 1967, also had occasion to examine this matter, and felt that the complaints by the Official Liquidators of the heavy burden cast on them as a result of amendment

were justified and were also supported by several witnesses for the profession who gave evidence before the Group. The Working Group recommended in para 13.9 that the legal provisions may suitably be amended to relieve the Liquidators of their additional burden of work, which they can hardly carry out. In their view, this important work of investigational nature should be undertaken by the Department through different regional and State Organisations only in the case of public companies.

15.53 We thus feel that there is no need for the scrutiny by the Official Liquidator as provided in sub-section (6) of Sections 497 and 509. We feel that the regulatory machinery has functioned quite effectively. Also the scrutiny by Official Liquidator has not indicated any serious defaults. We, therefore, feel that requiring the Official Liquidators to scrutinise the accounts before allowing the company to be dissolved does not serve any useful purpose. In view of this we recommend that sub-section (6), (6A) and (6B) of sections 497 and 509 should be deleted. This will require consequential changes in sub-section (3) of sections 497 and 509.

15.54 Prior to the Companies (Amendment) Act, 1965, the procedure was that the liquidator was required to send to the Registrar a copy of the accounts and the Registrar on receiving the same was required to register it. On the expiry of 3 months from such registration, the company was deemed to be dissolved provided that the Court, on an application of the liquidator or any interested person deferred the date of dissolution. In view of our suggestion to do away with the scrutiny by the Official Liquidator, the procedure provided in the sections 497 and 509 prior to the Amendment Act of 1965 will have to be restored with the modification that the period of 3 months mentioned in the old sub-section (5) should be raised to 6 months. We would further suggest that this sub-section should also enable the liquidator to move the Court for deferring the date of dissolution. Section 551 read with rule 327 of the Companies (Court) Rules, 1959, requires the liquidator to file a statement containing the prescribed particulars duly audited by a person qualified to act as an auditor of a company. In our view, this is a sufficient safeguard against misuse of authority by the Liquidator.

15.55 Section 559, at a present, permits an application to be made to the Court by the Liquidator or any other interested person within 2 years of the date of dissolution, for declaring the dissolution of a company to be void. As the scrutiny by the Official Liquidator is being dispensed with, we recommend that the period of 3 years under section 559 should be increased to 5 years. We find that section 559 only permits Liquidator or any person to move the Court for declaring the dissolution to be void. There is no specific power given to the Registrar to move the Court. We suggest that the Registrar should also have a similar power to move the Court to declare the dissolution void.

Filing of Accounts by Liquidators

15.56 Liquidators, both in winding-up by the Court, and in voluntary liquidation are required to file statement of accounts periodically with respect to the proceeding in, and position of, the liquidation. The form of account to be filed by the liquidators has been provided in the Companies (Court) Rules, 1959. We have noticed certain anomalies in filing of the accounts. While the Official Liquidator, who is subject to the control and supervision of the winding up Court, and also administratively controlled by the Central Government, is required to file four sets of accounts in a year under sections 462 and 551 of the Act, the voluntary liquidator who is not subject to any such control, is required to file only two sets of accounts with the Registrar. The Official Liquidator in-charge of companies wound-up prior to 1st April, 1956 is, however, required to file only one annual account with the Court pursuant to section 244 of the Indian Companies Act, 1913. The period upto which the half-yearly accounts have to be made up under section 462 and section 551 is also not uniform. The half-yearly accounts under section 462 which are required to be filed by the Official Liquidator with the Court should be made upto 31st March and 30th September while the half-yearly accounts required to be filed by all the liquidators under section 551(I) are required to be made upto a period of every six months commencing from the date of winding-up. It is needless to point out that the periods covered by the half-yearly accounts would over-lap in some cases, and the position with respect to proceedings in, and position of the liquidation may have to be repeated more than once. The prescribed form under the Companies (Court) Rules, 1959 of statement of accounts to be filed by the Official Liquidator (Form No. 144 and Form No. 153) is practically the same. In the case of accounts filed by the Official Liquidator under section 551, no audit is necessary if section 462 is attracted. Further, the accounts filed by the

Official Liquidator in the Court are audited by a Chartered Accountant appointed by the Court or, if the Court so directs, by the examiner of Local Fund Accounts of the State concerned. The audit is a complete check of the accounts of the Official Liquidator, and each of the companies in liquidation in his charge. After the audit of the accounts, the auditor shall forward to the Registrar a certificate of audit relating to the accounts with his observations and comments, if any. Therefore, the statement of accounts filed with the Registrar pursuant to section 551(1) is not subjected to any scrutiny. The statement of account filed by the voluntary liquidator is, however, scrutinised by the Registrar and clarifications from the liquidator are sought, if necessary.

15.57 It is within the knowledge of everybody that much progress cannot be made within a short period of six months by the liquidators in realising and distributing the assets of the company. Therefore, half-yearly accounts may not bring forth much information and serve any useful purpose. Besides, the Official Liquidators are required to file multiple accounts for the same period without any significant advantage. Filing of four sets of account has inevitably increased the work of the Official Liquidators apart from subjecting the companies in liquidation to additional expenses by way of audit fees etc. We, therefore, recommend that the Official Liquidators instead of filing two sets of accounts as at present need file only one set of accounts for one period made up to 31st March in each year under section 462 only and a copy of the same account simultaneously to be filed with the Registrar. No separate account need be filed with the Registrar. However, in case of voluntary liquidator, the present six monthly report be retained. But instead of having different forms of account, there should be a single form of account for purposes of section 462 and section 551(1) with suitable scope for adaptation, which can be worked out by the Department.

STATEMENT CONTAINING SUGGESTIONS
FOR SIMPLIFYING SECTIONS IN PART VII

S. No.	Sections	Remarks
1.	425, 426, 427	427 could be clubbed with 426 by adding an Explanation. 427 proviso (c) to be read with 470(1).
2.	440	In view of the Committee's recommendation suggesting deletion of sections 522 to 527, there is no need for this section.
3.	441, 442, 444, 446	These sections, in addition to sections 443, 453 and 456(2) could all be combined into one section.
4.	454	Instead of the section setting out the requirement of statement of affairs, a Form as provided in Rule 124 (read with Form 57) may be prescribed.
5.	448 to 452	All these sections relating to appointment of Official Liquidator, his powers etc. could be combined in not more than one or two sections.
6.	456 and 457	These sections relating to assistance to the Liquidator could be combined into one section. Section 456(1A) and (1B) could be added to section 457.
7.	459	This section, dealing with legal assistance to the Official Liquidator, can go with section 457.
8.	460	This section, dealing with control of Official Liquidators' powers, could be combined with sections 448 to 452.
9.	464/465	These sections, dealing with Committee of Inspection, may be deleted for the reasons discussed in the Report.
10.	466	This section could go with section 443 dealing with powers of the Court.
11.	468, 470	These sections can go with the other sections dealing with Court's power.

CHAPTER XVI

ADMINISTRATIVE MACHINERY

Introduction

16.1 The terms of reference of the Committee, as given in para 5 (v), specifically require us to consider and report on improvements, if any, which are required to be made in the present administrative structure and procedure regarding the enforcement of the provisions of the Companies Act, 1956.

16.2 The Companies Act, 1956, incorporates a social philosophy which visualises the dominance of public interest which our country has accepted in its Constitution. At the time when the Company Law Amendment Bill, which later became the Companies Act, 1956, was debated in the Parliament, the question arose as to whether or not the administration of Company Law ought not be entrusted to a statutory board or Commission independent of Government department. This necessity was emphasised because the Government was taking the power to regulate some of the important functions of private management like managerial remuneration, inter-corporate investment, or the appointment of directors on Board of companies to prevent oppression or mis-management. This view, however, did not prevail. Instead, with a view to ensuring that matters will be examined objectively and uninfluenced by executive considerations, the Act, as originally stood, constituted an Advisory Commission whose duties were to enquire into and advise the Central Government on various important matters mentioned in the statute and all other matters specifically referred to the Commission by the Central Government. Subsequently, the provisions constituting the Commission viz., sections 410 to 415, were deleted by the Companies (Amendment) Act, 1963. By the same Amendment Act, Part IA was incorporated in the Act and by virtue of section 10E of this Part, a Board of Company Law Administration, to be called the Company Law Board, was constituted. In recommending this amendment, the then Finance Minister who introduced the Bill in the Lok Sabha stated that it was felt that it would be better if the administration of Company Law was carried on by a Board acting in a quasi-judicial manner and exercising quasi-judicial powers. It was also mentioned that the Board would carry on the work delegated to it by the Government and that, apart from policy matters which would be considered at a higher level, wherever necessary, the Board would be fairly free to carry on the duties that are delegated to it.

16.3 At the same time, the Department of Company Law and Investment Administration which had been constituted in 1955 was merged with the Ministry of Finance at the end of October, 1963. Simultaneously, Board of Company Law Administration (or Company Law Board) was created by the Companies (Amendment) Act, 1963, which started functioning in February, 1964. The Company Law Board, as it was constituted, consisted of officers from the old Department of Company Law and Investment Administration and was not different from other Departments of the Government. Soon thereafter there was some rethinking and the separate Department of Company Law Administration was revived within a period of 10 months, though under a new name, viz., Department of Company Affairs. The close affinity between and almost a complete identity of the Department and the Board was apparent from the fact that the Chairman and Members of Board were none other than the Secretary, Joint Secretaries, etc. The Working Group of Administrative Reforms Commission (1968) headed by Mr. D.L. Mazumdar, ex-Secretary of the Department of Company Law Administration, found this co-existence of the Company Law Board and the Department of Company Affairs rather incongruous. It, therefore, recommended that the Company Law Board be abolished and the responsibility for administering the Act be put on the Department of Company Affairs alone. This recommendation was obviously motivated by the fact that by the very existence of the Company Law Board, an impression was sought to be given that the decision was taken by an independent authority whereas in fact the decision was made in the same manner as in any other Government Department. The Working Group, however, did not advert to the question which, in our opinion, is the real crux of the matter, namely, whether for the proper and effective administration of the Act, it was not necessary to constitute a genuinely independent Company Law Board manned by

persons acting in a quasi-judicial capacity, the functions and powers of the Board and the Department being clearly defined and demarcated by statutory provisions.

Role of the Company Law Board

16.4 Section 637 of the Act empowers the Central Government, with some restrictions, to delegate, by notification in the Official Gazette, any of its powers and functions to the Company Law Board. The Central Government has been issuing various notifications delegating powers to the Company Law Board. The last and the present notification delegating the powers to the Company Law Board was issued on 18th October, 1972. By the said notification, the Central Government has delegated to the Company Law Board the powers and functions of the Central Government under the Act other than those excepted in the notification.

16.5 The Company Law Board has also with the previous approval of the Central Government prescribed the Company Law Board (Procedure) Rules, 1964, in order to discharge its delegated functions.

16.6 In addition to the powers to administer the Act under delegation from the Central Government, some of the judicial powers which were previously vested in the High Courts have now been conferred on the Company Law Board statutorily under the Amendment Act of 1974. These powers are those under sections 17, 18 and 19 relating to the amendment of the memorandum of association, section 79 relating to the sanction of issues of shares at a discount, section 141 regarding extension of time for filing of particulars or for registration of charges and section 186 dealing with the powers to order calling of general meeting other than the annual general meeting of a company. It may be emphasised that this amendment in the Act was brought in the wake of the recommendation of the Administrative Reforms Commission which had taken the view that the powers exercised by these sections are more of administrative than judicial nature and should be taken away from the Court and given to the Central Government. The Joint Select Committee of the Parliament which went into the Bill, however, felt that the powers to be exercised under the said sections were of quasi-judicial nature, should not, therefore, be exercised by the Central Government, and must be conferred upon the Company Law Board which, in its view, was fit to exercise such powers. It was in this context that the statute substituted the "Company Law Board" — and not the Central Government — for the Court in those sections. While powers under sections 17, 18 and 19 are exercised by the Company Law Board through a Bench of two members, those under section 79 can be exercised by a single member in pursuance of the rules framed by the Board called the Company Law Board (Bench) Rules, 1975. Three Benches — one each at Bombay, Calcutta and Madras — are functioning in addition to the Headquarters of the Board at Delhi. Section 2 (18A) of the Act also empowers the Company Law Board to decide the question as to whether two or more individuals, associations, etc., constitute or fall within a "group". The Company Law Board has also been delegated by the Central Government its powers under section 111 (4) of the Act to hear the appeals against refusal to register transfer of shares. The procedure for hearing appeals under this section is specifically laid down under the Companies (Appeals to Central Government) Rules, 1957, and the appeals are heard by a single member of the Company Law Board.

Proposed Administrative Set-up—The Approach

16.7 Certain broad considerations which we have, therefore, kept in view when making our suggestions for structural changes in the existing administrative machinery are :—

- (a) the need for speed and efficiency with which decisions are made both on the judicial and the administrative side;
- (b) the need for identifying functions which are purely administrative and those which have an adjudicative element, necessitating a judicial approach;
- (c) the need for having a fresh look at the system of prosecutions in the Act in order to see whether or not it is possible to provide for a more effective deterrent by way of imposition of penalty without imprisonment where this is feasible, and to limit cases of imprisonment to more serious offences involving the affairs of the companies;

- (d) the need for bringing in greater decentralisation of authority, thus taking the authority exercising the power as near to the company's seat of operation as possible, especially keeping in view the question of costs likely to be incurred by smaller companies.

16.8 There is also the strong feeling, expressed almost without any reservation, by all the organisations and individuals who had submitted their memoranda to the Committee or had appeared before it that there is a definite need for a quasi-judicial tribunal, independent of the executive authority of the Central Government, which should not only ensure that the Act is administered in a manner which gives the affected party a right to be heard but also see that the decisions are taken uninfluenced by executive considerations. In the circumstances, what needs to be ensured is an in-built system which combines the application of judicial mind with speed and administrative efficiency, first, in respect of those matters which are at present with the Central Government though delegated to the Company Law Board and, secondly, in respect of such matters as are statutorily with the Company Law Board.

16.9 We, therefore, feel that appropriate solution would lie in statutorily constituting an independent quasi-judicial Company Law Board broadly on the lines of the Income-tax Appellate Tribunal, as provided in section 252 of the Income-tax Act, 1961 with Benches permanently located at different Regions, including Delhi, so that matters are heard at places not far removed from the offices of the companies. In order to see that the Company Law Board functions independently as a statutorily constituted Tribunal and is independent of the Department of Company Affairs, it would be necessary to frame rules for recruitment and conditions of service of the persons appointed as members of the Company Law Board by a Presidential notification under Article 309 of the Constitution of India, read with the relevant section of the Companies Act dealing with the constitution of the Company Law Board, as in the case of the Income-tax Appellate Tribunal. We are also anxious to see that suitable qualifications are prescribed for recruitment as members of the Company Law Board.

16.10 Under rule 3(2) (ii) of the Income-tax Appellate Tribunal (Recruitment and Conditions of Service) Rules, 1963, the Assistant Commissioners of Income-tax, who are members of the Indian Revenue Service and who have served for at least three years as such are eligible to be appointed as accountant members. The rules also provide for induction of the members of the Central Legal Service as judicial members of the Tribunal. Besides, the rules also permit direct recruitment of practising lawyers and accountants or members of the Judicial Service. In the case of the Department of Company Affairs, there exists a specialised service, namely, the Central Company Law Service which has two distinct branches, the legal branch and the accounts branch and the members of this Service are persons drawn from the legal and the accounting profession. We feel that on the same analogy, members of this Service should be eligible to be appointed to the Company Law Board. In addition, provision may also be made for direct recruitment of members from the accounting and the legal professions.

16.11 The Income-tax Appellate Tribunal Members (Recruitment and Conditions of Service) Rules, 1963, also provide for the constitution of a Selection Board for recruitment of the members of the Tribunal. The Selection Board consists of a nominee of the Minister for Law, Justice and Company Affairs, the Secretary to the Department of Legal Affairs, the President of the Tribunal and such other persons, if any, not exceeding two as the Minister for Law, Justice and Company Affairs may appoint. On similar lines, we would suggest that the recruitment rules for the Company Law Board should provide for a Selection Board consisting of a nominee of the Minister for Law, Justice and Company Affairs, the Secretary to the Department of Company Affairs, the Chairman of the Company Law Board and two other persons to be appointed by the Minister for Law, Justice and Company Affairs. In general, we would recommend that the recruit rules for the members of the Income-tax Tribunal may be advantageously looked into and adapted suitably for the purpose of laying down the rules for recruitment of the members of the Company Law Board. We would also recommend the modification of the existing provisions relating to the constitution and the function of the Company Law Board in the following manner :—

- (a) The power to constitute the Company Law Board shall remain with the Central Government as at present, but the power to constitute the Regional Benches with permanent secretariat which we recommend for the purpose of administering the Act shall be with the Company Law Board.

- (b) The Company Law Board alone shall have powers to frame the rules and procedures for the conduct of its business and the business of its Regional Benches.
- (c) The Company Law Board including its Regional Benches shall have powers of the Court under the Code of Civil Procedure not only in respect of matters specified in the present sub-sections (4C) and (4D) of section 10E, but also in respect of the powers conferred upon it or the Regional Benches by the Act.
- (d) The Chairman of the Company Law Board shall ordinarily be one who is qualified to be appointed as a judicial member. He shall hold office until he attains the age of 65 years or until he has served for a period of five years as the Chairman of the Company Law Board, whichever is earlier. The other members of the Board must be persons having legal and accounting qualification, in addition to the experience of the working and administration of the Companies Act and allied statutes and of corporate sector.
- (e) The present sub-section (6) of section 10E should be modified to provide that the Company Law Board or any of its Regional Benches, in exercise of their powers and discharge of their functions, shall not be subject to the control of the Central Government.

16.12 We have gone through the provisions of the Act, which confer certain powers and functions on the Central Government, the Company Law Board and the Court and also the powers and functions of the Central Government which are being at present exercised by the Company Law Board under delegation from the Central Government. We have reallocated these powers and functions to these authorities on the lines of our thinking expressed in paras 16.7 and 16.8 of this Chapter. Broadly, we have favoured the retention of the existing powers under the Act with the Central Government itself where a more intimate and detailed knowledge arising out of day-to-day administration of the Act is an essential prerequisite for the exercise of the power or the function. The powers relating to certain approvals under the Act have also been retained with the Central Government on the reasoning that, besides the considerations mentioned earlier, there is also an economic angle, or the question of public interest, involved. Certain powers, like the rule making power, have to be necessarily retained with the Central Government. In some cases, we have also suggested for a reference being made by the Central Government to the Company Law Board. The suggested reallocation of the powers and functions is presented in a tabulated form respectively in Annexures IA, IB and IC to this Chapter in respect of the Company Law Board, the Central Government and the Court. The powers and functions mentioned in these Annexures do not include the power to impose penalties which are dealt with herein below;

Penalties and Prosecutions

16.13 According to the present scheme of the Act, penalties are by way of fines in some cases, by way of imprisonment in some others and also by way of fine as well as imprisonment in still other cases. The penal provisions, as far as the substantive part is concerned, are scattered throughout the Act and are, with some exceptions, invariably mentioned in the section itself which enjoins certain compliance on the company or its officers. The persons against whom prosecution may lie under the Act are as follows:

- (a) the company ;
- (b) its directors and officers ; and
- (c) any person committing an offence under the Act.

16.14 Section 621 of the Act recognises three complaining authorities, namely, (a) the Registrar, (b) the share-holder of the company, and (c) a person authorised by the Central Government, for the purpose of prosecution for any offence under the Act. The Central Government has authorised the Regional Director and the Registrar to file complaints in respect of certain sections on their own, and has also issued instructions as to the sections in respect of which prosecution can be launched only after consultation with the Headquarters at New Delhi. Summary trial for any offence against the Act is permissible only in presidency towns and that too in respect of an offence which is punishable with fine only. Generally, however, the jurisdiction to try offences lies with a Presidency Magistrate in a presidency

town or a Magistrate of 1st Class in any other case. The Company Prosecutors, who are attached to the offices of the Registrars in each Region, represent the Registrar or the Regional Director before the Court. The Company Prosecutors are of the status of Public Prosecutor.

16.15 A look at the sections which provide for punishment or fine and/or imprisonment for any offence against the Act shows that the present scheme of prosecution suffers from the following defects :—

- (a) Even where the non-compliance with the legal requirement is already on record and hardly requires any further proof, the Registrar has to launch a prosecution and after protracted proceedings in the Courts of the Magistrates, the case may be disposed of by the imposition of a small fine and without necessarily ensuring the compliance of the law in future. Generally, prosecutions of this type are covered by the failure to file returns or documents with the Registrar.
- (b) Cases of technical violation which provide for fine as well as imprisonment as an alternative generally end with imposition of fine only, the lack of any specific *mens rea* being the governing consideration for not inflicting imprisonment.
- (c) Even where imprisonment is provided, it is usually to be backed by circumstances indicating wilful act or negligence. The difficulty of proving such wilful act, negligence or omission generally comes in the way of securing the deterrent punishment that is visualised.
- (d) Experience shows that not only it is costly and time-consuming for the Department to handle the large number of prosecutions to secure compliance with the law but is also hardly effective in view of the fact that a large number of complaints relates to violations by small companies which constitute the bulk of the total number of companies in India.
- (e) In many cases, fines imposed are so abnormally low that it is not worthwhile prosecuting the companies for the violations.
- (f) Quite a good number of prosecutions does not involve examination of witnesses and can be disposed of with reference to available records. These records are, however, company records and may require the application of legal and accounting mind rather than the application of the knowledge of the Criminal Procedure Code, the Indian Penal Code or the Indian Evidence Act in any considerable depth. It may not be reasonable, therefore, to impose additional burden on the magistrates who are already saddled and are more equipped, by virtue of their training and experience, to deal with crimes of more specific and common nature.

16.16 We have also received complaints from individuals and organisations submitting their memoranda or appearing for oral hearing before the Committee that better results may be secured by substitution of the existing provisions for realisation of fines through Court proceedings by a system of penalty as provided in the Income-tax Act. Having taken note of the difficulties in the present system of prosecution and the substance of the representations made before us, we are recommending a schematic change in respect of the penal provisions on the following criteria :—

- (a) Wherever the punishment inflicted at present is by way of fine only, it should be substituted by an equal amount of penalty with a provision for further penalty per day of default on the expiry of the last day mentioned in the show cause notice for imposition of penalty.
- (b) The present jurisdiction of the Court in respect of trial of any offence against the Act where the offence presupposes the existence of actual or implied *mens rea* in terms of the existing language in the sections like wilful default, having knowledge of the things or wilful negligence or omission or otherwise and is punishable by imprisonment and/or fine should be retained.
- (c) As far as possible, there should not be any prosecution or imprisonment to begin with. Instead, a penalty should be imposed, with certain directions, where necessary, to comply with the provisions of the law within stipulated time mentioned in the direction. The directors and officers of the company should be proceeded

against to secure imprisonment before the Court only when the penalty imposed is not paid and the directions given are not complied with.

- (d) The Registrar and the Company Law Board, including the Regional Benches, should be clothed with the powers of a Court so as to empower them to take cognizance of, and to impose penalties for, any infraction of certain specified provisions of the Act.
- (e) In case the amount of penalty, to begin with, is upto rupees five hundred and does not involve any detailed consideration of law or fact, the Registrar should be the authority imposing the penalty.
- (f) In case the penalty provided is more than rupees five hundred to begin with, the authority entitled to impose the penalty shall be the Company Law Board.
- (g) In the interest of equity and justice, certain penalty proceedings can be started only before the Company Law Board whenever such proceedings involve the examination of the questions of facts or of law, not too complicated, and are not already apparent on the basis of the availability or non-availability of records.

Annexures II-A, II-B and II-C set out respectively the penalties imposable by the Court, the Company Law Board and the Registrar in the light of the foregoing considerations.

We are also suggesting, in the proposed administrative set up, a machinery for appeal against the original orders of the Registrar or the Company Law Board imposing penalty beyond certain limits.

16.17 We also suggest, in order that our recommendations can be implemented effectively, that the following provisions be made in the new law with respect to penalties and their imposition :—

- (a) The Registrar or the Company Law Board may issue a notice to any person to show cause as to why the penalty mentioned in any entry in the particular Schedule to the Act shall not be levied for non-compliance of any provisions of the Act mentioned in the said entry and, on the person to whom the notice has been issued not showing sufficient cause within the period mentioned in the notice, shall impose a penalty not exceeding the amount mentioned in the said entry and shall further impose a penalty of like amount for every day after the infliction of the first penalty during which the failure to comply with the provisions of the Act continues.
- (b) (i) Any order of the Registrar imposing a penalty exceeding rupees two thousand shall be appealable to the Bench of Company Law Board within whose jurisdiction the office of the Registrar is situate. Such an appeal shall be filed within thirty days from the date of the impugned order and subject to the order on appeal, the order of the Registrar shall be final.
- (ii) Any original order of the Company Law Board imposing a penalty exceeding rupees ten thousand shall be appealable to the High Court within whose jurisdiction the Regional Bench is situate. The time limit for filing such an appeal shall be sixty days from the date of the impugned order.
- (iii) The amount of penalty imposed by the Registrar and imposed or maintained by the Company Law Board shall be recovered, without prejudice to any other mode of recovery, in the same manner as arrears of land revenue.
- (iv) The Company Law Board may authorise any member or any of its Regional Benches to hear the appeal.
- (v) The appellate authority shall not admit the appeal unless evidence is furnished to the effect that the penalty against which appeal is made is first deposited in the manner prescribed.
- (vi) The appellate authority may either waive, reduce or enhance the penalty already imposed.
- (vii) An appeal against an order of the Company Law Board shall lie only if the matter involves substantial question of law.

- (c) An order relating to the levy of a penalty may include an order as to the like amount which shall continue to be inflicted for every day during which the non-compliance of the provisions attracting the penalty continues.
- (d) Every authority imposing the penalty or waiving, reducing or enhancing the penalty shall have the discretion to compound the total amount of penalty on the compliance of the provisions attracting the penalty being shown.
- (e) Non-payment of penalty accompanied by the non-compliance of the provisions attracting the penalty shall be a cognizable offence within the meaning of the Criminal Procedure Code, 1973 (2 of 1973) and the persons and officers in default shall be punishable by imprisonment which may extend to six months.
- (f)
 - (i) No order imposing a penalty shall be made unless the person or persons to whom the notice has been issued have been heard or have been given a reasonable opportunity of being heard.
 - (ii) Every appellate authority on making an order relating to imposition of penalty shall forthwith send a copy of the order to the authority first imposing the penalty.
- (g) No notice for initiating proceedings for imposing a penalty shall be issued after the expiration of three years from the date on which the default had been committed, the non-compliance with the provisions or the requirements in respect of any matter included in the Schedule has taken place or from the date on which the default or the non-compliance had first come to the notice of the authority imposing the penalty.

**POWERS AND FUNCTIONS TO BE EXERCISED BY THE COMPANY LAW
BOARD IN THE PROPOSED ADMINISTRATIVE SET-UP**

S. No.	Present Section/ New Provision	Subject matter
1	2	3
1.	17 (2) and 17 (5)	To sanction alteration of the memorandum so as to change the place of registered office of the company.
2.	17 (New Provision)	To decide on an application made by certain members who are aggrieved by the alteration of the object clause of the memorandum.
3.	18 (4)	To extend time for the filing of documents under section 18 (1).
4.	19 (2) Proviso	To revive the order made under section 17 (5) on the application of the company.
5.	43 Proviso	Default in complying with conditions constituting a private company. CLB is empowered to decide that the failure to comply with the conditions was accidental.
6.	49 (10)	To direct an immediate inspection of the register showing investment of the company in case inspection is refused.
7.	79	To approve issue of shares at a discount.
8.	108 (1A) to 108 (1D) (New provisions)	To direct, on a complaint, that voting rights in respect of shares which are dealt with in Stock Exchange but are not lodged with the company for registration/transfer shall not be exercisable by any person, whether as member or proxy.
9.	111 (New provisions)	(a) To decide, on an application under this section, any question relating to title of any person who is a party to the application to have his name entered in, or omitted from the register, or on any matter in connection with rectification of register. (b) To direct the company to pay damages, if any, sustained by any party aggrieved by the refusal to register etc. the shares and to pass orders including orders regarding payment of dividend and allotment of bonus shares.
10.	113 (3)	To direct the company and any officer to make good the default for not complying with provisions of section 113 (1) regarding issue of certificates.
11.	125 (New provision)	To decide on an application made by companies aggrieved by the order of the Registrar refusing to register the charge.
12.	144 (4)	To compel an immediate inspection of the instruments creating charges kept in pursuance of Section 136 and the register of charges kept in pursuance of Section 143.
13.	149 (2B)	To allow on an application made by Board of Directors, commencement of new business.
14.	163 (6)	To compel immediate inspection of documents or direct that the extracts required shall forthwith be allowed to be taken by the person requiring it or a copy shall be sent to the person requiring it.

1	2	3
15.	167 (1)	To call, or direct the calling of annual general meeting on an application made by any member of the company.
16.	186 (1)	To order meetings, other than annual general meeting, to be called.
17.	188 (5)	To exempt company from complying with provisions of section 188 (1) regarding circulation of members' resolutions to be moved at the meeting and to award payment of company's costs.
18.	198 (New provisions)	To give approval to the payment of remuneration beyond the statutory guidelines.
19.	224 (7)	To give approval to the removal of auditor from his office before the expiry of his term.
20.	225 (3) (Proviso)	To exempt company from complying with provisions of section 225 (3) regarding sending of intimation or copies of representations received from auditors against removal to members.
21.	235	To direct the Central Government to appoint Inspectors for investigation into the affairs of a company on application by members or report by the Registrar of Companies.
22.	236	To require the member of a company applying for investigation into the affairs of the company under section 235, to give supporting evidence and to give surety for not exceeding Rs. 1,000/- for payment of the cost of investigation.
23.	237 (a)	To give approval for investigation into the affairs of companies.
24.	239 (2)	To give approval for investigation into the affairs of certain other or related companies also in the course of an investigation under sections 235, 236 and 237 (a).
25.	269 (New provisions)	<p>(a) To give approval to the appointment of a person who does not fulfil the conditions laid down in the Act, as managing or whole-time director.</p> <p>(b) To decide, on a reference made by the Central Government whether or not a managing director convicted for an offence under the Economic Offences (Non-application of Limitation) Act, the MRTP Act or the Companies Act, is a fit and proper person to hold the office of the managing director.</p> <p>(c) To approve, on an application made by the company the appointment as managing or whole-time director in the interest of the company.</p>
26.	274 (2)	To remove disqualification incurred by a person convicted by a Court of any offence involving moral turpitude or by a person who has not paid any call in respect of the shares held by him, for being appointed as a director of a company.
27.	283 (1) (f)	To remove disqualification incurred by a director on his failure to pay any call in respect of shares of the company held by him, for continuance as a director.
28.	283 (New provision)	To remove disqualification of a director incurred by his failure to file certain documents, with Registrar within the time specified in Registrar's order.

1	2	3
29.	284 (4) Proviso	To exempt company from complying with provisions of section 284 (4) (b) requiring intimation to members of the representation against removal received from a director or sending to them a copy thereof.
30.	307 (9)	To compel an immediate inspection of the register of shareholdings by any member or holder of debenture, on the refusal of the company to allow inspection.
31.	307 (New provision)	To provide remedy to a person who has suffered identifiable loss by reason of misuse of material information by certain persons (insiders) for the purchase or sale of shares of the company.
32.	309 (1) (b)	To opine that a director possesses the requisite qualification for rendering service other than as a director for the purpose of calculating his remuneration.
33.	309 (New provision)	To give approval to payment of, increase in remuneration, or to permit waiver of recovery of remuneration, of managing or whole-time director.
34.	314 (2) (b)	To give approval to the holding of office or place of profit carrying a total monthly remuneration of not less than three thousand rupees by a partner, or relative of a director, by a firm in which director, or his relative is a partner or by a private company of which the director, or his relative is a director/member.
35.	316 (New provision)	To approve of the appointment of a managing director of a public company as managing director of another public company.
36.	388B (1)	To decide, on a reference made by the Central Government, whether any person is fit and proper person to hold the office of director or any other office connected with the conduct and management of any company.
37.	388C (1)	To pass interim order during the pendency of the case under section 388B (1) directing that the person concerned shall not discharge any of the duties until further orders and to appoint another person in place of respondent.
38.	388D	To record decision in the case referred to under section 388B (1).
39.	388E (3) Proviso	To give concurrence to the Central Government's permission to allow the person against whom an order for removal from office is made to hold the office of director or any other office before the expiry of the period of five years for which he was earlier removed from office.
40.	388E (5)	To approve appointment of another person in place of person removed from the office of a director or any other office connected with the conduct and management of the affairs of the company.
41.	409 (1)	To pass interim and final orders on a matter relating to change in ownership of shares of a company so as to bring about change in the Board of Directors, if such change is likely to affect the company prejudicially.
42.	409 (New provision)	To extend the period of interim orders beyond two months.
43.	614A	To direct filing of certain documents with the Registrar.

**POWERS AND FUNCTIONS TO BE EXERCISED BY THE CENTRAL
GOVERNMENT IN THE PROPOSED ADMINISTRATIVE SET-UP**

Part I—Powers and Functions other than those to be exercised by Registrar of Companies.

Sl. No.	Present Section/ New Provision	Subject matter
1	2	3
1.	4A (2)	To specify any institution other than the ICICI, IFC, IDBI, LIC and UTI [already specified in section 4A (1)] as a public financial institution.
2.	8	To declare an establishment shall not be treated as a branch office of the company.
3.	10 (2)	To empower any District Court to exercise all or any of the jurisdiction conferred upon the High Court.
4.	10E (1), (2)	To constitute Company Law Board.
5.	20 (2)	To declare a name of company to be undesirable.
6.	21	To approve change of name of a company.
7.	22 (1) (a)	To approve change of name of a company earlier inadvertently allowed.
8.	22 (1) (b)	To direct change of name of a company.
9.	25	To direct, by licence, to dispense with word "Limited" in the name of charitable or other company and to revoke the licence.
10.	25 (New provision)	To issue directives to existing guarantee companies either to get themselves registered under section 25 or to convert themselves into companies limited by shares.
11.	58A (1)	To prescribe in consultation with Reserve Bank of India, limits upto which deposits may be invited or accepted by a company from the public or from its members.
12.	58A (7)	To exempt companies, other than banking companies from the provisions relating to acceptance of deposits from the public or from its members.
13.	81 (3) Provisos (a) and (b)	To approve the term providing for an option (before issue of debentures or raising loan) to convert the debentures, or loans containing such option, into shares of the company other than that issued to, or obtained from the Government or any specified institution, for the purpose of exemption from the provisions relating to further issue of share capital (section 81).
14.	81 (4)	To direct by order conversion of debentures issued or loans raised or any part thereof into shares of the company.
15.	94A (2)	To direct on the application of public financial institutions proposing to convert debentures or loans into shares in the company, that memorandum of the company shall stand altered and the nominal shares capital shall stand increased.
16.	153A	To appoint a person as public trustee.

1	2	3
17.	163 (1A)	To make rules for preservations or disposal of registers, indexes, returns and copies of certificates and other documents.
18.	166 (2)	To exempt any class of companies from the provisions relating to time and place at which annual general meeting is to be held.
19.	205 (2) (d)	To approve the basis to provide depreciation where no rate is provided by Income Tax Act and to approve the basis which has the effect of writing off by way of depreciation ninety five per cent of the original cost.
20.	205 (New Provision)	To approve the change in the method of calculating depreciation.
21.	205B	To make an order, on an application made by a person, for payment of unpaid or unclaimed dividend to such person.
22.	209 (1) (d)	To require any class of companies engaged in production, processing, manufacturing or mining activities to include prescribed particulars relating to utilisation of material or labour or to assess items of costs in the books and of accounts.
23.	209A (1)	To authorise any officer of the Government to inspect books of accounts and other books and papers.
24.	209A (1) (New Provision)	To order inspection of a company without prior notice of inspection.
25.	211 (3)	To exempt from compliance with any of the requirements in the form and contents of balance sheet and profit and loss account as prescribed in Schedule VI.
26.	211 (4)	To approve modification of any of the matters to be stated in the balance sheet or profit and loss account.
27.	212 (8)	To exempt a holding company from the provisions requiring it to include particulars as to its subsidiaries, partnerships and joint ventures
28.	213	To extend time on the application of a holding or a subsidiary company or with the consent of Board of the company for submission of accounts to a general meeting, the holding of annual general meeting, or making of the annual return, as that the subsidiary's financial year may end with that of the holding company.
29.	224 (3)	To appoint auditors when no auditors are appointed or re-appointed at the annual general meeting.
30.	224 (8)	To fix remuneration of auditors appointed by the Central Government.
31.	227 (4A)	To direct, by general or special order, inclusion of a statement on matters specified in the order.
32.	228 (4)	To exempt, by providing rules, any branch office of the company from provisions relating to audit of accounts of branch office of the company.
33.	233B (1)	To direct by order, an audit of the cost accounts of the company covered in clause (d) of section 209 (1) by a Chartered Accountant/Cost Accountant.

1	2	3
34.	233B (8), (9)	To call for additional information and explanation from the company after consideration of the cost audit report and to take further necessary action on the report.
35.	233B (10)	To direct circulation of the cost audit report to the members of the company along with the notice of annual general meeting.
36.	233B (New provision)	To discontinue cost audit in any particular industry.
37.	235	To appoint inspectors for investigations into the affairs of a company on the direction of the Company Law Board.
38.	237	To appoint inspectors to investigate into the affairs of the company on a declaration by the company by special resolution; or by the Court that the affairs of the company ought to be investigated.
39.	239(2)	To give approval to investigation into the affairs of certain other or related companies in the course of an investigation under section 237 (b) of the Act.
40.	240 (1A)	To give approval requiring any body corporate to furnish information or produce books and papers relevant or necessary for the purpose of investigation to Inspectors.
41.	240 (2)	To give approval to an Inspector to examine on oath any person other than those mentioned in section 240 (1).
42.	241	To direct Inspectors to make interim reports to the Government.
43.	242	To prosecute persons found guilty of any offence for which he is criminally liable, on receipt of the investigator's report under section 241.
44.	243	To authorise any person to present winding-up petition in Court and/or to make an application for an order under section 397/398 on receipt of Inspector's report.
45.	244	To bring proceedings, on receipt of Inspectors' report, for the recovery of damages in respect of fraud, misfeasance or for the recovery of any property.
46.	247	To appoint inspectors to investigate and report on the membership of any company and other matters relating to the company for the purpose of ascertaining the ownership of the company.
47.	248	To require any person for investigating into ownership of shares or debentures of a company to give information regarding persons having interest in those shares or debentures or regarding persons having interest in a former managing agency/secretaries and treasurers firms for investigating into ownership of interest in the firm.
48.	250(1)	To impose, by order, restrictions upon shares, for period not exceeding three years, for the purposes of finding out relevant facts about every share.
49.	250 (3) & (4)	To direct, by order, if transfer of shares of a company has resulted, or is likely to result in, the composition of Board of Directors and such change would be prejudicial to public interest, that the voting rights attached to these shares shall not be exercised, or that the change in the composition of the Board of Directors shall not have effect unless confirmed by the Central Government or that such transfer shall be void.
50.	250(5)	To vary, or rescind an order passed under sub-sections (1), (3) and (4) of section 250.

1	2	3
51.	259	To approve the increase in the number of directors of a public company which came into existence after 21st July, 1951, beyond the permissible maximum under its articles (No approval if increase is within the permissible maximum of fifteen).
52.	269 (New provision)	To refer to the Company Law Board, on an application made by certain shareholders, for decision as to whether or not a managing director, by reason of his conviction for an offence under the Economic Offences (Non-application of Limitation) Act, the Monopolies Act or the Companies Act, is a fit and proper person to hold the office of the managing director.
53.	294 (New provision)	To require a company having a selling arrangement or agreement to furnish information relating to such selling arrangement or agreement; to appoint a person to investigate and report on such terms and conditions.
54.	294AA	<p>(a) To declare (to prohibit the appointment) by notification that no selling arrangement or agreement shall be made by a company for the sale of goods the demands for which is substantially in excess of production.</p> <p>(b) To approve a selling arrangement or agreement by a company in which the party to the agreement or arrangement has substantial interest in the company.</p> <p>(c) To give approval to the existing selling arrangements.</p>
55.	295 (1)	To give approval to the giving of loan by a company or giving guarantee or providing security in connection with a loan made by another person, to its directors, etc.
56.	300 (3)	To exempt, by notification, companies from the provisions prohibiting an interested director from participating or voting in Boards proceedings.
57.	370/372 (New provisions)	To give approval to invest in the shares of, or to provide loans to, any other body corporate in public interest.
58.	388E (1)	To remove from office any director, or any person concerned in the conduct and management of the affairs of a company, (i.e. any managerial personnel) against whom there is a decision of the Company Law Board under Chapter IV A.
59.	388E	To permit, with previous concurrence of the Company Law Board the managerial personnel removed from the office to hold any such office before the expiry of five years.
60.	396 (1)	To provide for amalgamation of two or more companies into a single company in national interest.
61.	396A	To permit disposal of books and papers of a company which has been amalgamated with or whose shares have been acquired by another company under Chapter V and to appoint a person to examine the books and papers before granting such permission.
62.	*408 (1)	To appoint directors or additional directors to prevent oppression or mis-management, for a period not exceeding three years.
63.	408 (5)	To confirm change in the Board of Directors in a company wherein directors have been appointed by the Central Government under section 408 (1).
64.	408 (6)	To issue directions to the company wherein directors or additional directors have been appointed by the Central Government under section 408 (1).

*Appealable to High Court.

1	2	3
65.	408 (7)	To require the directors or additional directors appointed by the Central Government under section 408 (1) and (2) to report to the Central Government on the affairs of the company.
66.	410	To constitute an Advisory Committee to advise the Central Government and the Company Law Board.
67.	439 (1) (f)	To authorise a person to present an application to the Court for winding-up (applicable in a case falling under section 243).
68.	439 (5)	To give sanction to the Registrar to the presentation of petition for winding-up of a company.
69.	463 (1)	To take cognizance of the conduct of liquidators of companies which are being wound-up by the Court.
70.	463 (2)	To require a liquidator of a company which is being wound-up by Court to answer any inquiry in relation to winding-up. To apply to the Court to examine the liquidator or any other person on oath concerning winding-up.
71.	463 (3)	To direct local investigation into the books of a liquidator.
72.	496 (1)/508 (3)	To extend the date within which liquidator is required to call a general meeting of the company.
73.	545 (3)	To investigate on the report of the Registrar regarding the guilt of any officer or member of a company being wound-up and to apply to the Court for conferring on persons powers to investigate the affairs of the company.
74.	550 (3)	To prevent the destruction of books and papers of a company which has been wound-up and of its liquidator; To enable any creditor or contributory of the company to make representations in respect of certain specified matters and to appeal to the court for direction.
75.	551 (1)	To exempt a liquidator from filing statement of particulars regarding liquidation, where the winding-up of a company is not concluded within one year after its commencement.
76.	555 (7)	To order payment of money claimed by a person from Company Liquidation Account.
77.	594	To exempt a foreign company from making out a balance sheet, profit and loss account in the forms prescribed under the Act.
78.	609 (2)	To appoint the Registrars of Companies.
79.	610 (1)	To permit inspection of certain document delivered in pursuance of section 605 (1) (b) at any time after the expiry of fourteen days beginning with the date of prospectus.
80.	613 (1)	To reduce the amount of any fee, charge payable under the Act.
81.	615 (1).	To require any company to furnish information or statistics with regard to their constitution and working.
82.	619A (1)	To cause the preparation of annual accounts of a Government company and to lay a copy of the audited report before the Parliament.
83.	620 (1)	To modify any of the provisions of the Act in relation to Government companies.
84.	620A	To modify any of the provisions of the Act in relation to Nidhis etc.
85.	Shareholders' association (New provisions)	(a) To give recognition to, or withdraw recognition of, a shareholders' association. (b) To call for periodical returns from, or to direct enquiries to be made of, shareholders' association.

PART II—POWERS TO BE EXERCISED BY THE REGISTRAR OF COMPANIES

Sl. No.	Present section/ New provision	Subject matter
1	2	3
1.	17 (New provision)	To move the Company Law Board in the matter relating to alteration of the object clause of the memorandum of a company.
2.	118 (3)	To direct that the copy/copies of the trust deed (s) asked for by any member or debenture holder be sent to him as required in section 118 (1).
3.	*125 (New provision)	(a) To refuse to register the charge where there are any complications or conflict of interests among the creditors. (b) To allow, on payment of additional fees, the particulars and instrument of charges, etc. to be filed within thirty days on expiry of the thirty days provided in the section.
4.	196 (4)	To compel an immediate inspection of the minute books of general meetings or direct that the copy of minutes required be sent forthwith.
5.	219 (4)	To direct furnishing of a copy of last balance sheet and documents required to be annexed thereto demanded by any person.
6.	304 (2) (b)	To compel an immediate inspection of the register of directors by a member or any person on the refusal of the company to allow inspection.

* Appealable to the Company Law Board.

POWERS TO BE EXERCISED BY COURTS IN THE PROPOSED ADMINISTRATIVE
SET-UP—(OTHER THAN THOSE POWERS ALREADY VESTED IN COURTS
REGARDING WINDING-UP)

Sl. No.	Section	Subject matter
1	2	3
1.	56 (4) (c)	To decide whether the contravention or non-compliance is immaterial to excuse in the matter of incurring liability by a director or other person responsible for the prospectus.
2.	58A (New provision)	To extend time for repayment of matured deposits beyond the stipulated period of six months.
3.	81 (7)	To hear appeal against the order of the Central Government directing conversion of debentures or loans under section 81 (4).
4.	100	To confirm reduction of share capital to be effected by a company.
5.	101	To confirm reduction of share capital settling objections by creditors etc.
6.	102	To confirm reduction of share capital.
7.	104 (1) (Proviso)	To settle the list of persons liable to contribute to pay the debt of the creditor who was ignorant of the reduction of share capital.
8.	107 (3)	To disallow variation in rights attached to any class of share effected under section 106 on an application made under section 107.
9.	203 (2)	To order that a person shall not without the leave of the Court be a director of or in any way take part in the promotion, formation or management of a company.
10.	203 (New provision)	To disqualify a person from acting as a receiver or liquidator.
11.	234 (4) (b)	To order, on an application made by Registrar, production before him of such books and papers as in the opinion of the Court may reasonably be required by the Registrar for the purpose referred to in section 234 (1).
12.	234 (A) (2)	To authorise on an application under section 234A (1) the Registrar, by order, to enter the place where books are kept and to search/seize such books and persons of the company as considered necessary.
13.	237 (a) (ii)	To declare by order that the affairs of the company ought to be investigated by an inspector appointed by the Central Government.
14.	240A (2)	To authorise by order the Inspector on an application made by him under section 240A (1), to enter the place or places where books and papers are kept and to search/seize the books and papers considered necessary.
15.	241 (2) (d)	To require furnishing of a report of the inspector appointed on the order of the Court as in Section 237 (a) (ii),

1	2	3
16.	250 (6)	To order vacation of the order of the Central Government passed under section 250 (1), (3) & (5) imposing restrictions upon shares and debentures and prohibiting transfer in certain cases thereof.
17.	269 (New provision)	To order removal of a person from the office of the managing director on an appeal preferred by him against the order of the Company Law Board under section 269.
18.	391	To sanction any compromise or arrangement between a company and its creditors or between a company and its members or any class of them.
19.	392	To enforce compromise and arrangements sanctioned under section 391.
20.	394	To make provisions for facilitating reconstruction and amalgamation of companies either by order sanctioning the compromise or arrangement or by a subsequent order.
21.	394A	To give notice to the Central Government for applications under sections 391 and 394.
22.	395	To pass orders as thought fit, on the application of the dissenting shareholder, allowing acquisition or otherwise of the shares in question.
23.	397	To grant relief on the complaint of any members with regard to oppression.
24.	398 (2)	To grant relief on an application under section 398 (1) complaining of mis-management.
25.	399 (4)	To authorise any member or members who have the right to apply for relief in case of oppression (section 397) or in the case of mis-management (section 398) or any member or members of a shareholders' association to apply to the Court for relief.
26.	400	To give notice to the Central Government of every application made under section 397 or 398.
27.	401	To entertain application under sections 397 and 398 made by the Central Government or any person authorised by it.
28.	402	To exercise additional powers as provided in sections 402 (a) to (g) in addition to those under section 397 or 398.
29.	403	To pass interim order pending the making of final order under section 397 or 398.
30.	404	To permit changes only with the permission of the Court in the alteration of memorandum or articles of the company already ordered under section 397 or 398.
31.	405	To allow addition as a respondent, of managing director or any other director of the company or any other person who has not been impleaded as a respondent to the application under section 397 or 398.
32.	407	Not to allow appointment, without the permission of the Court, of managing director or other director for five years, whose agreement has been terminated or set aside.
33.	New provision	To decide on an application for injunction in respect of holding of meetings of the shareholders of the company.
34.	603 (4) (c)	To treat the non-compliance or contravention in respect of matters in section 603 (1) (a) and (b) as immaterial and reasonable to be excused.
35.	614	To order filing of returns or registering documents with the Registrars in case of failure of the company to do so.

STATEMENT SHOWING OFFENCES WHICH WILL COME UNDER
THE JURISDICTION OF THE COURT IN THE PROPOSED
ADMINISTRATIVE SET-UP

S. No.	Section	Nature of offence	Person liable	Punishment
1	2.	3	4	5
1	44(4)	Filing with the Registrar prospectus or statement in lieu of prospectus containing any untrue statement	Person authorising the filing of such prospectus or statement	Imprisonment upto two years or fine upto Rs. 5,000/- or both
2	58A(5)	Failure to make repayment of deposit in accordance with the provisions of sections 58A(3) and 58A(4) within specified time	Company Every officer in default	Fine not less than twice the amount in relation to repayment not made Imprisonment upto five years and fine
3	58A	(a) Accepting any deposits in excess of the prescribed limits (b) Inviting any deposits in excess of the prescribed limits	Company Every officer in default Company Every officer in default	Fine equal to the amount of deposit so accepted Imprisonment upto five years and fine Fine upto Rs. 1 lakh out not less than Rs. 5,000/- Imprisonment upto five years and fine
4	59(1)	Issuing a prospectus which contravenes the provisions relating to experts contained in sections 57 and 58	Company and every person knowingly a party to the issue of such prospectus	Fine upto Rs. 5,000/-
5	63(1)	Issuing a prospectus which includes any untrue statement	Every person who authorised the issue	Imprisonment upto two years or fine upto Rs. 5,000/-
6	68(1)	Fraudulently inducing persons to invest money	Any person who induced or attempted to induce	Imprisonment upto 5 years or fine upto Rs. 10,000/-
7	68A(1)	Making, in a fictitious name, an application for subscribing for shares or inducing company to allot etc. shares in fictitious name	Any person who applies or induces	Imprisonment upto five years
8	69(4)	Omitting to deposit and keep deposited in a scheduled bank moneys received from applicants for shares until returned or the certificate to commence business is obtained. And also making allotment of shares before minimum subscription is received	Every promoter, director or other person knowingly responsible for the contravention	Fine upto Rs. 500/-
9	70(4)	Making allotments without filing statement in lieu of prospectus etc	Company and every director wilfully authorising or permitting the contravention	Fine upto Rs. 1,000/-
10	70(5)	Delivering to the Registrar statement in lieu of prospectus which includes any untrue statement	Any person who authorised the delivery	Imprisonment upto two years or fine upto Rs. 5,000/- or both

1	2	3	4	5
11	73(2B)	Failure to make payment within six months from the expiry of eighth day	Company and every officer in default	Fine upto Rs.5000/- and also imprisonment upto one year
12	84(3)	Fraudulently renewing or issuing of duplicate share certificates	Company Every officer in default	Fine upto Rs. 1,000/- Imprisonment upto six months and fine upto Rs. 1,000/- or both
13	105	Concealing name of creditor etc.	Concerned officer of the company	Imprisonment upto one year, fine or both
14	116	Deceitfully personating any shareholder	Person personating	Imprisonment upto three years and fine
15	133(2)	Delivering debenture or certificate of debenture stock without endorsing on it certificate of registration	Any person knowingly delivering or wilfully authorising the delivery	Fine upto Rs. 1,000/-
16	143(2)	Omitting to make the requisite entries in company's register of charges in pursuance of section 143(1)	Officer knowingly omitting or wilfully authorising or permitting the omission	Fine upto Rs. 500/-
17	153B(3) (b)	Making false declaration as to shares and debentures held in trust	Trustees	Imprisonment upto two years and fine
18	176(4)	Issuing invitation at company's expense to appoint named person as proxy	Every officer knowingly issuing such invitation or wilfully authorising or permitting its issue	Fine upto Rs. 1,000/-
19	202(1)	Functioning as director by undischarged insolvent etc.	Person so functioning	Imprisonment upto two years or fine upto Rs. 5,000/- or both
20	203(7)	Contravening order of the Court that certain fraudulent persons shall not act as director etc without Court's consent	Person contravening	-do
21	207	Failure to distribute dividends within forty-two days of declaration	Every director who is knowingly a party to the default.	Simple imprisonment upto seven days and fine
22	209(7)	Failure to take all reasonable steps to secure compliance by the company with the requirements of section 209 relating to books of account	Managing director or every Director, officer, employee or agent of the company or the person charged with the duty of ensuring compliance with the section	Imprisonment upto six months or fine upto Rs. 1,000/- or both
23	209A(8) and 209A(9)	Failure to comply with the provisions of section 209A with regard to inspection of books of account of the company	Officer in default (if convicted of an offence under this section, office has to be vacated, by the officer guilty of default and he is also disqualified for five years from holding such position in any company)	Fine of not less than Rs. 5,000/- and also imprisonment upto one year

1	2	3	4	5
24	210(5) and 210(6)	Failure to take all reasonable steps to comply with the provisions of section 210 with regard to annual accounts and balance sheet	Any director or person charged with the duty of ensuring compliance with the section	Imprisonment upto six months or fine upto Rs. 1,000/- or both
25	211(7) and 211(8)	Failure to take all reasonable steps to secure compliance with the provisions of section 211 with regard to balance sheet and profit and loss account	Managing Director or every director, officer, employee or agent of the company or the person charged with the duty of ensuring compliance with the section	-do-
26	212(9) and 212(10)	Failure to take all reasonable steps to comply with the provisions of section 211 with regard to balance sheet and profit and loss account	-do-	-do-
27	217(5) and 217(6)	Failure to take all reasonable steps to comply with the provisions of section 217(1) and (3) relating to Board's report	Any director, chairman or other person charged with the duty of ensuring compliance with the section	Imprisonment upto six months or fine upto Rs. 2,000/- or both
28	221(4)	Failure to disclose certain payment etc. to company	Every officer in default	Imprisonment upto six months or fine upto Rs. 5,000/- or both
29	233B(11)	Failure to comply with the provisions of section 233(B) regarding audit of cost accounts	-do-	Imprisonment upto three years or fine upto Rs. 5,000/- or both
30	240(3)	Disobedience to the order of the Central Government directing the production of books before the Inspector	Person disobeying	Imprisonment upto six months or fine upto Rs. 2,000/- or both and further fine upto Rs. 200/- for every day during which disobedience continues
31	248(4)	Failure to give to the Central Government information required by it regarding person interested in company or making false statements in giving such information	Person giving the information	Imprisonment upto six months or fine upto Rs. 5,000/- or both
32	250(9)	Disposing of shares or exercising voting rights in respect of the shares in contravention of the restrictions imposed by Central Government during investigation of ownership of shares and debentures	Person contravening	-do-
33	293A(2)	Contravening the provisions of section 293A	Company	Fine upto Rs. 5,000/-
34	295(4)	Being knowingly a party to any contravention of the restrictions in regard to loans and financial assistance to directors etc.	One who is knowingly a party to such contravention	Simple imprisonment upto six months or fine upto Rs. 5,000/-
35	308(3)	Failure of directors to give company notice of the necessary matters for register of directors' shareholdings	Director concerned	Imprisonment upto 2 years or fine upto Rs. 5,000/- or both

1	2	3	4	5
36	371(B)	Being a party to contravention of the provisions of sections 369, 370A or 370/372	Party committing default	Fine upto Rs.5,000/- or simple imprisonment upto six months
37	393(4)	Failure to comply with the requirements of section 393 in regard to compromise or arrangement with creditors and members	Company and every officer in default including trustee for debenture holders	Fine upto Rs. 5,000/-
38	393(5)	Failure to give notice to company of certain matters in connection with compromises or arrangement with creditors and members	Every director, Managing Director and trustee for debenture holders	Fine upto Rs. 500/-
39	407(2)	Knowingly acting as Managing Director or director when the concerned agreement has been terminated or set aside by Court	Person so acting and every director knowingly a party to such contravention	Imprisonment upto one year or fine upto Rs. 5,000/- or both
40	420	Knowingly contravening or authorising or permitting the contravention of the sections 417, 418 and 419 in regard to employees' securities and provident funds	Officer or trustee concerned	Imprisonment upto six months or with fine upto Rs. 1,000/.
41	606 (Revised provision)	Contravening sections 603, 604 and 605 relating to prospectus of foreign companies	Any person knowingly responsible for such contravention	Imprisonment upto six months or fine upto Rs. 5,000/- or both
42	614A	Failure to comply with the order of Company Law Board directing the filing, etc. of return or document with the Registrar	Officer or other employee who contravenes	Imprisonment upto six months or fine or both
43	615(6)	Failure to comply with the order of the Central Government requiring companies to furnish information or statistics or to produce records or documents and furnishing incorrect or incomplete material	Company and every officer who is in default	Imprisonment upto three months or fine upto Rs. 1,000/- or both
44	628	Making false statements in returns reports, balance sheets etc.	Person who makes such statement	Imprisonment upto two years and fine
45	629	Giving intentionally false evidence	Person who gives such evidence	Imprisonment upto seven years and fine
46	630	Wrongfully obtaining or withholding company property	Officer or employee concerned	Fine upto Rs. 1,000/-

STATEMENT SHOWING OFFENCES WHICH WILL COME UNDER THE
JURISDICTION OF THE COMPANY LAW BOARD IN THE
PROPOSED ADMINISTRATIVE SET-UP.

Sl. No	Present Section/ New Provision	Nature of offence	Person liable	Penalty
1	2	3	4	5
1	11(5)	Becoming a member of a company, association or partnership formed in contravention of the provision of section 11	Every person who is a member	Upto Rs. 1,000
2	49(9)	Failure to comply with the requirements of sub-sections (1) to (8) that investments made by a company should be held in its own name, etc.	Company and every officer in default	Upto Rs. 5,000
3	56(3)	Issuing form of application for shares without being accompanied by a prospectus which complies with the requirements of Section 56	Person issuing	Upto Rs. 5,000
4	60(5)	Issuing a prospectus without copy being delivered to the Registrar, etc.	Company and every person knowingly a party to the issue of such prospectus	Upto Rs. 5,000
5	72(3)	Allotting shares or debentures before the beginning of the fifth day after the issue of the prospectus or such later time as specified therein	Company and every officer in default	Upto Rs. 5,000
6	73(2) (2A)	Failure to repay the excess application money received for shares and debentures within 8 days from the day the company becomes liable to pay it	Directors jointly and severally (Director may not be held liable if he proves that default was not due to any mis-conduct or negligence on his part)	Payment of interest @ 12% from the expiry of 8th day
7	73(3)	Omitting to keep in a separate bank account with a scheduled bank application moneys for shares and debentures until liability to repay ceases	Company and every officer in default	Upto Rs. 5,000
8	75(4) proviso	Showing shares as allotted for cash in return of allotment when the allotment has been merely by book adjustments in contravention of the proviso to clause (a) of section 75(1)	Every officer and promoter who is guilty of contravention	Upto Rs. 5,000
9	77(4)	Contravening restrictions on purchase by company, or loans by company for purchase, of its own or its holding company's shares	Company and every officer in default	Upto Rs. 1,000
10	89(3)	Non-compliance with the provisions of section 89(1) relating to termination of dis-proportionate voting rights in existing companies	Company and every officer in default	Upto Rs. 1,000
11	153B(3)	Failure to make declaration as to shares held in trust	Trustees	Upto Rs. 5,000 and Rs. 100 for each day during which default continues

1	2	3	4	5
12.	168	Failure to hold annual general meeting in accordance with section 166 or to comply with any directions of Central Government under section 167(1)	Company and every officer in default	Upto Rs. 5,000 and a further penalty upto Rs. 250 for every day during which default continues
13.	205 (New provision)	Payment of, or grant of permission to pay, interim dividend out of what the directors know is not profits of the company	Company and directors	Upto Rs. 5,000
14.	233	Failure by auditor to conform to the requirements of sections 227 to 229	Auditor or any other person concerned	Upto Rs. 1,000
15.	250(1)	Contravening the restrictions imposed by the Central Government upon transfer of shares and debentures in certain cases	Company and every officer in default	Upto Rs. 5,000
16.	269	Failure to incorporate necessary material particulars in the Explanatory statement relating to the appointment of managing or whole-time directors	Every officer in default	Upto Rs. 1,000
17.	272	Acting as director while not holding qualification shares	Person so acting	Upto Rs. 50 for every day of default
18.	279	Being director of more than twenty companies in contravention of the provisions contained in sections 275 to 277	Person so acting	Upto Rs. 5,000 in respect of each additional company
19.	283(2A)	Functioning as a director when he knows that the office has become vacant on account of disqualification	Person contravening	Upto Rs. 500 for everyday on which the person so functions
20.	299(4)	Failure of director to disclose interest in contract, arrangement, etc.	Director concerned	Upto Rs. 5,000
21.	300(4)	Interested director, participating or voting in Board's proceedings	Director who knowingly does so	Upto Rs. 5,000
22.	302(5)	Failure to disclose to members director's interest in contract appointing managing director	Company and every officer in default	Upto Rs. 1,000
23.	307(8)	Failure to comply with the provisions of section 307(1) & (2) in regard to register of directors' shareholdings	Company and every officer in default	Upto Rs. 5,000 and further fine upto Rs. 20 for every day of default

1	2	3	4	5
24	307 (New provision)	(a) Failure on the part of certain persons to disclose to the Board particulars of sale or purchase of the company or to give prior intimation to the Board of their intention to purchase or sell the shares of the company	Persons concerned	Upto Rs. 5,000
		(b) Purchase or sale of shares of a company by certain persons two months prior to or after the closing of the accounting year of the company	Persons concerned	Upto Rs. 5,000
25	374	Contravening sections 370/372 in regard to investments made in shares of or loans given to companies	Officer in default and company	Upto Rs. 5,000
26	393(4)	Failure to comply with the requirements of section 393 in regard to compromises or arrangement with creditors and members	Company and every officer in default including trustee for debenture holders	Upto Rs. 5,000
27	New provision	Failure to set aside ten per cent of profits after tax as Replacement Reserve	Company and every officer in default	Upto Rs. 1,000

STATEMENT SHOWING OFFENCES WHICH WILL COME UNDER THE
JURISDICTION OF THE REGISTRAR OF COMPANIES IN THE
PROPOSED ADMINISTRATIVE SET - UP

PART I

(OFFENCES OTHER THAN THOSE COVERED BY PRESENT SECTION 629 A)

Sl. No.	Present section/ New provision	Nature of offences	Person liable	Penalty
1	2	3	4	5
1	3 (New provision)	Failure by a private company to intimate the Registrar applicability of the provision relating to private companies	Company and every officer in default	Rs. 50/- per day of default
2	11 (New provision)	Failure by a foreign company which falls within sub-section (3) of section 11 to register itself under the Act	Company and every officer who is in default	Rs. 500/- for every day of default
3	12 (New provision)	Failure by existing unlimited companies to convert themselves into limited companies and to file returns relating thereto	Company and every officer who is in default	Rs. 500/- for every day of default
4	22 (2)	Failure to comply with any directions of the Central Government to change name of company	Company and every officer in default	Upto Rs. 100/- for every day of default
5	25 (10)	Omitting to remove from name of company the words 'chamber of commerce' in accordance with section 25 (9)	Company	Upto Rs. 500/- for every day of default
6	39 (2)	Failure to send to a member, on being required by him, within 7 days of request, copies of memorandum, articles of agreements specified in section 39 (1)	Company and every officer in default.	Upto Rs. 50/- for each offence
7	40 (2)	Issuing at any time copies of memorandum, resolutions or agreements which are not in accordance with the alterations made therein before that time	Company and every officer in default	Upto Rs. 10/- for each copy so issued
8	44 (3)	Omitting to file with the Registrar a statement in lieu of prospectus by a private company on ceasing to be private company	—do—	Upto Rs. 500/- for every day of default
9	58 A (New provision)	Failure to repay within a period of six months, when ten per cent of deposits have matured and have been claimed by depositors	Company	Rs. 500/- for every day of default
10	75 (4) proviso	Failure to file with the Registrar return of allotments	Every officer in default	Upto Rs. 500/- for every day of default

1	2	3	4	5
11	76 (5)	Failure to comply with the provisions of the Act relating to commission and discount contained in section 76	Company and every officer in default	Upto Rs. 500/-
12	79 (4)	Omitting to include in prospectus certain particulars relating to the issue of shares at a discount contained in sub-section (4)	Company and every officer in default	Upto Rs. 50/-
13	80 (6)	Non-compliance with the provisions relating to issue and redemption of preference shares	Company and every officer in default	Upto Rs. 1,000/-
14	95 (3)	Failure to give to the Registrar notice of consolidation etc. of share capital in accordance with section 95 (1)	Company and every officer in default	Upto Rs. 50/- for every day default
15	97 (3)	Failure to file with the Registrar notice of increase of capital or of members within 30 days of passing of the resolution	—do—	—do—
16	107 (5)	Failure to forward to the Registrar a copy of order of the Court in regard to variation of shareholders' rights	Company and every officer in default	Upto Rs. 50/-
17	113 (2)	Failure to complete and have ready for delivery share or debenture certificates within two months of allotment'	—do—	Upto Rs. 500/- for every day of default
18	118 (2)	Failure to forward a copy of debenture trust deed to members or debenture holders within 7 days of their request	—do—	Upto Rs. 50/- and further fine upto Rs. 20/- for every day of default
19	127 (2)	Failure to deliver to the Registrar for registration particulars of charges on company's acquiring property subject to charge	—do—	Upto Rs. 500/-
20	137 (3)	Failure to give notice to the Registrar of appointment' of receiver or manager ceasing to act	Any person defaulting to give notice	Upto Rs. 50/- for every day of default.
21	142 (1)	Failure to file with the Registrar for registration particulars of any charge, etc.	Company and every officer or other person in default	Upto Rs. 500/- for every day of default
22	142 (2)	Not complying with any of the requirements of the Act as to registration with the Registrar of any charge etc.	Company and every officer in default	Upto Rs. 1000/-
23	144 (3)	Refusing to allow inspection of copies of instruments creating charges and of company's register of charges	Company and every officer in default	Upto Rs. 50/- and further fine upto Rs. 20/- for every day of default during which refusal continues
24	146 (4)	Failure to give to the Registrar notice of the situation of registered office within 30 days of the date of incorporation of the company	Company and every officer in default	Upto Rs. 50/- for every day of default

1	2	3	4	5
25	147 (2)	Non-compliance with the provisions of section 147 (1) (a) in regard to painting or affixing its name and address of registered office outside office or place of business.	Company and every officer in default.	Upto Rs. 50/- for every day.
26	147 (3)	Non-compliance with the provisions of section 147 (1) (b), and (c) in regard to engraving common seal and mentioning name and the address of the registered office in all business letters.	Company	Upto Rs. 500/-
27	147 (4)	Using seal, business letters etc., which do not comply with the provisions of section 147 relating to publication of the name of company in all bills of parcel, invoices, receipts and letters of credit.	Officer or person concerned.	Upto Rs. 500/-
28	148 (2)	Non-compliance with the requirements of section 148 (1) regarding publication of authorised as well as subscribed and paid-up capital.	Company and every officer in default.	Upto Rs. 1,000/- for every day during which contravention continues.
29	149 (6)	Commencement of business or of a new business or exercising borrowing powers in contravention of section 149.	Person responsible for contravention.	Upto Rs. 500/- for every day during which contravention continues.
30	150 (2)	Committing default in complying with the provisions of section 150 (1) relating to maintenance of register of members and particulars to be entered therein.	Company and every person in default.	Upto Rs. 50/- for every day of default.
31	151 (4)	Committing default in complying with the provisions of sub-sections (1) to (3) relating to maintenance of index of members.	Company and every officer in default.	Upto Rs. 50/-
32	152 (3)	Committing default in complying with the requirements of sub-sections (1) and (2) regarding maintenance of register of debenture holders.	—do—	—do—
33	154 (2)	Closing register of members or debenture-holders otherwise than in compliance with provisions of section 154 (1).	—do—	Upto Rs. 500/- for every day during which the register is so closed.
34	162 (1)	Failure to file with the Registrar annual returns and certificates annexed thereto within the specified time limit (sections 159, 160 and 161).	Company and every officer in default.	Upto Rs. 50/- for every day of default.
35	163 (5)	Refusing inspection or, making of any extract or sending any copy within specified time, of registers, returns.	—do—	Upto Rs. 50/- for every day during which refusal or default continues.
36	165 (Revised)	Non-compliance with the provisions of statutory report.	Every director or others in default.	Upto Rs. 500/-
37	176 (2)	Omitting to state in notice of meeting that a member is entitled to appoint proxy who need not be a member.	Every officer in default.	Upto Rs. 500/-

1	2	3	4	5
38	188 (8)	Non-compliance with the provisions of section 188 regarding circulation of members' resolution.	Every officer in default.	Upto Rs. 5,000/-
39	192 (5)	Failure to file with the Registrar certain resolutions or agreements in accordance with section 192 (1).	Company and every officer in default.	Upto Rs. 20/- for every day of default.
40	192 (6)	Failure to annex copies or certain resolutions of agreement, to articles or not forwarding to member on request copy of certain resolutions or agreements.	—do—	Upto Rs. 10/- for every day of default.
41	193 (6)	Non-compliance with the provisions of section 193 regarding minutes of proceedings of general meetings and of Board and other meetings.	—do—	Upto Rs. 50/-
42	196 (3)	Refusing inspection of minutes book of general meetings or not furnishing to member on request a copy of minutes within specified time.	Company and every officer in default.	Upto Rs. 500/- for each such default.
43	197 (2)	Circulating or advertising proceedings of general meetings without including certain particulars.	—do—	Upto Rs. 500/-
44	205 A (4)	Failure to transfer unpaid dividend to unpaid dividend account.	Company	Interest @ of 12% shall be paid to such members.
45	205 A (8)	Failure to transfer the amount of accumulating profits to unpaid dividend account and other provisions of section 205 A.	Company and every officer in default.	Rs. 500/- for every day of default.
46	217 (2A)	Failure to file with the Registrar alongwith the annual return, information relating to employees drawing a remuneration of three thousand Rupees or more.	Company and officer in default.	Rs. 50/- for every day of default.
	(b)	Failure to furnish when required by a shareholder information relating to executives who draw remuneration in excess of that drawn by managing and/or whole time directors.	—do—	Rs. 50/- every day of default.
47	218	Improper issue, circulation or publication of balance sheet or profit and loss account.	Company and every officer in default.	Upto Rs. 500/-
48	219 (3)	Failure to send to members etc., copies of balance sheet, auditor's report etc., 21 days before the date of meeting.	—do—	—do—
49	219 (4)	Default in complying with certain demands for copies of balance-sheet etc., within 7 days of such demand.	—do—	—do—
50	220 (3)	Failure to file with the Registrar copies of balance sheet etc.	—do—	Upto Rs. 50/- for every day of default
51	223 (4)	Non-compliance by certain companies with the provisions of section 223 regarding publication of half-yearly statement in the specified form.	—do—	—do—

1	2	3	4	5
52	224 (4)	Failure to give notice to the Central Government within 7 days where no auditors are appointed at an annual general meeting.	Company and every officer in default.	Upto Rs. 500/-
53	232	Failure by company to comply with the provisions of sections 225 to 231 in regard to auditors.	—do—	—do—
54	234 (4)	Refusing or neglecting to furnish to the Registrar information or explanation required by him pursuant to section 234.	Company and all persons who are or have been officers of the company	Upto Rs. 500/- and an additional fine of Rs. 50/- per day in case of continuing offence
55	269 (5)	Failure of managing or whole-time director to vacate office when appointment is not in conformity with the guidelines laid down or has not been approved by the Company Law Board.	Concerned managing director/whole-time director on failing to vacate the office	Upto Rs. 500/- for every day of default.
56	269 (New provision)	Failure to file with Registrar return and certificate relating to the appointment of managing or whole-time directors.	Company and every officer in default.	Upto Rs. 50/- for every day of default.
57	286 (2)	Failure to give all directors notice of the meeting of Board of directors	Officer, whose duty it is to give notice.	Upto Rs. 100/-
58	305 (1)	Failure to disclose to company within twenty days of appointment requisite particulars required under section 303.	Director, managing director or secretary who fails to do so.	Upto Rs. 500/-
59	307 (7)	Failure to produce at annual general meeting register of director's shareholding.	Company and every officer in default.	—do—
60	320 (3)	Failure to take reasonable steps to comply with the provisions of section 320 in regard to payment to directors for loss of office etc.	Director concerned and any person properly required by the directors to comply with this section.	Upto Rs. 250/-
61	393 (5)	Failure to give notice to company of certain matters in connection with compromises or arrangements with creditors and members.	Every director, managing director and trustee for debenture holders.	Upto Rs. 500/-
62	404 (4)	Failure to file with the Registrar a certified copy of the altered Memorandum of Articles.	Company and every officer in default.	Upto Rs. 5,000/-
63	631	Making improper use of the words 'limited' and 'private limited'.	Person or persons concerned.	Upto Rs. 50/- for every day of default.
64	631 (New provision)	Failure to publish (by a company listed on the Stock Exchanges) an abstract in summarised form of half-yearly unaudited accounts of the company.	Company and every officer in default.	Upto Rs. 500/- for every day of default.

PART II: OFFENCES FALLING WITHIN THE AMBIT OF THE PRESENT SECTION 629A OF THE ACT

Sl. No.	Present section/ New provision	Nature of the offence	Person liable
1	2	3	4
1	25(8)	Alteration of memorandum by a section 25 company with respect to its object without the approval of Central Government.	Company and the officers in default.
2	31(2A)	Failure to file with the Registrar copy of the order approving alteration of articles under section 31(1).	—do—
3	55	Failure to date the prospectus.	—do—
4	61	Varying the terms of contract mentioned in the prospectus or in the statement in lieu of prospectus without the approval of, or without the authority given by the company in general meeting.	—do—
5	78	Failure to transfer premium received on issue of shares to "the share premium account".	—do—
6	81	Failure to offer further issue of shares to existing shareholders.	—do—
7	88	Issuing equity shares with disproportionate voting rights.	Company and the officers concerned.
8	102	Failure to add the words "and reduced" to the name of the company on order of the Court confirming reduction of share capital.	Company and the officers in default.
9	103	Failure to publish notice of the registration of the order of Court confirming reduction of share capital.	Company and the officers in default.
10	106	Alteration of rights of holders of different classes of shares in manner other than those specified in the section.	—do—
11	108	Registering transfer of shares without proper instrument of transfer.	—do—
12	110(2)	Failure to give notice of the application for transfer of shares to transferee.	—do—
13	117	Issue of debentures with voting rights.	—do—
14	153	Entering on the register of members or of debenture holders notice of any trust.	—do—
15	163(1) Clause (iii) of proviso.	Failure to give to Registrar advance copy of special resolution for the purpose of keeping registers and returns at a place other than the registered office.	—do—
16	173(2)	Failure to annex explanatory statement to notice of the meeting.	—do—
17	176(7)	Refusing to members inspection of proxies lodged.	—do—

1	2	3	4	5
18.	182	Prohibiting any member from exercising his voting right on the ground that he has not held his shares for any specified period etc.		Company and the officers concerned.
19.	190(2)	Failure to give notice to members of an intention to move a resolution requiring special notice.		Company and the officers in default.
20.	196(1)(a)	Failure to keep the books containing the minutes of the proceedings of any general meeting at the registered office of the company.		—do—
21.	197	Appointing or employing different categories of managerial personnel at the same time.		—do—
22.	198	(a) Payment of total managerial remuneration in excess of 11% of net profits.		—do—
		(b) Payment of minimum managerial remuneration without the approval of the Board.		—do—
23.	200	Paying tax free payments to any officer as remuneration by company.		—do—
24.	205	Non-compliance of the provisions regarding payment of dividend.		—do—
25.	206	Payment of dividend to persons other than registered shareholders etc.		—do—
26.	214	Failure of a subsidiary company to give inspection of its books and accounts to members and authorised representatives of its holding company.		—do—
27.	217(2A)	Failure to file with the Registrar information relating to employees drawing remuneration of three thousand rupees or more.		—do—
28.	224(1)	Failure to appoint an auditor at each general meeting.		Company and the officers in default.
29.	224(8)	Failure to fix auditors' remuneration.		—do—
30.	240(1)	Failure to preserve and produce books to an Inspector or to any person authorised by him and failure to give assistance to the Inspector in connection with the investigation.		—do—
31.	240(8)	Refusal to sign notes of examination by the person examined in connection with investigation.		Persons concerned.
32.	245	Failure of the specified persons to reimburse the Central Government expenses of investigation.		—do—
33.	252	Failure to have minimum number of directors of a company (public company to have minimum 3 directors and private company 2 directors).		Company and every officer in default.
34.	257(1A)	Failure of the company to inform its members of the candidature of a person for the office of director or the intention of a member to propose such a candidate for that office.		Company and its directors.
35.	259	Failure to obtain approval of the Central Government for increase in the number of directors.		Company and every officer in default.

1	2	3	4
36.	263	Making a motion at a general meeting for appointment of two or more directors by a single resolution except under the circumstances mentioned in the section.	Company and every officer in default.
37.	264	Failure to file with the Registrar within 30 days of appointment of a director his consent in writing.	—do—
38.	266(1)	Prohibiting a person from being appointed as a director unless certain formalities are done and unless his consent in writing is filed with the Registrar to act as a director.	—do—
39.	267	Appointing or employing any person as managing or whole-time director who is an undischarged insolvent or convicted by a Court etc.	—do—
40.	283(1), (2)	Not vacating the office by director on account of any disqualifications specified in several clauses of sub-section (1).	Director concerned.
41.	284(3)	Failure to send to a director a copy of notice of the resolution for his removal.	Company and every officer in default.
42.	284(4)	Failure to take the specified follow-up action on the representation made by the director who is intended to be removed.	—do—
43.	291	Exercising powers by the Board of Director beyond vested by the Act or the Memorandum of the company or otherwise etc.	Directors
44.	292	Exercising certain specified powers of the Board in any manner other than mentioned in the section.	—do—
45.	293	Board of directors exercising certain powers without the consent of the company in a general meeting.	—do—
46.	297	Entering into any contract with the company in which particular directors are interested without the consent of the Board.	Directors concerned
47.	314	Holding of office of profit by director etc. without the consent of the Company Law Board.	—do—
48.	316 (New provision)	Holding office of managing director in two public companies without the approval of the Company Law Board.	Person concerned
49.	317	Appointing a managing director for more than five years at a time.	—do—
50.	318	Payment of compensation for loss of office to persons other than managing/whole-time directors.	Company and officers in default.
51.	370(1F)	Failure to keep open for inspection the register of loans etc. maintained under section 370(1D) to members of the company at the registered office.	Company at every officer in default.
52.	395	Failure to acquire shares of shareholders dissenting from scheme or contract involving transfer of share of the company, approved by majority.	—do—
53.	619(3)(b)	Failure to furnish information or additional information as required by the Comptroller & Auditor General.	Person called up.
54.	619(4)	Failure of the auditor of a Government company to submit a copy of his audited report to C. & A. G.	Auditor concerned.

CHAPTER XVII

SIMPLIFICATION AND OVERALL REVIEW OF THE COMPANIES ACT NOT COVERED IN OTHER PARTS OF THE REPORT

17.1 There has been, from time to time, criticism about some of the provisions of the present Companies Act, both from the point of view of the administration of the Act by the Government and in the context of their day-to-day interpretation and practical working by companies. It is, however, in the nature of things that at all times and in all countries of the world, in spite of the best efforts on the part of the Draftsmen, a gap always remains between legislative intent and practical interpretation. It should also be borne in mind that the very nature of legislative process which has to reckon with the twin objectives of laying down a practical Code of Conduct for day-to-day activities and combining it with the ultimate social objective to be achieved by the society, necessarily leaves a time-lag before the latter objective can be achieved. All new legislations or modifications thereof are, therefore, an attempt to bridge this widening gap.

17.2 Both in the light of the experience of the working of the Act for over two decades and in the light of the structural changes suggested in this Report by the Committee, some of the existing sections call for modifications, some of them being of substantial nature. While suggesting these modifications, the following objectives have been kept in view :

- (i) removing practical difficulties and problems which have been felt in actual implementation of the existing legislation;
- (ii) avoiding repetition and unnecessary verbiage; and
- (iii) changes which should be made consequent on the structural changes suggested elsewhere in the Report,

Section 4 : Meaning of 'Subsidiary'

17.3 The present definition of 'subsidiary company' in section 4 is rather narrow and does not go beyond formation of direct subsidiary by single investment of holding company. We, therefore, suggest that clauses (b) and (c) of sub-section (1) of section 4 may be replaced by the following provisions :—

- (b) that a body corporate shall be deemed to be a subsidiary of another body corporate if more than half in nominal value of its equity share capital is held by that other body corporate ;
- (c) a body corporate shall also be deemed to be subsidiary of another body corporate if the above said value of the equity share capital is held either jointly or severally by a holding company and one or more of its subsidiaries; and
- (d) a body corporate shall be deemed to be the holding company of not only its immediate subsidiary but also of the subsidiaries of such subsidiaries.

17.4 Since the statutory relationship of holding-subsidiary continues only so long as the requirements of the provisions of sub-section (1) continue to exist and since there is no method to find out whether, at a particular point of time, a particular company is or is not a holding company or a subsidiary company, it would be advisable if a provision is made that along with the annual return to be filed, the company shall state in a form to be prescribed whether it is a holding company of another company or if it is a subsidiary of another—the intent being that a holding-subsidiary relationship should be notified to the Registrar of Companies along with the annual return each year.

Sections 15A and 15B: Special provision for alteration of memorandum consequent on alteration of name of a State

17.5 Our attention has been drawn to sections 15A and 15B which were added in 1969 and 1973 respectively consequent upon the change of name of Madras State into the State of Tamil Nadu and the Mysore State into the State of Karnataka. Instead of making additions to the Act, as and when the name of any particular State is changed or as a result of coming into existence of new States, it would be better if there is a single section worded in general terms to give effect to the change in the name of any State or the name of a new State by automatically substituting it in the existing situation-clause of the memorandum. The suggestion will obviate the necessity of amending the Act from time to time which indirectly will have the effect of increasing the number of sections. We, therefore, recommend the deletion of sections 15A and 15B which may be substituted by the following general provision :

“Wherever the name of a State or a Union Territory in which the Registered Office of a company is situate is duly altered, then, notwithstanding anything contained in this Act, the memorandum shall, as from the date such alteration takes effect, be deemed to have been altered by substitution of the new name of the State or the Union Territory in place of the previous name and the Registrar concerned shall make necessary alterations in the memorandum of association and the certificate of incorporation of the said company”.

Section 17 : Alteration of memorandum of association

17.6 Section 17(1) provides for alteration of memorandum of the company *inter alia* with respect to the objects of the company. This alteration requires approval from the Company Law Board. The object clause of a company is normally drafted so broadly that little, if at all, objection can be raised to the change of the objects when an application is made by a company. As a matter of fact, after the commencement of the Amendment Act, 1974, the total number of applications received by the Company Law Board for changing the objects of the company for alterations in the objects of the company as on 31st January, 1978 was 524 of which 53 were dismissed in default or non-compliance of the Rules. Among the 471 effective applications considered by the Board, as many as in 298 cases alterations were allowed (either in whole or in part) and only 3 cases were rejected. The remaining 170 cases were pending before the Board. This clearly shows that practically no objection is raised to the alteration in the memorandum of the object clause. The law is well-settled and, therefore, there does not seem to be any reason to follow this detailed procedure. We, therefore, suggest that there is no necessity for making application either to the Company Law Board or to any other authority and the company can, on its own, alter the objects clause of the memorandum by passing the necessary special resolution. We would, however, suggest that in case any member or members holding not less than five per cent of the total voting power of the company are aggrieved by such an alteration, such member or members should have a right to apply to the Company Law Board which shall look into the grievance, if any, and pass such orders as it may deem fit. As a measure of protection of the shareholders, a right may also be given to the Registrar and the Government of the State in which the registered office of the company is situate to move the Company Law Board. As it is, the Registrar has to be heard at present before any alteration in the memorandum is approved, and, therefore, no greater right is being given to him. Adoption of section 5 of the English Companies Act, 1948, with necessary modification will be suitable.

Section 20: Companies not to be registered with undesirable names

17.7 Section 20 prohibits registration of a company under a name considered undesirable by the Central Government or under a name identical or similar to the name of an existing company. The Department of Company Affairs has issued guiding instructions for deciding cases with regard to availability of names for registration under the Act. To obviate any substantial legislative amendment, we are of the view that statutory rules should be framed under section 642 (1) of the Act for this purpose. We, therefore, recommend that section 20 should be amended so that it empowers the Central Government to lay down the guidelines as may be prescribed. The guidelines which are currently being followed by it could then be issued as statutory rules.

Section 33: Registration of memorandum and articles

17.8 Clause (c) of sub-section (1) of this section refers to the agreement proposed to be entered into for appointing managing agents or secretaries and treasurers. While we feel that the reference in this clause to managing agents etc. is now redundant we would, suggest that this clause should rather be substituted as follows :—

“(c) The agreement, if any, which the company proposes to enter into with any individual, as Director, Managing Director or Whole time Director.”

Sub-section (2) of this section provides for a declaration to be filed by an advocate, a pleader, an attorney or a chartered accountant. We feel that a practising company secretary is equally competent to file this declaration and should be included in this sub-section. Necessary addition may, therefore, be made in this section providing for a declaration to be filed alternatively also by a practising member of the Institute of Company Secretaries of India.

Section 42: Investment by a subsidiary in its holding company

17.9 Sub-section (3) of section 42 permits a subsidiary company to continue as a member of its holding company if it was a member before the commencement of the Act or before becoming a subsidiary of the holding company, although the shares held by the subsidiary do not confer voting rights except where the subsidiary is concerned as a trustee or a legal representative, as provided in clauses (a) and (b) of sub-section (2). We, however, feel that though the restriction in the subsidiary acquiring shares in the holding company is plausible, this restriction should not operate to prevent the subsidiary from receiving bonus shares. We, therefore, recommend the following modifications in section 42 :—

- (1) In sub-section (2), the following clause shall be added, viz —
“(c) to the issue of bonus shares by the holding company.”
- (2) In sub-section (3), for the words, figure and brackets ‘cases referred to in sub-section (2)’, the words, figure and brackets, as follows, shall be substituted :—
“cases referred to in clauses (a) and (b) in sub-section (2)”.
- (3) The reference to unlimited companies in sub-section (5) should be dropped.

New provision to prevent cross-holdings in the case of companies other than holding-subsidary companies

17.10 Section 42 (1) prohibits a subsidiary company from investing in the shares of its holding company. This prohibition is basically intended to prevent cross-investment which is fundamentally wrong and which encourages, even where the companies are not holding-subsidary companies, the floatation of a chain of companies by using the same funds over and over again. In order to prevent inter-locking of investment/fund, the Committee considered it necessary to extend the principle contained in sub-section (1) of section 42, to other cases of cross investment. We would, therefore, suggest that a separate provision should be made in the Act to prevent one company from holding a large block of shares in another company which is its shareholding company. It is difficult, however, to provide an absolute restriction on cross-investment without regard to any percentage whatsoever. Accordingly, we recommend that restriction on interlocking of investment in shares should be imposed where the present holding by one company in another is in excess of twenty-five per cent with absolute restriction being applicable, as in the present section 42 (1), only where the holding is in excess of fifty per cent. The new provision suggested by us should provide that whenever company ‘A’ invests in the shares of company ‘B’ in excess of twenty-five per cent of the share capital of company ‘B’, company ‘B’ would not be entitled to invest in the share of company ‘A’ in excess of five per cent of the share capital of company ‘A’. We would further recommend that this new provision would operate only from the commencement of the Act and as far as the existing shareholdings are concerned, if they are in excess of the percentage specified in this provision, a reasonable period of time, say, three years, should be allowed to enable the company concerned to bring down its investment in accordance with the limits indicated by us.

Section 73: Allotment of shares and debentures to be dealt in on stock exchange

17.11 Section 73 of the Act provides that where the prospectus states that an application has been made for permission for the shares or debentures to be dealt in one or more recognised stock exchanges and permission has not been applied for before the tenth day of the first issue of the prospectus, or where such permission has been applied for before that day but the permission has not been granted by the Stock Exchange, as the case may be, before the expiry of ten weeks from the date of closing of the subscription list, any allotment made on an application in pursuance of such prospectus would be void. The proviso, however, excepts a case where an appeal has been filed against the decision of the Stock Exchange refusing permission. It was represented that a company which may have applied for being listed on many Stock Exchanges should not be compelled to have its allotment of shares declared void with consequential liability to repay all money just because one out of the many Stock Exchanges may have refused permission. We, however, see no justification for modifying such a provision. The reason is that the prospectus has clearly indicated to the allottees that the shares will be listed on various Stock Exchanges. A definite representation has, therefore, been made to the prospective allottees and, if by refusal on the part of the stock exchanges, part of the representation is no longer valid, it is only proper that the allottees should have the right to treat the allotment made in pursuance of such representation to be of no legal consequence and a right to get back their amount. However, in order to enable the company to prefer appeal against the decisions of the Stock Exchange, where such decision amounts to not granting permission, (though not expressly a case of refusal), we would recommend that the expression "refusing permission," wherever it occurs in this section should be substituted by the expression "refusing or not granting permission".

Section 77 : Restrictions on purchase by company, or loans by company for purchase, of its own or its holding company's shares

17.12 At present, the Act permits the company to give to its employees loan not exceeding an amount of their salaries or wages for a period of six months. In the interest of encouraging employees to participate in the company's share capital, it is suggested that the loan which may be granted by a company to any person during his entire period of employment with the company should not exceed 12 months' salary or wages, or twelve thousand rupees (Rs. 12,000), whichever is less. Sub-section (3) of section 77 may be amended accordingly.

Section 80 : Power to issue redeemable preference shares

17.13 Some suggestions were made that preference shares should be abolished. But the preponderant view is for retention of the same. The view of the financial institutions is that preference shares, though not a good investment, are still helpful to them because they ensure a steady income at the initial stages. Taking an overall view the Committee is not in a position to recommend that preference shares as such should be abolished. At the same time, it was unanimously urged that the existence of irredeemable preference shares, was an anomaly as the shareholders are compelled to be satisfied with the amount of return which is totally unrealistic and unrelated to the prevailing circumstances. We find there is sufficient justification for such a complaint. There are also instances where the companies, even though the time for redemption had ripened, have not gone in for redemption but have extended the time by a further period. We are of the view that the continuance of irredeemable preference shares is not helpful to the investing class. We, therefore, suggest that all irredeemable preference shares will become redeemable at the end of five years from the date of the commencement of the new Act if they are not already made so redeemable, within the said period. However, a situation might arise where a company may have to redeem the existing redeemable preference shares as well as the existing non-redeemable preference shares within the period of five years. This would cast a heavy burden on the finances of the company. We, therefore, suggest that a provision should also be incorporated to the effect that in case a company is not in a position to effect redemption within the stipulated period of five years, the company should have the option to convert such irredeemable preference shares into redeemable preference shares. The period of redemption in such cases should not exceed twelve years and interest at a rate not less than ten per cent would be payable on such shares. This particular option that we are suggesting here should be exercised by the company within six months from the date of the new Act and interest at the rate of not less than ten per cent would also become payable from the date. In this connection, we would specifically mention that no consent of any class of members should be necessary for such conversion. Our recommendations

regarding redemption should equally apply to the preference shares which are at present redeemable at the option of the company.

17.14 As a logical extension of the abolition of non-redeemable preference shares, we also recommend that in future no company should issue any preference shares which are not redeemable within a period not exceeding twelve years. We would further suggest that when the time for redemption of preference shares comes, it should be incumbent upon the company to redeem all the shares in cash, excepting those specifically agreed to be renewed. Further, it should no longer be open to the company to take recourse to section 106 or section 391 to have an arrangement by a majority decision, subject to the confirmation of the Court. This is to ensure that the existing irredeemable preference shares are redeemed within the five years or on the expiry of 12 years, as the case may be, after which such shares may be either renewed, or paid off in cash to those who do not agree to renewal. We would, however, recommend that so long as the total capital is not depleted, the procedure for Court's sanction for reduction of capital should not be made applicable to redemption of preference shares. This may be done either by issue of fresh shares or debentures either to the holders of redeemed preference shares or otherwise or by crediting an equivalent amount to Capital Redemption Reserve Fund from out of profits.

17.15 It was also felt that it would be in order to provide for a remedy in cases of default in redemption. We, therefore, suggest that company which was capable of redeeming its preference shares but had failed to do so should be prohibited from declaring any dividend on equity shares or transfer any of its profits to reserves until such time as it redeems the preference shares.

Section 81 : Further issue of capital

17.16 A suggestion has been received by the Committee that further issue of preference shares should be made to existing preference shareholders and not to the existing equity shareholders as required by clause (a) of sub-section (1) of Section 81. The Committee has not, however, found this suggestion acceptable for the following reasons :

- (a) this suggestion militates against the principle that it is equity shareholders alone who should decide about the capital structure of the company ;
- (b) further issue of preference shares does not in any way vary the rights of the existing preference shareholders. On the other hand, such further issue certainly affects the dividend prospect of the equity shareholders. The equity shareholders should, therefore, have a right to subscribe to the further issue of preference shares; and
- (c) in case the equity shareholders feel that the preference shares may be offered to the existing preference shareholders, the option is still open to the company to do so by passing a special resolution, as provided in section 81 (1A).

17.17 It has also been strongly urged by the financial institutions and others that the words 'before the issue of debentures or the raising of loans' occurring in clause (a) of the proviso below sub-section (3) of section 81 operate as a bar against conversion of the debentures and loans into equity at any time after their issue, even in cases when, in terms of the agreement, conversion is sought at the time of redemption. We feel that there is no justification, once the option exists in the agreement for converting the loan or issue of debenture, to deny this right. We would, therefore, suggest that exception be added after the first proviso to sub-section (3) of section 81 to say that nothing contained in the proviso will apply to the debentures or loans issued prior to the coming into force of the Companies (Amendment) Act, 1963 and which already contained an option of converting such debentures and loans into shares in the company.

Section 85 : Two kinds of share capital

17.18 This section should be suitably amended to provide for the following :-

- (a) all preference shares issued in future must be cumulative preference shares ;
- (b) all existing preference shares which are non-cumulative will be deemed to be cumulative with effect from the date of the commencement of the new Act;

- (c) all preference shares issued in future must be redeemable on or before a fixed date not later than twelve years from the date of issue. (See para 17.13);
- (d) all existing non-redeemable shares shall become redeemable within a period of five years from the date of commencement of the new Act or converted into redeemable preference shares subject to consideration mentioned in para 17.13.

Section 87 : Voting rights

17.19 Clause (c) of sub-section (2) of section 87 provides that where a holder of preference shares has a right to vote on any resolution, his voting right on poll shall be in the same proportion as the capital paid up in respect of the preference share bears to the total paid up equity capital of the company. Though the object of sub-clause (c) was to give proportionate voting rights to preference shareholder and the equity shareholder in the proportion of the total paid up capital of the company, the sub-clause as at present worded has given a disproportionate voting right to the preference shareholder. This needs to be corrected and we recommend that for the words 'bears to the total paid-up equity capital of the company', the words 'bears to the total paid-up capital of the company' be substituted.

Section 89 : Termination of disproportionate voting rights

17.20 Section 89 provides for termination of disproportionately excessive voting rights in the existing companies and gave a period of one year to reduce the said voting rights and bring them in conformity with the voting rights attached to such equity shares in sub-section (1) of section 87. That period of one year has long passed and, therefore, section 89 no longer serves any useful purpose and may be deleted.

Section 90 : Certain sections relating to share capital not to apply to private companies

17.21 Sub-section (2) of section 90 provides that the provisions of sections 85 to 89 shall not apply to private companies. We do not find any justification in allowing private companies to have any kind of shares other than equity or preference or to have shares with disproportionate voting rights. We, therefore, recommend abolition of section 90 of the Act. However, with regard to existing provisions in private companies relating to disproportionate voting rights, we further recommend that they should be brought within the discipline of the scheme of equal voting rights within three years from the date of commencement of the new Act.

Sections 94 and 94A : Increase of share capital

17.22 Clause (a) of sub-section (1) in section 94 refers only to increase in the authorised capital. The words 'issuing new shares' are inappropriate to such an increase and should be substituted by the words 'creating new shares'. The requirement in section 94A(3) for the company to send a return to the Registrar of Companies regarding increase of share capital etc., is redundant as, in terms of sub-section (2), the capital of the company 'stands altered' when the increase is pursuant to sub-section (1) and/or (2) and the Central Government has also to send a copy of its order to the Registrar of Companies. We, therefore, recommend deletion of sub-section (3).

Sections 94 and 95 read with section 2 (46) : Omission of reference to 'stock'

17.23 The definition of a share includes stock. In view of our recommendation that there should be only two kinds of shares, namely, equity and preference, the provisions which permit companies to convert paid up shares into stocks and reconvert the stock into fully paid-up shares need to be deleted. As a practical aspect also, we are informed that this practice of converting shares into stock is hardly resorted to and serves no useful purpose. We would, therefore, recommend that the definition in section 2 (46) should omit the reference to stock. Consequential amendments should be made in other provisions having reference to stock, e.g. sections 94 and 95 of the Act.

Section 98 : Power of unlimited company to provide for reserve share capital on re-registration

17.24 Consequent to our recommendation to de-recognize an "unlimited company", we suggest that this section should be deleted from the Act.

Sections 108A to 108 H: Restriction on the acquisition/transfer etc. of shares

17.25 The provisions of these sections are apparently applicable, by virtue of the specific provision in section 108H to shares of companies to which provisions of Part A of chapter III of the MRTP Act apply. Suggestions have been received by the Committee to effect that since the provisions in these sections are supposed to take care of concentration of economic power, they should be transferred to the MRTP Act. We would, therefore, recommend the transfer of these sections to the MRTP Act. We may in this connection mention that certain lacunae have been pointed out in the proper working of the sections and we are dealing with them in the section of the report dealing with MRTP Act.

Sections 114 and 115 : Share Warrants

17.26 Sections 114 and 115 deal with the issue and effect of share warrants to bearer. This practice is not very much in vogue. It is also an accepted principle that blank transfers should be discouraged as far as possible. It is suggested that this practice should not be allowed to continue. It is, therefore, recommended that sections 114 and 115 be deleted and a suitable provision be made giving time to the company to exchange the share warrant with a regular share certificate.

Sections 125 to 142 : Charges

17.27 We suggest that the provisions of this Part dealing with registration of charges should be modified to provide for the following :—

- (i) The proviso to section 125 may be so amended as to provide that the Registrar may allow on payment of additional fee, the particulars and instrument or copy of the charges etc. to be filed within thirty days next following the expiry of the period of thirty days as provided in this section—
 - (a) if the company satisfies the Registrar that it has sufficient cause for not filing the particulars and instrument or copy within that period; and
 - (b) a declaration has been furnished by the company that no other charge has been created in the interval.

The filing should be subject to the payment by the company of a penalty of Rs. 500.00 per day of delay as now provided in section 142 after the expiry of the period of sixty days.
- (ii) The provisions of section 141 would apply only when there has been failure to register the charge within the period of sixty days allowed under section 125.
- (iii) The Registrar should be empowered to refuse to register the charge where there are any complications or conflict of interests among the creditors. In such cases, the companies might be allowed to apply to the Company Law Board under the new set-up of administrative machinery.
- (iv) By way of drafting improvement, we suggest that the words 'requiring registration' in sections 134 (i) and 142 may be substituted by the words 'as provided for registration under the Act'.

Sections 153, 153A, 153B and 187B : Public Trustee

17.28 The provisions of sections 153, 153A, 153B and 187B may be consolidated at one place as these sections relate to the appointment of Public Trustee, declaration to be made to Public Trustee and the exercise of voting rights by him. The following modifications in the existing provisions are suggested :—

- (i) Since debentures do not carry any voting rights, these need not come within the purview of the declaration to be made to the Public Trustee. Reference to 'debentures', wherever it occurs in these sections, may, therefore, be deleted.
- (ii) Clause (a) of sub-section (4) of section 153B extends the provisions to a trust created by an instrument in writing. An Explanation may be added to provide for the inclusion of constructive trust within the meaning of the expression 'instrument in writing'.

- (iii) The present Explanation in regard to the 'value of the shares' spells out two criteria, viz.—
- (a) the cost of acquisition in case of shares acquired by way of allotment or transfer for consideration; and
 - (b) the paid-up value in any other case.

Since the voting rights are determined by the paid-up value of the shares as appearing in the company's books, it would be more appropriate if only the single criterion of 'paid-up value' is adopted for determining the value of shares held by a trust in a company. This Explanation should, therefore, be suitably modified to provide for this criterion in respect of all shares howsoever acquired.

- (iv) In computing the value of the shares or their percentage in relation to a company's total paid-up share capital, the value of shares held in a company by different trusts created by the same settler or settlers will be aggregated. This may be provided for by adding a suitable explanation.
- (v) In sub-section (1) of section 187B, the expression 'exercisable at any meeting of the company or at any meeting of any class of members of the company' may be replaced by the expression 'exercisable in relation to any meeting of the members or of any class of members of the company'.

17.29 The provisions of section 187C may be deleted. Our suggestion is based on our considered thinking that while the purpose behind introducing section 187C will be served better by requiring declaration to be filed with the Public Trustee in respect of certain specified quantum of holding of shares, there is, on the other hand, no particular advantage which has resulted from the operation so far of section 187C which has only led to considerable paper work both at the end of the company and at the end of the Registrar, besides making the law a little harsh on the general members of the public owning small or insignificant number of shares. We are also plainly not in favour of allowing *benami* transactions in any form. Even the Income Tax Act, 1961 [section 218A] recognises only the ostensible owner and any suit against the person in whose name the shares are held *benami* or any other person would not lie unless a notice has previously been given in the prescribed form to the Income-tax Officer. We recommend the incorporation of a similar provision in the Companies Act. In this connection we also feel that the provisions of section 12 (3) of the Banking Regulation Act, 1949, which make a presumption of title in favour of the registered holder of shares, if introduced, in the Companies Act itself, may have a salutary effect in preventing *benami* transaction. We have, therefore, recommended the incorporation of such a provision as well in the present section 155 of the Act. The reference to section 187C in the present section 187D may be suitably replaced by a reference to the new section which is to be incorporated, as per our suggestion to combine sections 153, 153A, 153B and 187B.

17.30 One Member of the Committee felt that the trusts created for the benefit of family members, as distinct from trusts created for charity and other public purposes, should be outside the purview of these provisions, as this would be an encroachment on the right of a citizen holding property.

17.31 At present, sub-section (3) of section 155 empowers the Court to decide any question relating to title. This section may be modified to include suitable provisions on the lines of the Banking Regulation Act, 1949 as contained in sub-section (3) of section 12 viz.—

“Notwithstanding anything contained in any law for the time being in force or in any contract or instrument, no suit or other proceeding shall be maintained against any person registered as the holder of a share in a company on the ground that the title to the said share vests in a person other than the registered holder:

Provided that nothing contained in this sub-section shall bar a suit or other proceedings—

- (a) by a transferee of the share on the ground that he has obtained from the registered holder a transfer of the share in accordance with any law relating to such transfer; or

- (b) on behalf of a minor or a lunatic on the ground that the registered holder holds the share on behalf of the minor or lunatic."

Sections 157 and 158 : Foreign register of members or debenture holders

17.32 A reading of the provisions of these sections shows that (a) a company may maintain a foreign register of members or debenture holders if the articles permit; (b) a return is to be filed with the Registrar for the purpose of maintaining such register; (c) particulars of the foreign register have to be incorporated in the principal register in the registered office of the company and these particulars form part and parcel of the register of members of the company, (d) the Central Government may issue notifications in Official Gazette about the validity or otherwise of the order of a competent Court in a foreign country on the question of rectification of the register of members; (e) once a particular foreign register is discontinued, it has to be replaced by another foreign register; (f) the company may make any regulation relating to foreign register; and (g) penalties are also provided for non-compliance.

17.33 We fail to understand the need, in the first instance, for making enabling provisions for the maintenance of foreign registers and then providing specifically that the foreign register is after all a part and parcel of the main register for all purposes of the Act, besides trying to take care of possible abuses and lacunae which may flow out of such enabling provisions and the consequent penalties. This section which seems to recognise the orders of a foreign Court or suggest a departure from the principle that the situs of the shares is in the place where the registered office of the company is situate, seeks to limit the legislative and administrative jurisdiction of the statute of this country. Though the provisions of a similar nature may still be found in some of the countries having a dominion status, it is inappropriate in our country. We, therefore, recommend the deletion of sections 157 and 158 of the present Act. We are also of the view that the deletion of these sections will not result in any hardship or in any difficulty in the administration of the Act in view of the saving provisions in sub-section (4) of section 158.

Sections 159, 160, 161 and 162 : Annual returns

17.34 We are of the view that these sections reiterate the requirements as to annual returns which are otherwise prescribed or capable of being prescribed in several parts in Schedule V to the Act. We are, therefore, of the opinion, that it would suffice if a simple provision is incorporated to the effect that the annual returns as regards certain categories of companies, including foreign companies, shall be respectively in forms set out in parts to be designated in Schedule V to the Act and shall set out the certificates or declarations as may be specified in those parts. As regards the provision with respect to penalty, we have suggested elsewhere that this may be provided in a separate schedule alongwith other penalties under the Act.

Section 165 : Statutory meetings and Statutory reports

17.35 This section is applicable only to public companies limited by shares and to companies limited by guarantee. We have received suggestions advocating the abolition of the requirements of the Act regarding statutory meetings. We are inclined to agree that holding of a statutory meeting has become a mere formality and, as such, this requirement should be dispensed with. However, we would suggest that every public company limited by shares should forward all particulars, which are now required to be incorporated in the statutory report to the shareholders within the period provided in the section. Such a report should also come up for consideration at the first annual general meeting and a copy thereof should also be filed with the Registrar. Section 165 should be modified on the lines recommended by us.

Section 166 : Annual general meeting

17.36 Sub-section (2) of section 166 provides that every annual general meeting shall be called for a time during business hours on a day that is not a *public holiday*. However, there is no such restriction in respect of requisitioning an extra ordinary general meeting under section 169. We feel that, from the point of view of shareholders it would be desirable to hold annual general meetings on holidays also so that they could attend the meetings and obtain any information they desire. We, therefore, recommend that the present provision in section 166(2) of the Act should be suitably modified to permit companies to hold annual general meetings during usual working hours on public holidays as well.

Section 169 : Calling of extra ordinary general meeting on requisition

17.37 We suggest that the section should be amended to provide for holding an extra-ordinary general meeting of a company only at the place where the registered office of the company is located, whether the extra-ordinary general meeting is called by the company itself or by the requisitionists.

Section 193 : Minutes of the Board and Committees thereof

17.38 Under section 292 of the Act, the Board of Directors can delegate their powers to a number of Committees. Many a time, important decisions are taken by the Committees but the minutes of Committee meetings are not circulated to the members of the Board. In order to provide for some safeguards against this practice, we recommend that sub-section (4) of section 193 be redrafted as follows :—

“(4) In the case of a meeting of the Board or a Committee thereof, the minutes shall contain the names of directors present at the meeting and the names of directors, if any, dissenting from, or not concurring in any resolution passed there at and, in so far as the minutes of the Committees of the Board are concerned, these shall be circulated within thirty days of the holding of the meeting to all members of the Board.”

Meetings—Injunction against

17.39 It was brought to the Committee's notice that there have been instances where injunctions have been applied for and granted under the provisions of the Civil Procedure Code just prior to the holding of the statutory and other meetings of companies rendering the holding of such meetings by company management difficult. Once an injunction is obtained, multiplicity of proceedings ensue with grave consequences to a large body of shareholders in matters concerning the declaration of dividends, passing of accounts, appointment of directors, appointment of auditors, etc. The Committee took note of the fact that such suits are often filed by disgruntled shareholders in various courts spread over the country. While it would not like to take away the jurisdiction ordinarily conferred on civil courts to determine and deal with cases of this nature, the Committee felt that for a very limited purpose namely, the power to grant injunction or interlocutory relief, restraining the holding of any meetings of the shareholders including annual general meeting, should be vested exclusively in the High Court having jurisdiction over the place where the registered office of a company is located. The Committee would accordingly, suggest that a provision on the following lines be incorporated in the Act (preferably after section 197)—

“Notwithstanding anything contained in any other law for the time being in force, the High Court within whose jurisdiction the registered office of the company is situate shall have exclusive jurisdiction to entertain applications for injunction in respect of holding of meeting of the shareholders of the company”.

Section 205 : Dividend to be paid only out of profits

17.40 A doubt has been raised as to whether interim dividend can at all be paid by a company in view of the language used in section 205, the two essential requirements to be met before payment of any dividend being (a) the prior adjustment of depreciation and (b) the prior adjustment of any accumulated losses. Regulation 86 in Table 'A', however, would seem clearly to permit the Board to pay any interim dividend as may be justified by the profits of the company. We are, therefore, suggesting the inclusion of a specific provision to permit the payment of interim dividend. It is, however, necessary to ensure that the provision enabling payment of interim dividend is not abused by the directors in a manner which is likely to prejudice the interest of the company or its creditors, or that the interim dividend is paid just for the sake of obtaining any tax advantage although there are no profits or there is no likelihood of any profits in the year of payment of the interim dividend. In this respect we find that the provisions of section 376 of the Australian Companies Act, if introduced in our Act, with some modification, may have a salutary effect.

We, therefore, suggest a new sub-section be incorporated in section 205 to the following effect :—

“Every director of the company who wilfully pays or permits to be paid any interim dividend out of what he knows is not profits of the company shall, without prejudice to any other law, be guilty of conducting the affairs of the company in a manner which is prejudicial to the interest of the shareholders and the company and shall, if the company is wound up within two years of declaration of such interim dividend, be also liable to the creditors of the company for the amount of the debts due by the company to them respectively to the extent by which the dividends so paid have exceeded the profits and such amount to be recovered by the creditors or the liquidator suing on behalf of the creditors.”

17.41 The Companies (Amendment) Act, 1974, introduced a new sub-section (2A) which requires companies to transfer certain percentage of profits to reserves before declaring certain percentage of dividends. For transfer of any higher amount of profits to reserves than ten per cent of the profits, certain further conditions have been laid down. These conditions are to be found in the Companies (Transfer of Profits to Reserves) Rules, 1975. The Committee feels that these Rules are unnecessarily cumbersome and lead to confusion and also hardship in some cases. Even their interpretation has not been free from doubt and the Government had to issue a number of clarifications for administering these Rules. The Committee is, therefore, of the view that the purpose of introducing the new sub-section (2A) in section 205 could be more easily and expeditiously achieved without recourse to the rule-making power of the Government by merely laying down the substance of the conditions now found in the Rules.

17.42 In the light of the amendments which we are suggesting, we are of the view that the Companies (Transfer of Profits to Reserves) Rules, 1975, should be deleted. Similarly the Companies (Declaration of Dividends out of Reserves) Rules, 1975, should also be dispensed with. Sub-section (3) of section 205A is redundant in this view and should also be deleted.

17.43 At present, proviso (b) to sub-section (1) of section 205 permits the company to pay dividend leaving a part of the accumulated loss unadjusted. The Institute of Chartered Accountants, in their memorandum, have strongly suggested amendment of this proviso to ensure that a company does not distribute the profit earned by it in a year or in the previous years unless the entire loss, including depreciation, whether charged in the books or not in the previous years, is completely made good. We are in agreement with this suggestion and would, therefore, suggest the deletion of reference to ‘an amount which is equal to the amount provided for depreciation for that year or those years whichever is less’ in proviso (b) to sub-section (1).

17.44 References in this section to the Companies (Amendment) Act, 1960, are, in our view, no longer necessary and may be deleted, wherever such references occur. Since we are not in favour of the company paying dividends without providing for depreciation, we also recommend that the proviso (c) to sub-section (1) and the further proviso thereunder should be deleted.

17.45 We are also against frequent changes being made by companies in the method of charging depreciation. We have, accordingly, made certain recommendations which should find place in the redraft of section 205.

17.46 Provisions of section 211(2) requires a company to have a profit and loss account which shall give true and fair view of the profit or loss of the company. The companies are required to comply with the requirements of Part II of Schedule VI so that the true and fair profits are arrived at in accordance with the same. Section 205 for the purpose of declaration of dividend does not refer to section 211(2) and provides for depreciation only for the purpose of declaration of dividend. Intention of section 205 is that the companies should declare and pay dividend out of profits and not capital. Section 349 defines net profits for the purpose of computation of commission on net profits.

17.47 Apart from simplification, it is inconceivable that there should be different methods for different purposes for determination of profit. Profits for all purposes should

be the same throughout the Act with only one exception that for determining managerial remuneration, such remuneration should be determined before tax. Most important is to ensure that dividends are declared out of its true profits and not profits arrived at by various permutation and combination and by adoption of various methods of not making provision and following different methods, i.e., cash basis in respect of some items, in order to arrive at profits which can be distributed, even though accounts have to be on mercantile system of accounting and cash basis is adopted for some items which do not reflect in the declared profits and stated by way of notes, but not taken into consideration for declaration of dividend. Even at times, miscellaneous expenditure and losses are not taken into account because of the present provisions of section 205. Many times profits are arrived at which do not represent true profits and are utilised to satisfy the shareholders and to show better performance and results with plethora of notes to the accounts but such profits are not real profits. Therefore, definition of section 205 requires to be amended. Consequently, the re-draft of section 205 and explanation to section 309 would read as indicated:—

“205. (1) No dividend shall be declared or paid by a company for any financial year except out of the true and fair profits that has been arrived at in accordance with the provisions of section 211(2) of the Act, after providing for depreciation in accordance with the provisions of sub-section (2) or out of profits of the company for any previous financial year or years arrived at in the aforesaid manner and remaining undistributed or out of both or out of monies provided by the Central Government or a State Government for the payment of dividend in pursuance of a guarantee given by that Government: Provided that—

- (a) if the company has not provided for depreciation or any other expenditure required to be taken into account in arriving at the true and fair profits for any previous financial year or years which falls or fall after the commencement of the Companies (Amendment) Act, 1960, it shall before declaring or paying dividend for any financial year, make provision for the same out of profits of that financial year or out of profits of any other previous financial year or years.
- (b) If the company has incurred any loss in any previous financial year or years which falls or fall after the commencement of the Companies Amendment Act, 1960, arrived at in the aforesaid manner, then the amount of such loss shall be set off against the profits of the company for the year in which dividend is proposed to be declared or paid or against the profits of the company for any previous financial year or years arrived at in both the cases in accordance with the provisions of this section and section 211(2) of the Act.

(2) For the purpose of sub-section (1), depreciation shall be calculated either—

- (a) with reference to Written Down Value of the assets as shown by the books of the company at the end of the financial year expiring at the commencement of this Act or immediately thereafter and at the end of each subsequent financial year at the rate specified for the assets by the Indian Income Tax Act, 1961, and the rules made thereunder for the time being in force, as normal depreciation including there in extra and multiple shift allowances but not including therein any special, initial or other depreciation or any development rebate or investment allowance whether allowed by that Act or those rules or otherwise in respect of each item of depreciable asset, for such an amount as is arrived at by dividing ninety-five per cent of the original cost thereof to the company by the specified period in respect of such asset; or
- (b) on any other basis approved by the Central Government which has the effect of writing off by way of depreciation ninety-five per cent of the original cost to the company of each such depreciable asset on the expiry of the specified period; or
- (c) as regards any other depreciable asset for which no rate of depreciation has been laid down by the Indian Income Tax Act, 1961, or the rules made thereunder, on such basis as may be approved by the Central Government by any general order published in the Official Gazette or by any special order in any particular case:

Provided that where depreciation is provided for in the manner laid down in clause (b) or clause (c) then, in the event of the depreciable asset being sold, discarded, demolished or destroyed, the written down value thereof at the end of the financial year

in which the asset is sold, discarded, demolished or destroyed, shall be written off in accordance with sub-section 2(a).

Provided further that the company shall have an option to provide depreciation as provided in (a), (b) or (c) and shall not be changed unless the change in method of depreciation from the method adopted by the company or any other method is adopted with prior approval of the Central Government, provided, however, such change, to the other method for providing depreciation shall be allowed only once and the fact thereof shall be shown clearly in the accounts of the year in which such change takes place.

(2A) Notwithstanding anything contained in sub-section (1) on and from the commencement of the Companies (Amendment) Act,, no dividend shall be declared or paid by the company for any financial year out of profits of the company for that year, unless at least twenty-five per cent of the profits of that year have been transferred to the reserves of the company, such transfers to reserves being inclusive of all the transfers required to be made under any law for the time being in force :

Provided that nothing in this sub-section shall be deemed to prohibit the voluntary transfer by the company of a higher percentage of its profits to the reserves, so long as the amount of dividend declared in the year in which such transfer is effected works out to at least the rate of dividend declared on an average during the last three years.

(2B) Notwithstanding anything contained in sub-section (1), no dividend shall be declared or paid for any year by a company, except out of free reserves including profit of that year for which the dividend is declared or paid and provided an amount equal to twenty-five per cent of the paid up share capital is kept in reserves.

(2C) The Board of Directors in any year may pay to the members such interim dividend as appear to the directors to be reasonably justified by the estimates of true and fair profits which might accrue for that year to the company keeping in view the adjustment for depreciation and accumulated loss which may have to be made at the time prior to the declaration of the final dividend but not exceeding half of the average rate of dividend declared for the last three years.

- (3) No dividend shall be payable except in cash. Provided that nothing in this sub-section shall be deemed to prohibit the capitalisation of profits or reserves of a company for the purpose of issuing fully paid up bonus shares or paying up any amount for the time being unpaid on any shares held by the members of the company.
- (4) Delete.
- (5) For the purposes of this section—
- (a) “specified period” in respect of any depreciable asset shall mean the number of years at the end of which at least ninety-five per cent of the original cost of that asset to the company will have been provided for by way of depreciation if, depreciation were to be calculated in accordance with the provisions of sub-section (2A).
- (b) any dividend payable in cash may be paid by cheque or warrant sent through the post directly to the registered address of the shareholder entitled to the payment of dividend or in the case of joint shareholders, to the registered address of that one of the joint shareholders which is first named on the register of members, or to such person and to such address as the shareholder or the joint shareholders may in writing direct.”

17.48 For the purpose of remuneration by way of commission and also for the purpose of section 198 for determining overall managerial remuneration, an Explanation should be added to sections 198 and 309 as under :—

“For the purposes of this section, true and fair profits as shall be arrived at in accordance with section 205(1) read with section 211(2) of the Act, except that tax payable by the company under the Direct Tax Laws, shall be excluded therefrom.”

17.49 As we are recommending the adoption of the concept of profit uniformly for the purposes of this Act and also are suggesting method of calculating depreciation, sections 349 and 350 may be deleted.

Section 205A and 205B ; Treatment of unpaid/unclaimed dividend

17.50 These sections were introduced by the Amendment Act of 1974. The intention of the legislature was to protect the shareholders against the possibility of misuse of money due to them by the management. However, it has been pointed out to us that the words 'remains unpaid' used in sub-section (1) of section 205A cannot really be construed, as the law stands at present, to mean actual non-receipt of the dividend money by the shareholders and the companies have taken the plea that, so long as the dividend warrants have been posted by the company, the dividend should be deemed to have been paid. In order to settle the question of interpretation, once and for all, it is suggested by us that section 205A should be redrafted to provide for compulsory transfer of the dividends not yet received by the shareholders—

- (a) where dividend warrants have not been posted, within seven days of the expiry of the forty two days after the date of declaration of dividend; and
- (b) where dividend warrants, though posted, are not yet collected, within ten days, after the expiry of six months from the last day on which the dividend warrants should have been posted by the company.

This would also be consistent with the currency of a cheque usually allowed by banks, namely, six months. It would not be fair either to the company or to the shareholders to go for the formality of issue of a fresh dividend warrant even before the expiry of six months during which the first warrant would still remain valid and could be collected. We also suggest that the provisions of sections 205A and 205B should logically find their place after section 207 and should, therefore, be shifted from their existing place accordingly.

Section 208 ; Power of company to pay interest out of capital

17.51 This section permits companies with long gestation period to pay interest to shareholders, out of the capital itself and charge the amount of interest so paid to the cost of construction. The rate of interest cannot exceed four per cent per annum or such other rate as may be notified by the Central Government and the payment is subject to the approval of the Central Government. We do not think that this is a healthy provision in as much as it has the effect of overstating the assets and weakening the financial position of the company in a difficult period. Investors in equity shares of such a company are supposed to bear with the gestation period for their stake is in the long term prospects of the company. In actual practice, we are informed that the powers under this section have hardly been invoked in the past and, as such, we would recommend the deletion of the provisions of this section.

Section 220 : Copies of balance sheets to be filed by companies

17.52 The present section 220 requires the companies to file three copies of balance sheet with the Registrar. The Department of Company Affairs has a Research & Statistics Division which maintains a library of balance sheet for purpose of carrying out research on corporate sector. The Registrar retains one copy and sends another copy to the Department while the third copy is given to the Reserve Bank of India to enable them to conduct their studies on corporate spectrums. The Reserve Bank of India has been writing to the Department that it would facilitate their work if the law provides for balance sheets to be sent directly by the companies to the Reserve Bank of India. The Department of Company Affairs at its headquarters in Delhi also gives research facilities to different institutions which are interested in conducting research on corporate sector, and also to individuals interested in corporate research. We would, therefore, suggest that section 220 may be amended to provide for five copies of balance sheets to be filed by companies out of which one copy may be sent directly by companies to the Reserve Bank of India.

Section 224 : Appointment of auditors

17.53 We suggest the following modifications which are of clarificatory nature. An Explanation may be inserted after sub-section (1) of this section to read—

“Every auditor appointed on annual general meeting shall be deemed to hold office from the date of the annual general meeting until the conclusion of the next annual general meeting.”

In sub-section (4), the words ‘Where at an annual general meeting’ may be substituted by the words ‘Where before the conclusion of the annual general meeting’.

Section 259 : Increase in number of directors

17.54 At present, approval of the Central Government is required if the number of directors is to be increased beyond twelve. We would suggest that, in future, such approval should be necessary only if the increase in the number of directors is beyond fifteen. Accordingly, the word ‘twelve’ wherever it occurs in the proviso to this section should be substituted by the word ‘fifteen’.

Section 293 : Restrictions on Powers of Board

17.55 We have suggested in Chapter V (para 5.26) that investment and borrowing powers should be exercised by the general meeting by passing a special resolution. We have also recommended in Chapter VIII (para 8.10) that provisions of section 212 should be made applicable to the accounts of partnerships/joint ventures entered into by a company. In keeping with this approach, we further suggest that any proposal by which a company becomes a partner in a partnership firm or a participant in a joint venture should be made subject to approval of the shareholders by special resolution. Section 293 may be modified accordingly.

Section 294 to 294AA : Appointment of sole-selling agents

17.56 Section 294 which prohibits the appointment or re-appointment of sole-selling agents for a period of more than five years at a time, also insist on the approval of the general body of shareholders in their meeting first held after the date of such appointment or re-appointment. Sub-sections (5) to (8) of this section, which empower the Central Government to intervene in the appointment of a sole-selling agent at its discretion, are healthy provisions. The Committee feels that these sub-sections can be made more effective use of—

- (a) in case the applicability of the section is extended to arrangements or agreements by whatever name called, for distribution of the products of the company such that the total off-take of the company's products by virtue of the arrangement or agreement is not likely to be less than ten per cent of the expected sales during the year; and
- (b) in case it is possible to develop a suitable system by which necessary information is made automatically available to the Central Government in respect of all arrangements or agreements as stated above.

Explanation : For the purpose of clause (a) aforesaid, the likely off-take arising out of the arrangement or agreement may be estimated, in the absence of any executory provision in this behalf in the agreement or arrangement, on the basis of the off-take, if any, made in the previous year by the party to the agreement or arrangement or on the basis of a reasonable estimate to be made by the Board in this behalf.

We, therefore, suggest the deletion of sub-sections (1) to (4) of section 294 and the retention of section 294A and sub-sections (5) to (8) of section 294 in a single section, viz., section 294, subject to the following modifications :—

- (i) The heading as well as the wording of the section should be changed so as to substitute any reference to ‘sole-selling agents’ by appropriate reference to ‘arrangement for distribution of companies’ products’.

- (ii) Selling arrangement or agreement should be defined to mean any agreement or arrangement the effect of which is that not less than ten per cent of the production of goods of particular description are sold or distributed to or through another person or firm or company, by whatever name such arrangement or agreement be called. Information in respect of such arrangement or agreement should be made automatically available to the Central Government. Necessary changes should be effected in sub-sections (5) to (8).
- (iii) Such selling agency arrangement or agreement will require the approval of the company in general meeting by special resolution.
- (iv) Wherever there is substantial interest, as defined in section 294AA, the prior approval of the Central Government will continue to be necessary as at present.
- (v) In so far as the existing arrangements for distribution falling within clause (ii) or (iv) are concerned, i.e., the arrangements which may be prevailing on the date of the coming into force of the new law, the company shall have to obtain the approval of the company in general meeting by special resolution or the approval of the Central Government for continuance thereof, as the case may be, within a period of six months from the commencement of the new law, failing which arrangements shall cease to be valid on the expiry of the nine months from the commencement of the Act. No compensation shall be payable to any person affected by the cessation of such arrangements.

17.57 We also feel that it is necessary, in view of the procedure for approval of distribution arrangements suggested by us, to modify accordingly section 294AA. We would suggest that the provisions relating to prohibition against payment of compensation for loss of office in the present section 294A and the provisions governing prohibition of sole-selling agencies in certain industries in certain circumstances and the approval of the Central Government in the case of 'substantial interest' in section 294AA should be suitably incorporated in the redraft of section 294. We are, however, suggesting that the prohibition against selling arrangements and agreements in notified industries should not hit the small companies. Necessary exemption has been suggested in Chapter IV on classification of companies.

17.58 The Committee is aware that the legislative changes suggested by it, though useful in preventing some of the existing practices having the effect of imposing unjustified burden on the consumer, they cannot by themselves, in view of the limitation of company law to afford total protection to the consumer, provide the complete answer to the problem of making essential consumer goods available to the people at the cheapest price and eliminating all avoidable costs of distribution. The Committee, therefore, feels that parallel legislations in the field of marketing of produce must be suitably strengthened to achieve the objective underlying the provisions of the Companies Act.

Section 297 : Board's sanction required for certain contracts in which directors are interested

17.59 At present, this section is applicable in the case of contracts between two companies only when the director concerned is a director of a private limited company which enters into a contract with the other company. Since the purpose of this section is to prevent the directors from obtaining any benefit out of a contract other than what is normally available in any open transaction for cash at prevailing market prices, it is felt that the reference to 'private company' in sub-section (1) should be substituted by reference to the expression 'body corporate'. We, however, recommend that the proviso added by the Companies (Amendment) Act, 1974, to sub-section (1) should be deleted. This proviso apparently requires Government approval even where the company is having a service contract with another company for maintenance of office equipments. But the company rendering the service on contract basis being a company which regularly trades or does business, the relief afforded by the proviso to clause (b) of section (2) is not of much avail. Even a contract of employment with the relative of a director, company appointing the relative having a paid up capital of not less than one crore rupees, requires Government approval. We feel that the requirement of a Board's resolution and the disclosure of the interest of the director are sufficient internal safeguards against unconscionable contracts. We, therefore,

recommend the deletion of the proviso to sub-section (1). Our further recommendations are—

- (i) In sub-section (2), in the proviso to clause (b) the words 'five thousand rupees' should be substituted by the words 'twenty-five thousand rupees'.
- (ii) For the removal of doubts, we also recommend that it should be made clear in this proviso that the proviso applies to clause (b) of sub-section (2) and not to clause (a) thereof.
- (iii) In sub-section (3), the words 'five thousand rupees' should be substituted by the words 'twenty-five thousand rupees'.

Section 309 : Remuneration of Directors

17.60 This section deals with payment of managerial remuneration by way of commission on percentage basis. We have made certain recommendations on managerial remuneration in Chapter VI. Any amendment of section 309 has to await the acceptance of our recommendations relating to managerial remuneration. We are not, therefore, suggesting to recast the section anticipating the acceptance of the Government. We would, however, recommend the incorporation of a proviso in the redraft of section 309 on the following lines :—

“Provided that any remuneration for services rendered by any such director in any other capacity shall not be so included if—

- (a) (i) the services rendered are of a professional nature, and
- (ii) where such services are related to the professions of law, accountancy (including taxation), medicine, engineering and architecture, the director possesses the requisite qualification for practice of that profession; or
- (b) in all other cases, in the opinion of the Company Law Board (to be expressed on an application made to it in that behalf), the directors possess the requisite qualifications for the practice of the profession.”

Section 314 : Director etc., not to hold office or place of profit

17.61 Clause (b) to sub-section (1), which was added by the Amendment Act of 1974, imposes a monetary limit of monthly remuneration of five hundred rupees. We feel that this limit is rather too low and should be raised to one thousand rupees per month. The proviso added to sub-section (1B) of this section has run out its utility after the commencement of the Amendment Act of 1974 and may, therefore, be dispensed with. Similarly, the words “after the commencement of the Companies (Amendment) Act, 1974” occurring in sub-section (2B) may be done away with, these words being now redundant. Sub-section (2C) follows from the proviso to sub-section (1B) and should be dropped in the light of our suggestion to delete the proviso to sub-section (1B). So far as sub-section (2D) is concerned, the reference to sub-section (2C) in this sub-section should be omitted.

Sections 324 to 348, 351 to 369, 375 and 377 to 383 : Managing Agents and Secretaries and Treasurers

17.62 Consequent on the abolition of systems of managing agents and secretaries and treasurers, it is no longer necessary to retain these provisions in the Act. Although our suggestion in that these sections may be deleted from the Act, at the same time, we feel that the essence of section 324A which effected the abolition of these two systems, should be retained with necessary safeguards in the new Act. Certain other sections (like section 249) which relate to managing agents or secretaries and treasurers or to erstwhile managed companies should be dropped.

Section 376 : Condition prohibiting reconstruction or amalgamation

17.63 The provision of this section should be shifted to an appropriate place, after deletion of references to managing agents and secretaries and treasurers, dealing with reconstruction and amalgamation (present section 391 to 396).

Sections 384 to 388A : Managers

17.64 We have recommended the abolition of the office of "manager" in Chapter V. Consequently, the provisions of sections 384 to 388A relating to managers should be deleted. Similarly, reference made to "manager" in any section of the Act should also be dropped.

Sections 390 to 396A : Arbitration, compromises, arrangements and reconstructions

17.65 The Committee received a large number of suggestions on the subject of amalgamation and generally the suggestions are for simplification of the procedural matters so that the time required to go through the formalities could be reduced and at the same time, costs of litigation could be minimised. The Committee has given very careful consideration to these suggestions.

17.66 Under the existing scheme of the Act, amalgamation of companies could be ordered by the Courts or by the Central Government (Sections 391 to 394 and section 396 of the Act). While in the case of approval by the High Courts, some procedural requirements (sections 391 to 393 of the Act) have to be gone through before the scheme becomes final, in the case of approval by the Central Government, a case of 'national or public interest' has to be shown to exist before the Central Government can exercise its power under section 396 of the Companies Act. Even in the case of an order by the Central Government, there are some procedural requirements, but then these are not as elaborate as the procedure under the Companies (Court) Rules, 1959. The Central Government has so far been exercising its power under section 396 only in the case of wholly-owned public sector companies. The provisions of this section have not so far been applied to private sector companies although we do not see any legal bar against its application even in respect of private sector companies. Recently, under a notification issued by the Department of Company Affairs, pursuant to section 620 of the Companies Act, 1956, the word 'Court' occurring in section 394, as far as Government companies are concerned, has been substituted by the words "Central Government", thereby giving jurisdiction to the Central Government to approve schemes of amalgamation of Government companies. Thus, the Central Government is already in a position to exercise power both under sections 391 to 394 and 396 of the Act in so far as Government companies are concerned. This double option for Government companies, in our view, can be reduced to a single option under section 396 only.

17.67 We have examined the relevant rules of the Companies (Court) Rules, 1959, applicable in this behalf and find that there are two stages in the Court procedure also. The first stage is the application stage (rules 67 to 78) and issue of directions by the Court for convening the meetings of the shareholders/creditors and the passing of the requisite resolutions with three-fourth majority both in number and value approving the scheme of amalgamation at class meetings of shareholders of both the transferor and the transferee companies, and the submission of the report by the chairman of the respective meetings. The second stage is—after the procedural requirements of the Act have been gone through—the Court considers the scheme of amalgamation on merits and passes the final orders (rules 79 to 84). We are informed that the Court issued notice to the Central Government only at the second stage of the proceedings. We have also been informed that the procedure before the Court takes at least 6 to 8 months before all the legal formalities are gone through, and the scheme is finally approved by the Court(s). Again, if one of the applicant companies is registered under section 26 of the MRTP Act, then in addition to the Court's sanction, the scheme has also to be approved by the Central Government under section 23(2) of the MRTP Act and the Central Government has to pass an order, before the Courts can actually approve the scheme of amalgamation. This undoubtedly adds to the delay. If one or more companies to the scheme of amalgamation are situated in different States, then the applications have to be made before different High Courts. This is yet another reason why the matter gets delayed. After a careful consideration of all these aspects, we are of the view that it is necessary to

cut down delay, avoid duplication of procedures and, incidentally, reduce litigation costs. We would, therefore, make the following recommendation :—

In so far as companies registered under the MRTTP Act are concerned, we are not suggesting any change from the existing procedure. There is a strong public purpose, in our view, to retain the powers of the Central Government to examine the proposal of merger etc. involving the question of concentration of economic power. However, in cases where the question as to whether the company is liable for registration under section 26 of the MRTTP Act or not, has not been finally decided and the matter is pending before the Central Government or the Commission, then in such a case, the companies being parties to the scheme of amalgamation could file the petition in the Court as per the existing provisions, but with this modification that in such a case, the applicant company/companies must mention in the petition the fact of the question of registration under section 26 being under determination, and also state the grounds as to why the company/companies is/are not liable to be registered under section 26. The Court, while disposing of the petition, may either await the final decision on the matter of registration or make other appropriate orders.

17.68 In the case of [companies which] do not fall within the purview of the MRTTP Act, the existing procedure should continue except that we would recommend :

- (a) single stage procedure commencing with a company petition on which the Court will issue notice to the Central Government (i.e., the Department of Company Affairs), the Ministry/Department concerned with the business activity of the amalgamating company (transferor company) and such other person/authority whom the Court considers it necessary to be heard before passing a final order;
- (b) with a view to affording sufficient time to the Government Departments/authorities, the applicant company should serve an advance copy of the petition to the Central Government/Department authority and make a statement to that effect in the affidavit of service prescribed in Form No. 7 of the Companies (Court) Rules, 1959 (with necessary modifications);
- (c) instead of both the amalgamating company (transferor company), and the amalgamated company (transferee company) making two separate applications either in the same Court or in different Courts, there should be only one joint application to be made by the parties to the scheme of amalgamation. The joint petition should be filed in the Court where the registered office of the amalgamated company (transferee company) is situated.

17.69 As an incidence of amalgamation, the transferor company goes out of existence and the Court orders dissolution of the transferor company without winding-up pursuant to clause (iv) of sub-section (1) of section 394. Before the transferor company is dissolved, the Official Liquidator attached to the Court has to submit a report under the second proviso to section 394(1) and on his certifying that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest, the Court orders dissolution. Conflicting views have been expressed by the Courts as to the exact scope of the said proviso. Calcutta High Court has consistently been holding the view that the said proviso applies only in cases where one of the companies to the scheme of amalgamation is wound up or is in the process of being wound up, and that it will not apply to cases where there is only a technical dissolution without winding up. A contrary view has been taken by a Bench of the Karnataka High Court and according to that Court the proviso applies in all cases, and it is necessary that the Court should have the benefit of the report filed by the Official Liquidator before any dissolution order can be made. Whatever may be the legal position, we feel that it may not be necessary for the Official Liquidator to make a scrutiny of the books and papers of the company and report to the Court that the affairs of the company have not been conducted in a manner prejudicial to the public interests or to the interests of its members, before the company can be dissolved. In the winding up Chapter we have already recommended that in the case of voluntary winding up, it is not necessary that before the company is dissolved, the Official Liquidator should file a report pursuant to section 497(6) or section 509(6) of the Companies Act, 1956. In the case of amalgamation too, as the matter is already before the Court, and the Court is expected to protect the interest of everybody concerned, it is not appreciated why a further report by the Official Liquidator pursuant to the second proviso to section 394(1) should be necessary. We, accordingly, recommend that this requirement should be dispensed with. Instead, it should be provided in

the section that at the expiry of six months after a certified copy of the order of the Court approving the scheme of amalgamation is filed with the Registrar, transferor company should be deemed to have been dissolved. Even otherwise, section 559 already provides for a declaration by the Court of any dissolution being void whether in pursuance of Part VII, or under section 394 or otherwise, and for passing such order as it may think fit. We think that this would afford sufficient protection to any person to re-open the matter within a period of five years of the date of dissolution, as recommended by us in Chapter XV.

17.70 We have earlier referred to the two alternative modes by which amalgamation of Government companies can be brought about by the Central Government. Government companies, by their very nature, are meant to subserve public interest or public policy in some manner. The ownership of such companies also vests in the public at large. In view of this ownership pattern, the interests of shareholders, which is one of the important interests to be taken care of in any scheme of amalgamation is not likely to be adversely affected in case of amalgamation of Government companies. The interests of creditors are to be protected in any case irrespective of the authority passing the order of amalgamation. It can, therefore, be safely assumed that a scheme of amalgamation or merger of Government companies, which has been already carefully considered by the concerned Governmental authorities, will be in public interest as gauged at the relevant time. We, therefore, see no difficulty in the Central Government exercising its powers under section 396 in all cases of amalgamation between Government companies. There need be no occasion for exercising of powers of the Central Government in respect of Government companies under section 391/394.

17.71 There is another category of cases of amalgamation where, we feel, the provisions of section 396 of the Companies Act, can be readily invoked by the Central Government in sanctioning schemes of amalgamation in the public interest. These cases pertain to amalgamation of sick industrial units with healthy units. In order to facilitate such amalgamation, Finance Act No. 2 of 1977 had inserted a new section 72A in the Income Tax Act relating provisions contained in the Act relating to set off of accumulated business loss and unabsorbed depreciation allowance. The cases covered are of amalgamation of companies owning an industrial undertaking. The prerequisite for availing of the tax benefit is that the Central Government, on the recommendation of the specified authority, is satisfied that certain conditions specified in this behalf are fulfilled and thereupon the Central Government makes a declaration to that effect. The declaration referred to above will be made by the Central Government if three conditions specified in this behalf are fulfilled. Among them there is one condition that the amalgamation is in public interest. The Central Government has evolved certain guidelines for the purpose of determining whether scheme of amalgamation can be considered to be in the public interest or not. There is also a provision in the procedure laid down for this purpose that if the specified authority is satisfied that the scheme of amalgamation is in the public interest and that other conditions mentioned in section 72A(1) of the Income Tax Act are also fulfilled, it may indicate to the amalgamated and amalgamating companies that, in the event of amalgamation being finally effected on the lines of the scheme presented and approved by the specified authority, it would make a recommendation to the Central Government for making a declaration under section 72A(1) of the Income Tax Act. The point of departure from the existing arrangements which we are emphasising is that in such cases of amalgamation where the existence of public interest has been clearly acknowledged by the specified authority, the scheme of amalgamation should be approved by the Central Government itself in exercise of its powers under section 396 of the Companies Act, 1956, rather than by forcing the companies to approach the courts for this purpose under the provisions of section 391/394. This would in fact facilitate speedy amalgamation of sick units with the healthy ones and would thus advance the very purpose for which the benefit under section 72A of the Income Tax Act has been extended. We would, however, suggest that the exercise of these powers under section 396 by the Central Government may be confined to companies which do not come within the ambit of the MRTP Act. Wherever the amalgamating or the amalgamated company is covered by the MRTP Act, the scheme of amalgamation should still be on the existing lines under the Act. We would further suggest that necessary rules may be framed by the Central Government for facilitating the passing of an order under section 396 on application being made by companies and for this purpose section 396 may be modified to confer powers on the Central Government to frame the necessary rules.

17.72 Elsewhere in the Report, we have recommended that in respect of small companies (i.e., private companies with not more than five lakhs of rupees of paid up capital); the court, in respect of all matters to be dealt with by court, should be the District Court

within whose jurisdiction the registered office of the company is situated. This should also cover matters relating to amalgamation/reconstruction. As far as winding up is concerned, although the order of winding up will be passed by the District Court, we have recommended certain departures in the matter of post-winding up procedure in Chapter XV.

Section 416 : Contracts by agents of company in which company is undisclosed principal

17.73 Section 46 of the Act brings all contracts by or/and on behalf of the company at par with contracts between private persons. The law of agency, which forms part of the law of contract, therefore, permits the company to remain an undisclosed principal, especially, in cases of contracts by persons who are supposed to have implied authority, e.g., the directors of the company. Although there may be some exceptional situations where, in an emergency, someone acting on behalf of the company may enter into a contract without disclosing the name of the company, in actual practice, this type of agency relationship is likely to be abused by directors of some companies. The possibility cannot be ruled out that losses arising out of private contracts may be passed on to the company, after the contract has revealed the loss, and to pass on the benefits arising out of any contract to those claiming to act independently after the contract has revealed the benefits. The provisions of section 416 are not, however, adequate to guard against such an abuse. Having carefully considered the balance of advantages and disadvantages of prohibiting contracts in which company is an undisclosed principal, we are of the view that not only such a prohibition is not likely to have any adverse effect on contracts by or on behalf of the company but that it would certainly have a salutary effect in preventing the abuses which the present provisions are likely to open up in favour of certain persons. We, therefore, suggest that section 416 should be deleted from the Act and a provision should be incorporated as a separate sub-section in section 46 itself to the effect that "any contract by or on behalf of a company in which the company is an undisclosed principal shall be void".

Sections 417 to 420 : Employees' securities and provident funds

17.74 These provisions may be retained in the present form. No amendment is suggested except for minor changes as regards the references to certain Acts and Rules which have now been replaced by latest legislations.

17.75 We have recommended in Chapter VIII (para 8.31), that in the accounts of companies, a specific provision must be made for gratuity payment to its employees, if any such amount is payable under any law, or agreement with the employees. In this connection, we would also suggest that provisions on the lines of section 418 should be made in respect of gratuity fund or provision for employees. We also consider that it is in the interest of corporate stability as well as employee-welfare that each year's liability for gratuity is provided and set apart from year to year. In respect of the pending liability as at the commencement of the new Act, suitable provisions should be made for contribution to be made to this fund in seven equal annual instalments.

Sections 421 to 424 : Receivers and Managers

17.76 Some High Courts had expressed the view that the filing of abstracts once every half-year with the Registrar of Companies under section 421 of the Act entails duplication of work for Court's receivers. Some of the High Courts do have their own rules which make it obligatory on the receiver to file regular accounts. They had also stated that even under the Code of Civil Procedure, Or. XL r. 3, the Court receivers supposed to submit the accounts to the Court. These High Courts have been of the view that except where the receiver is appointed by the Court in proceedings under the Companies Act, 1956 there is no need to file the abstracts with the Registrar of Companies. The matter had been referred to other High Courts in India and their views were obtained. We, after careful consideration of the views of the other High Courts in the matter and also the existing High Court Rules in this regard, do not consider it advisable to amend section 421 of the Companies Act. It was noted that the views of the High Courts were not uniform and some of the High Courts were positively against the proposed amendment. It was also felt that the existing provisions of section 421 have a salutary effect in so far as they are intended to benefit the general public including the shareholders of the company who may not be aware of the legal proceedings. We also feel that under the High Court practice the receivers are required to file the statement of accounts every

month and, in case copies of these accounts are only to be filed with the Registrar, it would only throw additional burden on the receiver as against the present provisions under which the receiver is expected to file only half-yearly statement of accounts. We, therefore, suggest no amendment of this provision.

Sections 561 to 564 : Application of Act to companies formed or registered under previous companies laws

17.77 These sections contained in Part VIII of the Act may be deleted. One single provision may be made to the effect that all companies shall henceforth be governed by the new law which is to replace the existing Act and that, for this purpose, any company registered under the previous companies laws may, if necessary, form themselves under the new law. If they have not already done so, a time limit of two years may be provided, in case there is any difficulty in falling with the new law which is expected to come into force.

Sections 565 to 581 : Companies authorised to register under this Act

17.78 The provisions of Part IX containing these sections may also be omitted. At present, it is only permissible for an existing company to register under the Act. We feel that the obligation to register under the new law should not be left to the option of the company and should rather be compulsorily enjoined on all existing companies. A provision is only to be retained to the effect that on registration of a company under the new law, there shall be no change in the rights and liabilities of the company in respect of existing property; debts, etc. All companies may also be automatically issued a new incorporation certificate by the Registrar of Companies and for this purpose the companies will be required to file their revised memorandum and articles.

Section 610 : Inspection of documents

17.79 The fees may be raised to rupees two from the existing rupee one, in this section.

Section 616 : Application of Act to insurance, banking, electricity supply and other companies governed by special Acts

17.80 Although the heading of the section may be retained, it is felt that a general provision, as in the present clause (d) of the section, would be quite sufficient and it is not necessary to repeat the various Acts in the section as at present.

Section 620A : Application of the Act to *nidhis*, etc.

17.81 Some peculiar and special class of companies are functioning mostly in the Southern States which are recognised in the Act as "*Nidhis*", "*Mutual Benefit Societies*" and "*Permanent Funds*". These companies are *sui juris* and present peculiar features. They are companies incorporated and registered under the Act of 1913 or the earlier Companies Acts which were in force prior to coming into force of the Indian Companies Act, 1913. The objects of these companies, *inter alia*, are to enable the members to save money, to invest their savings and to secure loans at favourable rates of interest. They inculcate the idea of thrift and compulsory saving in the minds of the poor and middle-class people. The companies have a fixed capital consisting of shares of one rupee each. The shares are not offered to the public for subscription but allotted to those who desire to take advantage of the benefits offered for depositing or borrowing money. The other very important feature of such companies is that they have transactions only with the members and not with the public. The membership of these companies generally runs to thousands. The membership of one of the premier and an old *nidhi* company in Madras was over 10,000 about 15 years ago. Since such types of companies were registered under the Companies Act, 1913 and even under earlier Acts, they continue to be administered by the provisions of the Companies Act, 1956.

17.82 Section 620A of the Companies Act, 1956 gives power to the Central Government to modify the application of the provisions of the Companies Act to this class of companies either in whole or in part. By virtue of this power, the provisions of the Act

have been modified and some of the more important sections are inapplicable to 'Nidhis' and 'Mutual Benefit Societies'. Some of the sections which are not applicable to 'Nidhi' companies are 53 (1), 81, 159, 205 (5) (b), 207, 295, 309 of the Act. One of the reasons for modifying the Act in relation to such class of companies is the unwieldy membership of such companies, and also the limited nature of activities of such companies. From the company law angle, there is nothing special about such class of companies which deserves to be regulated. In fact, these companies cause a problem to the Department in as much as there are general complaints of mismanagement of the affairs of the company preferred by some of the dissatisfied members who are either not given loan when they want, or they or their representatives have not been able to get themselves appointed on the Board. The affairs of such companies are generally managed by a close group, who are able to wield authority, and the management generally continues undisturbed for a number of years. There have also been complaints in respect of some of the 'Nidhis' regarding misappropriation of funds.

17.83 The Tamil Nadu Government enacted a new Act called the Tamil Nadu Non-Trading Companies Act, 1972, which applies to companies which have been registered under the Companies Act, 1956 or any of the earlier Acts, and whose business consists of "non-trading activity" and such activities are confined to the State of Tamil Nadu. It is likely that the other States also may enact State laws governing the activities of non-trading corporations whose activities are confined to a single State.

17.84 Having regard to the fact that 'Nidhi' and other types of companies are peculiar to a few States in the Union, and in view of the further fact that the activities of the company are not only limited in nature but are also confined to a particular region, it may not be desirable to extend the provisions of the Companies Act, 1956 to such companies. As stated earlier, some of the sections of the Companies Act are not applicable to 'Nidhi' companies. We have also been considering the desirability of extending certain benefits to small companies with a paid-up capital of less than Rupees five lakhs and to make the availability of administrative machinery as far as possible near to the place of their operation. It would, therefore, be fit and proper if the control and supervision over the working of 'Nidhis', 'Mutual Benefit Societies' and 'Permanent Funds' is administered by the respective States where such companies operate. The Tamil Nadu Government appears to have taken the initiative in the matter and brought forward a State Legislation to deal with non-trading corporations. We would, therefore, suggest that the administration of 'Nidhis', 'Mutual Benefit Societies' and 'Permanent Funds' should be taken over either by the respective State Government or through a special Central legislation. In fact, this will facilitate the working of such companies to a great extent and will obviate the need to approach the Central Government for approval under the Companies Act for payment of remuneration to managing or whole-time directors which, we are informed, is generally not over Rupees one thousand or Rupees two thousand. Incidentally, this will also help the Registrars in devoting their time of supervision over bigger and more important companies.

Schedules I to XIII

17.85 There are many sections in the Act which recognise the supremacy of the articles of association with respect to the matters dealt with in those sections. We feel that there is no justification for retaining these provisions in the main Act and that they should be incorporated as part of the 'Table A'. This is because the statute does not make them mandatory. There are, of course, other sections which, while permitting a thing to be done if authorised by the articles, do serve a broader public purpose and these, in our opinion, are the ones which must be compulsorily observed by the companies in the larger interests of the shareholders and the public. We feel that these provisions too should not figure in the Act and we would recommend that they be taken to 'Table A'. However, we would provide in 'Table A', a provision that these regulations which may be called "Compulsory Regulations" will be deemed to have been adopted by a company even if it has not adopted 'Table A'. It is in this light that we make the following suggestions :—

- (i) 'Table A' should consist of two parts—Part I laying down 'Compulsory Regulations' and Part II laying down 'Optional Regulations'.
- (ii) The present regulations 50 to 55, 57, 58, 60, 64, 71, 74 to 76, 82 to 84, 91, 94, 95 and 99 should find place in the revised 'Table A' in Part I dealing with 'Compulsory Regulations'. Also, sections 83, 171, 172, 187, 187A and sub-section

- (1) of section 190 should find place in Part I dealing with 'Compulsory Regulations'. Consequently, we would suggest the deletion of the provisions of these sections.
- (iii) The provisions of sections 50, 53, 54, 91, 92, 178 to 181 and 183 to 185 should find place in Part II dealing with 'Optional Regulations'.
- (iv) Some of the regulations in the existing 'Table A', as listed out in the Annexure, may be taken out of 'Table A' or should be modified in the manner indicated in the Appendix, for reasons explained therein.
- (v) Following our recommendation in Chapter VII (Protection of Shareholders' Interest), we would suggest the incorporation of suitable provisions in Part I of 'Table A' to the effect that proxies shall have right to vote on a show of hands as well as on a poll and shall also have the right to speak at the meeting.

17.86 'Table C' should be modified, consistent with our recommendation in Chapter IV that guarantee companies shall, in future, engage in activities covered by sub-section (1) of section 25. This will necessitate redraft of the third clause of the model memorandum. Changes should also be effected in the model articles in 'Table C' to the extent such modifications are necessary consistent with our recommendations elsewhere in this Report. We have also recommended in Chapter IV that companies limited by guarantee only will be permitted to continue as such or be registered in future only if they are registered under section 25 of the Act. All other guarantee companies should be required to convert themselves compulsorily into companies limited by shares. In the light of this recommendation, we suggest deletion of 'Table D' from the Act. With the abolition of unlimited companies as suggested by us, 'Table E' shall also be dispensed with.

17.87 'Table F' does not have much special significance as far as the Companies Act is concerned and, therefore, may be dropped.

17.88 The present Schedule VII, dealing with powers of managing agents and secretaries and treasurers and Schedule VIII, dealing with declarations to be filed by them, being redundant, should be done away with.

17.89 We have also recommended in Chapter VII that certain amendments are to be carried out in the Form of Proxy given in Schedule IX.

17.90 We are suggesting certain modifications of Schedule X relating to fees to be paid to the Registrar in paras 17.99 to 17.105.

17.91 Schedule XI reproduces sections 539 to 544 with some minor changes in wording for the purpose of applying these sections to cases where an application is made under sections 397 or 398. We would suggest the deletion of this Schedule and instead provide in section 406 that provisions of 539 to 544 will apply, *mutatis mutandis*, subject to an application under 397 or 398.

17.92 We have made certain suggestion in para 17.109 relating to repeals and savings. Schedule XII, dealing with enactments repealed should undergo changes in the light of our suggestions made elsewhere in this Report.

17.93 We have already suggested the transfer of sections 108A to 108H to the MRTP Act, 1969. Consequently, Schedule XIII, dealing with specified industries mentioned in section 108B should be transferred to the MRTP Act.

Rules and Forms

17.94 After the present Act came into force, a total of 45 Rules, one Order and one Regulation have been notified. These Rules affect substantially the working of the Act and can be said to be the instruments through which the Central Government seeks to exercise its powers. The rule making power of the Central Government is conferred by section 642 of the present Act. Under this section, the Central Government is empowered to frame rules for any specific matter which is required to be prescribed under any specific provisions

of the Act. It is also an enabling section empowering the Central Government to frame rules for any specific section, even if the requirement of the section does not specifically enjoin upon the Central Government to do so. The bulk of the present rules and forms prescribed by the Government under the Companies (Central Government's) General Rules & Forms, 1956 were framed by the Central Government under the general power conferred by section 642. These rules mostly relate to those provisions of the Act which require the Central Government to exercise some powers. We, however, feel that, as indicated in the next few paragraphs, certain broad directions may be kept in view before the Government undertakes a detailed review of the rules and forms while bringing the new law on the statute book.

17.95 Although the general approach in framing rules to facilitate the exercise of governmental power has been retained in framing the rules under the Companies (Central Government's) General Rules & Forms, 1956, and thus, certainly fall into a pattern suitably developed for the administration of the Act, we may observe that this pattern may be advantageously followed even in respect of some other sections calling for even *suo motu* exercise of governmental powers. Section 396, for example, empowers the Central Government to order the merger of two or more companies 'in national interest'. There are, however, no rules, forms or notifications which would give even remote idea of the considerations, the Government may have in mind in ordering such merger or even as regards the permissibility of an application being made under this section by companies desirous of having such merger. This question has assumed added significance in the light of the provisions made recently in the Income Tax Act incorporating new section 72A for facilitating the merger of sick with healthy units.

17.96 Again, Rule 4A of the General Rules and Forms to which we have referred is not at all adequate to inform company promoters about the criteria followed by the Central Government in exercise of the powers conferred by sections 21 and 22. The result has been to force the Central Government to issue detailed clarifications from time to time, especially on the question of desirability of name. We would suggest that the substance of these clarifications should also be incorporated in Rule 4A. There are also other sections conferring powers on the Central Government to accord approval or issue any order which still remain uncovered by any rules framed by the Government.

17.97 We also recommend that section 642 should contain an additional provision to the effect that wherever the Central Government, by virtue of any provisions of this Act, is required or authorised to accord approval, sanction, consent, confirmation or recognition to be accorded by that Government in relation to any matter or to give any direction or grant any exemption in relation to any matter, then the same shall be accorded, given or granted only in accordance with rules framed in this behalf.

17.98 In the light of our several recommendations dealing with the exercise of governmental powers under the new administrative machinery, the present rules and forms will undergo substitutions, deletions and modifications. New rules and forms may also have to be prescribed by the Company Law Board or the Central Government. Even as the law stands at present, there is considerable scope for reducing the number of forms and eliminating some of the unnecessary details contained therein. We have received suggestions for doing away with or modifying some of the existing forms which we have passed on to the Department and we do not consider it necessary to make specific recommendation with regard to forms.

Fees payable to the Registrar

17.99 Section 611 stipulates that in respect of several matters mentioned in Schedule X, fees are payable for registration of companies and for filing of documents etc., as laid down in that Schedule. According to this Schedule, the filing fees vary according to the size of the companies as determined by its authorised capital and for this purpose companies have been classified into four categories — (i) with authorised capital upto Rs. 1 lakh, (ii) between Rs. 1 lakh and Rs. 5 lakhs, (iii) between Rs. 5 lakhs and Rs. 25 lakhs, and (iv) Rs. 25 lakhs or more. The fees payable for filing respectively by each category of companies for each document is Rs. 15/-, Rs. 30/-, Rs. 50/- and Rs. 60/-. The scale of fees prescribed is in a way indicative of the workload involved at the Registrar's office as well as the capacity of the companies to pay.

17.100 Suggestions have been received by the Committee from various quarters that it will be desirable to prescribe a consolidated annual fee for each company in place of the existing system of charging fee for filing of each document, thus eliminating clerical work to some extent in the Registrar's office and also inconvenience for companies. The Committee is of the view that there is considerable merit in this suggestion and would, therefore, recommend to the Government to amend section 611 and Schedule X to provide for annual fees to be paid by companies, the present classification for purpose of determining the annual fees payable by each category of companies remaining the same. An attempt was made to arrive at some estimated figure of the annual fees payable by each category of companies. But it was not possible to make a detailed study of the frequency of filing of documents by each category of companies. However, some rough estimate could be worked out and on the basis of these estimates the Committee would suggest for the consideration of the Government the following scale of fees to be paid annually by companies for filing or recording of documents :—

i) For a company having a nominal share capital of less than Rs. 1 lakh	Rs. 140/- or say Rs. 150/-
ii) For a company having a nominal share capital of Rs. 1 lakh or more but less than Rs. 5 lakhs	Rs. 280/- or say Rs. 300/-
iii) For a company having a nominal share capital of Rs. 5 lakhs or more but less than Rs. 25 lakhs	Rs. 470/- or say Rs. 500/-
iv) For a company having a nominal share capital of Rs. 25 lakhs or more	Rs. 560/- or say Rs. 600/-

The above estimates of annual fees for different categories of companies have been arrived at on the basis of weightage as represented by the graduated scale of fees prescribed in Schedule X which varies from Rs. 15/- per document for the smallest company to Rs. 60/- per document for the large size company; the weightage has been determined by the fee per document serving in a way as the indices of corresponding workload involved. This technique of estimation, based on the rule of proportionality and yet taking into account the relative weights, may be illustrated as follows :—

1. Number of companies with nominal share capital of Rs. 25 lakhs or more	6,082
2. Relative weightage (the present filing fee of Rs. 60/- per document representing the weightage)	60
3. Number of companies of this category as compounded by the weight	3,64,920
4. Total number of 46,856 companies compounded on the same basis as in (3) above	19,28,065
5. Percentage of (3) to (4)	19%
6. Total filing fees realised by the Registrars in 1977	Rs. 1.80 crores
7. 19% of Rs. 1.80 crores	Rs. 34.10 lakhs
8. Fees payable by each of 6,082 companies in this category	Rs. 560/-

17.101 For associations not for profit or guarantee companies, we would in future recommend an annual filing fee of Rs. 100/-. This would be consistent with the estimate of annual fee that we have arrived at for each of the four categories, viz. ten times the fee for

filing a single document. The annual fees suggested by us would appear to be reasonable on the assumption that on an average a company would be filing approximately ten documents per year out of a total of about 55 types of documents and returns at the maximum which may be filed by the company with the Registrar. We have, while providing on the basis of an average of ten returns to be filed by a company, also taken into account the reduction in the number of returns and documents under the new law as well as the requirement of filing some additional returns or intimations with the Registrars, as suggested by us in the other parts of the Report.

17.102 We would also suggest some consequential changes in section 611. The first proviso to sub-section (1) of this section is no longer necessary and may be deleted and a suitable provision made in the Act in view of our suggestions made in para 17.78 of this Chapter. Similarly, the second proviso being redundant, in the light of our suggestions for the annual fees, may be deleted. In sub-section (2), the words 'ten times the amount of fee so specified' may be substituted by 'the annual fee so specified'. This suggestion will keep the maximum amount of additional fees within the present limit. Schedule X may be amended as follows :—

- i) Items 5 and 6 may be combined and in each of the sub-items representing the categories of companies, viz. (a), (b), (c) and (d), the words 'a fee of' may be replaced by the words 'an annual fee of'.
- ii) Similarly, items 13 and 14 may be combined and the words 'a fee of' may be replaced by the words 'an annual fee of'.
- iii) The amount shown against each item may be changed as per our recommendations above.

17.103 Section 611 read with Schedule X also prescribes the scale of fee that shall be charged for registering a company. The registration fee is on a graded scale depending upon the nominal share capital of the company in cases where the company has a share capital. Items 1 and 2 of Schedule X prescribe the registration fee. The minimum registration fee is Rs. 200/- and the maximum is Rs. 40 lakhs. Sometimes, the promoters, after they have submitted the Memorandum and Articles of Association and the other Forms to the Registrar, for registration inform the Registrar subsequently that they do not desire to have the company registered. In majority of cases, the Registrar, soon after the documents are filed with him would have examined the documents and either would have kept the certificate of incorporation ready or would have called upon the parties in writing to furnish additional information or carry out certain corrections or do some other act to complete the documents. The question for consideration is, whether either the whole or any part of the registration fee should be refunded to the promoters wherever they do not desire to have the company registered. Sometimes, an injunction order might have been served on the Registrar not to register a company and later, the parties settle the matter and decide not to register the company. The question is whether in such cases refund of registration fee should be allowed.

17.104 The office of Registrar is an Office of Records which preserves the documents/returns filed with him. He renders service to the public by scrutinising the documents filed with him before he registers/files or records the documents/returns. The fee is charged for the services rendered by the Registrar. The question whether Registrar has rendered any service or not is a question of fact to be decided in accordance with the circumstances of each case. In a reported case *Ratanshi Panchan Tonk vs Registrar of Companies 40 Company Cases p. 26*, it has been held that where the person who submitted the documents for registration does not, for any reason, desire to proceed with the registration of the company, in the absence of statutory provisions for refund of the fees paid, the person who has paid the fee has no right to get back the fee. However, as the fees are essentially in the nature of payment for services rendered and tend to be on the high side being calculated on an *ad valorem* basis on the nominal value of the share capital of a company, it is worthwhile to make a provision in the Act authorising the grant of refund particularly in cases where in the party does not wish to proceed with the registration before the scrutiny has been completed or other services rendered by the Registrar. It is suggested as follows :—

- (a) If a party has intimated to the Registrar within 15 days after presentation of document his desire not to proceed with the registration and the Registrar has

not rendered any service, refund of 75 per cent of the registration fee may be made;

- (b) Where such an intimation has been given after 15 days but before 30 days and the Registrar has not rendered any service, 50 per cent of the Registration fee may be refunded; and
- (c) No refund in any other case.

17.105 We are sure that the mode of payment by way of an annual fee will give good deal of relief to the companies, not excluding the smaller ones. We also feel that this will simplify and streamline the present procedure.

General

17.106 There are various areas in which corporate discipline cannot be achieved by mere amendments of both the Acts. Since the independence of the country and particularly after the role that has been developed for the public financial institutions, the industrial growth has come to be what it is today; but at the same time, it is not the Companies Act or the MRTTP Act which can take care of the total financial discipline that is required for management of corporate sector, whether it be in public or private sector. It is well-known that the financial institutions have substantial stake by way of participation in share capital and loans and also have their nominees on the Board of Directors of various companies. Their role has become very vital for the industrialisation of this country. The mere investment in share capital as well as loans or having legal powers for conversion of loans into equity or nominating the directors have not proved to be enough. Instances are not wanting where the industries have become sick in spite of the substantial participation of the financial institutions. This is a matter of grave concern. It is very necessary, therefore, that the role of the financial institutions should be re-oriented in a manner that there is an effective participation of a nature which encourages and achieves industrial growth and, at the same time, ensures confidence in the general public with the role played by the financial institutions. The role of financial institutions is not to be looked upon merely as an investor or a financing agency but more as a developmental agency. Industries in our country have developed largely through the mechanism of corporate sector and, therefore, the role the financial institutions play is very vital. This Committee recommends that in order to help rapid industrialisation what is needed is that, apart from the recommendations that are made elsewhere in the Report, the role that has to be played by the financial institutions has to be not only of profit-making but also from the point of view of the national growth which will lead to rise of income of the citizens by and large. For this purpose, the financial institutions must play a more participative and purposeful role in the development of various sectors of the economy, and the Government should lay down clearly well-defined policy on this aspect.

17.107 There are a large number of sections in the present Act which had been introduced as transitional provisions to facilitate company governed by previous laws to fall in line with the present Act. By now, these sections have all become redundant and may be omitted. Examples of such sections are sections 24, 370A, etc. There are also a number of sections which will become redundant or will undergo considerable modifications in the light of our suggestions to be incorporated in the new law. Thus, section 28 shall have to be modified to provide that all companies must adopt or shall be deemed to have adopted the regulations contained in Part I of 'Table A' and that the regulations contained in Part II of 'Table A', in so far as the articles of the company do not exclude or modify those regulations, shall also be deemed to have been adopted. Again, in the light of our suggestions relating to classification of companies, section 29 will undergo consequential change. Section 170 will undergo change consequent on our suggestions to transfer sections 171 and 172 as compulsory regulations to 'Table A'. Further, as we have suggested deletion of sections 157 and 158, there will be consequent deletion of Regulation 69, as already suggested by us. All provisions in the Act dealing with, or having reference to, managing agents and secretaries and treasurers may be omitted, after providing for certain safeguards as suggested later. In some of the sections of the Act, the expression 'if authorised by Articles or by ordinary resolution' occurs while in some of the other sections the expression 'if so authorised by Articles or by special resolution' does occur. We would suggest that as the new law is drafted, the alternative to authorisation by Articles should be taken away and only the words 'if so authorised by Articles' should occur. Similarly, following our suggestions to eliminate certain concepts like those of stocks and share warrants, all references in the Act to these terms should be

eliminated. Again, as we have suggested that in future preference shares must always be redeemable, necessary changes will have to be introduced in section 80 of the Act, taking care, *inter alia*, to see that the company does not make these shares irredeemable by not calling a part of the amount due on the shares issued, as is now permissible by virtue of proviso (b) to sub-section (1).

17.108. In order to prevent invalidation of the proceedings by reason of defects, irregularities or deficiencies in notice or time prescribed or provided by the Act, it is necessary to introduce an omnibus clause enabling a Court to pass orders obviating consequences that would flow from such invalidation. A useful precedent is to be found in Company Legislation in Australia and we would recommend the adoption of a similar provision in the Act. As will be noticed from the draft as proposed below, the Court will be required in each case to satisfy itself that orders negating or modifying the consequences in law of any omission, defect, error or irregularity would not do injustice to the company or to any member or creditor thereof. We would, accordingly, recommend the following provision, namely :—

- (1) No proceeding under this Act shall be invalidated by any defect, irregularity or deficiency of notice or time prescribed or provided by this Act unless the Court is of the opinion that substantial injustice has been or may be caused thereby which cannot be remedied by any order of the Court.
- (2) The Court may, if it thinks fit, make an order declaring that such proceeding is valid notwithstanding any such defect, irregularity or deficiency.
- (3) Without affecting the generality of sub-section (1) and sub-section (2) of this section or of any other provision of this Act, where any omission, defect, error or irregularity (including the absence of a quorum at any meeting of the company or of the directors) has occurred in the management or administration of a company whereby any breach of any of the provisions of this Act has occurred, or whereby there has been default in the observance of the memorandum or articles of the company or whereby any proceedings at or in connection with any meeting of the company or of the directors thereof or any assemblage purporting to be such a meeting have been rendered ineffective (including the failure to make or lodge any declaration of solvency pursuant to section 488), the Court —
 - (a) may, either of its own motion or on the application of any interested person, make such order as it thinks fit to rectify or cause to be rectified or to negative or modify or cause to be modified the consequences in law of any such omission, defect, error or irregularity, or to validate any act, matter or thing rendered or alleged to have been rendered invalid by or as a result of any such omission, defect, error or irregularity;
 - (b) shall before making any such order satisfy itself that such an order would not do injustice to the company or to any member or creditor thereof;
 - (c) where any such order is made, may give such ancillary or consequential directions as it thinks fit; and
 - (d) may determine what notice or summons is to be given to other persons of the intention to make any such application or of the intention to make such an order, and whether and how it should be given or served and whether it should be advertised in any newspaper.
- (4) The Court (whether the company is in process of being wound up or not) may enlarge or abridge any time for doing any act or taking any proceeding allowed or limited by this Act or any rules or regulations thereunder upon such terms (if any) as the justice of the case may require and any such enlargement may be ordered although the application for the same is not made until after the time originally allowed or limited."

Repeals and Savings

17.109 We would suggest that the present Act 1 of 1956 be repealed and a new Act is passed by the Parliament in its place. It would, however, be necessary to have certain saving

provisions so that advantage cannot be taken by any person of the repeal of the present Act. Thus, prosecutions started under the present Act before the commencement of the new Act should continue to be governed by the provisions of the repealed Act. However, any order passed by the Court, or any approval given or order passed by the Central Government, the Company Law Board or the Registrar of Companies or any other authority under the Act shall not be affected if passed or given prior to the commencement of the new Act. A provision should also be made to the effect that as regards the provision against appointment of managing agents, secretaries and treasurers or their associates to any office or place of profit, the provisions of the repealed Act shall always be deemed to be in force. As it is difficult to visualise all the difficulties which are likely to arise by reason of the repeal of the existing Act, a provision should also be made to the effect that the Central Government may, by general or special order, do anything not inconsistent with the provisions of the new Act, which appears to it to be necessary or expedient for the purpose of removing difficulties. Such general or special orders of the Central Government may provide for the adaptations or modifications subject to which the repealed Act may apply in relation to any company or class of companies.

ANNEXURE
[Para 17.85 (iv)]**Regulations recommended by us to be modified or taken out of the present 'Table A'**

- Regulation 2 will be deleted in view of section 80(1).
- Regulation 3 will be deleted in view of sections 103 to 106.
- Regulation 3(2) may be shifted to the Act and made applicable in case of special resolutions.
- Regulation 4 will be deleted in view of section 106.
- Regulation 5 will be deleted in view of section 76.
- Regulation 6 will be deleted in view of sections 153 and 187C.
- Regulations 7 and 8 will be deleted in view of Certificate Rules and subsequent provisions in the Act, namely, sections 112 and 113.
- Regulations 19 and 20 will be deleted in view of section 108 and Company General Rules and Forms.
- Regulations 36 to 39 will be deleted in view of the abolition of 'Stock' and 'Stock holder'.
- Regulations 40 to 43 will be deleted in view of the abolition of 'Share warrant'.
- Regulations 44 and 45 will be deleted in view of section 94.
- Regulation 46 will be deleted in view of section 100.
- Regulation 49 will be deleted in view of section 174.
- Regulation 56 will be deleted in view of the suggested change in the new law, namely, voting by show of hands and on poll.
- Regulations 61 to 63 will be subject to the changes in the substantive law.
- Regulation 68 will merge with section 50 which is being shifted to Regulations.
- Regulation 69 will be deleted in view of the abolition of sections 157 and 158.
- Regulation 72 will be deleted in view of section 260.
- Regulation 73 will be deleted in view of section 285, as amended.
- Regulation 80 will be deleted in view of section 290.
- Regulation 81 will be deleted in view of section 289.
- Regulations 82 and 83—References to 'manager' should be deleted in view of the abolition of the office of manager suggested by us.
- Regulation 86—The words 'subject to the provisions of the Act' should be added.
- Regulation 87 will be deleted in view of the Dividend Rules.
- Regulation 93 is redundant and may be deleted.

CHAPTER XVIII

SUMMARY OF RECOMMENDATIONS

(PART 'A'—COMPANIES ACT, 1956)

Chapter III : Concepts and Definitions

18.1 Having regard to the relevance of existing concepts and definitions to the changes being suggested in the present law, the need for a more rational arrangement of the provisions of the Act and also in view of certain departures from the existing scheme as suggested by the Committee, appropriate recommendations are being made relating to the concepts and definitions by way of consolidation and re-arrangement, modifications, additions and deletions. (Para 3.1)

18.2 The existing definitions of 'alter' and 'alteration' and 'modify' and 'modification' may be combined in one section. (Para 3.2)

18.3 The existing definition of 'member' in clause (27) of section 2 may be replaced by the definition of 'member' in section 41. The latter section may be deleted. (Para 3.2)

18.4 Section 2(41) relating to definition of 'relatives' may be redrafted on the lines of the provisions of section 6 along with an Explanation that if one is related to the other within the meaning of this clause, the latter shall also be deemed to be related to the former. Schedule I-A may be amended to include brothers and sisters of mother and father. Section 6 may be deleted. (Para 3.2)

18.5 'Articles' and 'memorandum' may be redefined as suggested. (Para 3.3)

18.6 The existing definition of 'Board' may be modified as suggested. (Para 3.3)

18.7 The definition of book and/or paper may be modified to include book of account. (Para 3.3)

18.8 The definition of 'company' may be simplified to indicate company registered under the existing Act or any other Acts, ordinances etc. before the commencement of the existing Act. (Para 3.3)

18.9 The definition of 'Company Law Board' may be simplified as suggested. (Para 3.3)

18.10 The definition of 'Court' may be amplified to include the Registrar and the Company Law Board as it has been elsewhere suggested that they may be clothed with powers to impose penalties for contravention of certain provisions. (Para 3.3)

18.11 The definition of 'debentures' should be modified to exclude issue of unsecured debentures. (Para 3.3)

18.12 The definition of 'investment company' as in section 372(10) and Note (1) to Schedule VI may be modified to exclude a private company and to include only those public companies who are carrying on business of only underwriting or dealing in shares, debentures or other securities. The revised definition should be incorporated in the definition section and section 372(10) and Note (1) to Schedule VI may be deleted. This will prevent investment companies from functioning as catalyst of corporate control. (Para 3.3)

18.13 The existing definition of 'officer' may be modified to exclude reference to managing agents and secretaries and treasurers and to include 'an accountant' as defined. (Para 3.3)

18.14 The definition of 'officer in default' in section 5 should be split up to spell out what constitutes default in the matter of imposition of penalty and in the matter of imprisonment or fine, or both. (Para 3.3)

18.15 The definition of 'prescribed' in clause (33) of section 2 may be amplified to include rules made by the Company Law Board. (Para 3.3)

18.16 In the existing definition of 'shares' in section 2(46), reference to 'stock' may be omitted. (Para 3.3)

18.17 In the existing definition of 'turnover' in clause (b) of Explanation to section 43A may be shifted to definition section itself. (Para 3.3)

18.18. New definitions have been suggested to be added as follows :— (Para 3.4)

- (i) Accountant
- (ii) Auditor
- (iii) Free reserves
- (iv) Managing/whole-time director
- (v) Professional Manager
- (vi) Recognised shareholders' association
- (vii) Worker/Worker-director.

18.19 Clauses (3), (4), (16), (18A), (24), (25), (34) and (44) of section 2 may be deleted, either because they have become redundant or are otherwise no longer necessary to be retained here. (Para 3.5)

18.20 For those expressions and definitions not defined in the 'Definition' section itself, attention should be drawn in this section by way of cross-reference. (Para 3.5)

18.21 References to words and expressions which have become redundant may be suitably changed or omitted. (Para 3.5)

Chapter IV: Classification of Companies

18.22 While the basic classification of companies into public and private limited may be retained, a few structural changes within this broad classification are called for. (Para 4.1)

18.23 The class of unlimited companies should be abolished and clause (c) of subsection (2) of section 12 and section 32 should be deleted. The existing unlimited companies should be compulsorily required to convert themselves into limited companies. (Para 4.2)

18.24 Guarantee companies must, in future, be required to be formed only as public limited companies and for the purposes enumerated in section 25 of the Act. The Central Government should be empowered to issue directive to the existing guarantee companies for either getting themselves registered under the provisions corresponding to the present section 25 of the Act or converting themselves into companies limited by shares. (Para 4.3)

18.25 The definition of a 'private company' will remain as at present in section 3 (1) (iii) of the Act. Such a company will, however, be prohibited from accepting deposits or borrowing money from the public, except from its own directors, shareholders and their relatives. It shall also be prohibited from borrowing long-term loans of more than three years from public financial institutions in excess of rupees ten lakhs. Whenever the turnover of a private company exceeds rupees one crore in any financial year or whenever, in any

financial year, twenty-five per cent or more of the paid-up share capital of the private company is held by one or more public limited companies, or whenever, in any financial year, twenty-five per cent or more of the paid-up share capital of a public limited company is held by the private company, certain provisions of the Act as are applicable to public companies shall also apply to such private companies. (Para 4.5)

18.26 The proviso to sub-section (1) of section 31 should be deleted. It should not be permissible for a public company to convert itself into a private company. (Para 4.6)

18.27 In order to encourage the growth of small scale sector, private companies may, henceforth, be classified into two groups—(1) small companies and (2) others. Small companies would be those private companies which have a paid-up capital of not exceeding rupees five lakhs. Such small companies would be eligible for further exemptions and privileges in respect of certain specified matters when they satisfy two conditions. Firstly, the small company must not have a body corporate, other than a Government company or statutory body, or a public financial institution or a bank, as its shareholder. Secondly, the small company must not invest in the shares of another body corporate. Powers of a purely executive nature in respect of such companies should be exercisable at the local level by the Registrar or the Regional Director. Powers of the Court under the Act should be exercised by the District Judge. (Para 4.9)

18.28 The law relating to foreign companies shall be rationalised. Where a body corporate incorporated outside India is engaged in agricultural (including plantation), production, processing, mining, manufacturing, distribution of goods, generation of power or construction activities in India, the body corporate must register itself as a company under the Act. Where not less than fifty per cent of the paid-up share capital of a body corporate incorporated outside India is held by one or more bodies corporate incorporated in India or by one or more citizens of India, it must register itself as a company under the Act before establishing or operating a place of business in India. Sub-section (2) of section 591 should be deleted. Sections 603 to 608 relating to prospectus issued by foreign companies may be deleted and suitable provisions including the prospectus provisions, contained in Part III of the Act, should be made. Provisions of clauses (c), (e) and (f) of section 433 should be made applicable to foreign companies. All the provisions relating to winding up of companies (following the applicability of these clauses of section 433) shall apply to foreign companies. Some other modifications will have to be made. (Para 4.12)

18.29 The Government may like to consider such matters as require urgent attention for suitable incorporation in the law as regards the additional disclosures or compliances to be made by multinationals in public interest, pending the recommendations of the U.N. Commission on Transnational Corporations. (Para 4.13)

Chapter V : Management Structure and Professionalisation of Management

18.30 Some of the provisions of the Act have proved to be ineffective to meet present day need of corporate management and administration. It would be a valid generalisation to say that managerial powers should be exercised not merely for the interest of the shareholders but also in the interest of the creditors, consumers, overall growth of the economy and also keeping in view the considerations of public good. Professionalisation of management is, therefore, not a mere concept but is, in fact, an inevitable necessity for the well-being of the company itself. In our country, the development of a distinct managerial class cannot be said to have taken place in any systematic manner. It is the abolition of managing agency system which had a salutary effect in helping companies to re-orientate themselves to the changed situation which called for management by the techno-structure. There is growing evidence that more and more professional people are taking up positions in companies previously held by owner-managers. This process of 'professionalisation' of management needs to be carried forward. (Paras 5.1—5.5)

18.31 It is difficult to legislate on professionalisation of management without defining professional management. There are certain areas which are beyond doubt within the competence of professionally qualified people. On the other hand, instances are not rare where professional approach has been developed and applied by people without professional qualifications but having considerable experience. The term 'professional manager' has thus

been defined to take into account the element of specialised knowledge as well as specialised experience; more intensive or extensive experience being insisted upon for a professional manager not possessing the specified qualifications. (Para 5.6)

18.32 While the conceptual and practical aspects of the problem of workers' participation in management are dealt with in Chapter XI, compulsory adoption of the two-tier board is not recommended. (Para 5.7)

18.33 The question of 'minority of shareholders' finding representation on the Board of Directors is beset with practical difficulties of definition and implementation. The Committee has, however, recommended a number of safeguards to protect shareholders' rights and interest. (Para 5.8)

18.34 Public limited companies having a paid-up capital of rupees fifty lakhs or more must have at least one managing or whole-time director. Large size companies cannot be successfully managed without somebody being specifically charged with substantial powers of management. (Para 5.9)

18.35 The form of management by 'manager' is very rare. Definition of 'manager' in clause (24) of section 2 should, therefore, be deleted. Reference to 'directors who are managers' occurring in section 318 should also be dropped. The provisions of sections 384 to 388A relating to managers need also to be deleted. Section 197A is to be suitably redrafted to incorporate that when a company has only one managing or whole-time director, he shall be deemed to have the management of the whole or substantially the whole of the affairs of the company. Where there are more than one managing or whole-time director, they shall be deemed to have been entrusted with substantial powers of management. (Para 5.10)

18.36 It should be provided that provisions of section 265 will be subject to any proportion which a company is required to maintain as regards worker-directors. Suitable references are also to be made in sections 266 and 270 to provide that there shall be no stipulation in the articles as regards qualification[shares to be obtained by a worker-director. (Para 5.11)

18.37 Consistent with the Committee's general approach requiring Governmental approval only, in exceptional cases, provisions of section 269 regarding appointment of managing and whole-time directors in public companies need to be replaced by new provisions as suggested. These include—

- (i) Appointment of a whole-time or managing director by a public limited company by a special resolution, if he has completed age of 30 years and is not above 65 years, and is not a relative of any director or is not a shareholder or a relative of a shareholder holding, in either case, more than two per cent of the paid-up equity capital of the company, and further that certain prescribed formalities have been complied with.
- (ii) On a complaint from a specified number of shareholders or on own information, the Central Government may refer to the Company Law Board to decide whether any person appointed as managing director, who has been convicted of an offence specified in certain statutes, is or is not fit and proper person to hold that office. This reference is subject to certain safeguards, and decision of the Company Law Board will be subject to an appeal to the High Court. The said managing director can thereafter be removed by the High Court or the Company Law Board, as the case may be.
- (iii) Appointment of a whole-time or managing director, who does not fulfil the prescribed conditions, can be made only with the previous approval of the Company Law Board. The said Board may also approve the appointment, notwithstanding any of the aforesaid provisions.
- (iv) Section 268 may accordingly be deleted. (Para 5.12)

18.38 No person will be allowed to hold office of managing director in more than one public company unless certain specified procedure has been followed and, in addition,

approval of the Company Law Board will be necessary, except in the case of holding-sub-sidiary companies. (Para 5.13)

18.39 Statutory prescription of a general statement of duties of directors is neither helpful nor desirable. The existing law, however, needs to be strengthened to ensure greater degree of effective participation by directors. (Paras 5.14 & 5.15)

18.40 Director will retire at the age of 70, unless his continuance is approved by a general meeting of the company for which special notice has been given. (Para 5.16)

18.41 The total number of twenty directorships that can be held by directors as per present law may continue but in computing this number, alternate directorships and directorships in private companies should also henceforward be included. This ceiling of twenty, in case of a managing or whole-time director will, however, be reduced to ten.

18.42 In order to ensure more effective compliance of the various provisions requiring a company or its officers to file certain statutory returns and documents with the Registrar, provisions of section 283 should be extended to provide for vacation of office by directors in case of persistent default in filing certain specified documents and returns. (Para 5.21)

18.43 Section 283 should be amplified to provide for additional grounds on which a whole-time director or a worker-director will become disqualified to continue in office. (Para 5.22)

18.44 To ensure more effective participation in management by the Board as a whole, Board meetings should be held at least once in every two months (as against once in three months at present). (Para 5.23)

18.45 With the same end in view, certain specified matters e.g., investments, borrowings, statutory liabilities, should be required to be placed before the meetings of the Board of Directors. (Paras 5.23 & 5.24)

18.46 A director who has not placed his dissent on record shall be presumed to have assented to the action of the Board, subject to certain safeguards. (Para 5.25)

18.47 Certain specified powers given in section 293 to the Board shall be exercised only by a special resolution in general meeting. (Para 5.26)

18.48 Notice of the meetings of the Board of Directors should be given ordinarily at least seven days prior to the date of the meeting. (Para 5.27)

18.49 Section 203 should be amended so as to empower the Court to direct that a person shall not without leave of the Court be a director of the company even when winding-up proceedings are not pending before it. (Para 5.28)

18.50 The Court should be empowered to disqualify a person (under section 203) who has been convicted of any offence involving fraud or dishonesty. (Para 5.29)

18.51 Power should be conferred on the Court to disqualify a person, who is found to be not competent to act as a director, from acting as a receiver, manager or liquidator. (Para 5.30)

18.52 A worker-director should not be deemed to hold any office of profit. (Para 5.31)

18.53 Section 317 should be deleted and provisions thereof, if necessary, may be taken care of along with provisions of section 269. (Para 5.31)

18.54 Sections 322 and 323 need to be deleted as they are virtually a dead letter. (Para 5.32)

18.55 Workers' participation at the Board level would require consequential changes in certain sections which have been specified. (Para 5.33)

Chapter VI : Managerial and Executive Remuneration

18.56 Despite differing views expressed in the Committee, it would have made an attempt to come to some definite conclusions regarding the regulation of managerial and executive remuneration. However, in view of the recommendations of the Bhoothalingam Committee on Wages, Incomes and Prices Policy (including top managerial salaries) which have since been submitted to the Government and on which an integrated policy is to be determined by the Government in consultation with all interests, this Committee is not making any specific recommendation, except that, in view of the professionalisation of management recommended elsewhere, managerial remuneration should be left to be regulated by the company itself by special resolution in general meeting after adequate safeguards are taken. Regulation of managerial remuneration may be subject to the guidelines of 11th November, 1969, now being followed by the Government till such time as the Government announces the decision in the light of its recommendations in the Bhoothalingam Committee Report. (Para 6.7)

18.57 The statutory guidelines should provide for classification of companies into four categories according to size based on effective capital, viz., A, B, C and D and the maximum and the minimum salary payable to managerial personnel of each category may be fixed accordingly. Minimum remuneration in excess of the limits or the period laid down in the guidelines would require the prior approval of the Central Government. (Para 6.8)

18.58 This wide powers now given to the Government in the matter of approval of every appointment and re-appointment of working directors may be modified to provide for such approval only in special circumstances, such as, in case of relatives of directors or where the proposed appointee is himself a shareholder or a relative of a shareholder holding in either case more than two per cent of the paid-up equity capital of the company or in case of appointment of expatriate directors. (Paras 6.11 & 6.13)

18.59 Powers of appointment/re-appointment within the statutory guidelines should be exercised by the companies only at a general meeting through special resolution and as an item of special business. Explanatory statement on such resolutions should contain all the particulars and justification in terms of the existing requirements in sections 269(3), 309 and 637AA of the Companies Act. The statement should indicate if the proposed managing/whole-time director was at any time involved in any prosecutions under the various specified economic offences. The Board's annual report to the shareholders should state that the statutory guidelines have been complied with. Breach of the guidelines would be cognizable by the Company Law Board on the basis of a complaint made to it. (Paras 6.12)

Chapter VII : Shareholders' Protection and Prevention of Mismanagement

18.60 Proper balance between shareholders' rights and the right of management should be maintained. Shareholders' individual membership rights and corporate membership rights should be strengthened with a view to make their participation effective and meaningful. There should be better management at Board level and remedies against oppression by majority over minority shareholders and against acts of mismanagement should be improved and quickened. Powers of Courts to deal with such matters should be enlarged. Recognition of shareholders' associations needs to be encouraged. Vigilance over corporate activities and corrective measures over erring companies needs to be strengthened. (Paras 7.1 to 7.4)

18.61 Proxy holder should have a right to speak as well as right to vote on show of hands. To facilitate this, the two-way proxy form with suitable modification should be a mandatory requirement for all public companies. (Para 7.5)

18.62 A legal right of intervention should be provided to shareholders in exercising control over and issuing directions to the Board without disturbance to their day-to-day managerial autonomy by amending section 291. (Para 7.7)

18.63 The twin proof requirements in section 397, namely, a continuous course of oppressive conduct and circumstances justifying winding-up of companies is onerous. Single act of oppression should be sufficient. Provision for necessity of circumstances justifying winding-up of the company be deleted. (Para 7.12)

18.64 Additional avenue of relief to individual shareholder—substitution of new section 397. (Para 7.12)

18.65 The same circumstances as in section 397 (as redrafted) should also be sufficient grounds for the Central Government to exercise its power under section 408(1). Orders under this section should be passed after giving an opportunity to the management to be heard. (Para 7.12)

18.66 Directors appointed by the Central Government under section 408 should report every three months on matters which the Government ought to know. (Para 7.12)

18.67 The power under section 409 presently exercised by the Central Government should be exercised by the Company Law Board (as re-constituted) in future. Prescribed percentage of shareholders also to have the right to complain. (Para 7.12)

18.68 Interim orders under section 409 should be operative for a period of two months only unless extended further. Final orders should be passed by Company Law Board within six months. (Para 7.12)

18.69 Any party aggrieved by the order of Company Law Board would have a right of appeal to the High Court. The appeal should be decided by the High Court within six months. Meanwhile the order of the Company Law Board should remain undisturbed. (Para 7.12)

18.70 Shareholders' association should be recognised on the same lines as of recognizing Stock Exchanges. They should be entitled to avail the rights to apply to the Court/Central Government/Company Law Board in cases of oppression or mismanagement. (Para 7.13)

18.71 Single shareholder or the shareholders' association (in the case of public companies) should be entitled to apply to the Court under sections 397 and 398 and not the Central Government to move a petition regardless of the prescribed percentage of members under section 399(1)(a) & (1)(b). (Para 7.13)

18.72 None of the office-bearers of shareholders' association should be concerned with the management of the company. (Para 7.13)

18.73 In order to ascertain how companies funds are utilised, Inspecting Officer should be empowered to inspect the accounts of partnership firms and joint ventures in which the company has an interest. (Para 7.15)

18.74 Inspection of companies under section 209A should be carried out only after giving prior notice, unless for reasons to be recorded by the Regional Director it is considered unnecessary. (Para 7.16)

18.75 Company Law Board like Court under section 237(a) should also have power to order investigation into the affairs of the companies. (Para 7.17)

18.76 Persistent default by the companies in complying with the statutory requirements should be an additional ground for *suo moto* investigation by the Central Government under section 237(b). (Para 7.18)

18.77 Investigation into the affairs of related companies should be carried out only after giving an opportunity to the concerned party to be heard. (Para 7.19)

18.78 Provisions relating to Special Audit in section 233A have not been made use of frequently and are redundant, and should be deleted. (Para 7.20)

18.79 Right of companies to refuse to register transfer or transmission of shares should be exercised within two months of the date of lodging of the transfer deed or request for transmission and for reasons to be recorded in writing. Default should be punishable. Such order to be appealable to the Company Law Board. (Para 7.21)

18.80 An appeal should lie to the High Court on the grounds mentioned in section 100 of C.P.C. against the orders of Company Law Board. (Para 7.21)

18.81 In order that members may move any resolution, the additional requirement with regard to the value of their shares being not less than one lakhs rupees as provided in section 188(2) should be removed. (Para 7.21)

18.82 Special notice required under sections 225, 261, 284 could be given by a single member. Section 190 should be amended. (Para 7.21)

18.83 In case the minimum subscription is not received by a company within 120 days, all monies received from the applicants should be refunded forthwith with increased rate of interest at 12%. (Para 7.21)

18.84 The copies of the minutes of the general meeting of companies should be supplied by companies on request to the shareholders and to recognised shareholders' association free of cost. (Para 7.21)

18.85 Sections 108 (1A) to (1D) for getting transfer of shares endorsed be deleted as they have served no useful purpose and have delayed the free transferability of shares. (Para 7.21)

18.86 On a complaint that shares have been dealt with for a period for six months or more in any recognised stock exchange without the same being lodged for registration with the company, the Company Law Board may make proper inquiries and may freeze the voting rights attached to those shares. (Para 7.21)

18.87 As a substitute for the present requirement of the prescribed authority dating the transfer-form, the transferor while signing should put the date. (Para 7.21)

18.88 A public company other than section 25 companies, should be expressly prohibited by Statute from having any power to expel any of its member notwithstanding its articles or resolution of the Board. (Para 7.21)

Chapter VIII : Accounts and Audit

18.89 The Committee has felt the need for simple, adequate and meaningful disclosure by the companies, for the benefit of the shareholders, the management, the workers and the community at large and also keeping in view the objective of professionalisation of management for improving the working of the companies. To achieve the objectives, the following recommendations are made. (Paras 8.1—8.5)

18.90 Maintenance of accounts by companies on mercantile system only should be made obligatory as maintaining accounts on 'cash' basis may not reflect a true picture of the state of affairs of the company. Section 209 may be suitably amended. (Para 8.6)

18.91 Presently the Registrar of Companies as also the Income-tax Officer can extend the 'Financial Year'. To simplify and to reduce the paper work in the Registrar's office, it should be provided that the 'Financial Year' should consist of eighteen months, if so permitted by the Income-tax Officer (Section 210). (Para 8.7)

18.92 As preparation of balance sheet in vertical form, which is not prescribed in Schedule VI, has become a fairly common practice now, section, 211 should be amended whereby companies can adopt vertical form of balance sheet at their option as per model given at the end of the Chapter. (Para 8.8)

18.93 Companies should be allowed to round off the figures in the balance sheet to the nearest thousand or hundred or ten rupees to facilitate publication of accounts in a more intelligible form. (Para 8.9)

18.94 Companies should be required to attach with their balance sheets, the balance sheet and the profit and loss accounts of firms, joint ventures in the same manner as it is incumbent on a holding company to attach to its own balance sheet a copy of the accounts etc. of the subsidiary companies so as to enable shareholders to know how the funds of the company are utilised. (Para 8.10)

18.95 With a view to achieve the objectives of professionalisation, all companies with a paid-up capital of twenty-five lakh rupees or more should be required to employ :

- (a) A Chief Accountant or a Financial Controller;
- (b) A Cost Accountant and an Internal Auditor, if such companies are engaged in any manufacturing or other specified activities.

Accountant and the Cost Accountant must be members of the Institute of Chartered Accountants of India and the Institute of Cost and Works Accountants of India respectively. Persons holding such offices at the coming into force of these provisions, though not members of the said Institutes, may, however, continue to function as such.

(Paras 8.11—8.13)

18.96 In the case of companies with a paid-up capital of twenty-five lakh rupees or more, engaged mainly in the construction of ships or in the manufacture or processing of goods or in mining or in generation and distribution of electricity and if the cost audit for that industry has been ordered, the Cost Auditor is also to certify in the balance sheet, the figures of stock-in-trade, stores, spares, raw materials, tools and work-in-progress.

(Para 8.14)

18.97 The Committee feels that many malpractices in the published accounts flow from the fact that those who are responsible to maintain the accounts are not held responsible for the figures shown in the published accounts. It is therefore, suggested that the statements of accounts of the company with a paid-up capital of twenty-five lakh rupees or more should be authenticated, prior to their submission for audit, by the Accountant or Financial Controller of the company and additionally for stock-in-trade, stores, spares, raw materials, tools and work-in-progress by a Cost Accountant if such a company is engaged mainly in manufacture or other specified activities. (Paras 8.15—8.16)

18.98 The report of Directors under section 217 should contain additional information, brief particulars of which are given below :—

- (i) Deposits received, total repayment made and outstandings;
- (ii) Certain types of prosecutions launched against the company and their results;
- (iii) Unclaimed and unpaid dividends;
- (iv) Investments in other bodies corporate, firms or joint ventures, exceeding five per cent of the company's paid-up capital and free reserves, as have not yielded any returns during the year and reasons therefor;
- (v) Any material liability incurred by the company from the date of closing of the accounts to the date of adoption by the Directors of such accounts; or matters likely to adversely affect profits and loss, or asset and liability position of the company during the current year;
- (vi) Commitments and liabilities for which no provisions have been made;

- (vii) Steps taken for discharging social responsibilities towards different segments of society, quantifying wherever possible in monetary terms;
- (viii) Losses incurred by the company in those activities which account for not less than ten per cent of company's total turnover;
- (ix) Certain accounting ratios;
- (x) Key factors preventing full utilisation of installed capacity of plant and machinery;
- (xi) Number of shares held by each Director, carrying two per cent or more of the total voting power;
- (xii) Contracts with the company and its subsidiaries in which a Director, his spouse or dependent children have interest to the extent of one per cent or more of total purchase, sale, payment or receipt; and
- (xiii) Compliance with statutory norms and guidelines relating to managerial appointment, remuneration and inter-company investments and loans. (Para 8.17)

18.99 Disclosure of the information under section 217(2A) be amended to provide that :—

- (i) Information relating to employees drawing remuneration of three thousand rupees or more per month has not served any practical purpose. This may be filed with the Registrar along with Annual Return and shall be open for inspection by members or public;
- (ii) The company shall be bound to furnish on demand by any shareholder, information regarding all executives receiving remuneration in excess of that drawn by managing or whole-time director;
- (iii) Information required to be furnished along with the balance sheet shall be limited to —
 - (a) particulars of Directors and their relatives drawing remuneration of not less than three thousand rupees per month or thirty six thousand rupees per annum;
 - (b) particulars of executive in receipt of remuneration in excess of that drawn by managing or whole-time directors, if such executive by himself or along with his spouse and dependent children holds not less than two per cent of equity shares of the company; and
 - (c) Category-wise statement showing number of employees drawing remuneration of less than five hundred rupees, between five hundred and one thousand rupees and between one thousand and two thousand rupees etc. (Para 8.18)

18.100. All payments including remuneration, salaries and perquisites to managing director/whole-time director, directors and employees drawing three thousand rupees or more per month should be quantified in monetary terms and shown separately in profit and loss account. (Para 8.19)

18.101 The Committee was informed that Chartered Accountants who are in whole-time employment elsewhere are sometimes admitted as partners in firms so that the firm could take credit for the specified number of audits. To counter this, it is suggested by way of addition of Explanation III in section 224(1C) that—

For calculating the specified number of audits, a person practising as Chartered Accountant singly and a partner of a firm of Chartered Accountants, in full-time employment elsewhere, shall not be reckoned. (Para 8.20)

18.102 Maintenance of Cost Accounting Records in certain types of industries and their continuous audit is a step not only in the direction of consumer protection but also an advantage to the company itself. Cost audit, therefore, ordered in respect of any particular industry should be continued every year unless the Central Government decides to discontinue such audit in that industry. (Para 8.21)

18.103 Cost Auditor is appointed by the Board of Directors with the previous approval of the Central Government. The Committee sees no reason for distinction in the procedure for appointment of a Financial Auditor and a Cost Auditor and, therefore, recommends that the provisions relating to appointment, resignation, etc. of a statutory auditor should also apply to a Cost Auditor. (Para 8.22)

18.104 Unfair profits can, sometimes, be made by dealing in shares by the use of confidential information generally available to 'insiders' like a company's Director, Statutory Auditor, Cost Auditor etc. To deal with this aspect, the main suggestions of the Committee are listed below :

- (i) Any Director, Statutory Auditor, Cost Auditor, Financial Accountant or Financial Controller, Cost Accountant, Tax and Management Consultant or Adviser and whole-time Legal Adviser or Solicitor of the Company and any private company, partnership firm or trust in which the above category of persons have pecuniary interest should notify the Board their intention to buy or sell the shares of the company. They are prohibited from purchasing or selling shares, prior to or after two months of the close of the accounting year unless permitted by the Board;
- (ii) Details of the number of shares and price at which they are bought or sold by the above category of persons should be annexed to the published accounts;
- (iii) The above requirements should also apply to the spouses and dependent children of the above persons;
- (iv) All public companies should be required to maintain a register disclosing dealings in shares of the company by the above persons, including dealings of their spouses and dependent children and also of those persons who are in full-time employment of the company and drawing a salary of three thousand rupees or more per month. This information should also form part of the published accounts;
- (v) Persons establishing to have suffered an identifiable loss by reason of misuse of information by any of the above categories of persons should have civil remedy before the Company Law Board;
- (vi) Notices of certain specified transactions within the given time will have to be furnished to the company. (Paras 8.23—8.29).

18.105 For the benefit of investing public, creditors and others connected with the affairs of the company, it has been recommended that all public companies listed in any Stock Exchange should publish an abstract in a summarized form, of half-yearly unaudited accounts of the company within sixty days of the close of the half-year highlighting the important developments in company during the period under report. (Para 8.30)

18.106 In the accounts of companies, a specific provision relating to gratuity to employees, payable under any law or agreement, must be made. (Para 8.31)

18.107 There are references to 'free reserves' in the Act. As the term has not been defined yet, the same has been provided with a definition.

Due to continuous increase in prices, providing depreciation on 'historical cost' will not be adequate to replace an old or obsolete asset. It has been recommended that companies should set aside ten per cent of their profits after tax as a Replacement Reserve which should be treated on par with depreciation. (Paras 8.32-8.33)

18.108 To protect the independence of the statutory auditors, certain provisions relating to their resignation etc. have been suggested. (Paras 8.34-8.35)

18.109 Many companies at the initial stage of operation or when incurring losses do not provide for depreciation but indicate only a note on accounts. As depreciation is a charge, it is recommended that profit and loss account should be made up only after providing for depreciation and there should be no provision to indicate *unabsorbed* depreciation. (Para 8.36)

18.110 It has been felt that general instructions for preparation of balance sheet and profit and loss account have grown in bulk over the years through successive amendments. In this process, while certain duplications have crept in, certain necessary requirements have been missing. With a view, therefore, to see that the accounts reflect a true state of affairs of the company, certain changes in Schedule VI have been suggested.

(Para 8.37)

Chapter IX : Inter-corporate Investments/Loans

18.111 Omission of the expressions 'same group' and 'same management' from the Companies Act consequent on the proposed transfer of sections 108A to 108H to the MRTP Act is recommended. These expressions basically have a bearing on the objectives underlying the MRTP Act.

(Para 9.3)

18.112 With a view to preventing the present practice of using investment companies as a vehicle for corporate control, a revised definition of investment company has been suggested in Chapter III as meaning a public company limited by shares and carrying on business of only underwriting in or dealing in shares, debentures, or other securities.

18.113 Investment in preference shares and debentures (the latter in case of companies under the same management), which are at present included within the purview of section 372, should be excluded. The debentures and deposits should, however, be included for purposes of inter-company loans. Investments should also include contributions by way of capital formation to firms, joint ventures or other associations of persons as such investments tend to deplete the funds available for deployment outside the investing company's own business.

(Para 9.5)

18.114 Existing exemption in favour of private companies in the matter of inter-corporate investments should continue.

(Para 9.6)

18.115 Capacity of the investing company to invest in shares or by way of loans should be related only to its 'free reserves' (including that part of the paid-up capital which is represented by capitalisation of profits made after the commencement of the Amendment Act incorporating these suggested changes) and not to subscribed capital or net worth as at present. Subscribed or paid-up capital should normally be invested in company's own fixed capital assets. While providing for a more rational basis for determining genuine surplus for investment in shares or loans, an absolute ceiling should be prescribed beyond which no company should make investments or give loans. This ceiling is proposed at sixty per cent in the aggregate, of which investments should in no event exceed thirty per cent. To ensure that inter-company investments do not operate as instrument of insidious corporate control, investments should be permitted in the interest of the growth of the economy only in certain specified categories of cases (promoting a new company; taking over a sick unit and taking over an existing company—the last one after making the same offer to all shareholders and with the approval of the Company Law Board). In view of absolute ceiling, and investments being permitted for certain specified purposes only, Government approval should be dispensed with except where, in public interest, the Government may permit investment notwithstanding any of the proposed provisions. The provisions for intercompany investments and loans can also be usefully combined into one section. Combined redraft of sections 370 and 372 is accordingly suggested.

(Para 9.7)

18.116 The Committee is anxious that its recommendations in this Chapter are put into effect immediately.

(Para 9.8)

Chapter X : Public Deposits—Protection to Depositors

18.117 Depositors as a class are like any other creditors of the company having dealings with the companies in different manner. Legislative protection to this class can be by compelling companies which accept deposits to disclose more about their affairs so that depositors can form their own opinion about the soundness of the companies. Rules framed in this behalf are quite exhaustive. Law cannot afford protection beyond a certain limit to any single or special class of creditors of companies. Nevertheless as the class of depositors include many trusting and unwary citizens some further tightening of law is recommended.

(Paras 10.1 to 10.8)

18.118 In the application form for deposits and in the Directors' report the details regarding outstanding deposits should be disclosed. It should also be stated that deposits rank *pari passu* with other unsecured creditors of the company. (Para 10.7)

18.119 Suggestions for extending insurance coverage to public deposits with companies is not feasible since there are practical difficulties. (Para 10.9)

18.120 Private companies, in order that they retain their private character, should not be allowed to invite or accept deposits from public in future. Private companies which have already accepted deposits earlier should be allowed sufficient time to pay of the deposits in a phased manner. (Para 10.10)

18.121 As an additional measure of protection and to tackle cases of more serious default section 58A should be amended to provide that where 10% of the matured deposits remain unpaid for over a period of six months in spite of claims from depositors having been made, the company and its directors should be deemed to be in default unless the company applies to the Court who would be empowered to pass all appropriate orders which the Court may, in the circumstances consider necessary. The company should bear all expenses in giving effect to the order of the Court. On failure of the company to apply, it will be deemed to be in default and would be penalised. (Para 10.11)

18.122 Sub-section (8) of section 58A does not and should not permit the Central Government to grant exemption or relaxation to any companies from payment of deposits which have matured for repayment. (Para 10.11)

18.123 A depositor who has not been paid either the interest or the principal or both should have a right to move the Court without any authorisation as presently required under section 621 of the Act. (Para 10.11)

18.124 A company which has defaulted in paying either the interest or the principal, should be prohibited from inviting or accepting further deposits. No company should be allowed to invite or accept deposits with a view to pay off earlier deposits. (Para 10.11)

18.125 Percentage for acceptance of deposits in relation to paid up capital and free reserves as at present should be changed to only with reference to 'free reserves' (as re-defined). (Para 10.11)

18.126 With a view to controlling the undesirable activities of brokers in canvassing for deposits, it would be necessary for stock exchanges to shoulder the responsibility of regulating such activities of brokers. The Government should also look into this matter and take remedial measures immediately. (Para 10.12)

Chapter XI : Workers' Participation in Management of Companies

18.127 Workers' participation at the Board level is recommended. To start with, such participation may be limited to companies employing 1,000 or more workmen as defined in the Industrial Disputes Act, 1947 (excluding casual or badli workers). This would apply both to Government and non-Government companies. Companies employing a lesser number of workmen would, however, have the discretion to have such participation at their Board level. (Paras 11.3, 11.10 and 11.11)

18.128 Every company proposed to be covered under the scheme of workers' participation recommended by the Committee should arrange to hold, under the supervision of the Labour Department of the State Government concerned and at its expense and premises, a secret ballot in which all workmen who have been in service of the company for six months would participate to decide whether or not to have workers' participation. If 51 per cent of the eligible workmen of the company vote in favour, the company would be legally bound to provide for workers' participation at the Board level and implement the scheme without any avoidable delay. (Paras 11.12, 11.13 and 11.18)

18.129 Decision regarding the proportion of worker-directors on the Board requires detailed consultation with companies, trade unions, and workers' representatives. Government should, therefore, initiate talks in this regard immediately for implementing the scheme. (Para 11.14)

18.130 The method of nomination for elections to be made by workers directly. No worker will be eligible to stand for election unless his candidature is proposed by at least ten workmen of the same company. (Para 11.17)

18.131 Arrangements should be made for the casting of votes by all the workmen conveniently at each establishment at their places of work. (Para 11.19)

18.132 The choice of the worker-director will be only from amongst the workmen belonging to the company. (Para 11.20)

18.133 The tenure of a worker-director would be for a period of three years. (Para 11.21)

18.134 Vacancies in the office of the worker-director will be treated as casual vacancies and will be filled with the approval of the other sitting worker-directors. Where there is no other worker-director on the Board, election of a worker-director will be held within three months. (Para 11.22)

18.135 No distinction will be made between a holding and a subsidiary company, each having 1,000 workmen or more, in regard to the election of worker-directors. Each of them will be entitled to have separate worker-director on the respective Boards. Foreign companies will also be covered by the scheme of workers' participation. (Paras 11.23 and 11.24)

18.136 Two-tier Board system obtaining in some European countries is not considered suitable for this country. (Paras 11.25 and 11.26)

18.137 In order to ensure effective participation by workers' representatives at the Board level section 292 should be amended to provide that certain decisions are necessarily taken only at the Board level and no delegation to Committees of the Board or to other functionaries is made. (Para 11.27)

18.138 Worker-director should not, because of section 299/300 of the Companies Act, be barred from participating in Board meetings while dealing with issues concerning workers e.g. wages, bonus, etc. In the case of workers, wages/salary and other benefits will not be treated as an office of profit for the purposes of section 314. (Para 11.29)

18.139 For proper performance of their duties, the worker-directors should be imparted training and be made familiar with subjects like Commercial Law, Elements of Accountancy, by the Government. Government must fund the expenses. (Para 11.30)

18.140 No reason to expect that worker-director will in any manner so act which is either detrimental to the interests of the company or in breach of the confidentiality of the information vouchsafed to them as members of the Board. (Para 11.31)

18.141 The Committee is hopeful that the participation of workmen at the top management level in a company will lead to greater industrial harmony and mutual trust and genuine endeavour by both, to work in the larger interests of the economy and welfare of the country. (Para 11.32)

18.142 The question is equity participation by workers is a vexed one and not easy of solution. While business interests do not approve of conversion of part of bonus payable to workers into shares due to difficulties in servicing capital, labour itself is vehemently opposed to such a suggestion. In the absence of mutually acceptable formula, the Committee is unable to suggest any mandatory participation of any workers in the equity capital of a company. (Paras 11.36 and 11.37)

18.143 Ten to fifteen per cent of all new shares issued in future should, however, be reserved exclusively as workers' shares and should be offered to the employees of the company and failing that only, to the existing shareholders or to the public. For this purpose, section 81 should be suitably amended. (Para 11.38)

Chapter XII : Social Responsibilities of Companies

18.144 In the development of corporate ethics, a stage has been reached where the question of social responsibility of business to the community can no longer be scoffed at. The plea of the companies that they are performing a social purpose in the development of the country can only be judged by the test of social responsiveness shown by them to the needs of the community. (Paras 12.1 and 12.4)

18.145 Acceptance of the concept of social responsibility must be reflected in the information and disclosure that the company makes available for benefit of various constituents like the shareholders, creditors, workers and the community. Openness in corporate affairs is the first principle in securing responsible behaviour. (Para 12.5)

18.146 The Committee is happy to note that some of the enlightened business houses in our country are showing a recognition of the social responsibility owed by the corporate sector. No enlightened management can really remain aloof to the national problems such as unemployment, over-population, rural development, environmental protection including conservation of resources, control of pollution and provision for clean drinking water. (Para 12.6)

18.147 Accountability of the public sector to the people through Parliament must find its parallel in the private sector in the form of social accountability which is, in our view, a mere extension of the principle of public disclosure to which a corporation must be subject. Every company, apart from being able to justify itself on the test of economic viability, will have to pass the test of a socially responsible entity. (Paras 12.7 and 12.8)

18.148 In order to ensure implementation of the concept of social responsibility and dissemination of adequate information in this regard, a provision should be made in the Act that every company, along with directors' report, shall also give a Social Report which will indicate and quantify in as precise and clear terms as possible the various activities relating to the social responsibility aspects which have been carried out by the company in the previous year. (Para 12.12)

Chapter XIII : Political Donations—Section 293A—Prohibition regarding making of political contribution

18.149 Prior to the coming into force of the Companies Act, 1956, by and large, companies had not provided in their memoranda of association for any enabling power to make contributions to political parties. (Para 13.2)

18.150 The pressure for making such contributions had increased by the time of General Elections in 1957 and in the two cases involving alterations of memoranda considered by the Bombay and Calcutta High Courts, the danger inherent in permitting such contributions was pointed out by the Courts. (Paras 13.3 and 13.4)

18.151 Parliament took note of this danger and put a ceiling on such contributions through section 293A inserted by the Companies (Amendment) Act, 1960. The Santhanam Committee, however, found this amendment ineffective and called for a total ban on all such contributions. (Para 13.5)

18.152 A total ban on such contributions was laid down in 1969 by the insertion of a new section 293A in the Act. During the period the permissive provisions were in force, the main, if not almost the sole, beneficiary of such contributions was the then ruling party. (Para 13-6)

18.153 An attempt was made to revoke the ban and permit the giving of political donations by companies by the Amendment Bill 80 of 1976, which, however, did not become law and lapsed, (Para 13.7)

18.154 Removal of existing ban on political contributions by companies would benefit only the larger companies because irrespective of whether the limit is in terms of percentage of profit or otherwise, the bigness of a company will determine the bigness of the contribution and this will necessarily lead to more unhealthy influence. (Para 13.10)

18.155 Danger of permitting money to play any important role in election has been recognised by the Election Law also. (Para 13.11)

18.156 Many democratic countries have placed limits on what a candidate or a political party can spend on elections. Even in countries like the USA, the unrestricted flow of money for elections is not permitted. The modern trend and practice is to make it unlawful for companies to make any contribution to political parties or for a political purpose. (Paras 13.12 and 13.13)

18.157 There are equally weighty reasons against removing the ban on political contributions. There is a sharp divergence of views as to who should have the right (the Board, the shareholders or the workers of the company) to determine which political party should be the recipient. In such a situation the right course is to treat the company's fund as a trust fund in which various parties have a stake and, therefore, to continue the existing prohibition on such contributions. (Paras 13.14 and 13.15)

18.158 An Explanation should be inserted in section 293A of the Companies Act on the lines of section 19(3) of the UK Companies Act, 1967 to clarify what is meant by political purpose and to cover any donation or subscription or payment to a political party or to a person carrying on or proposing to carry on any activity for public support for a political party. Any expenditure incurred by the company including on advertisement, souvenirs, brochures, tract, pamphlet or the like publication of a political party directly or indirectly should be deemed to be a contribution for a political purpose. (Para 13.16)

18.159 Any member of office-bearer of a political party or any other person who receives from the company directly or indirectly any amount by way of contribution for a political purpose in contravention of section 293A should be punishable with imprisonment upto three years and with fine. (Para 13.17)

18.160 Section 293A should be redrafted on the lines suggested in the previous paragraphs. (Para 13.18)

Chapter XIV : Government Companies

18.161 Keeping in view the recommendations for simplification of the Company Law, there will be no case for Government companies claiming exemption from the provisions of the law. (Para 14.8)

18.162 There is need to provide safeguards for preserving the autonomy of Government companies so as not to defeat the legislative intent to separate the commercial activity of the Government from bureaucratic intervention. Accordingly, a model set of Articles framed as at Annexure II to the Chapter should be statutorily prescribed by way of compulsory regulations for all Government companies. Under these regulations, the Board of Directors of Government companies will be entitled, among others, to create posts, to make appointments to posts carrying a monthly salary of below Rs. 2,500/- per month, to authorise variations upto ten per cent in the approved estimates of any work of capital nature already covered by a detailed Project Report—approved by the Central Government, and to authorise the undertaking of works of a capital nature in advance of the preparation of Project Report, where the cost of individual works involved is less than Rs. 100 lakhs. The Central Government would, on the other hand, be entitled to appoint the Chairman, Managing Director and other executive and functional directors, fix their salaries and allowances and also create and make appointments to posts carrying a salary of Rs. 2,500/- per month or more. (Para 14.11)

18.163 Definition of 'Government company' should make it explicit that a Government company is a public limited company of a separate type by itself.
[(Paras 14.12 and 14.13(1))]

18.164 Section 617 dealing with the definition of a Government company should be enlarged to make it clear that a company in which not less than 51 per cent of the paid-up share capital is held jointly or severally by the Central Government, by one or more State Governments, by one or more Government companies or by one or more bodies corporate owned or controlled by the Central or State Government shall be deemed to be a Government company.
[Para 14.13(1)]

18.165 In the case of shares held on behalf of the President or the Governor in a Government company, provision should be made for facilitating automatic transfer of shares to be recorded in the register of members notwithstanding any other provisions in the Act to the contrary.
[Para 14.13(3)]

18.166 The statutory provisions relating to meetings and proceedings shall apply only subject to the articles of association of the Government company.
[Para 14.13(4)]

18.167 Provisions relating to investigation shall also apply to a Government company.
[Para 14.13(5)]

18.168 Government companies should be exempted from the provisions relating to managerial appointments and remuneration. No compensation for loss of office should also be payable to the directors of a Government company. Provisions relating to appointment of relatives should, however, continue to apply to Government companies as well.
[Para 14.13(6)]

18.169 A panel of chartered accountants be maintained by the Comptroller and Auditor General of India from which Government companies should be free to appoint auditors subject, however, to such guidelines as may be laid down by the Comptroller and Auditor General. The existing statutory restrictions on the number of audits which a firm of chartered accountants can take at a time and also the principle of rotation of auditors after a specified period as per guidelines of C&AG should continue to be applicable. While retaining the existing scheme in sub-sections (4) and (5) of section 619, the C & AG should be requested to make available his report or comments within a given time-frame to enable Government companies to conform to the time-limit of six months permitted under the law for the holding of annual general meeting.
[Para 14.13(7)]

18.170 While the provisions applicable to non-Government companies in regard to penalties and prosecutions should be applicable to Government companies also, no Court should take cognizance of any offence under the Act alleged to have been committed by any Government company or any officers thereof except on the complaint in writing of a person authorised by the Central Government.
[Para 14.13(8)]

18.171 No distinction need be drawn between wholly-owned Government companies and Government companies in which private participation exists in the matter of extending the exemptions and modifications, as the extent of private holding was found to be only one per cent of the total paid-up capital of all Government companies.
(Para 14.14)

Chapter XV : Winding-up of Companies

18.172 Provisions dealing with winding-up procedures have long remained a neglected area in the Act. Delay in termination of winding-up proceedings and blocking of corporate assets is injurious both to the shareholders and to the economy in general. Problems in obtaining the statement of affairs filed by the Directors and the difficulties faced by the Official Liquidators in the realisation of assets necessarily delay early termination of winding-up proceedings. These need attention and the Committee's recommendations are directed towards this goal.
(Paras 15.1—15.9)

18.173 Section 454 should be amended to ensure the filing of a statement of affairs and provide information about the custody of books before the winding-up order is passed. (Para 15.14)

18.174 The following additional provisions should be made in section 454:—

- (a) Where the petition for winding-up is filed by the company itself, the petition should be accompanied by a duly prepared statement of affairs as required by section 454. The petition should specify as to who has the custody of the books of account and papers and name the officers and/or directors who would produce the books, papers, etc. after the order of winding-up. The statement regarding custody and production of books must have been approved by the Board of Directors, and the petition must include this averment.
- (b) In other cases, the Court should be empowered at the time of giving directions under Rules 96/99 of the Companies (Court) Rules, 1959, to direct the company to file, within such time as may be allowed by the Court, a declaration, which should be approved and/or verified by the Board of Directors of the company and accompanied by the consent in writing of person/persons charged with the responsibility of production of books of account and for filing statement of affairs, containing the required particulars.
- (c) In the event of default in filing the statement of affairs and/or production of the books of account within the prescribed period, all the directors on the date of filing of the winding-up petition should be deemed to be in default. There should be a minimum fine of rupees one thousand. (Para 15.19)

18.175 (a) Power to extend time for filing the statement of affairs should be left only with the Official Liquidator—Section 454(3) should be amended.

- (b) Expenses in connection with preparation of the statement of affairs should be borne by the directors and not paid out of assets of the company—Section 454(4) should be amended.
- (c) The onus of proving reasonable excuse for default should be on the person who alleges it—Section 454(5) should be amended. (Para 15.20)

18.176 The liquidator should only pay a fixed court fee in any suit, proceeding or claim brought by him on behalf of the company. (Paras 15.22 and 15.27)

18.177 Section 456 should be amended to empower the Liquidator, on the lines of section 132 of the Income-tax Act, 1961, to carry out search and seizure, after obtaining the leave of the Court. He should also be entitled to seek the help of police. (Paras 15.23 and 15.27)

18.178 A provision similar to sub-sections (1) and (2) of section 45-F of the Banking Regulation Act, 1949, be inserted in the Companies Act dispensing with the necessity of producing original books. (Paras 15.24 and 15.27)

18.179 Section 458A should be amended to provide for exclusion of a period of three years from the date of winding-up order for purposes of limitation. In the case of directors, there should be no period of limitation for enforcement by the company of any claim based on a contract. In other claims against directors, the period of limitation should be six years. (Paras 15.25 and 15.27)

18.180 There should be quicker and summary procedure for recovery of any amount due to the company. Provision on the lines of section 45-T(3) of the Banking Regulation Act 1949, should be provided. (Para 15.27)

18.181 (a) Section 530 should be amended to provide that notwithstanding section 178 of the Income-tax Act, 1961, arrears of taxes which have become due and payable within twelve months next before the 'relevant date' alone should have priority.

- (b) Costs and expenses of winding-up shall be determined by the Court and not by the Commissioner of Income Tax. Section 178(3) of the Income Tax Act should be suitably amended.
- (c) A provision should be made in tax laws for the assessment of companies in liquidation to be placed under the charge of one Income Tax Officer.
- (d) Salaries, wages upto Rs. 12,000 will have priority over taxes.
- (e) In section 530(1), existing clause (b), the period of four months should be increased to twelve months; and in sub-section (2) rupees one thousand should be increased to rupees twelve thousand with a view to enable the workers and other employees of companies in liquidation to recover a major share of their dues. (Para 15.36)

18.182 Section 467 should be amended to empower the Official Liquidator to settle the list of contributories. Only the list of persons who dispute should be referred to the Court. (Para 15.38)

18.183 Section 542 should be amended —

- (i) to make it clear that actual dishonesty is not a necessary ingredient of a charge under the section;
- (ii) to make directors and others personally responsible if they carry on the business in a reckless manner. It should cover civil liability only;
- (iii) empowering the Court while hearing applications under sections 542 and 543 to pass interim orders including freezing and prohibiting any dealings by the directors of their private properties so as not to render ineffective all final orders as may be passed by the Court; and
- (iv) to clarify that section 542 should apply in the case of working companies also and not only to companies in liquidation. (Para 15.40)

18.184 Section 543 should be amended to provide that misfeasance proceedings will lie against a director if he has acted with gross negligence. (Para 15.40)

18.185 The present procedure in section 545 is time consuming. Instead the voluntary liquidator should be empowered to straight away initiate action against offenders without any reference to the Registrar and the Central Government. (Para 15.40)

18.186 There should be additional grounds for winding-up, namely :—

- (i) when a company obtains additional deposits to pay off old deposits;
- (ii) If the security of the creditor entitled to the benefit of a floating charge is in jeopardy. [Para 15.41(1)]

18.187 The Registrar of Companies should be empowered to move a petition for winding-up on the grounds of 'public interest'. [Para 15.41(2)]

18.188 A provision should be made to provide for the vesting of property of the company in the liquidator in compulsory winding-up. [Para 15.41(3)]

18.189 A provision enabling the Court to recall or rescind the winding-up order should be made in the Act. [Para 15.41(4)]

18.190 A provision enabling the liquidator to appoint a 'special manager' of the estate and business of the company should be provided. [Para 15.41(5)]

18.191 (a) Section 536 should be amended to empower the Court to validate any disposition of property of the company, on such terms as it may think fit. During this period, the Court should be empowered to sanction carrying on the business of the company and acts incidental thereto.

- (b) It should be clarified that orders under section 536(2) could be passed by the Court even though no order for winding-up is actually passed.
[Para 15.41(6)]

18.192 Power to arrest directors and officers who are about to abscond should be provided in section 477 on the same lines as power to arrest absconding contributories in section 479. Expenses incurred for appearance before Court should be borne by the person summoned.
[Para 15.41(7)]

18.193 Section 494 should be amended to give right to any member who desires his interest to be purchased by the Official Liquidator.
[Para 15.41(8)]

18.194 If a branch of foreign company doing business in India is unable to pay its debts, the said branch should be deemed to be a company within the meaning of the Act and liable to be wound-up.
[Para 15.41(9)]

18.195 Sections (464, 465, 503 and 504) relating to Committee of Inspection should be deleted since they have not served any useful purpose.
[Para 15.41(10)]

18.196 The Official Liquidator should keep records for a period of ten years prior to the 'relevant date' and have a power to destroy all other records which are not required by him.
[Para 15.41(11)]

18.197 The Central Government should take up with the State Governments the question of exempting debts due to companies in liquidation from the purview of Debt Relief Acts.
[Para 15.41(12)]

18.198 The Court should be empowered to order enquiry against the conduct of the Official Liquidator.
[Para 15.41(13)]

18.199 The expenses incurred by the liquidators in connection with taking possession and subsequent sale of assets of the company in liquidation should be treated as liquidation expenses for tax benefits.
[Para 15.41(14)]

18.200 With a view to preserving the industrial activity, [the Official Liquidator should make efforts to dispose of the undertaking of the company as a going concern notwithstanding the winding-up proceedings.]
[Para 15.42]

18.201 Tenancy rights of the company in liquidation which are at present not saleable under the Rent Acts, should be allowed to be sold by the Official Liquidator, as this will increase the assets of the company.
(Para 15.42)

18.202 The practice of employing company-paid staff should be minimised and the offices of the Official Liquidator should normally be manned by regular Government employees only.
(Para 15.43)

18.203 (a) Section 435 should be amended to vest power in the High Court to delegate some of its powers to the Company Law Board as recommended to be reconstituted.

(b) All matters relating to winding-up of small companies should be with District Courts.
(Para 15.45)

18.204 (a) The two separate sets of sections 489 to 497 (dealing with members voluntary winding-up) and 500 to 509 (dealing with creditors voluntary winding-up) should be combined to provide for only one type of voluntary winding-up.

- (b) Sections 495, 498, 502, 503 and 504 should be deleted as a consequence of only one type of voluntary winding-up being suggested. (Para 15.46)
- (c) Winding-up subject to supervision of Court should be abolished and sections 522 to 527 be deleted. (Para 15.47)

18.205 Under section 488, the declaration of solvency should also contain a statement regarding the address where books and other records of the company are kept, and also name, address, designation of person/persons who is/are charged with the responsibility of producing the books, records, etc. and also the statement of affairs if required by the voluntary liquidator. (Para 15.48)

18.206 Scrutiny by the Official Liquidator under sections 497(6) and 509(6) should be discontinued. Consequential changes in sub-sections (3), (6A) and (6B) of section 497 and in section 509 should be made. (Para 15.53)

18.207 It is not necessary to have a report of the Official Liquidator before ordering dissolution. However, the dissolution will be effective only six months after holding of the final meeting. (Para 15.54)

18.208 As an additional safeguard on the dispensing of the report of the Official Liquidator under section 559, the Registrar of Companies also should be empowered to move the Court for declaring the dissolution as void and the period of two years be increased to five years. (Para 15.55)

18.209 The Official Liquidator need file only one, instead of two, set of accounts under section 462 for the period made upto the 31st March each year. A copy of the same account should be simultaneously filed with the Registrar of Companies. (Para 15.56)

18.210 In case of voluntary liquidation the present six monthly report by voluntary liquidator should be retained. There should be a single form of accounts for purposes of submitting reports to the Court as well as to the Registrar. (Para 15.57)

18.211 Number of sections in Part VII should be reduced by re-arrangement as indicated in the Annexure to this Chapter. [Para 15.41(15)]

Chapter XVI: Administrative Machinery

18.212 The Company Law Board should be statutorily constituted as an independent quasi-judicial body on the pattern of the Income-tax Appellate Tribunal with permanent Benches in the different regions, including Delhi region. (Para 16.9)

18.213 The Companies Act, 1956, incorporates concepts of social philosophy and protection of public interest as adumbrated in the Constitution. To achieve these objectives, the administration in discharge of its duties and functions must act in a quasi-judicial manner. While matters of purely administrative nature should continue to be exercised by the Central Government, other matters which require exercise of quasi-judicial powers should be entrusted to the Company Law Board as reconstituted. The Board should function independently of the Central Government ensuring speed and efficiency in discharge of these functions. There should be power to impose penalties for default in compliance of statutory obligations in place of the existing routine prosecutions (Paras 16.1—16.8)

18.214 Procedure for recruitment of Members to the Company Law Board as reconstituted should be on the lines of recruitment of Chairman and Members of the Income-tax Tribunal appointed by a Selection Board constituted under Rules framed for the purpose under Article 309 of the Constitution. (Para 16.9)

18.215 Professional qualification and experience in law or accountancy should be prescribed as the eligibility qualification for Members of the Company Law Board. (Para 16.10)

18.216 Modifications should be made to the existing provisions relating to the constitution and functions of the Company Law Board. Power to constitute the Company Law Board should remain with the Central Government and power to constitute the Regional Benches should be with the Company Law Board ; the Company Law Board alone should have powers to frame rules and procedure for the conduct of its business and that of its Regional Benches; the Company Law Board including its Regional Benches should have powers of the Court under the Code of Civil Procedure ; the Chairman of the Company Law Board should be a person who is qualified to be appointed as a judicial Member. He should hold office until he attains the age of 65 years or has served for a period of five years as a Chairman, whichever is earlier ; the other Members of the Board must be persons having legal and/or accountancy qualification, in addition to the experience of working and administration of the Companies Act and allied statutes and of corporate sector ; the Company Law Board or any of its Regional Benches should not be subject to the control of the Central Government. (Para 16.11)

18.217 Broadly while the existing pattern of exercise of various powers by the Central Government, the Company Law Board and the Court should continue, the said powers should be re-allocated to these authorities as per Annexures IA (Company Law Board), IB (Central Government) and IC (Court) respectively. (Para 16.12)

18.218 The penal provisions which are scattered throughout the Act should be consolidated at one place and grouped according to the nature of the offence and punishment. (Para 16.13 & 16.14)

18.219 In place of the existing practice of imposing fine only by the Courts, there should be power with the Registrar/the Company Law Board to impose penalty. The Registrar's power to impose penalty should be limited to Rs. 500 in the first instance ; Imposition of penalty beyond Rs. 500 in the first instance, should be by the Company Law Board. Offences which pre-suppose existence of 'mens rea' and are punishable with imprisonment, fine or both should be retained with the Courts. (Para 16.16)

18.220 There should be right of appeal against all original orders of the Registrar of Companies imposing fine beyond certain limits to the Company Law Board and against all original orders of the Company Law Board imposing fine to the High Court. Penalties imposed by the Company Law Board should be recovered as if they were arrears of land revenue. (Para 16.17)

18.221 The Company Law Board may authorise any of its Regional Benches to hear the appeals. No appeal should be admitted unless the penalty imposed and against which appeal is filed is first deposited. Appellate authority shall have power to waive, enhance, reduce or compound the penalty. Appeal against order of the Company Law Board should only be on question of law. Non-payment of penalty accompanied by non-compliance of the directions should be a cognizable offence. Opportunity should be given to the party to be heard before any order is passed. No proceedings for default under any provisions of the Act shall be taken notice of after expiry of three years from the date of default. (Para 16.17)

Chapter XVII : Simplification and overall review of the Companies Act not covered in other parts of the Report

18.222 There has been criticism about some of the provisions of the present Companies Act, both from the point of view of their administration by the Government and in the context of day-to-day interpretation and practical working by companies. It is in the nature of things that a gap always remains between legislative intent and practical interpretation. All new legislations or modifications thereof are, therefore, an attempt to bridge this widening gap. It is with a view to (a) removing practical difficulties and problems which have been experienced in the actual implementation of the existing legislation for over two decades; (b) avoiding repetition and unnecessary verbiage; and (c) in the light of the structural changes suggested elsewhere in this Report by the Committee, that several of the existing sections call for modifications, some of substantial nature. The specific recommendations in this regard are accordingly contained in succeeding paragraphs. (Paras 17.1 & 17.2)

18.223 The present definition of 'subsidiary company' in section 4 may be amplified to cover bodies corporate wherein more than half the nominal value of equity share capital is held either jointly or severally by a holding company and one or more of its subsidiaries. (Para 17.3)

18.224 Every company, along with its annual return, should state in the prescribed form whether it is a holding or a subsidiary company. (Para 17.4)

18.225 Sections 15A and 15B may be deleted and substituted by a general provision to give effect to the change in the name of any State or to the name of a new State by automatically substituting it in the existing situation clause of the memorandum. (Para 17.5)

18.226 No approval of the Company Law Board, or any other authority, should be necessary for alteration of the objects clause of the memorandum. Any member or members who hold not less than five per cent of the total voting power of the company and who are aggrieved by alteration of the objects clause may be given a right to apply to the Company Law Board. Such a right should also be given to the Registrar. (Para 17.6)

18.227 Section 20 should be amended so as to empower the Central Government to make rules and lay down the guidelines currently followed by it relating to names of companies. (Para 17.7)

18.228 Reference to managing agents and secretaries and treasurers in clause (c) of sub-section (1) of section 33 should be omitted and the clause should be modified to include agreement with managing or whole-time director. Sub-section (2) of section 33 should be amplified to include a practising company secretary as a person competent to file the requisite declaration. (Para 17.8)

18.229 Sub-section (2) of section 42 should be modified to provide that the restrictions under section 42 shall not apply to receiving bonus shares by the holding company. Reference to unlimited company in sub-section (5) of section 42 may be dropped. (Para 17.9)

18.230 Restrictions on interlocking of investments should be imposed to prevent one company from holding a large block of shares in another company. No company wherein more than twenty-five per cent of the share capital is held by another company shall be entitled to invest in excess of five per cent of the share capital of the other company. The present restrictions in section 42(1) are applicable where the holding is in excess of fifty per cent. (Para 17.10)

18.231 The expression 'refusing permission' in section 73 should be substituted by the expression 'refusing or not granting permission', so as to provide for an appeal being filed against delay in disposal of application by the Stock Exchange. (Para 17.11)

18.232 Sub-section (3) of section 77 should be modified to provide that the loan which may be granted by a company to any person during his entire period of employment with the company should not exceed twelve months' salary or wages, or rupees twelve thousand, whichever is less. (Para 17.12)

18.233 Irredeemable preference shares as a class should be abolished. The existing irredeemable preference shares should be redeemable at the end of five years from the date of commencement of the Act with the option, to be exercised within six months from the date of commencement of the Act, to redeem them within a period of twelve years, and at the rate of interest of not less than ten per cent. No consent of any class of members should be necessary for such conversion. (Para 17.13)

18.234 No company, in future, should issue any preference shares which are not redeemable within a period not exceeding twelve years. At the time of redemption, the shares may be either renewed or paid off in cash to those who do not agree to renewal. No company can take recourse to section 106 or section 391 to have an arrangement by a majority decision, subject to Court's confirmation. Court's sanction for reduction of capital should not be made applicable to redemption of preference shares, so long as the total capital is not depleted. Shares may be redeemed either by issue of fresh shares or debentures or by crediting an equivalent amount to Capital Redemption Reserve Fund from out of profits. (Para 17.14)

18.235 A company which has failed to redeem its preference shares shall be prohibited from declaring any dividend on equity shares or transfer any of its profits to reserves until such time the preference shares are redeemed. (Para 17.15)

18.236 The suggestion that further issue of preference shares should be made to the existing preference shareholders only is not found to be acceptable. (Para 17.16)

18.237 Sub-section (3) of section 81 may be amended to provide for conversion of loans issued prior to the coming into force of the Amendment Act of 1963, into equity, if there is such a provision in the agreement. (Para 17.17)

18.238 All preference shares issued in future must be cumulative preference shares. All existing preference shares which are non-cumulative will be deemed to be cumulative with effect from the date of commencement of the Act. (Para 17.18)

18.239 In clause (c) of sub-section (2) of section 87 the word 'equity' may be deleted. (Para 17.19)

18.240 Section 89—The termination of excessive voting rights in existing companies be deleted as the eventuality has long passed. (Para 17.20)

18.241 Section 90 may be deleted. The existing provisions in private companies relating to disproportionate voting rights should be brought within the scheme of the Act within a period of three years. (Para 17.21)

18.242 In clause (a) of sub-section (1) of section 94, the words 'issuing new shares' should be substituted by the words 'creating new shares'. Sub-section (3) of section 94A may be deleted. (Para 17.22)

18.243 Reference to 'stock' in sections 94 and 95 is to be omitted, as there should only be two kinds of shares—equity and preference. (Para 17.23)

18.244 Section 98 may be deleted as unlimited companies are being proposed to be deleted. (Para 17.24)

18.245 Sections 108A to 108H may be transferred to the MRTTP Act as these provisions pertain appropriately to the objects of that Act. (Para 17.25)

18.246 Sections 114 and 115 may be deleted as deletion of share warrants is being recommended. (Para 17.26)

18.247 The proviso to section 125 may be amended to empower the Registrar of Companies to allow particulars relating to charges etc. to be filed on payment of additional fees beyond the specified period.

Section 141 would apply only in case of failure to register the charge within sixty days. The Registrar should be empowered to refuse to register charge under certain circumstances. Appeal to the Company Law Board may be made for such refusal. The words 'requiring registration' may be substituted by the words 'as provided for registration under the Act'. (Para 17.27)

18.248 Sections 153, 153A, 153B and 187B need to be consolidated at one place. Reference to 'debentures' in these sections should be omitted. The expression 'instrument in writing' should include constructive trusts. 'Paid-up value' should be the only criterion for determining the value of shares held by a trust. Aggregate value of shares held in a company by different trusts created by the same settler(s) should be taken into account. (Para 17.28)

18.249 The provisions of section 187C may be deleted as they have not served any useful purpose. A provision on the lines of section 12(3) of the Banking Regulation Act, 1949, may be incorporated in section 155. (Paras 17.29 and 17.31)

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18.250 Sections 157 and 158 with regard to maintenance of foreign register may be deleted. (Para 17.33)

18.251 Sections 159 to §162 should be consolidated into a single section to provide that the annual returns should be filed by different categories of companies as per the form set out in the Schedule. (Para 17.34)

18.252 The requirement of holding a statutory meeting (section 165) may be dispensed with. Particulars required to be incorporated in the statutory report should be sent to the shareholders within the period under the Act and also placed before the first annual general meeting. (Para 17.35)

18.253 Annual general meeting should be allowed to be held on public holidays also. (Para 17.36)

18.254 Extra ordinary general meeting should be held only at the place where the registered office is located. (Para 17.37)

18.255 Minutes of the meetings of the Board and the Committees thereof should mandatorily contain certain particulars. Minutes of the meetings of the Committee should be circulated to all the members of the Board within a given period. (Para 17.38)

18.256 A new provision should be incorporated conferring on the High Court exclusive jurisdiction on applications for injunction in respect of holding of the meeting of the shareholders. This will help to reduce multiple legal proceedings. (Para 17.39)

18.257 Directors are to pay interim dividend only out of what they know are profits of the company. (Para 17.40)

18.258 The Companies (Transfer of Profits to Reserves) Rules, 1975, and the Companies (Declaration of Dividends out of Reserves) Rules, 1975, should be dispensed with. The substance of these Rules should be incorporated in the Act itself. Sub-section (3) of section 205A may be deleted. (Paras 17.41 & 17.42)

18.259 Proviso (b) to sub-section (1) of section 205 should be amended to ensure that a company does not distribute profits unless the entire loss, including depreciation, is completely made good. Reference to 'an amount which is equal to the amount provided for depreciation for that year or those years, whichever is less' may be deleted. (Para 17.43)

18.260 References in section 205 to Amendment Act of 1960 and proviso (c) to sub-section (1) of section 205 may be deleted. (Para 17.44)

18.261 Section 205 should be recast to ensure that dividends are declared only out of true and fair profits of the company; to prohibit payment of dividend unless at least twenty-five per cent of the profits are transferred to the reserves; to provide for payment of dividend out of free reserves only; to empower the Board to pay interim dividend not exceeding half of the average rate of dividend declared for the last three years; to provide that a method of depreciation once followed should be adhered to and approval of the Central Government should be obtained for change in the method of calculating depreciation. Method for arriving at depreciation should be the same for all the purposes of the Act. (Paras 17.46 & 17.47)

18.262 Explanation be added to sections 198 and 309 to indicate what constitutes true and fair profits. (Para 17.48)

18.263 Sections 349 and 350 may be deleted. (Para 17.49)

18.264 Section 205A should be amended to provide for transfer to the Unpaid Dividend Account if dividend warrant not posted within seven days of expiry of forty-two days or if posted, not collected within ten days of expiry of six months. Sections 205A and 205B should be shifted to be placed after section 207. (Para 17.50)

- 18.265** Section 208 may be deleted as it is improper to pay interest from capital. (Para 17.51)
- 18.266** Five copies of balance-sheets are to be filed under section 220. (Para 17.52)
- 18.267** An Explanation is to be incorporated in section 224(1) to indicate that an auditor holds the office from the date of an annual general meeting to the conclusion of the next annual general meeting. Consequential changes may be made in section 224(4). (Para 17.53)
- 18.268** The Central Government's approval may be required under section 259 only if the increase in number of directors is beyond fifteen in place of twelve at present. (Para 17.54)
- 18.269** Special resolution should be necessary under section 293 for any proposal by which a company becomes a partner of a partnership firm or a participant in a joint venture. (Para 17.55)
- 18.270** Any reference to 'sole selling agent' in section 294 should be substituted by "arrangement for distribution of companies' products". Selling arrangement by which not less than ten per cent of the goods of particular description are sold through any other person shall require approval by special resolution. The existing provisions requiring Central Government's approval in case of substantial interest in the company, will continue. (Para 17.56)
- 18.271** Prohibition against selling arrangements in notified industries may not be made applicable to small companies. (Para 17.57)
- 18.272** Parallel legislations in the field of marketing of products must be suitably strengthened. (Para 17.58)
- 18.273** Reference to 'private company' in sub-section (1) of section 297 should be substituted by the expression 'body corporate'. Proviso to sub-section (1) may be deleted. In sub-sections (2) and (3), the words 'five thousand rupees' may be substituted by the words 'twenty-five thousand rupees'. (Para 17.59)
- 18.274** Proviso to section (1) of section 309 should be amended to provide for services which are related to specified professions and to require approval of the Company Law Board in cases where the director does not possess the qualification for practice of the specified professions. (Para 17.60)
- 18.275** The monetary limit of five hundred rupees in clause (b) of sub-section (1) of section 314 needs to be increased to one thousand rupees. Proviso to sub-section (1B) and sub-section (2C) may be deleted. The words 'after the commencement of the Companies (Amendment) Act, 1974' in sub-section (2B) are to be dropped. (Para 17.61)
- 18.276** Sections 324 to 348, 351 to 369, 375 and 377 to 383 are to be deleted as they relate to managing agents, secretaries and treasurers, etc. (Para 17.62)
- 18.277** Section 376 should be shifted to appropriate place in sections 391 to 396, after deletion of reference to managing agents and secretaries and treasurers. (Para 17.63)
- 18.278** Sections 384 to 388A are to be deleted as a result of abolition of the office of 'manager'. (Para 17.64)
- 18.279** No change is necessary in the existing procedure relating to amalgamation and reconstruction in so far as MRTP undertakings are concerned. (Para 17.67)
- 18.280** The procedure in respect of other companies should be modified so as to reduce the delay on the suggested lines including making of only one application in the Court where the registered office of the transferee company is situated. (Para 17.68)

18.281 The Official Liquidator not to furnish a report in terms of the second proviso to section 394(1) in the case of amalgamation. (Para 17.69)

18.282 In all cases of amalgamation of Government companies, the Central Government should exercise its powers under section 396. (Para 17.70)

18.283 A scheme of amalgamation involving a sick unit and not involving an undertaking coming within the purview of the MRTTP Act should be approved by the Central Government itself under section 396 without Court's sanction. Section 396 may be modified to confer rule-making powers on the Central Government for the purposes of facilitating the exercise of such power. (Para 17.71)

18.284 Amalgamation or reconstruction involving small companies should be dealt with only by District Courts. (Para 17.72)

18.285 Section 416 may be deleted and suitable provision is to be made in section 46 to the effect that any contract by or on behalf of a company in which the company is undisclosed principal should be void. (Para 17.73)

18.286 Provisions on the lines of section 418 should be made in respect of gratuity fund or pension for employees. Each year's liability for gratuity should be provided and set apart. Contributions in respect of pending liabilities are to be made to the fund in seven equal annual instalments. (Para 17.75)

18.287 Sections 561 to 564 are to be deleted. All companies [should henceforth be governed by the new Act. (Para 17.77)

18.288 Sections 565 to 581 are to be deleted. All existing companies should register under the new law and should be issued with new incorporation certificates on filing revised memorandum and articles of association. (Para 17.78)

18.289 In section 610, fees payable for inspection of documents may be raised to rupees two. (Para 17.79)

18.290 A general provision as in clause (d) of section 616 is sufficient. (Para 17.80)

18.291 Administration of *Nidhis*, Mutual Benefit Societies and Permanent Funds should be taken over by the State Governments or through a special Central Legislation. (Para 17.84)

18.292 Table A should consist of two parts—Compulsory Regulations and Optional Regulations. All companies should, by law, be deemed to have adopted the 'Compulsory Regulations'. Some of the existing Regulations of Table A as also certain specified sections of the Act should find place in Compulsory Regulations. A suitable provision in Part I of Table A may be made to the effect that proxies shall have the right to vote on show of hands as well as on a poll and shall also have a right to speak at the meeting. (Para 17.85)

18.293 Table C may be modified consistent with recommendations on guarantee companies. Tables D and E may be dispensed with. (Para 17.86)

18.294 Table F may be dropped. (Para 17.87)

18.295 Schedules VII and VIII are to be dispensed with. (Para 17.88)

18.296 Form of proxy in Schedule IX [may be amended to incorporate suggestion in Chapter VII of the Report. (Para 17.89)

18.297 Schedule XI is proposed to be deleted and, instead, it is to be provided in section 406 that provisions of sections 539 to 544 would apply, *mutatis mutandis*, subject to an application under section 397 or 398. (Para 17.91)

18.298 Schedule XII will undergo change in the light of recommendations in Para 17.109 of Chapter XVII. (Para 17.92)

18.299 Schedule XIII may be transferred to the MRTP Act. (Para 17.93)

18.300 Government may undertake a review of the rules and forms in the light of the broad indications given by the Committee. (Paras 17.94—17.98)

18.301 The clarifications issued from time to time by the Central Government regarding availability of names for companies as per Rule 4A of the General Rules & Forms should be incorporated in the Rule itself so that the company promoters are informed about the criteria being followed by the Central Government in respect of names of companies. (Para 17.96)

18.302 Section 642 dealing with the rule-making power of the Central Government should contain an additional provision to the effect that approvals, sanctions, etc. accorded or granted by the Central Government are in accordance with the rules framed in this behalf. (Para 17.97)

18.303 In place of the existing system of charging fee for filing of each document, a consolidated annual fee for each company has been suggested to be prescribed. (Paras 17.99—17.101)

18.304 The first and second provisos to section 611 are suggested to be deleted and suitable provisions made in the light of suggestions in para 17.78. In sub-section (2), the words 'ten times the amount of fees so specified' may be substituted by 'the annual fee so specified'. Schedule X may be amended to incorporate the suggestion on 'Fees'. (Para 17.102)

18.305 A provision should be made authorising the refund of registration fees in certain circumstances. (Paras 17.103—17.105)

18.306 There are various areas in which corporate discipline cannot be achieved by mere amendment of the two Acts. The role of public financial institutions in regard to country's industrial growth has become very vital. It is, therefore, necessary that such institutions should play a more participative and purposeful role. (Para 17.106)

18.307 Consequential changes wherever necessary, are to be carried out in the light of the Report. (Para 17.107)

18.308 In order to prevent invalidation of the proceedings by reason of defects, irregularities or deficiencies in notice or time prescribed by the Act, a provision should be introduced empowering the Court to pass orders obviating the consequences that would flow from such invalidation. (Para 17.108)

18.309 Repeals and savings are to be provided for in the new Act. (Para 17.109)

CHAPTER XIX

CONCEPTS AND DEFINITIONS UNDER THE MRTP ACT

19.1 The Monopolies and Restrictive Trade Practices Act (MRTP Act) which was brought into force from the 1st of June, 1970 contains definitions in respect of certain economic concepts not previously found or defined in any other Indian legislation. During the eight years the Act had been in force, it has been found that some of these expressions are not free from ambiguity. Suggestions and representations have, therefore, been made to us both in the written memoranda submitted by various bodies and also in the submissions made to us at the oral hearings that these expressions need to be redefined to make the intention clear and their working more effective. It has also been brought to our notice that the authorities administering the provisions of this Act have also experienced certain practical difficulties in their operation. We have taken careful note of these various suggestions and would make the following recommendations for amending or substituting some of the existing definitions, with our reasons in each case.

19.2 Title : Section 1 (1)

As we are proposing to enlarge the scope of the Act to cover unfair trade practices, the word 'restrictive' occurring in the title of the Act may be deleted. The Act will, therefore, be called 'Monopolies and Trade Practices Act', in future.

19.3 Definitions : Section 2

For the same reason, the definition of 'Commission' in section 2(b) should be changed to read 'Monopolies and Trade Practices Commission established under section 5'.

19.4 Dominant and monopolistic undertaking : Section 2(d) and 2(j)

The Act contains elaborate and perhaps complicated definitions of these two expressions. The question whether an undertaking is a 'dominant undertaking' is made dependent on the share of the undertaking's production, supply or distribution or control of total goods. This share is laid down as one-third for purposes of dominance and one-half for purposes of determining whether an undertaking is a 'monopolistic undertaking' or not. Modern thinking on test to determine the dominance of an undertaking with reference to the market share of the product favours a smaller percentage. The modern trend as stated in section 6 of the Fair Trading Act of 1973 (UK) is based on a reduced share viz. one-fourth or twenty-five per cent. The trend elsewhere also is to accept reduced market share which would *prima-facie* be considered illegal and anti-competitive. Thus, an "Anti-trust laws of USA" by A.D. Neale, the share of ten to fifteen per cent of product in any given market is considered sufficient to raise a presumption of *prima-facie* illegality*. These observations were referred to without any adverse comment in 1963 Volume 373 US 916 (Note 41). In their book "Anti-trust Policy", Carl Kaysen and Donald F. Turner also suggest a share of twenty percent or more of a market as a criterion for *prima-facie* illegality. In our country, a particular share of the market does not involve any question or presumption of 'illegality'; it only implies that further growth of such a dominant undertaking in the same field will be subject to regulation in public interest. Having regard to the vast size of our country, the large number of entrepreneurial class available and the level of industrial growth already achieved, we are of the view that for purposes of determining dominance, the existing criterion of one-third should be reduced to one-fourth share of the market. We, therefore, recommend that the expression 'not less than one-third' occurring in sub-clauses, (i) and (ii) and in Explanation III, of clause (d) of this section should be amended to read 'not less than one-fourth'.

19.5 The question of dominance on the basis of production, supply, distribution or control by an undertaking is at present required to be determined with reference to the lowest production made, or services rendered by the undertaking concerned during the 'relevant

* Foot-note at page 446, "Anti-trust Laws of USA" by A.D. Neale.

year'. The 'relevant year' is also material for purposes of excluding the quantum of goods produced by an undertaking employing fifty or less workers where manufacturing process is carried on with the aid of power or employing one hundred or less workers where the manufacturing process is being carried on without the aid of power. The expression 'relevant year' itself is defined as meaning "any one year out of the three calendar years immediately preceding the preceding calendar year in which the question whether an undertaking is or is not a dominant undertaking is determined". A similar situation obtains in section 2(j) for determining whether an undertaking is a monopolistic undertaking or not. We feel that not only the definition of 'relevant year' is complex but the adoption of the 'lowest figure' of production etc. for purposes of determining dominance is both unsound and unreliable. The low production in any particular year could be due to any unforeseen factor like lock-outs, strikes, shortage of power or of raw-materials and it would be unreasonable to assess dominance or monopolistic position with reference to such low production. The figures of average production during three years would, on the other hand, be a more stable and reliable criterion as it would also take into account any variations during the period. We would accordingly recommend that :—

- (i) Explanation VI in clause (d) of section 2 should be deleted;
- (ii) The words 'relevant year' occurring in clauses (a) and (b) of the proviso below sub-clause (ii) in clause (d) of this section shall be substituted by the words 'the last three calendar years'; and
- (3) In Explanation IV, sub-clause (i) shall be substituted by the following viz. :—

“ (i) The average annual production made or services rendered by the undertaking concerned during the three calendar years immediately preceding the preceding calendar year in which the question arises as to whether an undertaking is or is not dominant.”

We have advisedly used the expression "the question arises as to whether the undertaking is or is not dominant" in the above suggested sub-clause as we are of the view that the point of time mentioned in the existing definition of 'relevant year' should be the time when the question 'arises' instead of the time when it is 'determined'.

19.6 According to Explanation III in clause (d) of section 2, the number of workers employed is a criterion for determining dominance of an undertaking which, in our view, is not too reliable a guide since the number of workers employed in a given manufacturing process will depend upon the degree of sophistication and the machinery used for the purpose. Similarly, for the purpose of rendering services also, the number of workers will depend upon the qualification and efficiency of persons on a job. Further for the purposes of reckoning substantial expansion under section 21 of the Act, the increase in the number of workers is usually not taken into account. We would, therefore, suggest that the words "or the number of workers employed for the production, supply distribution, or control of such goods or for the rendering of services" occurring in this Explanation should be deleted. We would also recommend that the concept of 'price' referred to in this Explanation for determining dominance requires to be eliminated as price generally refers to unit price and it may not be a practicable and workable criterion to follow.

19.7 The Department of Company Affairs which is administering the MRTP Act has no mechanism or machinery for the collection, maintenance and publication of data of goods produced etc. or of services rendered. The Department is presently relying upon data-collecting Departments/agencies like DGTD, Department of Statistics, CSO, DCSSI, etc. While we are not suggesting any direct collection and publication of data by the Department of Company Affairs itself, since this will involve duplication of such facilities at exorbitant cost, there is certainly a lacuna in the present arrangements which should be remedied forthwith. This lacuna arises out of non-publication of the data in time by the concerned departments which creates uncertainties about the applicability or otherwise of the provisions of this Act from the dominance angle for the industry. Without upto-date figures, the working of the Act also suffers. The collection, maintenance and publication of upto-date and correct facts is thus an immediate necessity. We strongly recommend that the Government should make necessary arrangements in this regard immediately. It would also be necessary to provide in the Act itself that the data now collected and published, by the Data-collecting Departments like

DGTD etc. could be taken into account by the Government for the purposes of this Act. This will ensure expeditious disposal of cases under the MRTP Act. Accordingly, we recommend that clause (ii) of Explanation IV in section 2(d) may be substituted by the following :—

- “(ii) The figures published by any authority approved for the purpose by the Central Government by a notification in the Official Gazette with regard to the total production made or services rendered in India or in any substantial part thereof”.

19.8 Goods : Section 2(e)

The existing definition of goods does not cover the cases of investment companies dealing in stocks and shares and other activities like mining or processing e.g. fish and animal products, which are not covered under the definition of goods in the Sale of Goods Act. Many investment companies maintain that they are not ‘undertakings’ within the meaning of the Act as the existing definition of goods would not include dealings in stocks and shares. In order to put matters beyond doubt, we would, therefore, recommend that the definition of goods should be revised as follows so as to harmonize it with the definition contained in the Sale of Goods Act. The proposed definition would run as follows :—

“Goods’ means goods as defined in the Sale of Goods Act (Act III of 1930) which are produced in India and includes products manufactured, mined or processed.”

19.9 Group

It has been represented to us from all quarters that the definition of the expression ‘group’ which was introduced into the Companies Act by the Amendment Act of 1974 as clause (18A) of section 2 of that Act should appropriately find a place in the MRTP Act. We are completely in agreement with this suggestion and consequently recommend that the definition contained in section 2(18A) of the Companies Act may be incorporated in the MRTP Act as clause (ee) of section 2 with certain modifications which are felt necessary for the reasons mentioned below.

19.10 The concept of group consists of two elements viz. (a) the controlling entities; and (b) the controlled entities. In the first part of the existing definition in section 2(18A) of the Companies Act, the controlling entities referred to are individuals, associations, firms or bodies corporate or any combination thereof. The controlled entities referred to in second part of the definition are body corporate, firm or trust. The trust is not included in the first part whereas it is contained in the second part of the definition.

19.11 There are practical difficulties in establishing if a group “has the object of exercising control” over any body corporate, firm, trust etc. whereas it may be possible to prove, with reference to past conduct of the group, that it exercises or is in a position to exercise control over the controlled entity. It is, therefore, suggested that the following revised definition of ‘group’ may be incorporated in the MRTP Act :—

- “(ee) ‘Group’ means a group of—
- (i) two or more individuals, associations, trusts, trustees or bodies corporate (excluding public financial institutions) or any combination thereof which exercises or is established to be in a position to exercise control directly or indirectly over any body corporate, firm or trust; or
 - (ii) associated person.

Explanation I

For the purpose of sub-clause (i) above, group of persons who are able directly or indirectly to control the policy of a body corporate, firm or trust, without having a controlling interest in that body corporate, firm or trust shall be treated as having control of it.

Explanation II

For the purpose of sub-clause (ii) above —

- (a) in relation to the director of a body corporate, the relative of such a director, a firm in which such director or his relative is a partner, any trust of which any such director or his relative is a trustee, any company of which such a director whether independently or together with his relative constitutes one-third of its Board of Directors or any body corporate at any general meeting of which not less than one-third of the total number of directors are appointed or controlled by such director or his relative acting either singly or together;
- (b) in relation to the partner of a firm, the relative of such a partner and any other partner of the firm; and
- (c) in relation to the trustee of a trust, any other trustee shall be regarded as an associated person,

Explanation III

If any person is an associated person in relation to another within the meaning of Explanation II the latter shall also be deemed to be an associated person in relation to the former within this meaning.”

19.12 Inter-connected undertakings : Section 2(g)

A new definition of ‘same management’ was brought into the Act by the Companies (Amendment) Act, 1974. This concept is relevant for purposes of Chapter III of the Act dealing with regulation of concentration of economic power. With a view to facilitating a decision on the question of inter-connection and at the same time to ensure that the purposes underlying the Act are fully achieved, we would recommend that the expression be redefined as suggested below :—

“ 2(g) ‘Inter-connected undertakings’ means two or more undertakings which are interconnected with each other in any of the following manner :—

- (i) If the undertakings are owned by or are under the control or management of one and the same person, firm, trust, association, society, co-operative society, Hindu undivided family or body corporate;
- (ii) Where the undertakings are owned by firms, if such firms have one or more common partners;
- (iii) Where the undertakings are owned by trusts, if not less than one-third of the trustees of such trusts are common;
- (iv) Where the undertakings are owned by bodies corporate —
 - (a) if one body corporate is a subsidiary of the other;
 - (b) if one body corporate holds, either by itself or together with its one or more subsidiaries or together with its directors or directors of its subsidiaries, not less than one-third of the total voting power of the other;
 - (c) if one or more subsidiaries of one body corporate holds or hold not less than one-third of the total voting power of the other;
 - (d) if the bodies corporate are under the same management in terms of Explanation below;
 - (e) if not less than one-third of the voting power in such bodies corporate is held by or on behalf of —
 - (i) the same individual;

- (ii) individuals who are relatives;
 - (iii) individuals who are partners of the same firm;
 - (iv) bodies corporate under the same management ; and
 - (v) the same trust or trusts or Hindu undivided family;
- (v) Where one undertaking is owned by a body corporate and the other is owned by a firm —
- (a) if one or more partners of the firm hold either jointly or severally or along with the members of the same group to which they belong, not less than one-third of the total voting power of the body corporate; or
 - (b) if one or more partners of the firm are managing director(s) of the body corporate; or
 - (c) if one or more partners of the firm exercise or is/are established to be in a position to exercise control whether as director(s) or otherwise over the body corporate; or
 - (d) if the body corporate is a partner of the firm;
- (vi) If one undertaking is owned by a body corporate and the other is owned by a firm having bodies corporate as its partners, if such bodies corporate are under the same management; and
- (vii) Without prejudice to the generality of sub-clauses (i) to (vi) above, if the undertakings are owned, managed or controlled by the same group or by any of the constituents of the same group.”

19.13 The existing Explanation I to Section 2(g) defining the expression ‘same management’ needs to be elucidated and may be substituted by the following viz. :—

“Explanation I

For the purposes of this Act, two bodies corporate shall be deemed to be under the same management —

- (i) if one exercises control over the other; or
- (ii) if both are under the control of the same group or any of the constituents of the same group; or
- (iii) if the managing director of one is the managing director of the other; or
- (iv) if one controls the composition of not less than one-third of the total membership of the Board of Directors of the other; or
- (v) if one or more directors while constituting [whether independently or together with the relatives of such director(s)] not less than one-third of directors of one such body corporate also constitute (whether independently or together with their relatives) not less than one-third of directors of the others; or
- (vi) if not less than one-third of the total voting power of each of the bodies corporate is held by one or more individuals belonging to the same group whether by themselves or together with their relatives; or
- (vii) if not less than one-third of the total voting power of each of the bodies corporate is held by one or more bodies corporate belonging to the same group; or
- (viii) if not less than one-third of the total voting power with respect to any matter relating to each of the two bodies corporate is held or controlled by the individuals belonging to the same group or by the bodies corporate belonging to the same group, or jointly by such individuals and one or more of such bodies corporate; or

- (ix) if the directors of one such body corporate are accustomed to act in accordance with the directions or instructions of one or more of the directors of the other body corporate, or if the directors of both the bodies corporate are accustomed to act in accordance with the directions or instructions of an individual, whether belonging to a group or not."

The existing Explanations II, III and IV should be retained in the existing form in the Act.

19.14 It should be clarified by way of an Explanation that wherever the expression 'trust' or 'trustee' occurs in the Act, the extent of voting power exercisable by the public Trustee on behalf of such 'trust' or 'trustee' shall be excluded in determining the total voting power by such trust or trustee.

19.15 In the normal course, it is quite possible that questions may arise as to whether any undertaking falls within the definition of these concepts of 'group', 'same management' and 'inter-connected undertaking'. It must also be recognised that in these cases, the forum must be such as will instil confidence in the objectivity and soundness of the judgement of such a body. We feel that the Commission would be the proper body for settling such disputed questions relating to inter-connection etc. A proviso may, therefore, be added at the end of the Explanation to the effect that if any dispute is raised by the concerned undertaking with regard to the facts constituting the 'group', 'same management' or 'inter-connection', the Central Government shall refer the matter to the Commission which will decide the issue not only in the light of the definition but also having regard to the underlying purposes of the Act. It may also be provided that until the Commission has finally decided the question, the concerned undertaking shall be deemed to be interconnected for the purposes of the MRTP Act. We feel that a time-limit of three months should be laid down for the Commission to decide any disputed question referred to it relating to 'group', 'same management' and inter-connection.

19.16 In the light of the foregoing revised definition of the expression 'inter-connected undertakings', certain consequential deletions in the existing definition are necessary. The Illustration and the Explanation occurring at the end of section 2(g) which were there even prior to the 1974 amendment are no longer necessary as the situation envisaged in the Explanation has been taken care of in the proposed revised definition. Secondly, the Illustration establishes a chain of inter-connections to the 'nth' degree which has led to considerable problems and inter-connection of undertakings which have neither managerial nor financial integration.

19.17 Monopolistic Trade Practices : Section 2(i)

The definition of this expression has to be read with the provisions of section 32 which lays down the circumstances under which such practices are deemed to be prejudicial to public interest. There are also certain over-lappings of provisions in those two sections which need to be rectified. We would, therefore, suggest the following revised definition :—

- "2(i) 'Monopolistic trade practices' includes a trade practice which has or is likely to have the effect of —
- (a) increasing unreasonably the cost of goods produced or of services rendered;
 - (b) increasing unreasonably or maintaining in any manner, at an unreasonable level, the prices of goods sold or re-sold, or of the services rendered;
 - (c) increasing unreasonably the profits derived from the production, supply or distribution of goods or from the performance of any service;
 - (d) unreasonably preventing or lessening competition in the production, supply, distribution of any goods or in the supply of any service;
 - (e) limiting technical development or capital investment to the common detriment;
 - (f) allowing the quality of goods produced, supplied or distributed, or in the performance of any service, to deteriorate.

19.18 Monopolistic undertaking : Section 2(j)

The concept of 'monopolistic undertaking' is relevant only for purposes of section 31(1) and section 37(4) of the Act. In the former, reference is made to the indulging in any monopolistic trade practice by "one or more monopolistic undertakings". In the latter, reference is made to a "monopolistic undertaking indulging in restrictive trade practices". It is conceivable and in fact existing section 31(1) assumes that it is possible for a non-monopolistic undertaking also to indulge in any monopolistic trade practice or restrictive trade practice. We are separately recommending in Chapter XXI that a monopolistic trade practice indulged in by any undertaking should be prohibited. In view of this, the need for retaining a separate concept of 'monopolistic undertaking' in the Act does not arise and we recommend that this clause be deleted.

19.19 Restrictive Trade Practices : Section 2(e)

Following the provisions of contemporary legislation of other countries, it is felt that the problem of restrictive trade practices indulged in by undertakings should be tackled in more effective ways. The basic object of any anti-monopoly legislation is to afford protection to the consumers by keeping competition alive in the relevant market. Some of the restrictive trade practices by their very nature have the effect of distorting or limiting competition which is always prejudicial to public interest. We would, therefore, suggest that all such practices should be statutorily prohibited under the Act subject to certain defences and gateways. We are dealing with this aspect in detail in Chapter XXI. In this chapter, however, the term 'restrictive trade practice' may be defined in a general way as follows :—

"2(o) 'Restrictive trade practice' means a trade practice—

- (a) which has or may have the effect of preventing, distorting or restricting competition in any manner;
- (b) which tends to bring about manipulation of prices or of conditions of delivery; and
- (c) which tends to affect the flow of supplies in the market relating to goods or services in such a manner as to impose on the consumers unjustified costs or restrictions and includes those specified in section".

(The section referred to here is in Chapter XXI in which the specific restrictive trade practices have been listed).

19.20 Scheme of Finance : Section 2(q)

It is proposed to amplify the definition of this expression to make it complete as the scheme of finance is usually composed of two parts viz. (1) the estimated capital outlay of the proposed project; and (2) the sources from which the finances are to be raised for meeting the estimated cost. The revised definition would accordingly read as follows :—

"2(q) 'Scheme of finance' means a scheme indicating the estimated capital outlay of the proposal and the sources from which, and the terms and conditions on which, finances are proposed to be obtained by an undertaking."

19.21 Undertaking : Section 2(v)

This expression is particularly relevant for the purpose of administering the provisions of sections 21 and 22 of the Monopolies and Restrictive Trade Practices Act. The present definition has been the subject matter of considerable controversy and litigation. In *Carew & Company vs Union of India* (AIR 1975 SC Page 2260), the Supreme Court observed that "the word 'undertaking' is a coat of many colours as it has been used in different sections of the Act to convey different ideas. In some of these sections, the word has been used to denote the enterprise itself while in many other sections it has been used to denote a person who owns it."

19.22 The definition of the word 'undertaking' in section 2(v) of the Act would indicate that an undertaking means an enterprise which is engaged in production, sale or control of goods etc. The present definition stresses the aspect of an undertaking being currently engaged in production etc. It does not take into account undertakings which have not been commissioned but are in embryonic stage and are designed to go into production at a future date. Secondly, in the case referred to above, the Supreme Court held that acquisition of even hundred per cent shares of a new company which is not yet engaged in the production, distribution etc. of goods did not amount to acquisition or takeover within the meaning of section 23(4) of the Act.

19.23 It is, therefore, suggested, that the expression may be amended as follows :—

“2(v) ‘Undertaking’ includes any business enterprise, work or project owned by an individual, Hindu undivided family, firm or association of persons or by trust, society, co-operative society or by a body corporate, and engaged or proposed to be engaged in the production, supply, distribution, purchase, trading or control of goods of any description or the provision of services of any kind.

Explanation

For the purposes of sections 21, 22, 23, 26 and 27 ‘undertaking’ includes a factory, unit or division of business enterprise engaged or proposed to be engaged in the production, supply, distribution, purchase, trading or control of goods of any description or the provision of services of any kind.”

19.24 Applicability to Government undertakings

Section 3 of the Act exempts from its purview any undertaking owned or controlled by Government company or by Central or State Governments or by any other corporation established by Central or State Acts and undertakings engaged in an industry, the management of which has been taken over by any person or body of persons in pursuance of any authorisation made by the Central Government under any law for the time being in force. A trade union or other association of workmen or employees formed for their own reasonable protection as such workmen or employees are also exempt from the applicability of the provisions of the Act. These exemptions subsist unless otherwise directed by the Central Government by notification in the Official Gazette.

19.25 The apparent justification for exempting these bodies can only be that as Government has a control over these companies, no protection is needed by the general public. Such an exemption cannot be accepted without qualification. It has been represented that there is no reason why the provisions of the Act specially those relating to monopolistic and restrictive trade practices (and unfair trade practices suggested by us) should also not be made applicable to such undertakings. Since Government or Government controlled undertakings are engaged in the production of the consumer or other items, the impact on the general consumer or the user of the goods and services of the trade practices in respect of such goods or services is the same whether they are produced or rendered by undertakings in the public sector or in the private sector. The beneficiary of the legislation is the consumer and it appears to us to be only fair and reasonable that even undertakings owned or controlled by Central and State Governments should be under the same type of rigour and discipline where the interests of the general consumer are involved.

19.26 However, in the case of undertakings owned by Governments—Central or State, the restriction relating to substantial expansion or setting up of new undertakings or mergers should not be applicable because of the fact that there is already public control over these undertakings and the question of monopoly or concentration of economic power is totally irrelevant inasmuch as there is public accountability of such undertakings. But that argument does not apply to those undertakings whose management only is taken over temporarily by the Government under any law for the time being in force. In such a case, there is no justification to grant any exemption from the applicability of the provisions of this Act. This is because such undertakings are being managed by the Government for a short period and may be returned back to the original owners. By the takeover of management, the basic characteristic of an undertaking being in private sector is not changed. In that view, these

undertakings must be treated like other undertakings belonging to private sector. They should, therefore, not be entitled to any exemption.

19.27 However, exemption in clause (d) of section 3 in favour of trade unions or other associations of workmen or employees stands on different footing and should continue. In the result, we recommend that section 3 should be substituted by the following revised section :—

- “3(1) Unless the Central Government, by notification in the Official Gazette otherwise directs, this Act shall also apply, except in relation to the provisions of Chapter III of this Act, to—
- (a) any undertaking owned or controlled by a Government company;
 - (b) any undertaking owned or controlled by the Central or State Governments; and
 - (c) any undertaking owned or controlled by a corporation (not being a company) established by or under any Central or State Act.
- (2) Notwithstanding anything contained elsewhere, the provisions of this Act shall also apply to any undertaking engaged in any industry, the management of which has been taken over by any person or body of persons in pursuance of any authorisation made by the Central Government under any law for the time being in force.”

19.28 MRTTP Act and Newspapers

The Committee has received a memorandum from the Indian & Eastern Newspaper Society (IENS), which pleads that the MRTTP Act should contain an exemption clause so far as newspaper undertakings or any association of newspaper undertakings is concerned. The Committee also had the benefit of oral representation from the Society. It was contended that the application of the Act to the newspapers infringed Article 19 of the Constitution and was thus violative of fundamental rights.

19.29 The Committee, however, informed the representatives of the Society that the question of constitutionality or ultra-vires was beyond the purview of this Committee which had been specifically constituted to undertake a comprehensive review of the MRTTP Act. It was, of course, open to the Society, if it had any grievance, to ventilate it before a court of law.

19.30 Apart from the constitutional question raised by the Society, no other reason was advanced before the Committee as to why the provisions of the MRTTP Act should not be made applicable to the newspapers. The Committee also cannot appreciate as to how the provisions of the MRTTP Act which are broadly meant to subserve public interest and also give protection to the consumer should be made inapplicable so far as such an important institution as newspapers is concerned. To be fair to the Society, it also did not say that the provisions regarding monopolistic or restrictive trade practices covered by MRTTP Act or the proposed unfair trade practices suggested by the Committee should not be made applicable to the newspapers. The Committee feels that the Society was pre-eminently correct in taking this stand.

19.31 We may point out that transfers and mergers of newspapers are very much a part of the monopoly legislation in other countries. In this connection, reference may be made to the Fair Trading Act, 1973 (UK) which, in Part V, deals with this aspect. These provisions lay down that the transfer of a newspaper to a newspaper proprietor, whose newspapers have an average circulation per day of publication amounting together with that of the newspaper concerned in the transfer of five lakhs or more copies, shall be unlawful and void unless the transfer is made with the written consent given by the Secretary of State, who shall not give such consent until after he has received a report on the matter from the Monopoly and Merger Commission.

19.32 As a matter of fact, in England, proceedings under the Restrictive Trade Practices Act, 1956 were successfully brought against six national newspapers for having made an agreement restricting the prices to be charged by their newspapers and also to give the same discounts and allowances to the trade, *Re. Newspapers Proprietor Agreement* (1964) (1) All ER. 55.

19.33 There is thus nothing peculiar or extra ordinary in the applicability of the provisions of the MRTP Act to the newspapers in our country. It is apparent that as the only reason for claiming exemption to the newspapers was on the alleged ground of the unconstitutionality of the said action, and as the said plea is not examinable by this Committee, we find no sufficient reason to recommend any exemption in favour of the newspapers from the applicability of any provisions of the MRTP Act.

19.34 Value of Assets : Section 2(W)

The Committee considered whether any change was called for in the existing method of computation of the "value of assets" but has decided not to suggest any change. It is, however, only fair to mention that some Members felt that the present definition is illogical as it takes into account the right hand side of the balance sheet without allowing for the liabilities and further, in the case of inter-connected companies, there is the possibility that under the existing position, the total assets of the inter-connected group get exaggerated by counting more than once the assets represented by investments and loans given by one company of the group to the other companies of the group. The present method, according to them materially reduces the real value of the ceiling which may apparently stand at Rs. 20 crores and that it would only be appropriate to exclude such investments and loans in the investee companies irrespective of whatever ceiling may be fixed, while on the other hand it was argued that in considering concentration of economic power, adding up the assets of the various companies comprising the group without the suggested refinement would be nearer to economic reality.

CHAPTER XX

CONCENTRATION OF ECONOMIC POWER

20.1 Objectives underlying the Act

One of the avowed objectives underlying the Monopolies and Restrictive Trade Practices Legislation is to ensure that the operation of the economic system does not result in the concentration of economic power to the common detriment. The authority for this is derived from the Directive Principles of State Policy contained in Article 39 of the Constitution which lays down that the State shall direct its policy towards securing that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. The specific measures for attaining this objective are contained in Chapter III of the Act.

20.2 The need to prevent concentration of economic power which may lead to common detriment did not suddenly emerge from the Act. For quite some time earlier, a feeling had been growing in the country that economic power was being concentrated in a few hands. Prof. Mahalonobis Committee on Distribution of Incomes and Levels of Living in October, 1960, had concluded that the wide range of variation that one finds between the top and bottom ten per cent of the population clearly revealed the existence of concentration of economic power in the country. The Committee also found that the top ten per cent of the population received as much as forty per cent of the income. Subsequently a study of industrial licensing procedures by Prof. Hazari had also concluded that the working of the licensing system had led to disproportionate growth of some of the big business houses of the country. The Monopolies Inquiry Commission had also found that top 75 business houses (comprising 1,536 companies) had total assets of Rs. 2,605.9 crores which constituted as much as 46.9% of the total assets of non-Government companies (being Rs. 5,522.14 crores). It also found that the paid-up capital of these houses was Rs. 646.32 crores which was 44.10% of the total paid-up capital of the private sector which was Rs. 1,465.46 crores. Similarly, the Dutt Committee which submitted its report in 1969 also came to the conclusion that the working of the industrial licensing system had helped in the growth of large industrial houses. It was thus with a view to check these obvious signs of concentration of economic power that Chapter III was incorporated in the Act.

20.3 Registration of undertakings

The provisions of Chapter III are applicable to undertakings which either by themselves or together with inter-connected undertakings have assets of not less than Rs. 20 crores and to dominant undertakings which either by themselves or together with their inter-connected undertakings have assets of not less than one crore rupees (section 20). All such undertakings including the inter-connected ones are required to be compulsorily registered with the Central Government (section 26). Till 30th June, 1978, 1,396 undertakings had been so registered. Out of them, registration of 234 undertakings was cancelled on representation. Thus the net registration as on 30th June, 1978, was 1,162.

20.4 Suggestions for revision of the Rs. 20 crores limit

Suggestions have been received in some of the memoranda for upward revision of the criterion of Rs. 20 crores as value of assets for purposes of applicability of the provisions in Chapter III of the Act. Suggestions have been made that it should be raised to Rs. 50 crores. We have considered this matter but we do not feel that any change in the criterion of Rs. 20 crores assets is necessary at present.

Some Members have also suggested that it should be on record that concentration of economic power, however, cannot in practice be curbed by the mere fixation of any monetary limit. This is because the expansion of a group beyond a point can happen only with the full knowledge, and in many cases, with the approval of the Government.

So, in the last resort, the enunciation of policy in regard to expansion or growth of a house or the exercise of discretionary power by the Government is really responsible for preventing any concentration beyond whatever limit may be determined.

20.5 Substantial Expansion

Subject to certain exceptions, substantial expansion and establishment of a new undertaking or a proposal for merger, takeover to which Part A of Chapter III applies, cannot be effected unless such proposal has been approved by the Central Government vide sections 21, 22 and 23. Such approval will only be granted if the Central Government is satisfied that the proposal for such expansion or setting up of new undertaking is not likely to lead to the concentration of economic power to the common detriment or is not likely to be prejudicial to the public interest in any manner, and it is also expedient in the public interest to accord approval. In according such approvals, regard shall be had to the considerations laid down in section 28. Thus, for undertakings covered by Part A, it is not enough that they fulfil the requirement of industrial licensing policy. They must also pass the further test that such expansion or establishment of new undertaking will not lead to concentration of economic power to the common detriment.

20.6 Similarly, schemes for merger, takeover, amalgamation of undertakings to which Part A applies cannot be given effect to unless the Central Government has given its approval (section 23).

20.7 Reference to Commission

In the present scheme of the Act, it is optional for the Central Government to refer the proposals for expansion and establishment of new undertaking (as also for merger, amalgamation and takeover) to the Monopolies Commission for inquiry and report. Even after the receipt of the report from the Commission, there is no compulsion on the Central Government to abide by the advice of the Commission and it is open to the Central Government to pass any order as it may think fit, even contrary to the advice of the Commission.

20.8 Procedure for disposal of applications under the Act

There has been some criticism in the public and the press that the Central Government has diluted the role of the Commission and has not allowed the latter to play the role assigned to it under the Act. Before any view can be expressed, it will be instructive to know how the provisions, of sections 21, 22 and 23 have so far been worked. It appears that after the Act came into force, an inter-Ministerial Advisory Committee was constituted in the Department of Company Affairs to consider applications under sections 21 and 22 of the Act. The said Committee was entrusted with the function of considering the proposals and advising the Government whether a reference may be made to the Commission and whether the proposals should be approved or rejected without such a reference. In cases where the matter was referred to the Commission and after the Commission had submitted a report, the Central Government gave an opportunity to the party to be heard under section 29 of the Act before passing a final order. The final orders were issued after approval by the Cabinet Committee on Economic Policy and Coordination except in cases where the proposal was to be rejected, and the administrative Ministry concerned concurred in the decisions of the Department of Company Affairs to reject. The matter was placed before the Advisory Committee after the concerned Ministries including the Department of Economic Affairs, the Department of Banking, DGFID, DCSSI and Planning Commission had given their views on the proposals. In cases where the Industries (Development and Regulation) Act [I (DR) Act] was applicable, the application had to be routed through the Licensing Committee. A new procedure for simultaneous processing of applications under the I(DR) and the MRTP Acts was brought into force with effect from 1st of November, 1973 when Secretariat for Industrial Approvals (SIA) was established in the Department of Industrial Development. In the case of MRTP undertakings, simultaneous applications under the MRTP Act and the I(DR) Act are made to the Department of Company Affairs and the SIA respectively. The applications are considered by the LC-cum-MRTP Committee or the Project Approval Board, on which the Department of Company Affairs is represented. The Project Approval Board or the LC-cum-MRTP Committee, as the case may be, now

discharges the functions of the Advisory Committee in so far as applications from the MRTP undertakings are concerned. In cases where the I(DR) Act is not applicable, the old procedure of considering these applications by the Advisory Committee in the Department of Company Affairs continues to be in force. In so far as the applications under the Act are concerned, the matter is now finally approved by the Minister of Law, Justice and Company Affairs and is not required to be submitted to the Cabinet Committee.

20.9 Over the period, the Government has authorised relaxation of procedure in certain types of cases in the public interest in accordance with the provisions of the MRTP Rules, 1970. For instance, it has issued an order under Rule 4A by which it has dispensed with the publication of general notice in respect of the class of undertakings engaged in production in the areas of Santa Cruz Electronic Export Processing Zone and Kandla Free Trade Zone. The result is that in practice, if any applications are made by MRTP undertakings for setting up an undertaking in these areas, no objections are invited nor any hearing under section 29 of the Act is given. Certain other industries have also been notified by the Central Government in which diversification is permitted and they have been granted exemption from the making of formal applications under the Act.

20.10 Out of 618 effective applications received by the Central Government from 1st of June 1, 1970 to 31st of December, 1977, under sections 21, 22 and 23, only 59 cases were referred by the Government to the Commission. Out of the 59 cases, the applicant parties did not pursue 15 cases and withdrew their applications. As on 31st March, 1978, there were only 2 cases pending with the Commission under sections 21 and 22. Proceedings had not been taken in one because of the stay given by the Court; in the other one which had been referred in 1978, the Commission has since sent its report to the Government. The 618 effective cases consisted of—

(a) Section 21	:	354
(b) Section 22	:	183
(c) Section 23	:	81

Reference was made to the Commission only in regard to 33 applications under section 21, 19 under section 22 and 7 under section 23.

20.11 Of the 552 disposed of applications, approval was given in 407 cases as indicated below:—

(a) Section 21	:	241
(b) Section 22	:	102
(c) Section 23	:	64
Total		407

20.12 The percentage of approval works out to be about 74%. The number of applications pending on 1st January, 1978 with the Government was 36 under section 21, 23 under section 22 and 7 under section 23, totalling 66.

20.13 While in the initial years the Government made quite a few references to the Commission, the flow of such references to the Commission almost dried up in the later years. Thus, out of 246 cases under sections 21 and 22 of the Act finally disposed of by the Government between January, 1974 to December, 1976, 227 cases were decided without reference to the Commission and in only 19 cases the Government's decision was given after obtaining the reports from the Commission. Out of these 19 cases, 3 cases were recommended by the Commission for rejection and these recommendations were accepted by the Central Government. Of the remaining 16 cases, 3 proposals fell through and the Central Government accorded approval in other 13 cases subject to the revised conditions.

20.14 Similarly during the period from 1st January, 1977 to 30th June, 1978, the Central Government passed final orders in 90 cases under sections 21 and 22 of the Act. Of these, 84 cases were decided without reference to the Commission and in only 6 cases, the Government's decisions were given after obtaining the reports from the Commission. Out of 6, 3 cases were recommended by the Commission for rejection and these recommendations were accepted by the Central Government. It will thus be seen that in the overall analysis, 92% and 93% of the applications under sections 21 and 22 were disposed of by Central Government without reference to the Commission during the period from 1st January, 1974 to 31st December, 1976 and during 1st January, 1977 to 30th June, 1978 respectively. Thus, during the period 1st January, 1974 to 30th June, 1978, 311 applications out of the total of 336 under sections 21 and 22 of the Act i.e. 92.6% were disposed of by Central Government without reference to the Commission. It is thus apparent that the role of the Commission in the consideration of applications under sections 21, 22 and 23 has been reduced to almost the minimum.

20.15 The Monopolies Commission had anticipated this tendency and raised this point way back in its Second Annual Administration Report laid before the Parliament in 1972. The Report said, "the Commission has, however, observed that a number of cases of large magnitude and importance to the economy were decided by the Central Government without reference to the Commission... But the Commission is not able to understand the policy which is being pursued in this respect..... The Commission cannot help feeling that there is some incongruity in that some times cases not involving any major issue were referred to the Commission while others which would *prima-facie* involve important considerations are not so referred .. It would be much better if clear guidelines are laid down by the Government regarding the cases to be referred to the Commission and otherwise" (page 18). The Department of Company Affairs answered this criticism in the Annual Reports for 1972 to 1974 by pointing out that the majority of the cases could be decided without further inquiry as the applications and information being submitted by MRTP undertakings were generally found to be complete and in accordance with the revised industrial policies of the Government (New Industrial Policy Statement was announced on 2nd February, 1973 spelling out, *inter-alia*, the industries open to large houses), it had not been considered necessary to make any reference to the Commission.

20.16 Whatever may have been the reasons underlying the disposal of almost overwhelming number of cases by the Central Government itself without making a reference to the Commission, it cannot be imagined that, when in the Act provision was made giving a discretion to the Central Government whether or not to refer the matter to the Commission, it would lead to the situation of almost total elimination of the role of the Commission. Criticism, therefore, that the Commission has ceased to play any effective role in the consideration of the matters relating to concentration of economic power, as visualised in sections 21, 22 and 23 cannot but be held to be justified. No doubt, on the other hand, sometimes, it is said that there is an in-built resistance to allow expansion or setting up of a new undertaking by large houses on the part of the Central Government. Facts, however, show that in the assets of the large business houses, there has been a considerable increase right through all this period. The Monopolies Inquiry Commission had estimated that in 1963-64, the assets of non-Government and non-banking companies amounted roughly to Rs. 5,552.14 crores. The latest figures for top 20 business houses which are registered under the MRTP Act show that the value of assets has risen from Rs 2,430.61 crores in 1969 to Rs. 4,465.17 crores in 1975; the percentage of increase of assets between 1972 and 1975 being 68.6. It is interesting to note that in 1975 the first two large industrial houses of this group of 20 (i.e 10%) had assets of Rs. 1,768.49 crores which works out roughly to 40% of the total assets of the top 20 industrial houses.

20.17 The percentage of increase in value of assets of top 20 large industrial houses shows that the percentage increase over 1969 had been to the extent of 25.9, 38.9, 61.3 and 83.7 in 1972, 1973, 1974 and 1975 respectively. The average annual increase during these years from 1969 works out to 8.6%, 9.7%, 12.2% and 13.9% respectively. The percentage of increase over previous years also comes to 10.3, 16.1 and 13.9 for the years 1973, 1974 and 1975 respectively. These figures will show that the Act has not stifled the growth of the economy. The Central Government has been quite liberal in allowing expansion or the setting up of new undertaking. But the legislative policy of the Act that before any expansion etc., is allowed, the advice of the Commission should be obtained has not, by and large, been followed. We see no justifiable reason why the Central Government should not avail itself of the forum provided by an expert body like the Commission for examination

in depth of the proposals submitted to the Government. We also see no reason why the Central Government should place itself in a position in which it avoidably invites criticism by withholding an objective examination by the Commission in which there may be more than one party involved. Surely, in all these cases, public interest is involved and would be demonstrably sub-served. It seems only proper that an impartial and expert body like the Commission should be allowed to examine the matter and give the benefit of its views on matters pre-eminently falling within its purview.

20.18 Logically, it could be urged that all applications under sections 21, 22 and 23 should inevitably be referred to the Commission and, further that the report received from the Commission should be binding on the Government. In principle, we can find no fault with such an approach. But somehow, as already pointed out, the Act has been worked differently. Government has in the past decided about 92.6% of the cases on its own without reference to the Commission. We would, for the present, content ourselves by adopting a middle approach so as not to make a clean break with the existing practice which may result in sudden dislocation. In the context of the scheme of increase of workload of the Commission which we are recommending elsewhere, it would be desirable to limit at present such mandatory references to the Commission under Chapter III to the more important cases. We would, therefore, recommend that in the following types of cases under sections 21 and 22, the proposals should be compulsorily and mandatorily referred by the Central Government to the Commission for inquiry and final disposal :—

- (i) Applications received from a dominant undertaking for expansion or for setting up of a new undertaking for the manufacture of goods or provision of services in which it is already dominant;
- (ii) Any application by any undertaking to which Part A of Chapter III applies for expansion or setting up of a new undertaking involving an estimated capital outlay exceeding Rs. 5 crores; and
- (iii) Any case in which more than one undertaking is the applicant or a case in which objections have been raised opposing the proposal.

20.19 The present procedure for making applications initially to the Central Government in all cases should continue. On scrutiny, if the Central Government finds that the proposal falls in any of the three categories referred to above, it shall refer the proposal to the Commission, who will then inquire into the matter and pass final orders. In such cases, it will not be necessary for the Commission to send its report back to the Central Government for passing a final order. Instead, the Commission itself will exercise the powers of passing final orders and would have the same powers as Central Government has at present in granting or refusing approvals. In this context, we feel that a time limit of thirty days may be prescribed in section 30 of the Act within which the Central Government should refer the proposal to the Commission. Sub section (2) of the existing section 30 provides for the Commission reporting back to the Government within ninety days. We suggest that the same period of ninety days should be provided for the Commission to pass final orders except where the Commission, for reasons to be recorded in writing, is of the opinion that the order cannot be made within the said period. We recommend that section 30 of the Act should be amended suitably.

20.20 So far as the cases other than those referred to in para 20.19 above are concerned, we hope that the Central Government will gradually develop a convention to make the reference in those kinds of cases also to the Commission, but we would not make it compulsory at this stage. We may mention here that the investment pattern of the proposals received under section 21 for the years 1976 and 1977 shows that out of total of 45 cases in the year 1976, 38 were proposals in which the investment was below Rs. 5 crores. For the year 1977, there were 49 proposals out of which the proposed investment in 39 cases was below Rs. 5 crores. Applications under section 22 showing investment pattern below Rs. 5 crores in the year 1976 were 27 out of the total of 37, and for 1977, the number was 18 out of 30. Broadly, therefore, it may be estimated that the figure of Rs. 5 crores capital outlay suggested by us as a cut-off point beyond which the cases are to be compulsorily referred to the Commission under sections 21 and 22, will only cover nearly 20 to 25% of the cases arising in a year. Dominant undertakings filed only 4 proposals under section 21 in the year 1976 and the same number in 1977. Though we are aware that this number is small, we are hoping that very soon this number will increase as the Government decides to refer other

cases also to the Commission. (If the capital outlay figure was taken as Rs. 3 crores, this may cover approximately 50% of the cases which arise for decision).

20.21 It is conceivable that in certain situations the reference to the Commission may not be necessary in cases which are otherwise to be compulsorily referred to the Commission, if the circumstances are extraordinary and of special significance. It may accordingly be provided that, where the Central Government is of such an opinion, it may, for reasons to be recorded in writing and on one or more of the following grounds alone, dispense with reference to the Commission, viz :—

- (a) In the interest of defence of India ; or
- (b) Security of the State ; or
- (c) Meeting exclusively export requirements.

In the aforesaid types of cases, the parties may move the Central Government with the necessary application and the Central Government may exercise its discretion either to deal with such application themselves on the aforesaid grounds or may refer the same to the Commission for decision.

20.22 At present, under the Act, the report received from the Commission may or may not be accepted by the Central Government. We have earlier specified the types of cases in which reference must be compulsorily made to the Commission under sections 21 and 22. Even in other category of cases under sections 21 and 22 when the Central Government itself being of the opinion that no order can be passed without further inquiry by the Commission refers them to the Commission, we see no logic or principle why the findings of the Commission should be further scrutinised by the Central Government. It will be appreciated that section 28 enumerates the matters which are to be taken into account both by the Central Government as well as by the Commission in according approval in exercise of the powers under Part A and Part B of Chapter III. This really means that power of both the Central Government as well as the Commission is broadly circumscribed by considerations mentioned in section 28. Other relevant factors such as the current industrial and economic policies of the Government will in any case be brought before the Commission by the Government Departments and other concerned parties. When, therefore, the Commission passes an order either on those references which are compulsorily referred to the Commission or on those cases which may have been referred to it by the Central Government, it will apply similar yardstick and will have to pass orders having regard to the matters referred to it in section 28 and other relevant factors. All orders passed by the Central Government or by the Commission under Chapter III are appealable to the Supreme Court *vide* section 55 of the Act. In that view it does not seem to us to be correct in principle or in keeping with the position of the Commission, that a quasi-judicial body set up especially under the Act should have its decisions reviewed by the executive on precisely the same considerations on the basis of which the decision has already been given by the Commission. It seems to us that apart from being derogatory to the position of the Commission, the same is a totally unnecessary, time-consuming and wasteful exercise. There is no permissible reason to empower the Central Government to again reconsider and re-examine the matter and take a contrary view from that taken by the Commission. In such cases, the requirement of sending the report to the Central Government serves no purpose. We feel that instead the Commission should be empowered in such cases to pass the final order on its own. Of course, before passing the order, the Commission, apart from giving notice to any other party interested in the matter, will also give notice to the Central Government so as to enable it to place its view-point before the Commission. We would, therefore, recommend that if once the matter has been referred by the Central Government, the Commission should have power to pass final order and the decision given by the Commission should be binding on the Central Government.

20.23 Procedure for Mergers and Amalgamations

Section 23 (1) and (2) deals with the scheme of merger or amalgamation of an undertaking. The scheme of the Act is that on application has to be made to the Central Government who may, if it thinks fit, refer the same to the Commission but is not bound to do so. The Central Government has the discretion to pass any order as it deems fit on receipt of the Commission's report. Unless the scheme of merger or amalgamation is approved

by the Central Government, it cannot be sanctioned by any court or be recognised for any purposes or be given effect to. Under the Companies Act, as it stands at present, schemes of merger or amalgamation are required to be sanctioned by the respective High Courts in whose jurisdiction the registered offices of the companies covered by the scheme of merger/amalgamation are situated. This results in delaying the proceedings. In order to simplify the law and the procedure and also to ensure expeditious disposal of such matters, we have recommended in Chapter XVII that if there are two or more companies having registered offices under the jurisdiction of different High Courts, only one application may be made in the High Court within whose jurisdiction the registered office of the transferee company is situated. The Committee considered whether requirement of sanction by the High Court could be avoided. But in view of the follow-up and supervision of schemes of merger, the Committee thought that it may place unnecessary burden on the Commission. We, therefore, do not recommend any other change in procedure in sections 23(1) and 23 (2). The only exception we would recommend is that where a scheme of amalgamation or merger of an undertaking covered by section 20 of the Act is approved by the Central Government in terms of section 396 of the Companies Act, in the national/public interest, no further approval should be required under section 23(2) of the MRTP Act.

20.24 Takeovers

Section 23(4) provides for acquisition by purchase or takeover or otherwise the whole or part of an undertaking. Here also, the reference to the Commission is at the discretion of the Central Government. We feel that this is an area in which some cases at least should receive the benefit of an objective examination by an expert body like the Commission. Accordingly, we recommend that the applications to acquire by purchase, takeover or otherwise shall be compulsorily referred by the Central Government to the Commission in the following cases, and the Commission will be competent to dispose it and pass final orders on them :—

- (i) Any proposal relating to acquisition by purchase, takeover or otherwise of the undertaking which together with the shares, if any, to which the transferee is already beneficially entitled or in which the transferee already has a beneficial interest, carry the right to exercise or control the exercise (in the case of a public limited company) of 33 $\frac{1}{3}$ % or more of the voting power at any general meeting of the company proposed to be acquired ;
- (ii) The cost of purchase or acquisition exceeds Rs. three crores ; or
- (iii) Where the acquisition by purchase, takeover or otherwise is likely to result in the creation of a dominant undertaking within the meaning of section 20(b) of the Act.

20.25 Section 27 of the Act enables the Central Government, if it is of the opinion that the working of an undertaking to which Part A of Chapter III applies, is prejudicial to public interest or has led or is leading or is likely to lead to adoption of any monopolistic or restrictive trade practice, to refer the matter to the Commission for an inquiry as to whether it is expedient in public interest to make an order for the division of the undertaking or of the inter-connected undertaking into such number of undertakings as the circumstances may justify. Since the coming into force of the Act, this power has been invoked by the Central Government only in two cases one of which was later on withdrawn by it, and in the other proceedings are still pending.

20.26 Now section 27 enables the Central Government to obtain the advise of the Commission in case the former is of the opinion that the largeness of an undertaking has led to the concentration of economic power to the common detriment which is prejudicial to public interest. This power to initiate proceedings for division of undertakings is conditional on the formation of an opinion by the Central Government. Evidently a matter regarding division of any inter-connected undertaking so as to prevent concentration of economic power is one on which the Government alone is competent to take a view. No general guidelines can be laid down in this regard. The terms of reference of the Committee do not call upon it to suggest whether any particular type of undertaking should be divided or should be asked to shed or divest any of its assets and activity. And rightly so, because this is a matter which the Government must itself decide keeping in view the expectations of the

public that large monopoly houses must not be allowed to grow without direction so as to be prejudicial to public interest and the economy. The mandate of the Constitution that State policy must be directed to prevent concentration of economic power to the common detriment has to be honoured by the Government and if, in pursuance of this objective, it is necessary to divide any inter-connected undertaking of large houses, Government is in law duty bound to do so. So far as the statute is concerned, the exercise of the power by the Central Government is clearly spelt out. No legal decision has created any impediment so far in the way of the Central Government to so act if circumstances so justify. Whether the circumstances in the country require the growth of the large houses still further in order to increase industrial production in the country or whether the growth of the industry could be better sub-served by encouraging the large number of competing entrepreneurs and by division of inter-connected undertakings is pre-eminently a matter of public policy, which can be initiated by the Government alone. Political will and circumstances mentioned in section 27 of the Act and not any elucidation in law are the preconditions for any decision whether to divide any large house, because law clearly provides for division of any undertaking or inter-connected undertaking or large houses if the Central Government is of the opinion that the continuance of it has led to concentration of economic power to the common detriment which is prejudicial to public interest. The Committee does not find that Government power has ever been or is constrained by any deficiencies in the Act which may call for any amendment. A suggestion that this power to initiate action under section 27 should be given to the Commission does not find favour with us. This is so because detailed knowledge and information concerning the structure and finance of not only the undertaking but also of the general economic conditions pertaining to any particular trade or industry in the country would be necessary to initiate this step. The analysis of this vast reservoir of information and data and other details which necessarily must precede formation of an opinion to invoke section 27 could only be satisfactorily taken by the Central Government. The Commission may not have the necessary infrastructure to initiate the proceedings on its own for division of any undertaking. We feel that this power of initiating an inquiry under section 27 should continue to remain with the Central Government.

20.27 However, the position with regard to passing final orders after the matter has been referred by the Central Government to the Commission stands on a different footing. Sub-section (2) of section 27 gives a discretion to the Government to act on the report of the Commission or not. Now the Central Government makes a reference because *prima facie* it is of the opinion that the working of the undertaking is prejudicial to public interest. Once therefore, the Commission has, after inquiry, also taken the same view, that a division ought to be made, there seems no reason why the matter should be reported back to the Central Government and reconsidered by it. It is apparent that a large number of adjustments, creation of rights, settlement of claims and adjustments of contracts is called for. All these matter are pre-eminently fit to be decided by the Commission and not by the executive agency like the Central Government. We, therefore, feel that once a reference has been made by the Central Government, all further action, whether to divide the undertaking and the consequential steps to be carried out, should be done under the supervision and control of the Commission. It is not necessary nor is it desirable to involve the Central Government with the subsequent stage. It may be mentioned that in other countries, all the cases of division of undertakings are brought before the ordinary Courts, who pass final orders without the same being subject to scrutiny by the Government. We do not see any reason why, when the ordinary Courts can be entrusted with the function, a specialised body like the Commission should be kept away from it and its role be made only of an advisory nature. We would, therefore, recommend that in this aspect instead of Central Government as at present, power should be given to the Commission to pass final orders under section 27 and should not be reviewable by the Government and be treated as final.

20.28 In regard to the applicability or otherwise of section 13 of the I (DR) Act with reference to section 21(4) of the MRTP Act, because of the different nomenclatures adopted under the I(DR) Act and the MRTP (Classification of Goods) Rules, lengthy correspondence with the concerned Ministry is involved to find out whether the said expansion is covered within the said section. Because of the different classification, it quite often becomes difficult to reconcile the situation with the result that the matters get delayed. A suggestion was, therefore, made that sub-section (4) of section 21 should be deleted. The Committee, however, after having considered the matter, came to the conclusion that the difficulties pointed out were of administrative nature and could be overcome administratively and did not call for deletion of this provision from the Act.

20.29 Substantial Expansion

Substantial expansion under section 21 is deemed to be where the value of assets before the expansion results in an increase by not less than 25% of such value or the production, supply or distribution of any goods or the provision of any services by it before expansion would result in an increase by not less than 25% of the goods produced, supplied, distributed or controlled. Thus, even if the value of the assets increases by less than 25% but the production of the goods increases by not less than 25%, the party is to take the approval before going in for expansion of the undertaking. We feel that if substantial expansion in the value of assets is brought about as a result of the replacement or modernisation of the plant and machinery subject to the licenced/approved capacity not being exceeded by 25% or by the installation of balancing equipment for fuller utilisation of existing capacity, no approval should be necessary. We would, therefore, suggest that the following cases be exempted from the applicability of section 21 of the Act :—

- (i) Any substantial expansion in the value of assets as a consequence of replacement or modernisation of plant and machinery as approved by competent authority notified by the Central Government, provided that by such expansion the licensed/approved capacity is not exceeded by 25% or more ;
- (ii) Any expansion which is effected for fuller utilisation of the existing licensed or approved capacity by the installation of balancing equipment as approved by competent authority notified by Central Government.

In order to enable the Government to have a watch on the number and extent of cases falling under the aforesaid exemptions and also to enable monitoring of data, we would recommend that the person or authority proposing to effect the expansion, though not required to obtain approval, would nevertheless be required to furnish to Government, in the prescribed form, the details of such expansion. Such a provision would also afford an opportunity to the Government to examine the proposal independently with reference to the provisions of the Act and offer its views, if any, to the administrative Ministry concerned.

20.30 Setting up of new undertakings

Section 22 of the Act, as it stands at present, is not applicable to dominant undertakings covered by section 20 (b) of the Act with the result that expansions of dominant undertakings by way of establishment of new inter-connected undertakings for the manufacture of the same type of goods in which they are dominant are not covered by this section. This is a serious lacuna because an undertaking which is dominant will be allowed to concentrate more economic power without scrutiny by the Commission and the Central Government. It is accordingly suggested that the section may be modified suitably by the insertion of an Explanation to the effect that the establishment of new inter-connected undertakings by the dominant undertakings for the manufacture of the same type of goods in which they are dominant would require prior approval of the Commission. At the same time, it may be clarified that proposals of dominant undertakings for the manufacture of goods other than in which it is dominant, through the establishment of the new undertakings would continue to be outside the scope of the provisions of this section.

20.31 An undertaking may diversify either at the existing place of its business or at some other place. At present the Department treats a case of diversification at the same place as under section 21 as a case of expansion and a case of diversification at a new place is dealt with under section 22 as that of a new undertaking. According to us, whenever diversification takes place, it is obviously a case of setting up a new undertaking, and therefore, such a case should fall within section 22. We suggest that this may be clarified in section 22. This is to ensure that the scope and applicability of sections 21 and 22 are clearly demarcated to avoid any possible confusion. In order, however, to exclude diversification proposals to be effected within the existing licensed capacity or by the manufacture of new products through the utilisation of waste products or bye-products by the installation of balancing equipment, a new sub-section may be inserted granting statutory exemptions in the following types of cases (this is similar to such exemption suggested in an earlier paragraph in relation to section 21) :—

- (a) Manufacture of new article(s) by way of diversification within the overall licensed/approved capacity through the installation of balancing equipment as approved by a competent authority notified by the Central Government; or

- (b) Manufacture of new articles by utilising waste product/bye-products with the installation by balancing equipment as approved by a competent authority notified by the Central Government.

As in the case of section 21, it would also be desirable to provide that the person or authority proposing to establish a new undertaking coming within the scope of the above mentioned exempted categories shall furnish to Government in the prescribed form the details of such new undertaking.

20.32 Sub-section (4) of section 23 provides that where an undertaking, to which Part A of Chapter III of the Act applies, proposes to acquire by purchase, takeover or otherwise, the whole or part of an undertaking, such a party shall apply to the Central Government before giving effect to the proposal. We feel that the expression 'or otherwise' used in this sub-section may be illustrated by giving some specific instances like, lease, licence or mortgage as well. These words may, therefore, be added in the sub-section after the words 'or otherwise'. It has been brought to our notice that some doubts have arisen with regard to the applicability of the provisions of section 23(4) of the Act in which the acquisition is proposed to be effected by purchase of shares of an undertaking. It has also been represented that in order to fall within the scope of this section, there should be acquisition of at least 51% of equity shares by such party. In our view, this is not a correct interpretation. We feel that this provision covers the cases of acquisition by purchase of shares even if the purchase is less than 51%. In the circumstances it will be proper to put the matter beyond any doubt and we recommend that the position may be clarified by inserting an Explanation below section 23(4) on the following lines :—

“Explanation

For the purposes of this sub-section and the (proposed) sub-section (5), 'acquisition' includes purchase of shares of an undertaking which would carry the right to exercise, or control the exercise of, 25% or more of the voting power at a general meeting of the undertaking which is proposed to be acquired.

In computing 25% referred to hereinabove, the shares, if any, already held by the purchaser, or shares in which he has beneficial interest or to which he is beneficially entitled, shall be taken into account.”

The present sub-section (4) of section 23 has inadvertently omitted to empower the Central Government to pass orders approving or disapproving the proposal though such a power is implied by virtue of the provisions in sub-section (5). We, therefore, feel that sub-section (4) should be further amplified by the addition of the following words at the end :—

“The Central Government, or the Commission, as the case may be, may, if it is satisfied that it is expedient in the public interest to do so, accord approval to the said proposal on such terms and conditions as it thinks fit.”

20.33 Sub-section (8) provides for a proposal of purchase or takeover of an undertaking to which Part A applies not being given effect to unless it is accorded approval by the Central Government. This contemplates a situation which is the reverse of sub-section (4) i.e. an undertaking to which this Part applies being acquired rather than the undertaking to which the Part applies acquiring some other undertaking as covered by sub-section (4). But there is no further mechanics given of what procedure is to be followed in the case of an acquisition under sub-section (8). Presumably for this reason, some confusion has arisen seeking to give an interpretation that sub-section (8) has to be related back to sub-section (4) for approval by the Central Government. In our view, the wording of sub-section (8) is clear enough; it relates to a situation where there is a proposal to acquire an undertaking to which Part A applies and not to a situation involving the acquisition by an undertaking to which the Part A applies. In any case, we feel that it would be proper if this matter were clarified. We see no logic to exempt such a case which relates to the purchase or takeover of an undertaking to which Part A applies. We, therefore, feel that sub-section (8) should be reworded so as to provide that where a proposal is to acquire by purchase, takeover or lease or licence or mortgage or otherwise an undertaking to which Part A of Chapter III applies, the proposal would require an application to be submitted to the Central Government for obtaining its

approval before giving effect to such a proposal. This is on the same lines as the existing sub-section (4). Consequently, sub-section (8) as recommended to be reworded as above, would become sub-section (5) and the existing sub-sections (5), (6) and (7) would be re-numbered as sub-sections (6), (7) and (8) respectively. A further consequential change would be required in the proposed re-numbered sub-sections (6) and (7) so as to include a reference to the sub-section (5) therein after the word 'sub-section (4)'.

20.34 Transfer of sections 108A to 108H of Companies Act, 1956 to MRTP Act

While on this subject, we would refer to a suggestion made to us by various bodies in relation to sections 108A to 108H of the Companies Act, which were introduced by the Companies (Amendment) Act, 1974. It has been pointed out that these sections relate to the acquisition and transfer of shares of a body corporate owning any undertaking to which the provisions of Part A of Chapter III of the MRTP Act apply and that, therefore, the appropriate place for these provisions would be the MRTP Act rather than the Companies Act. There is considerable force in this suggestion and we agree that the provisions of sections 108A to 108D, 108F and 108G should be brought over to the MRTP Act as sections 23A to 23F respectively. The provisions of section 108E which deal with time limit within which the approval of Central Government is to be accorded should be incorporated in section 30 of the Act as a new sub-section. Opportunity of being heard, as provided for in section 29 of the Act, will necessarily be given to all persons, who are, or may be, interested in the matter, by the Central Government before passing any order under these provisions.

20.35 At present, approval of the Central Government under these sections of the Companies Act is required in respect of even transfer of shares from one constituent within a group to another in the same group. It has been represented to us that such a requirement is superfluous as such transfer within the group does not lead to any further concentration of economic power of the group as no increase in the holding of the group is involved. We feel that there is some justification in this view and would, therefore, recommend that a suitable provision be incorporated in the Act, while transferring them to the MRTP Act. The provision may be to the effect that nothing in these sections will affect the transfer of shares within the group from one constituent to another provided an intimation of the transfer is given to the Central Government within two months of effecting the transfer.

20.36 In the light of our earlier recommendations, particularly those relating to certain types of cases under sections 21, 22 and 23 of the Act which are henceforth to be compulsorily referred to the Commission to pass final orders in the cases inquired into by it, certain consequential changes in sections 21, 22 and 23 would also be necessary.

20.37 Registration of undertakings

Section 26 requires registration of an undertaking to which Part A of Chapter III of the Act is applicable. The wording in sections 21, 23 and 26, however, does not specify the person on whom the responsibility lies for getting the undertaking registered. In contrast to that, section 22(2) clearly specifies that any person or authority intending to establish a new undertaking shall apply to the Central Government, thus clearly placing the responsibility on the owner of the undertaking. We feel that this inadvertent ambiguous drafting in sections 21, 23 and 26 should be rectified and it should be clarified that it would be the responsibility of the owner of the undertaking to give notice to the Central Government under section 21 or for making an application to the Central Government under section 23 or for getting registration under section 26. This will require amendment in the said sections.

20.38 Section 28 of the MRTP Act lists out the matters which, among other things, have to be considered both by the Central Government and, as the case may be, the Commission, while considering the proposals under Chapter III of the Act. It has been suggested to the Committee by some memorialists that the consideration of increase in production and development of economy should also be one of the factors to be taken into account. Though we feel that the matters already listed in section 28 are wide enough and cover the aforesaid aspects also, there can be no objection to spell out clearly that the approving authority shall also give consideration to the need for increase in production and development of economy.

We accordingly recommend that the following sub-clause (f) may be added to section 28 after clause (g), viz :—

“(h) to maximise production of goods particularly of those not being produced within the country or which are in short supply”.

20.39 Opportunity to be given to parties

Section 29 of the Act provides for an opportunity of being heard to be given by the Central Government to all persons interested in the proposal before passing final orders. There is, however, no mention of the requirement for the Commission to give such an opportunity to parties interested in the matter, though the Commission has framed detailed regulations in pursuance of which such hearing is being given. As we are suggesting that the Commission should be empowered to inquire and finally dispose of matters not in an advisory capacity but as the final adjudicative authority, we recommend that section 29 should be amended by adding the words “or as the case may be, the Commission” after the words “Central Government” and “Government” in the said section.

CHAPTER XXI

MONOPOLISTIC, RESTRICTIVE AND UNFAIR TRADE PRACTICES

21.1 One of the objects underlying the enactment of the Monopolies and Restrictive Trade Practices Act is to provide for the prohibition of monopolistic and restrictive trade practices. The instrument through which this object is sought to be achieved is the Monopolies and Restrictive Trade Practices Commission.

21.2 Monopolistic trade practices

Section 10(b) empowers the Commission to inquire into any monopolistic trade practice upon a reference made to it by the Central Government or upon its own knowledge or information. Section 31 provides for investigation by the Commission into the monopolistic trade practices on a reference being made by the Central Government which will thereafter pass an appropriate order, if the Commission makes a finding that the trade practice operates or is likely to operate against the public interest. While section 10(b) gives power to the Commission to inquire into the monopolistic trade practices on its own knowledge or information, there is unfortunately no provision for follow-up action in section 31 which only postulates that the same will be inquired into by the Commission only on a reference being made by the Central Government. The position is made more confusing by section 37(4) which provides that if the Commission finds during the course of its inquiry into restrictive trade practices that any "monopolistic undertaking is indulging in restrictive trade practices", it will refer the matter to the Central Government "with regard to any monopolistic trade practice for such action as that Government may take under section 31". The reference to "restrictive trade practices" is wrong as the legislative intent is to refer only monopolistic trade practices to the Government. More important, apparently though section 10(b) empowers the Commission to inquire on its own into any monopolistic trade practices, the procedure and machinery for follow-up action in such cases are not spelt out in the Act. It is for this reason that objections have been raised that section 10(b) is only an enabling section and this section can be given effect to only on the basis of a reference under section 31(1) or in pursuance of a report given by the Commission to the Government under section 37(4). Thus the original power of the Commission to inquire into the monopolistic trade practices has not been practically exercised and has remained almost dormant in as much as only one inquiry into monopolistic trade practices has so far been instituted by the Commission on its own. (As a matter of fact, since the passing of the Act, the Government itself has referred only three cases under section 31, viz., Colgate Palmolive (India) Private Limited, Cadbury Fry (India Limited) and Coca Cola Export Corporation to the Commission. Proceedings into these matters could not be taken because of the stay given by the Court).

21.3 Now, an inquiry into monopolistic trade practices by the Commission is one of the major objectives of the Act. Section 10(b) has clearly indicated the legislative intent by giving such power to the Commission. Unfortunately, follow-up of this power has not been clearly provided in the Act. We feel that the said lacuna should be corrected. We, therefore, suggest that section 10(b) should be amended so as to give the same independent power to the Commission to inquire and pass final orders in the case of monopolistic trade practices as it has in the case of restrictive trade practices. This will necessarily require amendments to be made in section 31 to provide for the exercise of the power by the Commission in the matter of passing final orders in regard to monopolistic trade practices also. We see no reason as to why if any monopolistic trade practice is established before the Commission, it should not have the power to prohibit the same or pass any other appropriate final order with regard to it.

21.4 As we have already indicated, the Commission has powers under section 37(4) of the Act to inquire and submit its findings to the Central Government in regard to any monopolistic trade practice being indulged in by a monopolistic undertaking which the Commission may come across during the course of its inquiry into a restrictive trade practice. There is, however, no corresponding power vested in the Commission in section 31 of the Act to inquire into and pass final orders on any restrictive trade practice that it may come across during the course of its inquiry into any monopolistic trade practice. Such

power is a natural corollary to the powers vested in the Commission under section 37(4) of the Act.

21.5 The control and regulation of monopoly is the very core of any monopoly legislation. Not only in our country but in the rest of the world also, the danger of monopoly is sought to be legislatively curbed. In America, the Sherman Act makes any attempt to monopolise, or to combine or to conspire with any other person or persons to monopolise any part of trade or commerce amongst several States punishable with fine upto one million US dollars (if a corporation) and one lakh US dollars and/or imprisonment upto three years (if any other person).

21.6 Article 86 of the Treaty of Rome provides that any abuse by one or more undertakings of a dominant position within the Common Market or of a substantial part of it shall be prohibited as being incompatible with Common Market in so far as it may affect trade between member States. The Australian Trade Practices Act, 1974 (as amended in 1977) prohibits monopolisation and all agreements in restraint of trade which have or would have the effect of lessening competition. Similarly, the Combines Investigation Act of Canada prescribes anti-competitive agreements as well as monopolies that operate or are likely to operate to the detriment of the public. Apart from criminal prosecution, there is provision in the two Acts for award of damages to the person who suffers any loss or injury as a result of prohibited conduct.

21.7 In our legislation, control of monopolistic trade practices is intended to check unreasonable profits and unreasonable level of prices. If the Commission cannot independently deal with these practices, its functioning would suffer from a basic and inherent infirmity. If there has to be an effective control of monopoly and relief to the consumers, a power to inquire independently and to pass final order, as regards monopolistic trade practices must be vested in the Commission, which is the sentinel for consumer interest. Hence, our above suggestions so as to vest independent powers in the Commission. The other provision in section 31(1) which empowers the Central Government to make a reference to the Commission for inquiry where it appears to it that monopolistic trade practices prevail in respect of any goods or services, is a pre-eminently desirable one and should be retained.

21.8 In an earlier chapter, we have suggested an expanded definition of the expression 'monopolistic trade practice' in section 2(i) of the Act so as to incorporate into it the provisions of section 32 which lay down the circumstances in which such a trade practice is deemed to be prejudicial to public interest. The adoption of this revised definition combined with our recommendations (which follow) that all such trade practices should be prohibited will render the retention of section 32 redundant. This section should, therefore, be deleted from the Act.

21.9 Having regard to the enlarged definition of 'monopolistic trade practice' proposed by us, it is our view that all monopolistic trade practices should be prohibited and any agreement in so far as it relates to any of these practices should be made void and unenforceable at law notwithstanding anything contained in any other law for the time being in force. Any contravention of any of these provisions by any person or undertaking should also be made punishable.

21.10 Over the course of years, case law and commercial world have identified certain trade practices as restrictive and they are known in the commercial world by specific names. We feel that in order to impart more certainty and familiarity for the benefit of the trade as also the consumers; certain restrictive trade practices should be defined more specifically, apart from the general definition of restrictive trade practice as being one which has the effect of preventing, distorting or restricting competition.

21.11 It is also a common experience that some of the restrictive trade practices are so destructive of competition that there is no question of their being justified in public interest. These practices are minimum re-sale price maintenance, collective bidding, price discrimination and discriminatory discounts and rebates. These practices should be prohibited, subject to certain general defences arising from defence requirements or from compliance with express authorisation under any law made by the Central Government. We

are further proposing that the other trade practices which are restrictive should also be prohibited subject to certain specific defences being available to the parties to the agreement/arrangement; in addition to the general defences referred to above. Thus, unless a party can bring its case within one or more of the general or specific defences, the restrictive trade practices will be prohibited and hence made actionable.

21.12 Consumer Protection—Unfair trade practises³

Our Act at present contains no provision for protection of the consumers against false or misleading advertisement or other similar unfair trade practices. The Act at present is directed against restrictive or monopolistic trade practices. These provisions proceed on the assumption that if dealers, manufacturers or producers can be prevented from distorting competition, the consumers will get a fair deal. But this is only partly true. There is now greater recognition that consumers need to be protected not only from the effects of restrictive practices but also from practices which are resorted to by the trade and industry to mislead or dupe the customers.

21.13 Advertisement and sales promotion have become well established modes of modern business techniques. That advertisement and representation to the consumer should not become deceptive has always been one of the points of conflicts between business and consumer.

21.14 The objection taken is not to the advertisement of the product, which it may be necessary to do in order to acquaint the public with the articles. What is, however, insisted on is that there is an obligation on the seller, namely, that if he advertises, he must speak the truth. This obligation also requires that the representation that is made to the consumer must not only contain an element of truth but must also avoid half-truths so as to give a deliberately different impression than is the actual fact. Thus, the advertisement may be misleading because things are omitted that should be said or because advertisements are composed or purposefully printed in such a way as to mislead. We are not suggesting that the Commission will examine the advertisement with a view to finding out whether right or wrong social values are being projected. That is not its purpose. Its object will be only to prevent false or misleading advertisement. Over twelve billion dollars were spent on advertisements in America in sixties. In India also, the expenditure on advertisements is substantial. Thus, in 1976, the total expenditure on advertisements in press, cinema and TV etc. amounted to about one hundred and fifteen crore rupees, whereas in 1977, it is estimated to be one hundred and twenty-five crore rupees. Of this, sixty seven crore rupees is in the shape of advertisement in the press; cinema and radio taking another eight crore rupees each; and even TV commercials run to three crore rupees annually. Importance of fairness in the matter of advertisements is thus obvious. The object of legislation is only to bring honesty and truth in relationship between the seller and the consumer. The truth of the advertisement and representation must be proved if the same are challenged before the Commission. It is even recognised by the sellers of products that advertisement may become counter-productive and may even result in loss of confidence by the public unless truth is adhered to. The advertisers may, therefore, themselves feel unhappy if the effect of the advertisements is devalued because of the false claim put forward in them.

21.15 It is often said that consumers need no special protection; all can be safely left to the market. But the perfect market is an economist's dream and consumer's sovereignty a myth. In real life, products are complex and of great variety and consumers and retailers have imperfect knowledge. Suppliers may often have a dominant buying position. As a consequence, bargaining power in the market is generally weighed against the consumer. Thus, consumers have felt the need to create organisations to identify their interests and to supply information and advice.*

21.16 Susan Wagner, in her book, "The Federal Trade Commission of America", says that over the past half a century the Commission has labelled under the Federal Trade Commission Act, 1914 numerous practices not known before. The whole basis of this exercise is that a situation has developed in which the public must be prevented from being made victims of false claim of products blatantly advertised, even though it may not have an adverse effect on the competition. The effort is to shift the emphasis on detection and eradication of frauds against the consumers, particularly belonging to weaker sections of society. If a consumer is thus falsely induced to enter into buying goods which do not possess quality and do

*The Consumer Interest—John Martin George W. Smith

not have the cure for ailment advertised, it is apparent that the consumer is being made to pay for quality of things on false representation. Obviously such a situation cannot be accepted.

21.17 Fictitious bargain is another common form of deception. Many devices are used to lure buyers into believing that they are getting something for nothing or at a nominal value for their money. Prices may be advertised as greatly reduced and cut when in reality the goods may be sold at sellers' regular prices. The test always is whether the consumer would, as an average purchaser, be misled. Advertised statements that could have two meanings, one of which is false, are also considered misleading. In one case in America, it was held that a statement that a tooth paste 'fights decay' could be interpreted as a promise of complete protection and was thus deceptive. Mock-ups on TV pictures put up by companies, including Colgate—Palmolive had also received the attention of enforcement agencies in America and have been held to be deceptive.

21.18 We cannot say that the type of misleading and deceptive practices which are to be found in the other countries are not being practised in our country. Unfortunately, our Act is totally silent on this aspect. The result is that the consumer has no protection against false or deceptive advertisements. Any misrepresentation about the quality of a commodity or the potency of a drug or medicine can be projected without much risk. This has created a situation of a very safe haven for the suppliers and a position of frustration and uncertainty for the consumers. It should be the function of any consumer legislation to meet this challenge specifically. Consumer protection must have a positive and active role. All over the world, various legislations are seeking, in the words of Justice Learned Hand, to discover and make explicit those unexpressed standards of fair dealing which the consumer as a community may progressively develop. In this connection, reference may be made to Australian Trade Practices Act, 1974, and Canadian Combines Investigation Act and legislations in rest of Western Europe and elsewhere against monopoly and other unfair trade practices.

21.19 We are, therefore, proposing to specify certain number of unfair trade practices which are notorious and to prohibit them. The Act, hereafter will deal not only with monopolistic and restrictive trade practices but also with unfair trade practices which are of immediate concern to the consumer. We, therefore, propose that a separate chapter should be added to the Act defining the various unfair trade practices which we have mentioned in the latter part of this report. We have specified the practices so that the consumer, the manufacturer, supplier and trader and other persons in the market can conveniently identify the practices which are being prohibited.

21.20 Power to inquire into past restrictive practices

In (1977) 47 Company Cases 323, a single Judge of the Allahabad High Court had held that no inquiry can be held by the Commission in respect of the practice which has been determined prior to the passing of the order by the Commission. The result of this would be that after the Commission has issued the notice to the party, the latter may take a stand that the agreement having been determined, the Commission has no jurisdiction to inquire and this would render the Commission powerless. This is an unsatisfactory state of affairs, apart from the correctness of such a view. The House of Lords in *Associated Newspapers Limited and others* (1964) (1) All ER 55 had not accepted such an interpretation. It was held in that case that all agreements entered in the register whether subsisting or determined, were referable to, and justiciable by, the Restrictive Practices Court. The Court had jurisdiction to hear the references of the agreements and to exercise all its powers in respect of the relevant restrictions comprised in it, including its most important power of restraining the making of further agreements to the like effect. It was also observed, that the fact that the parties have already terminated the agreement is no guarantee that they will not make another one, and the need for such remedy may be just as great where they have terminated agreement before the commencement of the proceedings as where they have terminated their agreement at some time in the course of the proceedings.

21.21 Under section 37 of the Act, the Commission has powers, inter alia, to direct by order that 'the practice shall be discontinued or shall not be repeated'. The practice which has already been discontinued would need no direction to discontinue and the only direction in such cases could be that it shall not be repeated. It is in the interest of all including the trade that it should be known clearly as to which practices are prohibited. This can happen only if, notwithstanding that the practice may have been discontinued before the issue of

notice by the Commission, the latter was to be held empowered to adjudicate upon it. Recently, on the 15th June, 1978, the view of the single Judge referred to above, has been reversed by a Division Bench of that Court, which has followed the above House of Lords decision. Although the position in this regard has now been clearly propounded by the Court, the Committee considers that it would be better if the law is amended suitably to provide in the Act specifically that the power of the Commission shall not be affected by the determination of agreement whether before or after the commencement of the proceedings; and whether any agreement is varied before or after the commencement of the proceedings, the Commission may make an order as it thinks proper in respect of the said agreement or in respect of the said variation or in respect of both. We would, therefore, recommend that the law should be amended to provide that, notwithstanding the determination of the agreement whether before or after the proceedings have been started by the Commission, the latter should be empowered to proceed to determine the validity of the said practice.

21.22 At present, the only power with the Commission in regard to restrictive trade practices is to issue a 'cease and desist' order or to permit the party itself to modify the agreement so that it is no longer prejudicial to public interest. It will be seen that in this manner a party, till it is called before the Commission, can continue to indulge in any restrictive trade practice without suffering any adverse consequences. At the most, when a party is so called and restrictive trade practice is established, it may be directed to discontinue it and only if it indulges in it thereafter that it becomes punishable for contravening an order made under sections 31 and 37 and that too only with a fine of five thousand rupees and/or imprisonment upto six months and continuing fine of five hundred rupees for every day of default, as provided in section 50 of the Act. We believe that the need for an effective provision for meeting the challenge of the restrictive trade practices which pollute the fountain of competition and cause great damage to the consumers and the community is most necessary and urgent.

21.23 Recommendations

In the light of the above, sections 10, 31 and 37 are to be amended, which we suggest may be done as follows :—

“Section 10

The Commission may inquire into any monopolistic, restrictive or unfair trade practices—

- (a) upon receiving a complaint of facts which constitute such practices from any trade or consumers' association having a membership of not less than twenty-five persons or from twenty-five or more consumers; or
- (b) upon a reference made to it by the Central/State Government; or
- (c) upon an application made to it by the Director General of Trade Practices; or
- (d) upon such knowledge or information, as may come into its possession.”

“Section 31

- (1) No person or undertaking shall, after the commencement of the Act, directly or indirectly, indulge in any monopolistic trade practice.
- (2) Notwithstanding anything contained in any other law for the time being in force, any agreement in so far as it relates to any monopolistic trade practice, shall be void and unenforceable at law.
- (3) The Commission shall inquire into any monopolistic trade practice and pass such order as it may think fit to prevent the continuance or recurrence of such a practice.
- (4) Without prejudice to the provisions of sub-section (3) of this section, where it appears to the Central Government that any monopolistic trade practice prevails or is likely to prevail in respect of any goods or services, the Central Government may refer the matter to the Commission for an inquiry and the Commission shall, after such hearing as it thinks fit, report to the Central Government its findings thereon.

- (5) If as a result of the inquiry referred to in sub-section (4), the Commission makes a finding to the effect that, having regard to the economic conditions prevailing in the country and to all other matters which appear in the particular circumstances to be relevant, the trade practice operates or is likely to operate against the public interest, the Central Government may, notwithstanding anything contained in any other law for the time being in force, pass such orders as it may think fit to remedy or prevent any mischiefs which result or may result from such trade practice.
- (6) Any order made by the Commission or by the Central Government under the provisions of sub-section (3) or sub-section (5), as the case may be, may include an order—
- (a) regulating the production, supply, distribution or control of any goods by the undertaking or the control or supply of any service by it and fixing the terms of sale (including prices) or supply thereof;
 - (b) prohibiting the undertaking from resorting to any act or practice or from pursuing any commercial policy which prevents or lessens, or is likely to prevent or lessen, competition in the production, supply or distribution of any goods or provision of any service;
 - (c) fixing standards for the goods used or produced by the undertaking.
- (7) The Commission may, in addition to passing of an order referred to in sub-sections (3) and (6) of this section, make a report to the Central Government communicating its findings in the matter and its recommendations, if any, thereon for such action as may be deemed necessary by the Government.
- (8) Notwithstanding anything contained in this Act, if the Commission, during the course of an inquiry under sub-section (3) finds that any person or undertaking is indulging in any restrictive trade practice, it may, in addition to passing orders under sub-section (3) and sub-section (6) with respect of monopolistic trade practice, pass such order as it may consider necessary in regard to such restrictive trade practice.”

“Section 37

- (1) The Commission may inquire into any restrictive trade practice and may pass orders, as it may think fit and in particular may, by order, direct that—
- (a) the practice shall be discontinued or shall not be repeated;
 - (b) the agreement relating thereto shall be void in respect of such restrictive trade practice or shall stand modified in respect thereof in such manner as may be specified in the order.
- (2) The Commission may, instead of making any order under this section, permit the party to any restrictive trade practice, if it so applies to take such steps within the time specified in this behalf by the Commission as may be necessary to ensure that the trade practice is no longer prejudicial to the public interest, and, in any such case, if the Commission is satisfied that the necessary steps have been taken within the time specified, it may decide not to make any order under this section in respect of that trade practice.
- (3) No order shall be made under sub-section (1) in respect of—
- (a) any agreement between buyers relating to goods which are bought by the buyers for consumption and not for ultimate re-sale whether in the same or different form, type or specie or as constituent of some other goods;
 - (b) a trade practice which is expressly authorised by any law for the time being in force.
- (4) Notwithstanding anything contained in this Act, if the Commission, during the course of inquiry under sub-section (1) finds that any person or undertaking is

indulging in any monopolistic trade practice, it may, in addition to passing order under sub-section (1) or sub-section (2) with respect to restrictive trade practice, pass such order, as it may consider necessary, in regard to such monopolistic trade practice."

21.24 In the succeeding paragraphs, we give our recommendations for modification of the other provisions in the Act relating to restrictive trade practices and incorporation of new provisions relating to unfair trade practices.

21.25 Restrictive trade practices

It is seen from the practical experience, particularly that in the UK as evidenced by the annual reports of the Monopolies Commission for the years 1948 to 1970, that collective discrimination in the following situations has been found to be usually harmful to the public interest. These annual reports speak of the following collective discrimination, namely —

- (i) By sellers without any corresponding obligation on the buyers;
- (ii) By sellers in return for an exclusive buying (exclusive dealing);
- (iii) Collective adoption of conditions of sale (notably maintenance of re-sale prices); and
- (iv) Collective enforcement of such conditions of sale.

21.26 Similar situations cannot be ruled out in India. In fact, in our view, these do appear to exist. The existing law has already provided for some of them but those provisions need to be strengthened. In view of this, it is recommended that the following collective agreements or arrangements or practices should be prohibited :—

(1) Collective discrimination

Agreements/arrangements between persons whether as producers, wholesalers, retailers, buyers, contractors or any combination thereof, to limit or restrict the output or supply of any goods or rendering of any services or to withhold or destroy supplies of goods or the rendering of services or to allocate territories or markets for the disposal of goods or the rendering of services or with reference to the prices at which the goods are to be sold or services are to be rendered; and in particular —

- (a) to restrict by any method the class or number of buyers to whom goods are sold or services are rendered; or
- (b) to restrict by any method the class or number of wholesalers/producers/suppliers from whom goods or services are bought; or
- (c) to sell or tender for sale goods or render services only at prices or on terms or conditions agreed upon between them; or
- (d) to buy or offer to buy goods or services only at prices or on terms and conditions agreed up on between them.

(2) Boycott

Agreements/arrangements unjustifiably excluding from any trade association any person carrying on, or intending to carry on, in good faith the trade in relation to which the association is formed.

For the purpose of determining whether any exclusion from such an association is unjustifiable, the Commission may examine, in addition to any other matter which is considered relevant, not only the application of any rules of that association but also the reasonableness of any such rules themselves.

(3) Collective Bidding

Agreement or arrangement between two or more persons —

- (a) to tender for the supply or purchase of goods or services at prices or on terms agreed or arranged between them; or
- (b) as to the prices which any of them bids, at an auction for sale of goods or whereby any party to the agreement or arrangement agrees to abstain from bidding at any auction for sale of goods.

(4) Resale Price Maintenance

Agreement or arrangement to sell goods on the condition that the prices to be charged on resale by the purchaser(s) shall be the prices as stipulated by the seller(s) unless it is clearly stated that the prices lower than those prices may be charged.

(5) Residuary Collective Agreement

Agreements or arrangements to enforce the carrying out of any agreement or arrangement referred to in the foregoing provisions of this section.

21.27 The restrictive trade practices of the types mentioned above arising out of collective action should, subject only to the following general defences, be prohibited. The following circumstances would constitute such general defences :—

- (i) Defence requirements or security of State; or
- (ii) Compliance with any of the conditions stipulated by the Government by general or special order in relation to the particular goods or services; or
- (iii) Agreements expressly authorised or approved by the Central Government or under any law for the time being in force or if the Government is a party to such agreement.

21.28 As regards the restrictive trade practices arising out of bilateral agreement, we recommend that the following restrictive trade practices should be prohibited :—

(1) Minimum Resale Price Maintenance

Any agreement or arrangement or practice —

- (a) purporting to charge, or providing for the charging of, minimum price on resale of the goods in India; or
- (b) withholding supplies of goods from any person seeking to obtain them for resale in India on the ground that he —
 - (i) has sold in India at a price below the resale price, goods obtained either directly or indirectly, from that supplier or has supplied such goods indirectly to a third party who had done so; or
 - (ii) is likely, if the goods are supplied to him, to sell them in India at a price below that price or supply them either directly or indirectly to a third party who would be likely to do so;

Nothing contained in clause (b) shall render it unlawful for a supplier to withhold supplies of goods or to cause or procure another supplier to do so if he has reasonable cause to believe that the person seeking supplies of goods has been using as loss leaders any goods of the same or similar description whether obtained from the supplier or not.

(2) Price Discrimination

- (i) Any agreement or arrangement or practice under which a person discriminates between purchasers of goods of like grade and quality in relation to —
- (a) the prices charged for the goods; or
 - (b) any discount, allowance, rebates or credits given or allowed in relation to the supply of goods; or
 - (c) the provision of services in respect of goods; or
 - (d) the making of payments for services or facilities provided in respect of goods;
- if the discrimination is of such a magnitude or is of, such recurring or systematic character that it has, or is likely to have the effect of preventing, distorting or limiting competition in any line of trade.
- (ii) Sub-section (i) does not apply in relation to discrimination, if the discrimination makes only differences in the cost or likely cost of manufacture, distribution, sale or delivery resulting from different places to which, methods by which or quantities in which the goods are supplied to the purchasers provided that it is not done in such a manner as would have, or likely to have, the effect of substantially lessening or restricting competition.
- (iii) In any proceedings for contravention of sub-section (i), the onus of establishing that sub-section does not apply in relation to discrimination by reason of sub-section (ii) is on the party asserting that sub-section (i) does not so apply.

(3) Tie-up Sales

Agreements or arrangements or practices —

- (a) under which goods are sold only to those buyers who undertake to buy other goods from the seller or from the sources specified by the seller; or
- (b) for selling goods with the condition that after-sales services even beyond the warranty period shall be rendered only by the seller or by any person or persons authorised by him; or
- (c) providing for warranty or free after-sales service with the condition that the spare parts or accessories should be bought only from the seller or from persons specified by him.

(4) Exclusive Dealings

Agreements or arrangements or practices under which —

- (a) seller requires buyers to sell to customers or to certain class of customers; or
- (b) a buyer requires the sellers to supply only such quantity of goods to other buyers which may be surplus to the buyer's requirements on prices and terms and conditions not more favourable than those allowed to the purchaser; or
- (c) the seller requires the buyer to purchase his entire requirement of goods from the seller; or
- (d) a seller requires the buyer to refrain from supplying or distributing along with the goods sold, any other goods not supplied or sold by the seller or his nominee; or
- (e) a manufacturer/wholesaler/distributor requires dealer or any other person to sell or to resell only in a certain territory ;

if the effect of such dealing, agreement, arrangement or understanding is or is likely to be to prevent, distort or limit competition in any line of trade.

(5) Production Sharing

Agreement or arrangement or practice, to sell or supply one's entire production or a substantial part thereof to a single purchaser/customer.

(6) Conditional Know-how

Agreement or arrangement providing technical know-how for the production of goods on condition that —

- (a) purchase of raw materials etc. shall be made from approved/specified sources; or
- (b) there shall be restrictions on enlargement of capacity; or
- (c) the know-how shall not be transferred or sub-licensed to other persons even after the expiry of the agreement or providing for a much longer period than is considered by the Commission to be reasonable before the expiry of which such transfer or sub-licence to other persons cannot be granted.

(7) Residuary Agreements

Any agreement or arrangement collectively or individually, to enforce the carrying out of any agreement or arrangement or practice referred to in the foregoing provisions.

21.29 We recommend that all the restrictive trade practices arising out of collective action as described by us in para 21.26 and the first two trade practices relating to minimum resale price maintenance and price discrimination emanating from bilateral agreements as indicated by us in para 21.28 should, subject only to the availability of general defences as mentioned in para 21.27, be prohibited. As regards the other restrictive trade practices viz. barring those arising out of collective action and the first two trade practices arising out of bilateral agreements referred to above, we recommend that all such trade practices should, subject to the availability of general defences as well as the gateways of escape enumerated in clauses (a) to (h) of present section 38 of the Act, be also prohibited. We, however, feel that section 38 needs to be slightly amended so that, instead of deeming provision, it should be provided that the Commission may presume a restrictive trade practice to be prejudicial to the public interest unless the Commission is satisfied of any one or more of the circumstances mentioned therein. A new section incorporating the general defences, referred to by us earlier, would require to be inserted after section 38. These general defences would be available to all types of practices. We further recommend that all prohibited practices whether monopolistic, restrictive or unfair should be made actionable whether such a practice has been incorporated in the form of an agreement or not.

21.30 Under section 33 of the Act, agreements relating to restrictive trade practices falling within one or more of clauses (a) to (1) of that section are required to be registered with the Registrar of Restrictive Trade Agreements. Since the coming into force of the Act till the end of 1977, some twenty-one thousand and odd agreements were registered with the RRTA in compliance with the provisions of section 33 of the Act. Of these agreements, the proceedings have been brought by the RRTA before the MRTP Commission in regard to one hundred and six agreements only. In view of our recommendation for prohibition of restrictive trade practices subject to certain exceptions, and keeping in view the past experiences, we feel that it should not be necessary to have compulsory registration of agreements relating to restrictive trade practices. We feel that there are enough sources open to the Director General to become aware of any prohibited practices, and to take action accordingly. In any case, whenever a complaint is received or an investigation is made, the proposed Director General of Trade Practices will have the power to call for a copy of the agreement and other relevant information or documents etc. for the purpose of his investigation, particularly in view of the enhanced powers which are proposed to be vested in him. We, therefore, recommend that the requirement of compulsory registration of agreements relating to restrictive trade practices should be

deleted. Accordingly, section 33 will have to be deleted, while sections 34, 35 and 36 will require to be amended suitably. We may mention that no such compulsory registration provision exists in latest legislations of Australia, Canada and Newzealand.

21.31 The provisions contained in sub-section (1) of section 39 and sub-sections (1) and (2) of section 40 relating to restrictive trade practices of 'resale price maintenance' have already been provided for in paragraph 21.28 (1) of this chapter. These provisions have consequently become redundant and should be deleted. Sections 39 and 40 of the Act would be required to be recast so as to provide for the remaining provisions contained in the sub-sections (2) and (3) of section 39, and sub-section (3) of section 40. Section 41 of the Act gives power to the Commission to exempt, on a reference being made to it by the RRTA or any other person interested, goods of any class from the operation of the provisions relating to maintenance of minimum resale prices. We have already recommended that the practice of maintaining minimum resale prices should be prohibited and should be subject only to general defences. In view of these recommendations, it would be anomalous to retain the provision empowering the Commission to exempt any class of goods from the operation of these provisions. We, therefore, recommend that section 41 should be deleted from the Act.

21.32 Unfair Trade Practices : Consumer Protection

We have already discussed the need for new legislative measures which would ensure adequate protection to the consumers. With that end in view, we suggest that new provisions relating to unfair trade practices on the lines indicated below should be incorporated by way of a new chapter in the Act. In this context, we recommend that the following unfair trade practices should, subject to the exceptions indicated in respect of each, be prohibited :—

(1) Misleading advertisement and false representation

Making false representation in connection with the supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services such as to —

- (a) falsely represent that the goods are of a particular standard, quality, grade, composition, style or model;
- (b) falsely represent that the services are of a particular standard, quality or grade;
- (c) falsely represent that the re-built, second-hand, renovated, reconditioned or old goods are new goods;
- (d) represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have;
- (e) represent that the seller or the supplier has a sponsorship, approval or affiliation he does not have;
- (f) make false or misleading statements concerning the need for or the usefulness of any goods or services;
- (g) make a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product or of goods that is not based on an adequate and proper test thereof, the proof of which lies upon the person making the representation;
- (h) make a representation to the public in a form that purports to be —
 - (i) a warranty or guarantee of a product or of goods, or
 - (ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,

if such form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out;
- (i) make a materially misleading representation to the public concerning the price at which a product or like products or goods have been, are or will be ordina-

rily sold; and for the purposes of this paragraph a representation as to price is deemed to refer to the price at which the product or goods has been sold by sellers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold by the person by whom or on whose behalf the representation is made;

- (j) make false or misleading representation of facts disparaging the goods, services or trade of another person.

Exceptions

- (1) The aforesaid provision shall not apply if a person establishes —
 - (a) that the act or omission giving rise to the offence was a result of a *bona fide* error; or
 - (b) that he took reasonable precaution and exercised due diligence to prevent the occurrence of such error and that he took reasonable measures forthwith, after the representation was made, to bring the error to the attention of the class of persons likely to have been reached by the representation.
- (2) In a proceeding for contravention of any of the aforesaid provisions committed by the publication of an advertisement, it would be a defence for a person who establishes that he is a person whose business it is to publish or arrange for the publication of advertisement and that he received the advertisement for publication in the ordinary course of business and did not know and had no reason to suspect that its publication would amount to contravention of any such provision.

Explanation

For this purpose, a representation that is —

- (a) expressed on an article offered or displayed for sale, its wrapper or container,
- (b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale; its wrapper or container, or anything on which the article is mounted for display or sale,
- (c) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public,

shall be deemed to be representation made to the public by and only by the person who caused the representation to be so expressed, made or contained.

(2) Bargain sale, Bait and Switch selling

Advertising for supply at a bargain price, goods or services that are not intended to be offered for supply at the price, for a period that is, and in quantities that are reasonable, having regard to the nature of the market in which the business is carried on, the nature and size of business and the nature of the advertisement.
The bargain price for this purpose would mean —

- (a) a price that is, represented in an advertisement to be a bargain price, by reference to an ordinary price or otherwise; or
- (b) a price that a person who reads, hears or sees the advertisement would reasonably understand to be a bargain price by reason of the prices at which the product advertised or like products are ordinarily sold.

Exceptions

The aforesaid provision shall not apply to any person who establishes that —

- (a) he took reasonable steps to obtain in adequate time a quantity of the goods that would have been reasonable having regard to the nature of the advertisement, but was unable to obtain such quantity by reason of events beyond his control that he could not reasonably have anticipated; or
 - (b) he obtained a quantity of the goods that were reasonable having regard to the nature of the advertisement, but was unable to meet the demand therefor because that demand surpassed his reasonable expectations; or
 - (c) after he became unable to supply the goods in accordance with the advertisement, he undertook to supply the same goods or an equivalent goods of equal or better quality at the bargain price and within a reasonable time to all persons who requested for the goods and who were not supplied therewith during the time when the bargain price applied and that he fulfilled the undertaking.
- (3) **Offering of gifts or prizes with the intention of not providing them and conducting promotional contests**
- (i) Offering of gifts, prizes or other items with the intention of not providing them as offered or creating the impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole;
 - (ii) Conducting any contest, lottery, game of chance or skill, for the purposes of promoting directly or indirectly, the sale of a product or any business interest.

Exceptions

The aforesaid provision shall not apply if it is established that —

- (a) there is adequate and fair disclosure of the number and approximate value of the prizes, of the area or areas to which they relate and of any fact within the knowledge of the advertiser that affects materially the chances of winning;
 - (b) distribution of the prizes is not unduly delayed; and
 - (c) selection of participants or distribution of prizes is made on the basis of skill or on a random basis in any area to which prizes have been allocated.
- (4) **Product safety standards**

Supplying goods that are intended to be used or are of a kind likely to be used by consumers, being goods which do not comply with the standards prescribed by competent authority relating to performance, composition, contents, design, construction, finishing or packaging of goods as are necessary to prevent or reduce risk of injury to persons using the goods.

(5) Hoarding or destruction of goods

Hoarding or destruction of goods, or refusal to sell the goods, or to make them available for sale, if such hoarding or destruction or refusal raises or tends to raise or is intended to raise the cost of those or other similar goods.

21.33 All the aforesaid unfair trade practices would be punishable as an offence and any person or undertaking indulging in any of them should be liable to be prosecuted before the Commission.

21.34 Under the present Act, the Central Government has power, amongst others, under section 31 of the Act, to pass orders regulating the production, supply, control or

distribution of goods or prohibiting any undertaking from resorting to any monopolistic trade practices. At present, the only power with the Commission, in regard to restrictive trade practices is to pass an order of 'cease and desist' under section 37 of the Act. We have already recommended that a separate chapter be included to deal with unfair trade practices like false representations and misleading advertisements. It is a well established principle of jurisprudence that for every wrong there must be a remedy. It is apparent that the prohibited practices, if indulged in, are likely to cause grave loss or damage to many consumers. But in the Act there is no provision for awarding damages to a person, a body or even the State and the Central Government against those who have indulged in any of the practices which are prohibited. This is a highly unsatisfactory state of affairs. A consumer may be compelled to pay higher prices as a result of monopolistic or restrictive trade practices or may be persuaded to buy goods not having the claimed advantages or suffer pecuniary loss because of other unethical practices indulged in by the sellers. And yet, as the Act at present stands, the only order which he may obtain is of 'cease and desist'. Such an order can at best be a preventive one for future. It can obviously not compensate the injured party for the losses already suffered. Thus, unless a provision is made for damages, a party who suffers from the prohibited practice being indulged in by a producer or seller or supplier will hardly receive the benefit which the Act is supposed to confer on an average consumer. The injury to the business or property caused as a result of prohibited practice calls for a remedy. The anomalous situation under the present Act, that even after the Commission has found that a prohibited practice has been indulged in by a party and even if it has further found that the complaining party has suffered serious injury and losses, it is powerless to compensate the injured party, must be remedied.

21.35 In all the legislations the world over, provision exists enabling an affected party to seek remedy for being compensated for loss or damage suffered by it at the hands of a person who has indulged in prohibited practices. Thus section 7 of the Sherman Act and section 4 of Clayton Act (USA) provide that any person who has been injured in his business or property by reason of anything forbidden or declared to be unlawful may sue with respect to the amount in controversy and recover three-fold the damages sustained and the costs. Similarly, section 6 of the Federal Act (Switzerland) also provides that any person whose interests are affected by unlawful interference with the competition may request damages for any wrongful act or omission.

21.36 Section 6 of the Act against Restraint of Competition (Spain) also provides for a person, who suffers damages by reason of restrictive trade practices that are declared to be prohibited, to recover damages.

21.37 Section 25 of the Act concerning Prohibition of Private Monopoly and Maintenance of Fair Trade Act (Japan) makes an entrepreneur, who has employed unfair business practices, to be liable to indemnify the person injured. Section 82 of the Trade Practices Act, 1974 (Australia) as amended upto 1977, also provides that a person who suffers loss or damages by conduct of a person which is in violation of the provisions relating to restrictive trade practices and unfair trade practices may recover the amount of loss or damages by action against that other person.

21.38 Similarly, the Combines Investigation Act of Canada, being amended by the Competition Bill, 1977, also provides by section 31.1 the right of any party to recover damages from the person who has indulged in trade practices which are prohibited.

21.39 Power to award damages has quite frequently and liberally been used by Courts in America, West Germany and elsewhere, when it has been found that any party has acted against competition and indulged in any of the prohibited practices. One of the most important cases relating to the award of damages in America relates to the Tetracycline Case. In that case, the Federal Trade Commission charged three companies, viz. Pfizer, Cynamide and Bristol, for having monopolised and fixed the price of tetracycline and two chemically related antibiotics. Claims were filed by the Cities and their political Sub-Divisions for reimbursement for purchases of the antibiotics made at a retail store by welfare patients. Ultimately in 1969, the companies agreed to pay one hundred and twenty million dollars in final claims to the Cities, States and others. One of the important cases decided by the US Supreme Court more recently relates to the treble damage suit brought in the United States by the Governments of India, Iran and Philippines* for alleged price fixing by six major United

States pharmaceutical companies, in respect of their sales of broad range of antibiotic drugs (Pfizer Inc vs Government of India *et. al* No. 76-749, decision 11. 1. 78). In this case, the United States Supreme Court has confirmed that foreign Governments damaged by restrictive business practices of United States enterprises contravening United States Restrictive Business Practices Legislation are entitled to sue for treble damages.

21.40 The provisions for claiming damages are thus an established principle. It is also logical and equitable to provide that any person who is affected by any prohibited practice should have a remedy to recover damages and compensation from the guilty party. We, therefore, feel that a similar provision as in Australian and Canadian Acts should be made in our Act to the effect that any person, authority, Central or State Government who has suffered loss or damage as a result of conduct of another person having indulged in any of the prohibited practices, viz. monopolistic trade practices, restrictive trade practices and unfair trade practices, will be entitled to recover the amount of loss or damage including costs suffered by him from the party who has indulged in any of the prohibited practices. We feel that such a provision in our country will have a salutary effect and that it may prevent the prohibited practices from being indulged in. The remedy by way of damages will act as a deterrent to these prohibited practices right from incipency and motivate the producers and suppliers themselves to desist from indulging in such practices.

21.41 We are including Central and State Governments and other authorities in this provision for the reason that the Governments, like any other person, also make mass purchases of many goods for their use in hospitals, stores, canteens and messes etc., and if as a result of prohibited practice, they have suffered damages, it is only natural that they should also be in a position to recover the same.

21.42 There is also to be found a procedure for recovery of damages not only at the instance of an individual but through what is called a 'class action'. In this kind of action, proceedings are brought by one or more members of a class on behalf of persons who are permitted to do so by the Court, if it finds that questions of law or of fact or causes of action are common to the members of a class and predominate over questions affecting only individual members and that there are sufficient members of that class who are likely to have suffered significant quantum of loss or damage. In such a case, the Court permits one or two members of the class to bring action on behalf of that class. Where the Court finds that a claim has been proved, it awards compensation and damages to all the members of the class and may give judgement in favour of each member also. Of course, before trying a 'class action', general notice would have to be given for the benefit of those persons on whose behalf class action is sought to be brought and, unless any person specifically excludes himself from that action, the result of a judgement in a class action will constitute a final judgment between each member of the class in question and each person against whom the class action was taken with respect to the conduct or failure alleged was brought. The necessity for providing this procedure of class action is that it is possible that a large number of persons who may have suffered damages at the hands of a producer, supplier or seller but, being poor and not possessed of sufficient resources, may not be able to bring individually separate proceedings against the delinquent. In such a case, if individual action was insisted on, the result will be to deprive large number of such poor persons from the benefit of the consumer protection legislation. Detailed procedure for such class action is provided in section 39.1 of the Competition Bill, 1977 of Canada. We would suggest the adoption with necessary changes of the provisions of that legislation and incorporation of a separate chapter in our Act for this purpose.

21.43 There is no power at present with the Commission to pass any order of interim injunction. It may happen that a matter is brought before the Commission and *prima facie* the Commission is of the view that such a practice should not be allowed to continue during the pendency of inquiry. But at present there is no power to issue any interim injunction. This is a serious lacuna. We would, therefore, recommend that the Commission should have the power, on the application of the Director General of Trade Practices, the Central Government or State Governments or any other aggrieved person, to grant an interim injunction restraining any person from engaging in or continuing with any of the prohibited practices, whether monopolistic, restrictive or unfair. Of course, the Commission would also have the

power to alter, vary, or modify any order of injunction granted by it, on proper grounds being shown to the Commission. The Monopolies Commission will only grant an injunction where it finds that a *prima facie* case has been presented to the effect that a person against whom injunction is sought is about to engage in a conduct that will cause serious injury to the business of a party applying for injunction. The Commission will also normally grant an interim injunction only after hearing the other party excepting in a case, where not to do so will cause serious injury and irreparable harm. In such a case, it may grant an *ex parte* interim injunction but its effect will be only for a period of not exceeding ten days or as specified in the order. We have no doubt that the society will gain by providing such a power to award damages and injunction and it will also give relief to the common man.

21.44 At present, the offences and penalties are provided in Chapter VIII of the present Act. Penalties exist for contravention of sections 21, 22, 23, 24, 25 and 27 and for failure to register or contravention of any order passed under sections 13, 31 or 37 by the Commission. All such offences are triable before a Magistrate of the First Class vide section 56 of the Act. As there was no provision for awarding damages or for granting injunction, there is obviously no forum provided for the same in the present Act. As we are now suggesting provisions enabling parties to recover damages and also to obtain injunction, the forum has necessarily to be spelt out.

21.45 We are of the view that a provision should also be made that in any proceedings for recovery of damages, any conviction of the person previously for an offence for having indulged in any of the prohibited practices will, in the absence of proof to the contrary, be a proof that the person against whom the action is brought had engaged in the prohibited practices. Any evidence given in those proceedings to that effect of such acts or omissions will be treated as evidence in the proceedings brought for damages. Such a provision is to be found in section 31.1(2) of the Competition Bill, 1977 of Canada.

21.46 Clearance of Trade Practice(s) by the Commission

Since we are suggesting prohibition of restrictive trade practices subject only to the limited exceptions and gate-ways, we feel that there should be provision in the Act for grant of clearance by the Commission. It should, therefore, be provided that the parties may, on their own volition, apply for and seek the clearance from the Commission if they feel that any particular practice or practices fall under one or more of the exceptions/defences provided for in the Act. The Commission, thereupon, would ordinarily be expected to give its decision within a period of three months from the date of application; during this period, the party concerned will not engage in such practices. However, after the expiry of the said period, and no decision having been given, the party may, on its own responsibility and risk, proceed with the proposed agreement or arrangement or practice. But in such a case, the liability of the party for civil action in damages would continue to remain from the date the practice was indulged in, if ultimately the Commission refuses clearance. However, the criminal liability, in the event of the necessary clearance not being given by the Commission, would accrue only from the date of knowledge of the Commission's final order and if the party continues to indulge in that particular practice(s) despite the Commission's decision. We, therefore, recommend that suitable provisions on the above lines may be made in the Act.

21.47 In other countries, the forum for recovery of damages etc. is generally the ordinary Civil Courts. We do not feel inclined to follow the said pattern. The working of the Act requires specialised knowledge and detailed information concerning various aspects of the matter. The Commission is already dealing with such matters. The ordinary Civil Courts do not possess such expertise as the Commission. We would, therefore, recommend that all these matters relating to recovery of damages or injunctions should be triable before the Commission. We are also of the view that the present jurisdiction of the Magistrate to try offences under the Act should also be taken away and the same be vested in the Commission. However, the Commission may be empowered to transfer any such proceedings which it considers necessary to the Court of Metropolitan Magistrate or Magistrate of First Class as recommended by us in the next chapter if it is considered expedient in the interest of justice to do so. As indicated earlier, some of the prohibited practices have no specific defences provided for. Any person indulging in them will incur not only civil liability but also criminal liability. In our view, if any violation has taken place in respect of any such prohibited practice and criminal proceeding is to be taken against such a party, the same

should also be brought before the Commission and not the Magistrates. We would suggest that, in such a case, the Chairman of the Commission or any Member of the Commission designated by the Chairman may be authorised by law to hear and dispose of such matters by following the procedure of a warrant case under the Code of Criminal Procedure 1973.

21.48 It may be asked as to why this original power—both civil and criminal—is being conferred on the Commission. We feel that in the early stage of development of the legislation, a number of complicated and new questions of law and policy are likely to arise. If jurisdiction is spread over, it is possible that there may be conflict of views between the different Courts and this may impede the development of a definite, easily understood state of law. We, therefore, feel that it would be proper at least at this stage to allow only one body, *i.e.* the Monopolies Commission to deal with such matters as mentioned above.

CHAPTER XXII

ADMINISTRATIVE MACHINERY UNDER THE MONOPOLIES AND RESTRICTIVE TRADE PRACTICES ACT

22.1 The scheme of the Monopolies and Restrictive Trade Practices Act, as it stands at present, provides for a dual machinery for implementing its provisions. These two are the Central Government and the Monopolies and Restrictive Trade Practices Commission (hereinafter referred to as 'Commission'). In its work, the Commission is assisted by two statutory functionaries, namely, the Director of Investigation and the Registrar of Restrictive Trade Agreements. The functions of the Central Government under the Act are in the sphere of ensuring that the operation of the economic system does not result in the concentration of economic power to the common detriment and for the control of monopolies. The powers in this regard, in so far as contained in Chapter III, are exercisable by the Government and if it so chooses, in consultation with the Commission, which, therefore, has an advisory role to play. The Commission, on the other hand, is vested with independent powers to inquire into restrictive trade practices, either on the application of the Registrar or the Central Government or State Government or a specified number of consumers or a trade or consumers' association having a specified number of membership or on its own information and knowledge. We have recommended elsewhere that the role of the Commission in regard to matters covered by Chapter III should be more effective and purposeful and have accordingly suggested that, in specified cases, there should be compulsory reference to the Commission which should be empowered thereon to pass final orders. In these cases, the Commission will no longer be an advisory body but rather be an adjudicative one. The Commission will also be required to decide disputed questions relating to 'group', 'same management' and 'inter-connection' in future. In the matter of monopolistic trade practices also, we have suggested that the Commission should have independent powers for inquiring and passing orders. We are also recommending the inclusion in the Act of certain provisions, with a view to checking, what are commonly known as unfair trade practices, so as to ensure adequate protection of the interests of the unwary consumers. All these are likely to add considerably to the work-load of the Commission and will require the building up of sufficient expertise at various levels for discharging the duties assigned to it.

22.2 Our recommendations in regard to monopolistic, restrictive and unfair trade practices also include provision for the award of damages and imprisonment in certain cases, the power to issue interim injunctions and also the conferment on the Commission of the status of a Court of Record. These will necessarily involve important changes in the power of the Commission as also in the authorities empowered to file complaints before the Commission. In the succeeding paragraphs, we shall deal with each one of these matters separately.

22.3 Composition of the Commission

The Act now provides for not less than two and not more than eight members in addition to the Chairman of the Commission to be appointed by the Central Government. The Commission has had at no time more than three members including the Chairman. We feel that the present strength provided in the Act is adequate.

22.4 Under the Act the Chairman of the Commission shall be a person who is, or has been or is qualified to be a Judge of the Supreme Court or of a High Court. Considering that appeal from the Commission's order lies only to the Supreme Court and not the High Court, we feel that it will be only appropriate to make a clarificatory provision that where the person appointed to the office of Chairman is a sitting Judge of a High Court, he shall enjoy the same rank, status, pay and allowances and privileges as of the Chief Justice of a High Court. Sub-section (2) of section 5 should be amended accordingly.

22.5 Vacancies in the office of Chairman

There is at present no provision for dealing with a situation when a vacancy in the office of the Chairman temporarily occurs either due to resignation, leave or otherwise. This

has led to anomalies in the functioning of the Commission. Questions have also been raised as to whether the Commission could function without a Chairman at any time and with only one or more members. As a matter of fact, the Commission did not have a Chairman from 17th October, 1972 to 22nd July, 1973 and again from 9th August, 1976 to 23rd February, 1978. In order to remove any doubts in this regard, we consider it desirable to provide that where there is a vacancy in the office of the Chairman or the Chairman is temporarily absent or is unable to act, the Central Government may, notwithstanding anything contained in any other provision, appoint the seniormost member of the Commission to act temporarily in place of the Chairman and the person so appointed to act temporarily as Chairman shall have all the powers, functions and privileges of the Chairman during the period in which he acts in that capacity.

22.6 Vacation of office of Chairman

There is at present no provision in the Act governing the vacation of office of the Chairman either due to resignation or removal from office, as has been provided in the case of a member in sub-section (2) of section 6. This is a lacuna which needs to be rectified by a proper amendment in section 6. Where, however, it relates to the removal, from office of Chairman, of a person who was a sitting Judge of a High Court or the Supreme Court prior to his appointment as Chairman, his removal would be governed by the relevant provisions in the Constitution as applicable to the Chief Justices of a High Court or a Judge of the Supreme Court, as the case may be.

22.7 Director-General of Trade Practices

Section 8 of the Act at present provides for the appointment by [the Central Government of a Director of investigation in consultation with the Commission for making investigations for the purposes of the Act. There is another provision in section 34 providing for the appointment by the Central Government of the Registrar of Restrictive Trade Agreements (RRTA). The functions of the latter are mainly to maintain the register of agreements relating to restrictive trade practices and to file applications under section 10(a) (iii) before the Commission for conducting an inquiry into such practices. In the context of the enlarged functions that we are envisaging for the Commission in relation to cases under Chapter III and other trade practices and the role that the Director of Investigation or the RRTA will have to play in regard to these matters, we consider that it would be necessary and useful to combine the functions of both the Director of Investigation and the RRTA and redesignate the office as that of Director-General of Trade Practices.

22.8 Powers of the Commission to regulate the conditions of service of its staff

Section 8 deals with the powers of the Central Government in regard to appointment of Director of Investigation and to make provision for the Commission's staff and their conditions of service. These two aspects may be dealt with separately as in the modified provisions of this section suggested below :—

“8(1) The Central Government may, in consultation with the Chairman of the Commission appoint a Director-General of Trade Practices for making investigations for the purposes of this Act and for performing such other duties as are laid on him by this Act and those that may be laid by regulations framed by the Commission under section 66. The Central Government may, in addition, appoint other members of the staff of the Director-General of Trade Practices and fix the number of such members on his staff in consultation with the Commission. The conditions of service of the Director General of Trade Practices and his staff would be prescribed by the Central Government in consultation with the Commission.

8(2) The Commission may appoint members of its own staff and may make provision with respect to the number of members of its staff and their conditions of service subject to such rules as may be made in this behalf by the Central Government”.

22.9 Consequent on the proposed combination of the offices of Director of Investigation and the RRTA into that of Director-General of Trade Practices, section 34 may no longer be necessary. Consequential changes in other sections, wherever necessary, would also require to be made.

22.10 Powers of the Director-General of Trade Practices

As a result of combining the two offices of Director of Investigation and the Registrar of Restrictive Trade Agreements and also due to the increased duties and functions laid on the Director-General of Trade Practices, it would be necessary to empower him adequately to make the investigations required under the Act and also to search and seize documents of evidentiary value required for purposes of the investigations; the powers should also extend to impounding documents and the retention in his custody for such period as may be deemed fit. The powers of search and seizure would, however, be exercisable by the Director-General only with the prior approval of the Commission. Accordingly, we recommend that the existing section 11 of the Act may be substituted by the following :—

“11. (1) In the matter of trade practices as defined in section(s)—[section(s) dealing with monopolistic trade practices, restrictive trade practices and unfair trade practices], in respect of which a complaint is made under the proposed sub-clause (a) of section 10, the Commission shall, before issuing any process requiring the attendance of the person complained against, cause a preliminary investigation to be made by the Director-General, in such manner as it may direct, for the purpose of satisfying itself that the complaint requires to be inquired into.

(2) Where for the purposes of enquiry or investigation referred to in sub-section (1), the Director-General has reason to believe that the books and papers of or relating to any undertaking(s) have been or are likely to be destroyed, mutilated, altered, falsified or secreted, it may make an application to the Commission for an order for the search and seizure of such books and papers, and, thereupon, the Commission may, by order, authorise him —

- (a) to enter, with such assistance as may be required, the place(s) where the books are kept;
- (b) to search that place or those places in the manner specified in the order; and
- (c) to seize books and papers which he considers necessary for the purpose of his investigation.

(3) For the purposes of making a preliminary investigation referred to in sub-section (1), the Director-General of Trade Practices shall have the same powers as are vested in a Court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely —

- (a) Discovery and production of any document or other material object producible as evidence;
- (b) Enforcing the attendance of any person and examining him on oath; and
- (c) Compelling the production of books of accounts and other documents including requisitioning of any public record from any Court or office.

(4) The Director-General of Trade Practices may impound and retain in his custody for such period as he thinks fit any books of accounts and other documents seized by him under sub-section (3) or produced before him in connection with the discharge of his functions under the Act :

Provided that he shall not —

- (a) impound any books of accounts or other documents without recording his reasons for doing so; or
- (b) retain in his custody any such books of accounts for a period exceeding thirty days (exclusive of holidays) without obtaining the prior approval of the Commission therefor.”

22.11 Elsewhere we have suggested that such practices as are prohibited should be actionable offences and that any person indulging in such practices would be liable to be prosecuted before the Commission and that the authority competent to initiate necessary

prosecution would be the proposed Director-General of Trade Practices. The proposed Director-General would also have the power to move on behalf of the Central and the State Governments or any other authority or public body claiming damages suffered by it on account of the commission of any of the prohibited trade practices. The Director-General would also be joined as a party to the proceedings brought by the individuals or in any 'class action' proceedings so as to ensure that the broader public interest may be put forward by him before the Commission. In order to enable the Director-General to discharge these functions, it would be necessary to add one or more sub-sections in section 11 specifically empowering the Director-General —

- (i) to initiate prosecution proceedings before the Commission;
- (ii) to move on behalf of the Central and State Governments or any other authority or other public body claiming damages suffered by it on account of the commission of any of the prohibited trade practices; and
- (iii) to be joined as a party in the proceedings which might be brought before the Commission by any individual or in any 'class action'.

22.12 Powers of the Commission

Section 12 of the Act details the powers exercisable by the Commission in making inquiries under the Act. In the Committee's view, these powers are not sufficient for the purpose of holding proper inquiries. Therefore, the Committee feels that the Commission should be vested with some additional powers. Sub-section (3) thereof may be amended as suggested below, to require any person —

- (a) to produce before, and allow to be examined and kept by, an officer of the Commission generally or specially specified by the Commission in this behalf, such books, accounts or other documents including those relating to any trade practice or business organisation or any other connected activity in the custody or under the control of the person so required as may be specified or described in the requisition, the examination of which may be required for the purposes of this Act; and
- (b) to furnish to an officer so specified such information as respects the trade practice or business organisation or any other connected activity as may be required for the purposes of this Act or such other information as may be in his possession in relation to the trade carried on by any other person.

22.13 Powers to punish for contempt

There is at present no power with the Commission to punish for contempt of itself. This is a serious lacuna as all bodies having adjudicative functions must necessarily have these powers. This is essential not only to safeguard the proper working of the Commission but also to see that the proceedings before the Commission are conducted properly. We would, therefore, recommend that the Commission should be declared a Court of Record and it should have the power to punish for contempt. Sub-section (2) of section 12 may, therefore, be amended as follows :—

“(2) (a) The Commission shall be a Court of Record and shall have all the powers of such Court including the power to punish for contempt of itself.

(b) Any proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1860), and the Commission shall be deemed to be a Civil Court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.”

22.14 Power to grant injunctions

We are providing that a party can seek damages for the loss suffered by reason of any person indulging in any of the prohibited trade practices. It is possible and indeed it may happen in many cases that unless a party can be given relief immediately, he will suffer irreparable harm by the time the proceedings before the Commission are concluded. We have already

suggested that there should be a power to issue injunctions with the Commission. We recommend that the Commission should be authorised not only to issue permanent injunction but also to issue temporary and interim injunctions pending the completion of the inquiry. Of course, it will be open to the Commission to annul, modify or vary any interim order made by it if due cause is shown to the Commission. Accordingly, section 12 may be modified as under :—

“12. (1) The Commission may —

- (i) on an application of the Director-General of Trade Practices or any other persons; or
- (ii) on its own motion during the course of any inquiry into any monopolistic, restrictive or unfair trade practice under this Act ;

issue an injunction restraining a person or an undertaking from—

- (a) engaging in any conduct that constitutes or would constitute a contravention of any of the provisions of sections—(sections relating to monopolistic, restrictive and unfair trade practices);
 - (b) attempting to contravene any such provision;
 - (c) aiding, abetting in the contravention of any such provision;
 - (d) inducing or attempting to induce a person whether by threats, promises or otherwise, to contravene any such provision;
 - (e) being in any way, directly or indirectly and knowingly concerned in, or party to, the contravention by a person of any such provision; or
 - (f) conspiring with others to contravene any such provision.
- (2) Where, in the opinion of the Commission, it is desirable to do so, the Commission may grant an interim injunction pending determination of an application or inquiry under sub-section (1).
- (3) The Commission may rescind or vary an injunction granted under sub-section (1) or sub-section (2).”

22.15 Application of Commission's orders to a 'particular trader'

Sub-section (3) of section 13 of the Act provides, *inter alia*, that an order made by the Commission may be either general in its application or may be limited to any particular class of traders or a particular class of trade practice or a particular trade practice or a particular locality. A doubt has been expressed as to whether this will include an order in respect of a particular trader. As such, in order to remove the possibility of any such doubt, we suggest that the words 'or a particular trader' may be added after the words 'any particular class of traders' in the said sub-section.

22.16 Procedure of the Commission

Provisions relating to the powers of the Commission to regulate its procedure are at present contained in section 18 of the Act. In the cases relating to TELCO (47 Comp. Cases 520) and Hindustan Lever Limited (47 Comp. Cases 581), the Supreme Court had occasion to express views on the admissibility of evidence extraneous to the agreements on matters coming before the Commission. This has posed a problem as to whether the proceedings before the Commission should be governed by the technical rules of evidence as per the Indian Evidence Act. Considering that the proceedings before the Commission are of highly specialised nature, the technical rules of the Indian Evidence Act can only weaken the powers of the Commission to dispose of the matters satisfactorily. We would, therefore, suggest that the provisions of the Indian Evidence Act should not be applicable to the proceedings before the Commission. Analogous provisions exist in England in Rule 55 of the Restrictive Practices Court Rules, 1957, reading as follows :—

“While it appears to the Court, on the hearing or adjourned hearing of the application for directions or at the final hearing, that the Court would be assisted in determining any issue in the proceedings by the admission of evidence (whether oral or documentary), which would not otherwise be admissible under the law relating to evidence, the Court may make order allowing the admission of such an evidence.”

Similar provisions have also been proposed in section 31.8 of the Competition Bill, 1977, of Canada; sub-section 1.1 of this section provides as under :—

“.....the Board is not bound by any legal or technical rules of evidence in conducting a hearing and all proceedings before the Board shall be dealt with by the Board as informally and expeditiously as the circumstances and consideration of fairness will permit.”

We, therefore, recommend that a new sub-section (3) may be added at the end of the existing section 18 on the following lines :—

“(3) Notwithstanding anything contained in the Indian Evidence Act, in any inquiry before the Commission—

- (a) the proceedings shall be conducted with as little formality and technicality and with as much expedition as the requirements of this Act and a proper consideration of the matters before the Commission permit ; and
- (b) the Commission shall not be bound by any legal or technical rules of evidence.”

22.17 In line with our recommendation that the technical rules of evidence should not apply it is also necessary to empower the Commission to decide in each case a specific procedural requirement so as to best fulfil the objective of the Act. For that purpose, sections 18 and 66 be amended to empower the Commission to do the following :—

- (a) despite the general burden of proof (the burden in the case) being on any particular party to direct in each case to provide effectually and fully for the shifting of onus of proof (the evidentiary burden) on various issues or relevant facts necessary for deciding the issue or issues, be empowered to give opportunity for reasons to be recorded in writing to the party on whom the onus of providing any particular relevant fact rests, to adduce evidence by way of rebuttal; and
- (b) to provide, in addition to the costs in the proceeding following the result thereof except for the same being disallowed for reasons to be recorded in writing, the cost of proving any relevant fact, which is denied without sufficient cause, be borne or paid by any party, regardless of the ultimate decision of the proceeding, by the party so denying.

22.18 Powers to constitute single-member Benches

Sub-section (2) of section 16 of the Act provides that powers and functions of the Commission may be exercised or discharged by Benches formed by the Chairman of the Commission from among the members. Doubt have been expressed whether it is competent for the Chairman to constitute a single-member Bench for discharge of the powers and functions of the Commission under the Act. It is not possible to rule out occasions where the Commission may have to constitute more than one Bench and it may, therefore, become necessary to form single-member Benches. In order to remove any doubt about the competence and valid functioning of such Benches, it is desirable to provide specifically, by the addition of a new sub-section as sub-section (3) in section 16, to the effect that “the Chairman may constitute a Bench with one or more members for exercising the powers and discharging the functions of the Commission.”

22.19 Time within which action should be taken by the Central Government/Commission

Section 30 of the Act provides for time limits within which action is required to be taken by the Central Government and the Commission in respect of various matters specified therein. We have suggested elsewhere time limits within which certain additional matters will have to be referred by the Central Government to the Commission or disposed of by the

Central Government and the Commission. In the light of these recommendations, section 30 will have to be suitably amended to provide for the following matters :—

- (i) Notices, applications and proposals under sections 21, 22 and 23 of the Act and disputed questions relating to 'group', 'same management' and 'inter-connected undertakings' which are required to be compulsorily referred by the Central Government to the Commission, shall be so referred within a period of thirty days from the date of receipt of such notice, application or proposal or as the case may be of the communication raising the dispute provided that where further particulars in connection with such notice, application, proposal or the communication are called for by the Central Government, the said period of thirty days shall be computed from the date on which such further particulars are furnished to the Government.
- (ii) Where any notice, application, or proposal under Chapter III of the Act or any questions relating to the determination of 'group', 'same management' or 'inter-connected undertaking' is referred to the Commission for inquiry and passing of final orders, the Commission shall dispose of the matter within a period of ninety days from the date on which the reference is received by it, except where the Commission, for special reasons to be recorded by it in writing, is of the opinion that the matter cannot be decided by it within the said period of ninety days.
- (iii) Consequent on the transfer of the provisions contained in sections 108A to 108G of the Companies Act to the MRTP Act as sections 23-A onwards, it is necessary to provide that the Central Government shall communicate its decision in respect of such proposals within a period of sixty days from the date of receipt of such request, on the same lines as is now provided for under section 108E of the Companies Act.

22.20 Penalties for failure to register an undertaking

Section 48 provides for penalties for failure to register, without any reasonable excuse, an agreement or an undertaking which is subject to the registration under this Act. In the case of failure to register an agreement, the offence is punishable with fine which may extend to five thousand rupees and where the offence is a continuing one, with a further fine which may extend to five hundred rupees for every day of default. Where, however, the default relates to registration of an undertaking, the offence is punishable with a fine which may extend to one thousand rupees and where the offence is a continuing one, with a further fine which may extend to fifty rupees for every day of default. We have recommended in Chapter XXI that the obligation to register agreements under section 33 of the Act should be done away with. In view of this, sub-section (1) of section 48 is redundant and should be deleted. We are of the view that the punishment provided for failure to register an undertaking is not very stringent. In our view the failure to register an undertaking under section 26 of the Act is an equally, if not a more serious offence than the failure to register an agreement. We, therefore, recommend that the penalties for failure to register an undertaking should be increased to the level provided at present in sub-section (1) of this section.

22.21 There is no specific provision permitting the registration of an undertaking after the expiry of the stipulated period even on payment of a penalty for delayed compliance (as in the case of filing documents with the Registrar of Companies under the Companies Act on payment of additional fee). We feel that wherever there is a delay in registering an undertaking, within the time-limit stipulated in the Act, the parties concerned may be permitted to register such undertaking within such further time as may be stipulated in the notice to be issued by the Central Government on payment of a specified penalty not exceeding ten times the registration fee and as may be determined by the Central Government. This will be without prejudice to any other action that may be taken for contravention of the relevant provisions of the Act.

22.22 Penalties for failure to furnish information or for furnishing false information

Section 49 of the Act refers to offences in relation to failure or incorrect furnishing of information required under sections 42 and 43 of the Act. It also provides for punishment of persons who furnish false information or omit to state any material fact or wilfully alter,

suppress or destroy any document which is required to be so furnished. There is at present no power with the Commission to punish persons who fail to attend or produce books of accounts or other documents in response to the summons issued by the Commission, or who fails to comply, without reasonable excuse, with the requisition/orders of the Commission for production and examination of books of accounts or other documents. In order to make the enforcement of the provisions of the Act effective, we recommend that the penalties for the aforesaid offences should also be provided for in this Act. We, therefore, recommend that sub-section (1) of section 49 of the Act may be modified as under :—

“49. (1) If any person fails, without any reasonable excuse :—

- (i) to attend or to produce books of accounts or other information at a specified place and time in response to the summons or requisition issued by the Commission under section 12; or
- (ii) to furnish any information required under section 43 or to comply with any notice duly given to him under section 42;

he shall be punishable with imprisonment for a term which may extend to three months or with fine which may extend to two thousand rupees, or with both, and where the offence is a continuing one, with a further fine which may extend to one hundred rupees for every day, after the first, during which such failure continues.”

22.23 It may also be provided in section 49 that the burden of proving reasonable excuse will be on the person alleging such excuse. Sub-section (2) of section 49 will remain as at present.

22.24 Penalties for contravention of prohibited trade practices

Section 50 deals with penalties for offences in relation to orders made by the Commission under sections 13 and 37 (restrictive trade practices) or the orders made by the Central Government under section 31 (monopolistic trade practices). Section 51 relates to offences in regard to minimum resale price maintenance, provided for in sections 39 and 40 of the present Act. We have suggested earlier in this respect that the Commission should have powers to pass final orders in regard to monopolistic trade practices also. We have also suggested incorporation of new provisions in the Act relating to unfair trade practices. It has also been recommended by us that monopolistic, restrictive and unfair trade practices should be prohibited and some of them have been made punishable. In the light of these recommendations, we suggest that sections 50 and 51 may be substituted by the following single section :—

“50. If any person contravenes the provisions of sections—(sections relating to monopolistic trade practices, restrictive trade practices and unfair trade practices), or any order made thereunder, he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to twenty thousand rupees, or with both, and where the offence is a continuing one, with a further fine which may extend to one thousand rupees for every day, after the first, during which such contravention continues.”

22.25 Provision for recovery of damages

We have already suggested that there should be a provision in the Act for recovery of damages against any person or undertaking who is found to have indulged in any of the prohibited practices, in addition to his liability for being punished with fine and/or imprisonment. We, therefore, recommend that a new section on “Recovery of damages” should be incorporated on the following lines to effectuate the remedy for the aggrieved person :—

“Any person who suffers or has suffered loss or damage as a result of contravention of the provisions of sections—(sections relating to monopolistic trade practices, restrictive trade practices and unfair trade practices) of any order made thereunder, may sue for, and recover from the person who has contravened the provisions of the said sections, or has failed to comply with the order made thereunder, an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the Commission may allow, for costs.”

22.26 Class action

We further recommend that a provision for 'class action' for recovery of damages suffered may be made on the lines of the similar provisions contained in section 39.1 of the Competition Bill, 1977 (of Canada).

22.27 Jurisdiction of Commission to try offences

At present, the offences under the Act are triable by a Court of a Presidency Magistrate or by a Magistrate of the First Class. The cognizance for the offences is taken by the Court on a report in writing being made by a public servant, as defined in section 21 of the Indian Penal Code. We are of the view that it is more appropriate that the economic offences under the Act should be tried by the Commission which is an expert body and more suited for this purpose than the Magistrate. The Commission may, however, be given powers to transfer any of the proceedings to the Court of Presidency Magistrate or Magistrate of the First Class if it considers it expedient in the interest of justice and if the circumstances of any particular case so require. It may also be provided that the cognizance of the offences punishable under the Act shall be taken by the Commission only on a complaint made by the proposed Director-General of Trade Practices. We, therefore, recommend that sections 56 and 57 should be amended suitably to provide for the above matters.

22.28 Appeals under section 55

Under section 55 of the Act, an appeal lies to the Supreme Court on one or more of the grounds specified in section 100 Civil Procedure Code against the orders passed by the Central Government under Chapters III and IV, or, as the case may be, by the Commission, under sections 13 and 37 of the Act. We have suggested the incorporation of a new chapter on unfair trade practices and have also provided that any party aggrieved by any of the prohibited practices will be entitled to claim damages from the guilty party. We have suggested that these powers should be given to the Commission. According to our recommendations, certain specified category of cases under Chapter III of the Act and a few other matters will now be finally disposed of by the Commission. We have also suggested that the Commission may be given powers to try offences mentioned in Chapter VIII of the Act which are at present triable by the Magistrates. There is at present no provision for appeals against the above said orders of the Commission for the obvious reason that they are being proposed now for incorporation in the Act. It is, therefore, necessary that section 55 should be amended to provide for appeals against the said orders of the Commission as well as orders passed on trial of offences. We would however, recommend that appeal against the above said final orders of the Central Government or the Commission, as the case may be, shall be to the Supreme Court only, if the Supreme Court is satisfied that the case involves substantial question of law of general importance. Section 55 may be suitably amended.

22.29 This section should further be amended to provide, by way of an Explanation, that the proposed Director-General of Trade Practices would be an aggrieved person and would also be entitled to prefer an appeal to the Supreme Court in respect of the said order passed by the Commission.

22.30 Restriction on disclosure of information

Section 60 of the MRTP Act places certain restrictions on the disclosure of information relating to any undertaking which has been obtained by or on behalf of the MRTP Commission for the purposes of the Act. These restrictions do not, however, apply to the disclosure made of such information for purposes of any criminal proceedings which may be taken pursuant to the Act or otherwise or for the purposes of any report relating to such proceedings. These provisions are not adequate in their practical application, firstly, because they do not cover information that may come into the possession of the Commission by way of complaints or otherwise, and, secondly, because the provisions do not protect the information given to or obtained by or on behalf of the proposed Director-General of Trade Practices. These are lacunae which need to be removed. The absence of adequate and effective provisions prohibiting disclosure of confidential and secret information which might be received by the Commission or, as the case may be, by the proposed Director-General of Trade Practices, by way of complaints or otherwise, would not only deter the informants communicating such information about the prohibited trade practices—monopolistic, restrictive or unfair—but may

also inhibit the collection by the Commission and the proposed Director-General of Trade Practices of the required information to be able to decide about the initiation of proceedings under section 10 of the Act. This would be a serious handicap and the MRTP Commission as well as the Director-General of Trade Practices would be hampered in the discharge of duties imposed on them by the Act for remedying certain anti-social activities. The Committee, therefore, is of the view that, in wider public interest, it should be specifically provided in the Act that the complaints made or information supplied to the Commission or the proposed Director-General of Trade Practices shall not be liable to be disclosed, if the Commission is of the opinion that it is not expedient and in public interest to do so. We, therefore, recommend that section 60 of the Act should be amended as follows:—

“60 Restriction on Disclosure of information

- (1) No information relating to any undertaking, being an information which has been given to or obtained by or on behalf of the Commission or, as the case may be, the Director-General of Trade Practices, for the purposes of this Act shall, without previous permission in writing of the owner for the time being of the undertaking or the giver of the information, as the case may be, be disclosed otherwise than in compliance with or for the purpose of this Act.
- (2) Nothing contained in sub-section (1) shall apply to the disclosure of an information made for the purposes of any legal proceeding pursuant to this Act or of any criminal proceeding which may be taken, whether pursuant to this Act or otherwise, or for the purposes of any report relating to any such proceeding, unless the Commission is of the opinion that it is not expedient and in the public interest to make such disclosure.”

CHAPTER XXIII

SUMMARY OF RECOMMENDATIONS (MRTP ACT)

Chapter XIX : Concepts and Definitions under the MRTP ACT

23.1 The definitions of some of the economic concepts in the Act are not free from ambiguity. These expressions need to be redefined to make the intention clear and their working more effective. (Para 19.1)

23.2 As the scope of the Act is being enlarged to cover unfair trade practices, the title of the Act should be modified to read as "Monopolies and Trade Practices Act". (Para 19.2)

23.3 The definition of 'Commission' should accordingly be changed to read as "Monopolies and Trade Practices Commission". (Para 19.3)

23.4 Modern thinking on the test to determine dominance with reference to market share in respect of any goods or services favours a smaller percentage than one-third presently prescribed in the MRTP Act. Having regard to the vast size of our country, the level of industrial growth and the large number of entrepreneurial class available, the existing criterion of one-third share of market should be reduced to one-fourth for the purposes of determining dominance. (Para 19.4)

23.5 The concept of 'calendar year' as at present for determining dominance and other related issues is complex. The adoption of the 'lowest figure' of production etc. for this purpose is unsound. The share of market for the purposes of dominance should be determined with reference to 'average annual production made or services rendered' during the three calendar years immediately preceding the preceding calendar year in which "the question arises" rather than with reference to the year of the lowest production. (Para 19.5)

23.6 Reference to 'the number of workers employed' and 'price' as criteria for determining dominance should be deleted from Explanation III to section 2(d). (Para 19.6)

23.7 The collection, maintenance and publication of up-to-date and correct data of goods produced or of services rendered is an immediate necessity for effective implementation of the Act and the Government should make necessary arrangements in this regard. At the same time, to ensure expeditious disposal of cases under the Act, Explanation IV in section 2(d) should be modified to clarify that the data collected and published by an authority approved by the Central Government can form the basis for determination of dominance and for other purposes under the Act. (Para 19.7)

23.8 The definition of 'goods' in section 2(e) should be revised so as to harmonise it with the definition of this term in the Sale of Goods Act, with a view to including stocks and shares within its ambit. This is to ensure that the investment companies will also come within the purview of the Act and thus a major lacuna would be plugged. (Para 19.8)

23.9 The definition of 'group' in section 2(18A) of the Companies Act should be shifted to the MRTP Act with certain modifications as it has relevance to the purposes of this Act. The revised definition of this term has been suggested. (Paras 19.8—19.11)

23.10 The expressions 'inter-connected undertakings' and 'same management' should be re-defined on the lines suggested so as to remove obscurities and lacunae. (Paras 19.12—19.14)

23.11 Disputed questions relating to 'group', 'same management' and 'inter-connected undertakings' should be referred by the Central Government to the Commission within a

period of thirty days and the Commission shall pass final orders within a period of three months. Until the Commission finally decides the question, the concerned undertaking shall be deemed to be inter-connected for the purposes of the Act. (Para 19.15)

23.12 The definition of 'monopolistic trade practice' has to be combined with the provisions of section 32 and should be amplified as suggested. (Para 19.17)

23.13 In view of the Committee's recommendation for the total prohibition of monopolistic trade practices, the concept of 'monopolistic undertaking' will not be relevant and its definition in section 2(j) should be deleted. (Para 19.18)

23.14 The problem of restrictive trade practices needs to be tackled in more effective ways. The term 'restrictive trade practice' in section 2(o) should be re-defined as suggested. (Para 19.19)

23.15 The term 'scheme of finances' in section 2(q) should be amplified to include the sources of finance also. (Para 19.20)

23.16 The expression 'undertaking' in section 2(v) should be re-defined as suggested since the present definition has been the subject-matter of considerable controversy and litigation. (Paras 19.21—19.23)

23.17 There is no justification for exempting Government and Government controlled/ owned undertakings from the provisions relating to control and prohibition of monopolistic and restrictive trade practices (and the new provisions relating to unfair trade practices being suggested). The beneficiary of monopoly legislation is the consumer and it is only fair and reasonable that undertakings owned or controlled by the Government should be subject to same type of rigour and discipline as the private sector undertakings where the interests of the consumers are involved. Exemption to the Government companies will, however, continue from the applicability of Chapter III of the Act as there is no question of concentration of economic power in so far as the public sector is concerned. There will, however, be no exemption for an undertaking the management of which has been taken over by the Central Government in pursuance of any law because the basic characteristic of such an undertaking being in private sector is not changed by temporary takeover of the management by the Government. (Paras 19.24—19.27)

23.18 There is no justification for exempting the newspapers from the provisions of the MRTP Act. These provisions should continue to be applicable to newspapers as heretofore. (Paras 19.28—19.33)

Chapter XX : Concentration of Economic Power

23.19 No change in the criterion of Rs. 20 crores as value of assets for applicability of Chapter III of MRTP Act is considered necessary at present. (Para 20.4)

23.20 During the period from 1-6-1970 to 31-12-1977, in about 74% of the cases, approvals were granted by the Central Government. (Paras 20.8—20.12)

23.21 During the period from 1-6-1970 to 30-6-1978, about 92.6% of such applications were disposed of by the Central Government without reference to the Commission. (Paras 20.13—20.15)

23.22 There is no justifiable reason why the Central Government should not avail itself of the services of an impartial and expert body like the MRTP Commission in the disposal of applications dealing with matters falling pre-eminently within the latter's purview. The role of the Commission needs to be strengthened effectively. (Para 20.17)

23.23 Proposals under sections 21 and 22, (a) from dominant undertaking for manufacture of goods or provision of services in which it is dominant; or (b) involving capital outlay exceeding Rs. 5 crores; or (c) where objections have been received or there is more than one applicant, should be compulsorily referred by the Central Government to the Commission

(except under specified circumstances and for reasons to be recorded in writing) for inquiry as well as passing of final orders, instead of reporting back to Central Government as at present. The other cases can be referred to the Commission at the discretion of the Central Government as at present. However, once a reference has been made to the Commission, it should have power to pass final orders. (Paras 20.18—20.22)

23.24 Section 30 of MRTP Act should be amended to provide that reference of the disputed questions referred to in para 23.11 and the proposals referred to in para 23.23 will be made by Central Government within thirty days and that the Commission shall pass final orders on the proposals referred to it within a period of ninety days from the date of receipt of the reference by the Commission. (Para 20.19)

23.25 Where a scheme of merger or amalgamation of an undertaking covered by section 20 of MRTP Act is approved by the Central Government in terms of section 396 of the Companies Act in the national public interest, no further approval should be required under section 23(2) of the MRTP Act. (Para 20.23)

23.26 Any proposal for acquisition under section 23(4) where (a) it results in the control of 33½ per cent or more of voting power; or (b) the cost of acquisition exceeds Rs. 3 crores; or (c) it is likely to result in the creation of a dominant undertaking, should be compulsorily referred to the Commission for final disposal. (Para 20.24)

23.27 The power to initiate action under section 27 for division of an undertaking vests in the Central Government. This power has hardly been used. Power to order division of inter-connected undertakings under section 27 is a matter of public policy for the Government to decide and is dependent on the circumstances of each case. No legal impediment under the Act comes in the way of Central Government to proceed under section 27 if circumstances so justify in the public interest. While it is appropriate that the power to initiate action under section 27 should continue to remain with the Central Government, once a reference has been made to the Commission, all further action should be taken by the Commission, including the final decision as to whether the undertaking should be divided or not and consequential arrangements. (Para 20.25—20.27)

23.28 Substantial expansion in the value of assets of an undertaking brought about by replacement or modernisation of plant and machinery without resulting in expansion of licensed/approved capacity by 25 per cent or more, or substantial expansion effected for fuller utilisation of existing licensed approved capacity by installation of balancing equipment, as approved by notified competent authority, should not require approval of the Central Government under section 21. However, the person or authority proposing to effect such expansion should be required to furnish the prescribed details of such expansion to Central Government. (Para 20.29)

23.29 Establishment of a new inter-connected undertaking by dominant undertaking for the manufacture of the same type of goods or provision of services in which it is dominant should require prior approval of the Central Government under section 22 of the Act. (Para 20.30)

23.30 It should be clarified that all proposals for diversification, whether at the same place or at a different place, amount to establishment of a new undertaking within the ambit of section 22. However, proposals for manufacture of 'new articles' within the existing licensed capacity or by utilisation of waste-products/bye-products with the installation of balancing equipment, as approved by notified competent authority, should be exempted. (Para 20.31)

23.31 Section 23(4) may be modified to illustrate the expression 'or otherwise' by giving some specific instances like 'lease', 'licence', 'mortgage'. It should also be clarified that 'acquisition' would include purchase of shares, which, together with the shares, if any, already held, carry 25 per cent or more of the voting power at the general meeting of the undertaking proposed to be acquired. This sub-section should further be modified to incorporate enabling provisions empowering the Commission/Central Government to pass final orders on the proposals for acquisition. (Para 20.32)

23.32 Sub-section (8) of section 23 should be amended to clarify that it seeks to cover proposals for acquisition of undertakings, to which Part A of Chapter III of the Act applies, by undertakings not covered by the MRTP Act. (Para 20.33)

23.33 The provisions contained in sections 108A to 108H of the Companies Act should be transferred to the MRTP Act. (Para 20.34)

23.34 The provisions of sections 108A to 108G should not apply to transfer of shares from one constituent of the group to another constituent of the same group as it does not lead to any further concentration of economic power. It should, however, be provided that an intimation will be given to the Central Government within two months of effecting the transfer. (Para 20.35)

23.35 The onus of giving notice under section 21, or of making an application under section 23, or for getting registration under section 26 should be on the owner of the undertaking concerned. (Para 20.37)

23.36 The need for increase in production of goods, particularly those not being produced in the country or which are in short supply, should be specifically spelt out by adding clause (h) to section 28. (Para 20.38)

23.37 Section 29 should be amended to specifically provide that the Commission shall give an opportunity of being heard to all interested persons before passing any order in respect of matters which are referred to it for final disposal. (Para 20.39)

Chapter XXI : Monopolistic, Restrictive and Unfair Trade Practices

23.38 Consumer protection legislation is lacking in the existing Act, as there is no protection of consumers against false or misleading advertisements or such other unfair trade practices. There is now greater recognition that the consumers need to be protected against such practices which are resorted to by the trade and industry to mislead and dupe the customers. The Committee has, therefore, proposed to specify certain unfair practices and prohibit them altogether. The Act will henceforward deal not only with monopolistic and restrictive trade practices but also with unfair trade practices. (Paras 21.12—21.19)

23.39 Section 10(b) empowers the Commission to initiate *suo moto* inquiries into monopolistic trade practices but there is no provision for follow-up action in section 31. Similarly, it has no power to inquire into and pass final orders on any restrictive trade practice that may come to its notice during the course of inquiry into monopolistic trade practices under section 37. This affects the functioning of the Commission. (Paras 21.2—21.7)

23.40 Consequent on the revised definition of 'monopolistic trade practices' and the Committee's recommendation to totally prohibit such practices, section 32 will become redundant and should be deleted. (Para 21.8)

23.41 All monopolistic trade practices should be prohibited. Some of the restrictive trade practices which are destructive of competition should also be prohibited subject to certain general defences. The other restrictive trade practices should be prohibited subject to certain specific defences in addition to the general defences. (Paras 21.9—21.11)

23.42 The Act should be amended to specifically empower the Commission to inquire into and pass appropriate orders in respect of such practices whether the relevant agreement was determined before or after the commencement of the inquiry proceedings before the Commission. (Para 21.21)

23.43 Consequential amendments to section 10, 31 and 37 of the Act have been suggested. (Para 21.23)

23.44 Collective agreements/arrangements and restrictive trade practices arising out of collective action relating to 'collective discrimination', 'boycott', 'collective bidding' and 're-sale

price maintenance' should be prohibited subject to availability of certain general defences arising out of (i) defence requirements or security of the State, (ii) compliance with any of the conditions stipulated by the Government order, and (iii) any express authorisation of, or under any law made by, Central Government. (Paras 21.25—21.27)

23.45 Bilateral agreements and restrictive trade practices relating to 'minimum re-sale price maintenance' and 'price discrimination' should also be prohibited subject only to the specified general defences. The other bilateral agreements and restrictive trade practices relating to —

- (a) 'tie-up sales',
- (b) 'exclusive dealings'
- (c) 'production sharing', and
- (d) 'conditional know-how'

should be prohibited subject to the availability of one or more of the general defences and also certain other defences enumerated in clauses (a) to (h) of section 38 of the Act.

(Paras 21.28 and 21.29)

23.46 All prohibited practices whether monopolistic, restrictive or unfair should be made actionable whether such a practice has been incorporated in the form of an agreement or not. (Para 21.29)

23.47 The requirement of compulsory registration of agreements relating to restrictive trade practices should be done away with as this requirement has only added to paper work. Out of 21,000 agreements registered, only 106 were brought before the Commission. It is felt that there are enough sources to proceed against prohibited practices without requiring all trade practice agreements to be registered. Section 33 should be deleted and suitable consequential amendments in sections 34, 35 and 36 of the Act should also be made.

(Para 21.30)

23.48 In view of the recommended prohibition of the practice of maintaining minimum re-sale prices (subject only to general defences), it would be anomalous to retain the provisions of section 41 empowering the Commission to exempt any class of goods from the operation of these provisions. This section should, therefore, be deleted. (Para 21.31)

23.49 Unfair trade practices like —

- (a) 'misleading advertisements and false representations',
- (b) 'bargain sales',
- (c) 'bait and switch selling',
- (d) 'offering of gifts or prizes with intention of not providing them',
- (e) 'conducting promotional contests',
- (f) 'supplying goods that do not comply with safety standards', and
- (g) 'hoarding and destruction of goods'

should be prohibited subject to the specific exceptions indicated in respect of each. They should also be made punishable as an offence and any person guilty of contravention should be prosecuted before the Commission. (Paras 21.32 and 21.33)

23.50 The Act does not now contain any provision for recovery of damages for any loss suffered. It is only logical and equitable that a person who is affected by any prohibited practice should have a remedy to recover damages and compensation from the guilty party. It should, therefore, be provided that any person, authority, Central or State Government who has suffered loss or damage as a result of conduct of another person having indulged in any

of the prohibited practices, viz. monopolistic trade practices, restrictive trade practices and unfair trade practices, will be entitled to recover the amount of loss or damage, including costs, suffered by him from the guilty party. (Paras 21.34—21.41)

23.51 Procedure for recovery of damages through 'class action' like a representative action should also be provided. Not to do so would be to deny them the benefit of consumer protection legislation. Such a provision is necessary to safeguard the interest of a large number of persons who may have suffered damages but being poor are not able to bring individual proceedings against the delinquent. (Para 21.42)

23.52 The Commission should be vested with power to grant interim injunction to suit the needs of each case. (Para 21.43)

23.53 In any proceedings for recovery of damages any conviction of a person previously for an offence for having indulged in any of the prohibited practices, should, in the absence of proof to the contrary, be a proof that the person against whom the action is brought had engaged in the prohibited practices. (Para 21.45)

23.54 Any person may, on his own volition, apply for, and seek clearance from, the Commission in regard to any trade practice on the ground that such a practice falls under one or more of the exceptions or defence provided for in the Act. If the Commission does not give its decision within a period of three months, the party may proceed with the practice but his liability for civil action in damages would have arisen from the date the practice was indulged in if ultimately the Commission refuses clearance. But the criminal liability would accrue only from the date of knowledge of the Commission's final order and if the party continues to indulge in that particular practice despite the Commission's decision. (Para 21.46)

23.55 All matters relating to recovery of damages or injunctions should be triable before the Commission and not the Magistrate as at present. Any person indulging in any of the prohibited practices for which no specific defence has been provided for, will incur not only civil liability but also criminal liability. Criminal proceedings for any violation thereof should be also brought before the Commission. The Chairman of the Commission or any Member of the Commission, so designated by the Chairman, may be authorised by law to hear and dispose of such matters by following the procedure of a warrant case under the Code of Criminal Procedure, 1973. Such a vesting of power in the Commission is considered necessary at least in the early stages of the development of this legislation, and in order to avoid conflict of views between the different Courts. (Paras 21.47 and 21.48)

Chapter XXII : Administrative Machinery under the Monopolies and Restrictive Trade Practices Act

23.56 Where the person appointed to the office of Chairman of the Commission is a sitting Judge of a High Court, he should enjoy the same rank, status, pay and allowances and privileges as of the Chief Justice of a High Court since appeal from the Commission's order lies only to the Supreme Court. (Para 22.4)

23.57 A provision should also be made that where a vacancy in the office of a Chairman arises due to resignation, leave or otherwise, the senior most Member of the Commission may be appointed by the Government to act temporarily as its Chairman. (Para 22.5)

23.58 Provision should be made also for vacation of the office of a Chairman due to resignation or removal as now exists in the case of a Member. (Para 22.6)

23.59 In view of the enlarged functions envisaged for the Commission and the role the Registrar of Restrictive Trade Agreements and the Director of Investigation will have to play in future, the two offices should be combined into one and the post designated as that of Director-General of Trade Practices. (Paras 22.7 and 22.9)

23.60 Section 8 of the Act may be amended to provide for the appointment of the Director General of Trade Practices and the Commission should be empowered to appoint members of its own staff and determine their conditions of service subject to the rules made by the Central Government. (Para 22.8)

23.61 The proposed Director-General of Trade Practices should be vested with powers to search, seize and impound documents of evidentiary value for the purposes of investigation. The proposed Director General should also have powers to initiate proceedings, or move for recovery of damages on behalf of the Central and State Governments and also to be joined as a party in the proceedings before the Commission. (Paras 22.10 and 22.11).

23.62 Section 12 dealing with the powers of the Commission should be amended to empower the Commission to provide for production before and examination by an officer of the Commission books of account and other documents and other information relating to any trade practice or business organisation. The Commission should also be made a Court of Record and be vested with powers to punish for contempt of itself. The Commission should also be empowered to issue injunction, interim or final. (Paras 22.12 and 22.14).

23.63 Section 13(3) of the Act may be modified to clarify that an order made by the Commission under the section would cover any particular trader also instead of any particular class of trade practice or a particular trade practice only as at present. (Para 22.15)

23.64 Section 18 of the Act has to be amended to provide that the technical rules of the Indian Evidence Act, should not be applicable to the proceedings before the Commission, because such rules only weaken the powers of the Commission to deal with the matters under the Act effectively. The proceedings before the Commission should be conducted with as little formality and technicality and with as much expedition as the requirement of the Act and a proper consideration of the matters for the Commission permit. (Paras 22.16 and 22.17).

23.65 In order to remove any ambiguity, section 16 of the Act has to be amended to clarify that the Chairman may constitute a Bench with one or more Members for exercising the powers and discharging the functions of the Commission. (Para 22.18).

23.66 Section 30 of the Act should be amended to include a reference to the several additional matters suggested for disposal by the Central Government and by the Commission and to which also the time limits in the section would be applicable. (Para 22.19).

23.67 The penalty for failure to register an undertaking provided for in section 48 should be made more stringent. Provision should also be made for permitting late registration of the undertakings on payment of a specified penalty not exceeding ten times the registration fee. (Paras 22.20 and 22.21).

23.68 Section 49 of the Act may be amended to provide for penalties for persons who fail to attend or produce the books of account or other documents in response to the summons issued by the Commission. The burden of proving reasonable excuse in such cases would be on the person alleging such excuse. (Paras 22.22 and 22.23).

23.69 Sections 50 and 51 may be substituted by a new single section 50 which will provide for punishment of persons contravening the provisions of sections relating to the monopolistic, restrictive and unfair trade practices, before the Commission. (Para 22.24).

23.70 A new provision for recovery of damages by persons who have suffered loss should be made in the Act on the lines suggested. The amount of damage recoverable should be equal to the loss or damage proved to have been suffered and include an amount for costs. The forum for recovery of damages will be the Commission. (Para 22.25).

23.71 Provision should be made for recovery of damages through 'class action' also, before the Commission. (Para 22.26).

23.72 The jurisdiction to try for offences under the Act should vest with the Commission instead of the Magistrate as at present. The Commission may, however, be given powers to transfer any of the proceedings to the Court of a Presidency Magistrate or Metropolitan Magistrate of the First Class if it considers expedient to do so. (Para 22.27).

23.73 The appeals against the final orders of the Central Government and the Commission should lie to Supreme Court only if it involves a substantial question of law of general public importance. (Para 22.28).

23.74 Absence of adequate and effective provisions prohibiting disclosure of confidential and secret information which might be received by the Commission or the Director-General of Trade Practices by way of complaints or otherwise would not only deter the informants from communicating such vital information about the prevalence of the prohibited trade practices, but may also inhibit the collection by the Commission and the DGTP of such information for purposes of proceedings under section 10. Specific provision in the Act to the effect that complaints made or information supplied to the Commission or to the DGTP should not be liable to be disclosed if the Commission opines that it is not expedient and in the public interest to do so has therefore been recommended. (Para 22.30)

Sd/- RAJINDAR SACHAR

Sd/- S. RANGANATHAN

Sd/- R. D. GATTANI*

Sd/- BEDABRATA BARUA

Sd/- F.S. NARIMAN

Sd/- SHANTANU N. DESAI

Sd/- M. SRINIVASA RAO

Sd/- D.C. KOTHARI

Sd/- KESHUB MAHINDRA

Sd/- K.P. TRIPATHI*

Sd/- K.K. RAY†

Sd/- M.K. KUKREJA

Secretary

New Delhi,
Dated the 29th August, 1978.

* Subject to a Note on some points

† Subject to Note of Dissent on some points

Note by Shri R.D. Gattani, M.P.

I regret it has not been possible for me to agree with the recommendations of the Committee in regard to inter-corporate investments and loans.

According to one of the Directive Principles embodied in our Constitution, "the State shall, in particular, direct its policy towards securing that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment". In spite of this clear directive principle, the hard fact we are facing is that the number of the persons living below poverty line has been constantly increasing in our country; that rich have been growing richer and the poor-poorer for the last thirty year. One of the main reasons for this is that there is a galloping increase in the wealth of big industrialists. The figures published in the Hindustan Times, Delhi (dated the 8th July, 1978: page 6: columns 6 and 7) clearly indicate that during a period of three years (from 1972 to 1975) there has been a tremendous increase in the wealth of the first twenty business houses of this country. I need not give those figures here. There cannot be a heap without a hole. Surely this increase has been to the detriment of general masses. It cannot be denied that the greater the number of the companies a business house controls the greater are the chances of concentration of wealth more and more in the control of that business house. And inter-corporate investment is the main instrument for getting control over the investee company which ultimately leads to monopolisation.

Even though realising that inter-corporate investment is an important instrument of gaining corporate control, the Committee, it appears, has based its Report upon the assumption that inter-corporate investment is not only useful but favourable as well for the growth of economy, and, therefore, it did not take into consideration the other side of the problem, namely, the need of banning it altogether.

3. Not only this, the Committee has treated the problem of the inter-corporate investment and inter-corporate loans on the same level and has suggested the drafting of one section only instead of the existing sections 370 and 372 of the Companies Act, 1956, which deal with inter-corporate loans and investments separately.

4. I am of the considered view that if we have to work for the letters and spirit of Article 39(c) of our Constitution referred to above, if we have to stop the galloping concentration of wealth in the hands of a few industrialists, if we want to make our country really happy and if we are really serious in getting the disparity of income between the various classes of our country minimised, there is no option to us but to ban inter-corporate investments altogether. It might be said that investment by one of the existing big business houses for the purpose of promoting a new company or taking over a sick unit would result in the growth of the economy of the country and, therefore, should be allowed. I am of the view that the very purpose of investment by an investing company into another company—existing or new—being gaining control over that company, it results in the growth of the economy of the big business house concerned but certainly not of the general masses of the country. This is what we have been witnessing for the last twenty years.

5. A question was raised as to what should a business house do with the profits earned by it if it is not allowed to make investment in another company or to promote a new company. My answer is that in the first place the business house should not have managed in a way so as to have such a huge profit. In the second place it should utilise its profits in ameliorating the conditions of its working class. There is hardly any business house the workers of which are satisfied with it—the only motto of the business house being to earn as much profit as possible. It is indifferent in regard to improving the conditions of its toiling labourers. If a business house after improving the condition of its labourers and maintaining price level satisfactorily still has money to be invested, it may invest the same in public trust units or such other undertakings.

It is said that if inter-corporate investment is disallowed, there will be no 'incentive' left with an industrialist to increase the growth of the economy of the country. In saying so, it is

presumed that the capital of an industrialist is the only factor responsible for the growth of economy. Suffice it to say that capital, now-a-days in this country as well, has lost its importance which it had a few decades ago. Alone industrialist with any amount of capital can do nothing if he has no cooperation of the working class. As a matter of fact, the proper functioning of a factory now-a-days depends largely upon the labour force or the working class. Therefore, the question of 'incentive' loses its significance. Moreover with the change of values of life the society will pay more and more regard to the cult of body labour and will detract its attention from money.

6. I am, therefore, for a total ban of inter corporate investment, even if it be for promoting a new company or taking over a sick unit. Of course, this contention of mine will not apply to

- (a) any government company;
- (b) any banking company; and
- (c) any public financial institution.

7. Coming to the question of inter-corporate loans, I am of the view that a company may

- “(a) make a loan; or
- (b) give any guarantee or provide any security in connection with a loan made by any other person to, or to any other person by, any body corporate but the making of such loan, the giving of such guarantee or the provision of such security”.

should be previously authorised by a special resolution of the lending company and that the aggregate of the loans made to all bodies corporate shall not exceed 10 per cent of the free reserves.

8. Of course, what has been stated above regarding the grant of loan will not apply to

- (a) any Government company;
- (b) any banking company or private company;
- (c) any public financial institution; and
- (d) any company whose only object and activity is financing of industrial enterprises.

Furthermore, a company which is in arrear of payment of income-tax or which is defaulter in making any statutory financial obligation should be held disqualified for granting any loan to any other company.

Sd/- R.D. GATTANI

New Delhi,
Dated the 29th August, 1978.

Note of Shri K.P. Tripathi

After the amendment of the Constitution of the country making socialism as the goal, it is necessary to recast the role for the corporate sector. Unfortunately, this has not been done excepting asking it to undertake some social responsibilities of setting up a school here or a well there. To my mind, it is necessary to integrate the corporate sector with the new social purpose.

I The biggest social purpose before a company is to provide goods at cheapest possible cost. At present there is no profit ceiling with the result that companies which started with a couple of lakhs as capital a decade ago, now own crores of rupees. At present the only sectors which are liable to profit control are the following:—

- (1) Agriculture,
- (2) Public Sector industry,
- (3) Essential commodities for which Government goes on to fix prices.

The rest of the economy is completely free to profiteering, and when Government steps in in certain cases to control, it is too late. I, therefore, hold that there should be profit ceiling on the basis of invested capital or share capital, and the ceiling may also take into account the bank rate so that the profit is calculated at so many points above the bank rate. Until this is done, industrialists will continue to seek most profitable sectors to migrate to which will not be in the national interest. Some may think it is incapable of implementation. Under socialist concept, I do not think so.

As regards implementation it is easy. The legislation should provide for confiscation above the profit ceiling so that without any extra expenditure the Income-tax Department can syphon it off. It will be an in-built mechanism, for the industrialist will prefer to give the relief to the consumer rather than tax to the Government. The question of chemical industries with early obsolescence and need for modernisation is raised against this. Higher rate of depreciation might be given to chemical industries.

II. The Constitution has been changed to give the worker's right to participate in the management. I am glad that the Committee has decided that the workers be given right to participate in management board. They have, however, omitted to decide what percentage of the Board should be constituted by workers' representatives. The Committee has referred the matter to the Government by saying that the Government may decide after consultation with the workers and employers organisations. This is throwing the subject open for wide discussion. Workers and employers organisations are bound to take up rigid positions in which solution of this problem would become more difficult. I feel that it would have been better if the Committee had indicated the percentage. There were three suggestions made in the Committee:

- (1) that one or two workers directors should be appointed as a symbolical gesture;
- (2) one-third of the Board should consist of workers directors;
- (3) fifty per cent of the Board should consist of workers directors.

The aim of workers participation is to saddle them with the responsibility of higher productivity, and profit and loss. This responsibility will be better discharged by workers once they are in the Board. So the representation should be adequate to make them responsible and not symbolic. If it is symbolic, it will miss the purpose. In other countries, where they have gone in for one-third representation of the workers in the Board, they have also decided that the balance one-third will be selected jointly by the workers and the shareholders' representatives. This is so done to make the workers responsible, and that they may not feel being at the receiving end. In my view, the Government should immediately decide to accept the view mentioned at (3) or (2) above. The Committee has recommend that the nomination should be by workers

only. I cannot agree that the unions should not be given the right to nominate candidates just like any other workers. Unions are after all the representatives of the workers and, in my view, they should have also the right to nominate the candidates for election along with other workers. In my view, trust begets trust. When the industry is going to make the workers partners the approach should be one of trust. Permitting the unions to nominate candidates for election as worker director will lead to smoother and better relations between the management and the workers.

III. As regards the social responsibilities of the corporate sector, the biggest hurdle has been the attitude of the management generated by lack of social responsibility for protection of consumers on the one hand and protection of workers on the other. The higher the profits the higher the commissions. This principle has led to double exploitation of workers on the one hand and consumers on the other. In the closed economy of India, there is hardly any competition because there are no imports and production of every commodity is in short supply. If there is no continuous shortage, temporary shortages are created to push up the profits. I have already mentioned earlier about the necessity of profit ceiling.

I am glad that Bhoothalingam Committee has pointed out that commission is a hangover of managing agency days and now when we are professionalising the management, there should be no necessity for commission. If incentive is necessary, it should be given by way of bonus as is given to workers at the same rate. Once the commission is out of way the management will have no vested interest in exploiting the workers. In my view, a ratio of 1 : 10 (including salary and all kinds of perks) between wages and salaries of workers and top managerial personnel as take home pay in the company should be rigidly enforced to bring about equity in remuneration and advance social justice. This is for now; in future the ratio shall further reduce as has happened in developed countries.

IV. The racket of inter-corporate investment has led to widespread sickness in the industry for the sake of building industrial empire. I feel that the inter-corporate investment should be banned. But question is raised that in the interest of the growth of the economy, it will be better to permit investment rather than allow the funds to lie idle. There are very few companies which have really surplus capital if the liabilities are offset. Today with five to ten per cent share capital the industries are run with the support of the financial institutions and banks. It is, therefore, necessary that diversion of funds may be prevented. I have, however, agreed to the following investments of surplus funds which should be calculated on the basis of free reserves minus liabilities:

- (1) for new industry
- (2) for modernisation and diversification
- (3) for taking over the sick units when Government wants
- (4) for taking over non-sick units when Government wants and permits.

Apart from this diversion of funds by way of inter-corporate investment shall be prohibited.

V. The Monopolies and Restrictive Trade Practices Commission lays down no ceiling over assets of individual monopoly houses. This lacuna has permitted the monopoly houses to double their assets in less than a decade. The Government seems to have no direction in the matter as to whether it wants the monopoly houses to expand or not. The only guideline is that they should be permitted in backward and scarce technology areas. In practice, it has not been possible to adhere to this guideline. The result has been phenomenal increase in the assets of the monopoly houses. With every announcement of increase in assets of monopoly houses, there is strong public reaction. Public demands a halt in the expansion of assets of monopoly houses. The Government permits their expansion for the growth of the national economy. This process is bound to come into frontal conflict. I have been told that the monopoly houses do not work at that stage for personal gain because taxes take away all of their gains. Why do they then go in for new industries? It is said that it is for satisfying entrepreneurial fever and national purpose. If it be so, then they would go in for new enterprises even though they are asked to shed a corresponding amount of industrial investment. So I suggest that (1) a ceiling may be laid beyond which individual monopoly house shall not expand; (2) whenever

the monopoly house wants to undertake new enterprise, it should be permitted but asked to shed corresponding amount of its existing industrial or commercial investment so that the necessity for national growth is maintained, and at the same time, the individual monopoly house is prevented from expanding beyond the ceiling so laid. This process will not be difficult because today most of the industries are financed by financial institutions. The Government has merely to ask these institutions to convert their investment into share capital, and the public investment becomes more than that of the individual entrepreneur. Once the unit is taken over by this process, it will be run by the Government or handed over to a new entrepreneur who owns assets below the monopoly ceiling.

Sd/-
(K.P. TRIPATHI)

New Delhi,
the 29th August, 1978.

Note of dissent by Shri K. K. Ray

Although I am in agreement with a large part of the Report which I have signed, I am not able to reconcile myself with some of the views and recommendations. I have also felt that there are certain issues of great public interest and public importance which require to be dealt with separately. I am, therefore, constrained to give a separate note of dissent but in doing so, I have confined myself to only a few essential points. To the views and recommendations of the Committee from which I differ, I have given the most anxious consideration which my learned colleagues on the Committee deserve but I felt that I must explain my differences of opinion. My obligation as a Member of the Committee also prompts me to express my views on matters which are clearly within the terms of reference given to us. In order to facilitate reference to the main Report, I propose to put forth my views of disagreement in the order in which the subject matter of the Report is or should have been dealt with in the Report. I have also tried to be as brief as possible.

Chapter III: Concepts and Definitions

Although in the drafting of definition, individual's own choice of words plays an important role and as long as the intention is made clear, a mere difference in the choice of words does not really matter, it does happen that the definition of certain terms and concepts made in a broad way defeats the legislative intent otherwise expressed in the substantive provisions of the statute. In the Report an attempt has been made to redefine an '*investment company*' and it has been stated that the idea is to allow the continuance of present exemption enjoyed by investment company in respect of inter-corporate investments only when such companies are genuine investment companies. I am afraid, the way this term has been defined would not achieve our real purpose. It is not, for example, enough to provide that investment companies should be public limited companies. The legal distinction between a private company and a public company is not really that significant when the public limited company is formed by a minimum of seven or more members all belonging to a family business house or a group; for in such a case a public limited investment company is public as per its certificate of incorporation but has otherwise all its moorings in the group whose objective is to spread its domain over a large number of other companies via inter-corporate investments. I would, therefore, suggest that a minimum of hundred members should be prescribed for any investment company. Further, if the intention is to extend the benefit of exemption under section 372 to a genuine investment company, that is a company which is genuinely interested in deriving its income from investments and is not interested in gaining corporate control, there is no reason why such a company should still be clothed with the right of exercising voting powers in respect of the shares held by it in other companies. The limit of ten per cent which has been prescribed for an investment company, in so far as its investment in the other company is concerned, is not a sufficient guarantee against extension of corporate control. This is because in so many companies, where the shareholding is distributed, a shareholding of ten per cent is enough to exercise substantial control.

It is quite possible that the present holding with voting rights still attached to such holding will defeat the objective of delinking investment companies from group control. In many business groups in India there are investment companies numbering from anything between ten to thirty which can join together to hold any substantial proportion of the share capital of a company which is necessary for exercising full control. In case, voting rights are still to continue, I would suggest that the percentage allowed by the revised provisions of section 372 should be brought down to five. In fact, the definition of an investment company in the Canadian Law and the Australian (State) Companies Act, 1961, is much stricter. The argument that investment companies will henceforth be covered by the definition of '*undertaking*' in the MRTTP Act is not valid in so far as our objective to prevent concentration of economic power is concerned. It can at best take care of the companies which are already registered under the MRTTP Act. Further, our intention being only to see that in future investment companies are the genuine ones, it is necessary to incorporate one other essential ingredient in the definition, namely, that an investment company should be compulsorily listed with the stock exchange. In the interest of corporate growth and in the light of the fact that the capital market in India is not

fully developed, I would rather prefer complete exemption to an investment company from inter-corporate investments so long as the shares held by them in other bodies corporate do not have voting rights attached to them, the other conditions suggested by me remaining the same.

The definition of '*professional manager*' is not only directly linked with our recommendations relating to professionalisation of management but has important implications in so far as the recommendation of the Committee calls for dispensing with Government approval of managerial appointment on the ground that the company intends to appoint a professional manager. What constitutes profession is well understood. A professional manager is really an individual who is or is entitled to be a member of the recognised professional body or institution, exercising supervisory jurisdiction over its members. He may also be a person who has obtained special training, after his graduation in any institution which imparts the necessary knowledge, skill and expertise in the management sciences like the Indian Institutes of Management. Recognising certain academic qualifications, however important these qualifications may be, is no assurance that the possessor of the qualifications is capable of performing the skills of a profession nor would he be subjected to disciplinary action by a recognised body for breach of any code of ethics which that body may prescribe for its members. This safeguard is a real necessity if the Government is to leave the question of managerial remuneration to a self-regulated system to be operated by the companies themselves. In my view, therefore, the definition of '*professional manager*' should not include any post-graduate degree, as suggested in clause (iv) of the definition in this Chapter in the Report.

While dealing with concepts and definition, opportunity should be taken to review the existing concepts and streamline them for the purpose of uniformity, simplification and avoiding the application of different criteria in similar circumstances. At present, section 4A lists out certain financial institutions as given in the *definition of financial institution* and empowers the Central Government to specify some other financial institutions as public financial institutions provided they are established or constituted by or under any Central Act or not less than fifty-one per cent of the paid-up share capital of such institutions is held or controlled by the Central Government. Section 81, in addition, empowers the Central Government to specify certain institutions which can be issued shares by way of conversion of loan and debenture without attracting section 81. This empowers the Central Government to specify institutions other than those covered by section 4A for the purpose of the exemption visualised in sub section (3) (proviso) of section 81. Section 224A seems to expand the definition of public financial institution by including any financial or other institutions established by any provincial or State Act. In addition, this section also includes Government companies, the Central or State Governments and the nationalised banks and insurance companies, the idea obviously being to cover all those bodies where the funds have been contributed by the public exchequer. This idea appears to have been further extended in section 619B by including not only the Central and State Governments and Government companies directly but also by covering all corporations which can be said to be owned or controlled by the Central or State Governments. It would also appear from an examination of the provisions of sections 81, 224A and 619B that the underlying objective is to bring within the ambit of the law all organisations and bodies owned and controlled by the Central or State Government so that the question of exemption or regulation can be decided on the consideration of the involvement of public money. While, therefore, reviewing the existing concepts and definitions, it was necessary, in my opinion, that the concepts underlying sections 4A, 81, 224A and 619B should have been combined and a definition of financial institution or public corporation should have been incorporated in the Act. This can be achieved by adding the expressions 'State Act' in clause (i) and 'State Government' in clause (ii) of the proviso to section 4A (2). It would not only be logical and consistent with the legislative thinking already evident in the existing Act, as amended from time to time, with the avowed object of safeguarding both the interests of the investor and the public (referred to in the terms of reference), but it would also appear to be of great significance in the matter of administration of the MRTTP Act. The latter Act adopts the definitions and concepts—not otherwise defined by it—as they are defined in the Companies Act. The limited concept of public financial institution in section 4A, when adopted in the MRTTP Act, as at present limits also automatically the power of the Central Government to identify undertakings giving rise to concentration of economic power. This is because the more limited we make the definition of financial institutions, the less is the number of inter-connected undertakings which can be legally said to be registerable under the MRTTP Act.

Chapter V: Management Structure and Professionalisation of Management :

The Committee had been specifically requested to consider and report on the constitution of the Board of Directors with special reference to the protection of the interests of the shareholders who are in a minority. Although the observation made in para 5.8 to the effect that it is difficult to identify in actual practice what constitutes a minority is largely true, I do not agree that the Committee should, while considering the question of representation of minority on the Board, conclude with a note of insoluble difficulty on this ground, as has been done, and not consider the feasibility of introducing certain non-legislative measures to ensure some representation or at least a say of the minority on the Board. The system of proportional representation by cumulative voting, it is well-known, does afford a reasonably good chance to any minority group of shareholders to have a say in the matter of election of directors. Indeed, it is for this reason that the Company Law requirements in some of the countries, as for example in the U.S.A., provide for compulsory adoption of the system of proportional representation by cumulative voting. In the present Act, provisions already exist, in section 265 to enable a company to adopt the system of proportional representation. It would have been better if the reasons as to why the already existing provisions have not been effective in bringing about minority representation on the Board were first looked into and then remedies, if any, were suggested by us to reshape the existing provisions for better results. To my mind, there is a basic contradiction of purpose in the present provisions which permit minority representation only when the majority so wishes. It is precisely for this reason that reported cases of adoption of proportional representation by companies in accordance with section 265 of the Act are extremely rare. Virtually, therefore, this section has remained a dead letter on the statute book. The minimum that I would suggest, while responding to the terms of reference as I have understood them, should be to provide for compulsory adoption of cumulative voting by postal ballot for election of directors in the case of all public limited companies having not less than two thousand shareholders and listed on the Stock Exchange.

I am in agreement with the Committee's observation in para 5.9 that as there is no compulsion at present on any public company to nominate or designate a person as manager, managing director, whole-time director, the object of securing governmental approval for appointment of managerial personnel has been by-passed by many companies. As a matter of fact, I can say from my personal knowledge that some of the business houses follow quite often this practice of not designating anybody as manager, whole-time director or managing director. The object of the purpose of doing so is quite obvious. The restriction on managerial remuneration would cease to apply, so to say, if the persons holding the real reins of control and exercising real managerial powers can have a set of directors who are their employees or are subservient to them and pay themselves as executives, not being directors, any remuneration and perquisites which they wish to draw from the companies. This is because the law does not at present require the approval of the Central Government either for appointment of executives or for remunerating the executives. It is true that there is a deeming provision even in the existing law under which persons, so long as they are exercising substantial powers of management, can be called upon to submit themselves to the discipline of approval and for this purpose the designations of these persons are immaterial; but then experience has shown that it is very difficult to apply these deeming provisions in practice and the executives who are deemed managing directors or whole-time directors or managers can always produce some documentary evidence (not the real evidence) in their defence to show that they are not exercising substantial managerial powers. Assuming that it was possible to identify such executives, the vigorous efforts that will have to be made by the Department would call for an administrative machinery more or less akin to the intelligence machinery of policing organisations. This is apart from the question of the legal and procedural impediments which are so common in successfully carrying out any inspection or investigation.

The question of appointment of managing or whole-time directors in companies can be considered objectively and quite apart from the question of managerial remuneration which provides the necessary motivations to companies for avoiding certain designations and formal status. I cannot, with my experience as an administrator and a member of the public services, really think of any organisation worth the name, which does not have a central authority with unity of command, direction and coordination on a continuous and direct basis for managing its affairs properly. This is also fully consistent with the modern management concept and organisational theory. Management by a collective body of directors or by their Committees sitting only at intervals is not and cannot be in a position to bring about unity of command and ensure proper conduct of affairs in a corporate organisation. According to the very scheme of

the Companies Act, the Board of Directors do not manage the company but only exercise overall superintendence and control over individuals who are incharge of management. In other words, we cannot think of a company organisation being without at least one individual who is vested with substantial powers of management. Even in a widely accepted sense, management by a Board or a Committee is ineffective and antiquated. It is this sound principle of company management which seeks to find a rational answer in the adoption of a two-tier board, distinguishing clearly between those who manage and those who supervise the management. Although for certain practical difficulties which have been pointed out in the Report and with which I do not seriously disagree, the Committee has not been able to recommend the adoption of a two-tier system. It was necessary, however, in my view, to ensure that the distinction between those who really manage the affairs of the company and those who merely oversee the management is clearly followed in practice by means of some statutory safeguards. It is in the light of this background as well as from the larger view of public policy that I have looked at the terms of reference which require us to suggest measures necessary to regulate both managerial and executive remuneration. In other words, even from a limited angle, the question of regulating managerial remuneration cannot be completely delinked from the question of regulating executive remuneration and as soon as it is shown that what is called executive remuneration is really being paid for exercising substantial managerial powers, it should be necessary to regulate the so-called executive remuneration in the same manner as managerial remuneration. In order to prevent the abuse or by-passing governmental approval of managerial appointments by showing such appointments as executive appointments and also in keeping with the principles and practices of modern corporate management, I am making the following two recommendations which are complementary to each other, namely, that every public company must designate someone as managing or whole-time director and that no executive in the company should be entitled to draw remuneration in excess of what the managing director or the whole-time director would be entitled to draw as per our recommendations in this Report. This has been dealt with in my comments on managerial and executive remuneration (Chapter VI). These are good and unexceptionable principles. A study of statements furnished with the report of the Board of Directors under the newly inserted provision of section 217 (2A) of the Companies Act tends to show that well-managed companies have managing/whole-time directors and executives in the company do not draw remuneration in excess of what the managing director or the whole-time director gets from the company. The services of specialists and highly qualified persons possessing particular expertise required by a company can always be obtained on special contracts with the approval of Government. The recommendation in the main Report to the effect that only companies of certain size must have a managing/whole-time director would leave a serious loophole in the law. As a matter of fact, the requirement of compulsory appointment of managing/whole-time director in companies having paid up capital of fifty lakhs rupees and more would in effect mean that we are in favour of regulating managerial appointment and remuneration in respect of a few hundred companies. The result of our recommendations in the main Report would also really be a free for all executives. Even so, we should have at least suggested that in case any company which has a paid-up capital of less than fifty lakh rupees is not in a position, on account of some special reason, to appoint a managing/whole-time director, the total managerial remuneration which the company can pay would be limited, notionally, to the amount which can be made available under the prescribed guidelines, had an individual been appointed as a managing/whole-time director. This concept of collective remuneration is already recognised in sections 198(4) and 309 of the present Act. The notional ceiling is also necessary to regulate the executive remuneration which should not exceed the managerial remuneration payable to a managing/whole-time director. The Central Government has been advising companies to have managing/whole-time directors whenever any occasion arises. If a company is freely allowed to have a Board of Directors to manage its affairs it can, even under the present law, allow three per cent of its net profits as managerial remuneration to such directors without any ceiling.

It may be that every public limited company, which is large in number, may find difficulty in appointing someone as managing/whole-time director. If the Government so feels, it can provide other suitable guidelines for appointment of managing/whole-time director in pursuance of the policy of professionalisation of management. The following principles could be adopted in this connection:

- (i) Every company, which becomes a deemed public limited company in terms of section 43A as per recommendations in the main Report, will appoint a managing/whole-time director;

- (ii) Every company, which is a public limited company with a paid-up capital of rupees twenty-five lakhs or more, will also appoint a managing/whole-time director;

And/or

- (iii) Every public limited company which is listed on the Stock Exchange will appoint a managing/whole-time director.

Chapter VI : Managerial and Executive Remuneration :

The terms of reference of the Committee require us to suggest measures necessary to the regulation of managerial and executive remuneration. My colleagues in the Committee have expressed their views on this question in para 6.6 of the Report. I differ from most of the views expressed in this paragraph and besides indicating the points of difference, I might as well have added mine. But I could not do so by reason of the fact that I have not been able to reconcile myself with the approach adopted by the Committee in making their recommendations. A member of the Committee may not agree with the need of a particular term of reference, but I thought that I should take up this item of the terms of reference as I have construed it and make my observations. I do not fully agree with one of the views that 'the argument that one should be paid according to his ability is in the present circumstances mischievous' (for responsibilities and ability should go together) in the face of the terms of reference which require us to suggest measures for regulation of managerial remuneration, commensurate with managerial responsibilities. Similarly, the view that there should be no ceiling on managerial remuneration since there is no ceiling on wages is neither convincing nor logical nor can it be competently made within the terms of reference of the Committee. I do not also agree with the view that since industries in future will be manned by professional managers, the existing administrative, ceiling on managerial remuneration should be raised especially in view of the Committee's recommendations to include any person with a post-graduate degree within the definition of a professional manager. However, the most serious objection to the approach adopted in the Report relates to the observation that the Committee is not in a position to make any recommendation which would run counter to the Government policy enunciated in the Resolution appointing a Study Group to undertake a comprehensive study on wages, incomes and prices policy. Firstly, I do not see how any recommendation by us would run counter to the policy frame or the policy recommendation of the Bhoothalingam Committee. The terms of reference of that Committee did not include the specific issue of managerial remuneration in the corporate sector. The Study Group made certain observations and recommendations with respect to senior executives and managers in the private corporate sector as a part of its general recommendations in regard to future incomes and wages policy. As a matter of fact, the Study Group have made no distinction between executive remuneration and managerial remuneration in their Report. The terms of reference of the Study Group also refer only to the disparities in the structure of pay, dearness allowance and other compensatory allowances of employees in the public and private sector. Managerial compensation, in the sense in which it is understood in Company Law is quite distinct from, though, not wholly unrelated to executive compensation. Moreover, I feel that I should make a definite recommendation in the matter of regulation of executive and managerial remuneration, especially in view of the specific terms of reference to the Committee. There is also a clear statement by the Study Group that evolving a national wage structure is doubtful and accepting the existing wage structure improbable (page 7, para 29). The recommendation in the main Report to the effect that the existing administrative guidelines of November 11, 1969, for regulating managerial remuneration should continue to apply till such time a national policy is evolved is to leave the terms of reference of the Committee to the probability of the unknown. More specifically I would like to put forth the following arguments by way of justification for suggesting definite slabs of ceiling remuneration for managerial personnel:

- (a) Not laying down any ceiling on managerial remuneration would run counter to the national policy of reducing disparity of income wherever possible;
- (b) Remuneration payable to a managing/whole-time director should have relevance to the size of capital, operations and profitability of the company in order to measure the extent of responsibility on the one hand and the extent of compensation on the other;
- (c) It is true that there is no statutory limit on remuneration in some of the professions. But unlike the remuneration of a lawyer or a director, the remuneration of a manager is fixed in all sectors of the economy. There is no reason why the corporate sector should be an exception. The manager who makes his case for remuneration without limit on the plea that there is no limit on the remuneration of a director or a

lawyer or a business man should not choose to be a manager but choose to be an independent professional man or business man;

- (d) The argument that those who own the company should be entitled to pay themselves any amount depending on what they earn is only a point of view. We have travelled far from the concept that a company means the company and its shareholders. A public company now includes, besides shareholders, workers and employees, auditors and consumers and its working cannot be divorced from public interest. But even if such an argument could be put forward, it does not follow that the professional manager can also be paid without any limit. As a matter of fact, he is not the owner and he has a price which is equal to the opportunity-cost of his employment elsewhere. This opportunity-cost is to be determined by what he can get in an alternative employment in India and not necessarily by what a professional manager can get outside India, for there is a value which the professional manager receives as compensation for the cost of his transference from his own country;
- (e) The public sector managers are discharging their heavy responsibilities within certain ceilings of compensation. It is not clear why the private sector managers should not be able to deliver the goods within certain ceilings of compensation. The argument that managerial remuneration in the public sector is low because of lower profitability or *vice versa* is not valid. For, I do not agree with those who think that managerial efficiency in the public sector should be judged by profit alone. The infrastructure which the public sector undertakings have been developing and on which the private sector is being sustained, the number of sick textile mills and other sick units which the public sector has been able to rehabilitate and its many other achievements cannot be overlooked in judging the efficiency of the public sector manager. There must be some co-relation between public sector undertakings and private sector undertakings because they are operating in the fields of trade, commerce and industry under corporate law; and
- (f) Laying down certain ceilings of remuneration within which companies could themselves regulate the remuneration payable to managing/whole-time directors would be welcome to a majority of the companies which would not be required to come to the Government with applications for approval. This suggestion is also consistent with our approach on Government regulation by exception. Moreover, companies wanting to pay higher remuneration would still be free to approach Government.

It is not possible to give in a short note of dissent any elaborate arguments about the need of making specific recommendations on operational guidelines for regulating both managerial and executive remunerating nor does it seem to be necessary. After all, the need for prescribing ceilings in graded slabs should be willingly accepted in view of the widespread prevalence of an urge for some ceiling on income when there are (a) large number of the very poor, (b) more than forty per cent of the total population in India is living below the poverty line which is computed at less than Rs. 40.6 per month in the draft Fifth Five Year Plan and (c) per capita income is only around Rs. 55 per month. This has been the subject matter of national debates in Parliament in the context of directive principles of the Constitution. Section 637AA which has been newly inserted in 1975 in the Companies Act, 1956, lays down that the Central Government shall have regard to public policy relating to the removal of disparities in income while fixing the remuneration of managerial personnel. Conspicuous consumption which is made possible by high remunerations in the corporate business sector in a developing country has certain undesirable effects. Everyone knows that continuing tensions and trials of strength stand in the way of a planned development founded on equity and justice. The high income groups should be subjected to restraint and the present social order demands that a balance should be struck between equity and efficiency considerations. There is above all a fundamental consideration which has to be borne in mind, namely, that the reservoir of manpower for filling the top posts in the Government, the public sector and the private sector is gathered from similar sources which are provided by people having much in common in their background, educational attainments and basic personal traits and qualities. High rates of compensation should not result in a distortion that affects the requirements of the jobs in the three different sectors and the supply of properly endowed personnel. It is in this background that I shall give below in a short compass a perspective view before proceeding to the recommendations I propose to make.

The top levels of management in the private sector draw the following remuneration:—

Salary	..	Rs. 90,000 p.a.
Commission	..	Rs. 45,000 p.a.
Perquisites	..	Rs. 88,000 p.a.
(According to real value in monetary terms)	...	<u>Rs. 2,23,000 p.a.</u>

The details of salary, perquisites and commission are given in an annexure to this Chapter. This will roughly work out to a little over Rs.18,500 per month paid for the top managerial compensation in real terms. The tables below give a comparative picture of sectoral emoluments of topmost executives and also of perks-salary relationship in the private sector.

Comparative Tables (in rupees)

Total emoluments of topmost executives
(inclusive of all perks)

Central Government	Service Chiefs	Comptroller & Auditor General	Public Sector	Banks	Private Sector
67,421	1,33,844	67,412	83,740	83,934	2,23,350

Perks-Salary relationship in private sector*

Salary level	Percentage of fringe benefits to salary (basic/consolidated)	
	From	To
1000	71	306
2000	52	222
3000	47	173
4000	65	192
5000	60	150

It will be interesting to examine in this connection the comparative figures published in the Employment Gazette of United Kingdom which is a developed country with a strong background of private corporate business and known for the high opportunities offered by business companies. The December 1977 issue of the Gazette gives the following information for men and women earning gross weekly income in the highest decile range:

	1977	
	All men £	All women £
Public sector	118.5	88.6
Private sector	110.7	61.1

* The differential even between the post-tax emoluments (salary plus perquisites) of topmost executives in the Central Government and the private sector is heavy, being almost three times and that between the public sector and private sector is more than twice as much. Income tax rates in the higher slabs have also been appreciably reduced now.

* Based on Bhoothalingam Study Group Report—Tables on pages 115 to 117.

Note: Public sector comprises three main branches, namely, (i) the Central Government; (ii) Local Government; and (iii) Public Corporations. Private sector comprises all other undertakings and business.

In the light of what I have said in the foregoing paragraphs, I would now submit the following recommendations for the consideration of the Government :

Although in the main Report it has been recommended that classification according to size may be into four categories, namely, A, B, C and D and the maximum salary payable to the managerial personnel of each category of company may be fixed accordingly, the Report, while indicating effective capital as the basis, does not give the quantum of such effective capital for each category to which we can relate the emoluments that should be drawn by managerial personnel in each category both as maximum remuneration and minimum remuneration. I would make definite recommendations in this regard and classification of companies into four categories should be based on effective capital which is already being applied by the Department of Company Affairs. The categories are indicated below:

Category of company	Effective capital (Rs. in lakhs)
A	1000 and above
B	500 to 1000
C	100 to 500
D	Below 100

Small trading companies (like companies in category D) having a small capital base but a large turnover may be given a weightage for turnover also by adding fifty per cent of the difference between the effective capital and the turnover for purposes of classification. As I have pointed out earlier, there is appreciable inter-sectoral disparity and I feel that the higher salary in the private sector should not exceed public sector salary by a reasonable margin. For lesser security of service and somewhat uncertain tenure, managing/whole-time directors in the private sector could reasonably be given a margin of fifty per cent. A ceiling of fifty per cent over the present maximum salary of rupees four thousand per month in the public sector would allow rupees six thousand per month as managerial salary to be given to the biggest companies in the private sector. Starting from a maximum of rupees six thousand per month, the salaries against each category are shown below:—

Category A	—Any scale or fixed salary upto Rs. 6,000 p.m.
Category B	—Any scale or fixed salary upto Rs. 5,000 p.m.
Category C	—Any scale or fixed salary upto Rs. 4,000 p.m.
Category D	—Any scale or fixed salary upto Rs. 3,000 p.m.

Suitable incremental scales can be evolved within the parameters indicated above to avoid a feeling of stagnation among the top executives. Under the present law, managerial remuneration shall not exceed five per cent of the net profits for one managing/whole-time director and if there is more than one such director, ten per cent of the net profits for all of them together. The present provision is reasonable and should remain to ensure that the remuneration drawn is fair and reasonable.

As far as commission is concerned, the present system of allowing such commission upto one per cent of the net profits subject to a maximum of half of the salary, seems to owe its origin to the old managing agency system of the British days. The method of managing companies by an agency when specialised management personnel were scarce was a historical necessity. The institution of managing agency and secretaries and treasurers has been abolished and we have moved to the idea of professionalisation of management of individual companies. There is no need to have a legacy of the British days. The system of paying remuneration by way of commission on profits either in addition to or in lieu of salary should, therefore, be abolished.

Perquisites are fringe benefits or non-salary remuneration. Even if such benefits are utilised for managerial compensation in non-monetary forms, the rupee value can be estimated approximately. I would emphasise the need of translating all perquisites into terms of money, including all non-salary benefits within this category. The financial advantage should be clearly

worked out as far as possible in order to provide the indicators of reasonable remuneration in relation to others similarly placed and to make comparisons between highest and the lowest remunerations more meaningful. There is no reason why there should be too much pre-occupation with guiding ourselves by the taxman's niceties or the company's virtuosity for new ways to circumvent the law.

Perquisites should be limited to one-third of the salary in real monetary terms. Superannuation fund contributions, medical benefits, leave travel concessions and the like (as per annexure under this Chapter) should all be included within the aforesaid ceiling. I would, however, recommend that provident fund contribution to the extent of ten per cent of salary and gratuity should be excluded from this one-third limit. Provident fund and gratuity are in the nature of special benefits for the welfare of all personnel which have been allowed separately and should not be included as perquisites. This limit of perquisites will apply as a formula in all the slabs of remuneration in categories A, B, C and D companies. It may be mentioned in this connection that the present law under section 198 of the Companies Act defines remuneration to include any expenditure incurred by the company in providing all kinds of amenities and benefits. The notional computation on the basis of income-tax as per present administrative guidelines does not seem to be justified.

The present law provides a minimum remuneration of Rs. 50,000 p.a. to the managing director and other directors where a company is not making any profit or adequate profits. This has been found sometimes inadequate specially where the substantive remuneration is in the higher ranges. The Central Government has taken recourse to the proviso in section 198 (4) of the Companies Act 1956 in drawing up the guidelines for higher minimum remuneration in suitable cases for efficient conduct of business of the company. These administrative guidelines for minimum remuneration lay down that a maximum of Rs. 60,000 per annum can be allowed with a total perquisite of Rs. 12,000 per annum, based again on certain exemptions and notional calculations followed for maximum managerial remuneration. A drastic reduction in remuneration at a time when the work and responsibility of the managerial personnel have increased not only affects the individuals concerned but also the prospects of a company to recover from its illness. Losses are sometimes incurred due to extraneous reasons for which management is not responsible and my proposal to entrust management to professionals with high technical and managerial qualifications should be encouraged by providing for a greater degree of stability in their salary and emoluments. Directors and general managers in the public sector do not suffer any reduction in their remuneration when the company runs into a loss. On the other hand, a reasonable reduction will ensure greater managerial vigilance and resourcefulness which are necessary in such a situation. A reasonable reduction should, therefore, be effected by bringing the remuneration to that admissible under the next lower slab. This should apply to both salary and perquisites on the basis of real monetary terms. The requirements of submitting each and every case for the approval of the Central Government in order that minimum remuneration can be paid should be automatically dispensed with. To ensure vigilance, however, and to prevent companies from falling sick, Government approval for minimum remuneration should be made necessary when a company has been making losses for three consecutive years or more.

As for remuneration ratios between the worker and the top executives in a company, it is difficult to make any specific recommendations in view of the widely prevailing patterns of wages and managerial as well as executive remuneration in each class of companies in the private sector and between companies in different classes like sugar, cotton textiles, paper mills, electrical and non-electrical machinery, heavy engineering and others. It has been repeatedly proclaimed that the ratio between the highest paid employee and the lowest paid employee wages should be brought down to a level of 1 : 10 over the next few years. The Indian Trade Union Congress wanted a ratio of 1:10 between the lowest paid and the highest paid. The Centre of Indian Trade Unions represented to the Committee that

“The Companies Act should be amended so as to enforce strict limitations on salaries of top executives and directors inclusive of perquisites which should not be more than six times of the lowest wage/salary in the company”.

I have found that the ratio between the lowest paid and the highest paid in many companies is much more than even 1:20. It would be desirable if each company examines its wage and salary and remuneration structure and reduce the existing disparities between the lowest paid and the highest paid, so as to bring the ratio to 1:10, over a period of the next five years.

As for laying down the limits of remuneration, the power of the Central Government is capable of being exercised in three different ways. There may be purely administrative guidelines as at present. But this manner of exercise of power is subject to an element of arbitrariness or temporary compulsions. On the other hand, if it is sought to incorporate the principles in the statute itself, the result may be arid and unworkable law, whereas such principles should contain an element of flexibility. The best course that I would recommend would be to prescribe the guidelines in the Act itself in the form of a schedule or prescribe them by rules which can be changed from time to time to meet new situations. All the principles which I have recommended above should be applicable only to public limited companies as private companies should enjoy a greater degree of freedom, no substantial public interest being at stake in them. The new guidelines should also be applied prospectively as any retrospective effect of the provisions may affect adversely some directors who have joined already on certain approved terms and conditions. This will enable the existing managerial personnel to retain their personal benefits for the duration of their term of office.

Executive Remuneration :

This brings us finally to the question of regulation of executive remuneration in public limited companies. I have already examined some aspects of executive remuneration in my views on management structure and professionalisation of management (Chapter V). The term 'executive' should include all personnel who hold supervisory and executive positions in a company other than that of a managing or whole-time director.

It has been found that executive remuneration structure in most Indian companies has grown over the years into a complex pattern. Competition between various business firms, rising expectations and other factors have pushed up the range and quantum of executive remuneration in the business sector. Greater profits in business and the tax environment in our country had led to higher emoluments in the shape of perquisites also. The range of remuneration in the private sector companies is generally higher and all that I have said earlier about managerial personnel will also apply to the business executives. Certain forms of perquisites or terminal benefits offered by the private sector are not available to public sector executives or to Government servants. A greater balance in the correlation between the three sectors, especially the public and the private sectors, would be desirable in the interest of mobility and sharing of talent. In theory, a set of guidelines could be worked out for executive remuneration. But the field seems to be so vast and complex that any attempt from a Central level to make a comprehensive plan as reasonable and fair is likely to fail. I can only think of broad principles which might be applied with flexibility and according to the needs of different situations. Accordingly, the following suggestions are made :—

- (a) the ceiling of total remuneration of managing directors and whole-time directors should serve as the upper limit for executives in all companies ;
- (b) in any public limited company, the total of the salary and perquisites of any executive should not exceed the total of the salary and perquisites of any of the whole-time directors or the managing director computed on the same basis as managerial remuneration ;
- (c) if no managing/whole-time director is appointed in a public limited company, the salary and perquisites of any executive would be limited notionally to the amount which could be made available under the prescribed guidelines, had an individual been appointed as a managing/whole-time director; and
- (d) subject to these limits only, executive remuneration in a company can be determined by its management in any way that is considered fair and reasonable.

In some rare cases, exceptions will have to be made. Such dispensation should be reported in the directors' report accompanying the annual accounts under section 217(2A) of the Companies Act so that the position is made known to all concerned. This will also serve as an in-built regulatory measure and the situation can be watched for some time.

It should be our endeavour to bring about a ceiling on incomes all around. I honestly believe that because the corporate sector is the pace-setter, any curbs on executive expense in this sector will inevitably set a trend in other sectors of the economy. This will be in harmony with the socio-economic philosophy of the country as evolved over the year.

**POSITION OF PERQUISITES ALLOWED TO MANAGING PERSONNEL IN
THE PRIVATE SECTOR (Public Limited Companies)**

I. Retirement and other benefits

- (i) Company's contribution towards provident fund upto a maximum of ten per cent of the salary ;
- (ii) Company's contribution towards pension/superannuation fund which, together with the contribution to provident fund shall not exceed twenty five per cent of the salary;
- (iii) Gratuity not exceeding 1 month's salary for each completed year of service subject to a maximum of twenty months' salary or Rs. 30,000 whichever is less;
- (iv) Reimbursement of medical expenses for self and family actually incurred not exceeding one month's salary in a year subject to a maximum of Rs. 5,000 per annum or three months' salary with a maximum of Rs. 15,000 for a period of three years of service ;
- (v) Passage benefits to expatriate directors for self and family not more frequently than once a year by economy class or once in two years by first class ;
- (vi) *Leave Travel Concession* : Reimbursement of actual fares but not hotel expenses, for self, wife and dependent children once a year to and from any place in India ;
- (vii) Bonus when allowed to other executives but limited to the amounts admissible under Payment of Bonus Act, 1965 ;
- (viii) Reimbursement of proper entertainment expenses actually incurred for the business of the company.

II. Other perquisites

- (i) Free furnished/unfurnished residential accommodation evaluated as per Income-tax Rules, 1962 ;
- (ii) Free use of car, the monetary value of which is evaluated as per Income-tax Rules, 1962 ;
- (iii) Personal accident insurance, the annual premium of which does not exceed Rs. 1,000 ;
- (iv) Free telephone facility at residence ;
- (v) Subscription fees to two clubs but excluding commission fee or life-membership fee.

These five items above alone are subject to the ceiling of one-third of the salary or Rs. 30,000 whichever is less.

CHAPTER XX Concentration of Economic Power :

In its schematic order, the MRTP Act envisages regulation of diversification by large size undertakings (having assets of rupees twenty crores or more either singly or together with inter-connected undertakings) and further expansion of dominant undertakings (having a market share of one-third or more either singly or together with interconnected undertakings) in the same lines in which they are dominant. As the law stands at present, the Act does not prohibit expansion in the existing activities by a large size undertakings which can not only corner more and more of the economic resources of the community by augmentation of productive facilities but also increase its market share without any limit to long as the augmentation of the facilities is made in the existing line of activity thus, giving rise to a higher share of market power to the undertaking. This is not only undesirable but is an obvious anomaly which had crept in the Act as was originally passed because of the provisions made in sub-section (4) of section 21. The net effect of the exemptions given to large size undertakings by sub-section (4) of section 21 is that as long as the undertaking is required to obtain a licence for expansion of its existing activities under the Industries (Development and Regulation) Act, 1951 (section 13), the provisions of the MRTP Act would not apply unless, of course, it is shown that the large size undertaking is also a dominant undertaking at the time of applying for a licence for expansion under the Industries (Development and Regulation) Act, 1951. The present provisions of the Act would thus appear to operate as follows :—

- (1) An undertaking, however small, may not be allowed to expand if its own production together with production of its inter-connected undertakings constitutes one-third or more of the country's total production. While this restriction is clearly understandable, the present section 21(4) which permits a large size undertaking, which is not at the moment dominant, to grow beyond any proportions and dwarf with impunity all other undertakings in the country producing the same goods is opposed to this understanding and is inconsistent with the principle of preventing concentration of economic power, especially by those in a position to do so.
- (2) A dominant undertaking can make an outright purchase of the entire factory of another company or firm producing the same goods as the dominant undertaking, expand its own market share and yet go out of the purview of the Act by virtue of provisions of section 23(4)(a) which states that the restriction relating to acquisition of an undertaking would apply only if such acquisition results in the creation of an undertaking to which the Act applies. Since the purchase of the factory of another company or firm by a dominant undertaking does not result in the creation of an undertaking to which Part A of Chapter III applies, the dominant undertaking concerned would be in a position to increase its own market power without coming within the mischief of any of the provisions of the Act. Even so, the present provisions of section 21, sub-section (1), which uses the words 'proposes to substantially expand... in any other manner' could probably be stretched to bring the act of acquisition just illustrated within the ambit of section 21—although the matter is not free from doubt because of the fact that sub-section (1) of section 21 starts with the words 'subject to the provisions of section 23'. In future the question of applying the provisions of section 21 to the case of acquisition of a factory by outright purchase would be clearly out of question. Nor would section 22 apply in view of the fact that the applicability of that section is limited to large size undertakings proposing to diversify in a different field.

In the light of my understanding of the present provisions as well as the recommendations made in the Report, I strongly feel that once the existence of economic power can be identified as operating to put greater market power and control over economic resources in the hands of any undertaking, suitable provisions should be made in the Act to regulate the resulting concentration. By its very size, large companies are able to exert considerable market power even though its production in particular item of goods may not have substantial market share at a particular moment. But then the loophole in the Act which enables such large companies to grow bigger both in size and in market operation at one sweep must be plugged. I have not been able to understand the reasoning given in the Report for retaining the existing provisions of sub-section (4) of section 21 that the whole question of retention or deletion of sub-section (4) of section 21 is a matter of reconciling administrative difficulties resulting from different classification of goods being followed by two Ministries of the Government. In my view, great economic significance attaches to this question.

It has been recently stated in Parliament by the Minister of Industries that the top 20 large industrial houses have increased their assets by more than 50%. Although it has been explained by some people that the present inflation is a cause of such expansion of assets, it is not the whole truth. One of the ways by which large industrial houses have increased their economic power is through the operation of section 21(4).

I therefore recommend that both section 21(4) and clause (a) of sub-section (4) of section 23 should be deleted from the Act. I would further recommend that the expression 'subject to the provisions of section 23' occurring in the beginning of section 21(1) be also deleted.

Conclusion :

I am confining myself in conclusion to a point of importance arising out of one of the recommendations of the Report in Chapter XIV dealing with Government companies. It has now been recommended that provision should be made to the effect that the investigation procedure need not be made inapplicable to Government companies as the notification issued by the Central Government seeks to provide in this behalf. I cannot bring myself to accept this amendment. It will be not only unwarranted but also uncalled for because the provisions of investigation under sections 235 to 237 of the Companies Act are applicable only in special circumstances such as defrauding of creditors, carrying on the business of the company by its management in a manner oppressive of any of its members or where the management have been guilty of misfeasance or other misconduct towards the company. Government has sufficient machinery of its own to look into these aspects as far as Government companies are concerned and it is not at all necessary to make the provisions relating to investigation being made applicable to these companies.

New Delhi,
Dated August 22, 1978.

Sd/-
(K. K. Ray)

THE GAZETTE OF INDIA
EXTRA - ORDINARY

Part I - Section I

Published by Authority

No. 101

New Delhi

Thursday

June 23 1977/Asadha 2 1899.

Ministry of Law, Justice and Company Affairs
(Department of Company Affairs)

RESOLUTION

New Delhi; the 23rd June '77.

No. 7/6/77-CL-V- The Companies Act, 1956 was enacted with a view to creating conditions necessary for the healthy growth of joint stock enterprises and for providing safeguards in relation to the interests of the investor and the public. Soon after the enforcement of this Act, there was criticism about some of the provisions of this statute and Government, therefore, appointed another Committee in May, 1957. On the basis of the recommendations of the said Committee, as also the recommendations of the Commission of Enquiry in respect of certain group of companies and with a view to preventing malpractices, as and when they were noticed, the Act was amended from time to time. There have been, so far, as many as 12 amendments. As a result of such frequent changes, however, the structure of the Act has been affected and many of the provisions have become cumbersome and not amenable to easy interpretation and understanding. Some of the provisions such as those relating to managing agency system have become obsolete while some others have proved to be ineffective to meet the present day need of corporate management and administration. Another important part of Company Law which has not been reviewed in depth, so far, is the part which deals with winding-up procedures. The statutory provisions in this respect have more or less remained unchanged since 1913. These provisions need a fresh look so as to ensure early termination of winding-up proceedings and settlement of the claims of the creditors and contributories of companies in liquidation.

2. With the enactment of the Monopolies and Restrictive Trade Practices Act, 1969, a new dimension was added to the Government policy in regard to the regulation of the corporate sector. Suggestions have been made by various quarters including the Monopolies and Restrictive Trade Practices Commission that several provisions of this Act need to be modified. In the implementation of the Act also certain difficulties have been encountered. Several obscurities and lacunae have been noticed in the provisions of the Act with the result that the realisation of the objectives underlying this enactment has not been effective to the extent desired. For the reasons stated above it has become necessary to constitute a high-powered Expert Committee to undertake a comprehensive review of the two enactments urgently.

3. Government, accordingly, hereby appoints a Committee to consider and report on what changes are necessary in the Companies Act, 1956 and the Monopolies and Restrictive Trade Practices Act, 1969, with particular reference to the modifications which are required to be made in the form and structure of the Companies Act, 1956 and the Monopolies and Restrictive Trade Practices Act, 1969, so as to simplify them and to make them more effective, wherever necessary.

4. The Committee will also consider the provisions of the Companies Act, 1956, and report *inter alia* on :

- (a) classification and formation of companies and the constitution of directors with special reference to protection of the interests of the shareholders who are in a minority;
- (b) exercise of managerial powers, and protection of shareholders and creditors' interests and their relations, *inter se*;
- (c) measures by which workers' participation in the share capital and management of companies could be brought about;
- (d) provisions which are required to be made to prevent mis-management with special reference to safeguarding of company's own interest and the public interest;
- (e) measures necessary to promote professionalisation of management and regulation of managerial and executive remuneration commensurate with their responsibilities; and
- (f) measures by which re-orientation of managerial outlook in the corporate sector could be brought about so as to ensure the discharge of social responsibilities by companies.

5. The Committee is also requested to consider and report on :

- (i) what changes are required to be made in the Companies Act, 1956 to streamline the winding-up procedures so as to expedite the realisation and distribution of assets to the creditors and contributories;
- (ii) whether it is desirable to enact special provisions applicable to the Government companies as a class so as to exclude the provisions of the Companies Act, 1956, generally in their applicability to such companies;
- (iii) what adaptations and modifications are necessary in the provisions of the Companies Act, 1956, in their application to entrepreneurs in medium and small scale sectors carrying on business as joint stock companies;
- (iv) what further changes are required to be made in the Companies Act, 1956, regarding the establishment of places of business and operation of foreign companies in India;
- (v) what improvements, if any, are required to be made in the present administrative structure and procedures regarding the enforcement of the provisions of the Companies Act, 1956, and the Monopolies and Restrictive Trade Practices Act, 1969;
- (vi) what changes are required to be made in the Monopolies and Restrictive Trade Practices Act, 1969, in the light of the experience gained in the administration and operation of the said Act; and
- (vii) any other matter incidental or ancillary to the administration of the Companies Act, 1956 and the Monopolies and Restrictive Trade Practices Act, 1969, having regard to the growth and development of trade, commerce and industry.

6. The committee will be constituted as follows :—

Shri K.S. Hegde, Member of Parliament (former Judge of the Supreme Court of India)	Chairman
1. Shri S. Ranganathan, Member of Parliament (former Comptroller and Auditor General of India)	Member
2. Shri R.D. Gattani, Member of Parliament (Retired Judge of Rajasthan High Court)	„
3. Shri Bedabrata Barua, Member of Parliament	„

- | | |
|--|------------------|
| | Member |
| 4. Shri F.S. Nariman, Senior Advocate,
Supreme Court of India
(former Additional Solicitor General of India) | ” |
| 5. Shri Santanu Desai, FCA President,
Merchants Chamber of Commerce, Bombay
(former President of the Institute of Chartered Accountants
of India) | ” |
| 6. Shri S. Srinivasa Rao, FICWA, Professional Accountant
(former President of the Institute of Costs and Works
Accountants of India and also a member of the Institute
of Company Secretaries of India) | ” |
| 7. Shri D.C. Kothari, Industrialist, Madras
(former President of FICCI and President,
Asian Chamber of Commerce) | |
| 8. Shri Keshuv Mahindra, Industrialist,
Bombay. | ” |
| 9. Shri K.P. Tripathi, Labour Leader
(former Minister of Assam) | ” |
| 10. Shri K.K. Ray, Barrister-at-law,
Secretary, Department of Company Affairs. | Member-Secretary |

7. The headquarters of the Committee will be at New Delhi and it will meet as and when necessary. The Committee may also visit such other places as it may consider essential for the purpose of its inquiry. The report of the Committee shall be submitted to the Government of India in the Ministry of Law, Justice and Company Affairs (Department of Company Affairs), not later than 31st December, 1977.

ORDER

Ordered that a copy of this resolution be communicated to all the State Governments, Union Territories, Ministries and Departments of the Government of India, Prime Minister's Office, Cabinet Secretariat, Private and Military Secretaries to the Vice-President, acting as President.

Ordered also that it be published in the Gazette of India Extra-ordinary.

K.K. Ray
Secretary

PUBLISHED IN THE GAZETTE OF INDIA—
EXTRA—ORDINARY—PART 1—SECTION 1

New Delhi, the 26th Aug., 1977

Ministry of Law, Justice and Company Affairs
Department of Company Affairs

RESOLUTION

No. 7/6/77—CL—V—The Central Government hereby appoints Shri Justice Rajindar Sachar, Judge of the High Court of Delhi, as Chairman of the high powered committee constituted by the Resolution of the Government of India in the Ministry of Law, Justice and Company Affairs (Department of Company Affairs) No. 7/6/77—CL—V dated the 23rd June, 1977, for undertaking a comprehensive review of the Companies Act, 1956 and the Monopolies and Restrictive Trade Practices Act, 1969, in place of Shri K.S.Hegde, resigned.

ORDER

Ordered that a copy of this Resolution also be communicated to all the State Governments, Union Territories, Ministries and Departments of the Government of India, Prime Minister's office, Cabinet Secretariat, Military Secretary to the Vice President of India and Private Secretary to the Vice President of India.

Ordered also that it be published in th Gazette of India-Extra-ordinary.

Sd/-
(K.K. RAY)
Secretary to the
Govt. of India

**PUBLISHED IN THE GAZETTE OF INDIA
EXTRA—ORDINARY—PART I—SECTION 1.**

**Government of India
Ministry of Law, Justice and Company Affairs
Department of Company Affairs**

RESOLUTION

New Delhi, the 30th December, '77

No. 7/6/77—CL—V. The Central Government hereby extends the time for submission of report by the Committee appointed under Government Resolution of even number dated 23rd June, 1977, upto 30th June, 1978.

ORDER

Ordered that a copy of this Resolution also be communicated to all the State Governments, Union Territories, Ministries and Department's of the Government of India, Prime Minister's Office, Cabinet Secretariat, Military Secretary to the President of India and Private Secretary to the Vice-President of India.

Ordered also that it be published in the Gazette of India—Extra-ordinary.

Sd/—
(K.K. Ray)
Secretary to the Government of India.

**PUBLISHED IN PART I, SECTION 1 OF THE GAZETTE
OF INDIA EXTRA—ORDINARY DATED THE
20TH JULY, 1978**

**Government of India
Ministry of Law, Justice and Company Affairs
Department of Company Affairs**

New Delhi—1, the 20th July, 1978

RESOLUTION

No. 7/6/77—CL—V: The Central Government hereby extends the time for submission of Report by the Committee appointed under Resolution of even number dated the 23rd June, 1977, upto 31st August, 1978.

ORDER

Ordered that a copy of this Resolution also be communicated to all the State Governments, Union Territories, Ministries and Departments of the Government of India, Prime Minister's Office, Cabinet Secretariat, Military Secretary to the President of India and Private Secretary to the Vice-President of India.

Ordered also that it be published in the Gazette of India, Extra-ordinary.

Sd/—
(P. Krishnamurti)
Secretary to the Government of India.

THE GAZETTE OF INDIA
EXTRA-ORDINARY
PART I—SECTION I
PUBLISHED BY AUTHORITY

No.51 New Delhi, Tuesday, February 28, 1978
Phalguna 9, 1899

Ministry of Law, Justice and
Company Affairs
Department of Company Affairs

New Delhi, the 27th Feb., 1978.

RESOLUTION

No. 7/6/77—CL—V.—The Central Government hereby appoints Shri K.K. Ray, at present working as the Member-Secretary of the High Powered Committee, constituted by the Resolution by the Government of India in the Ministry of Law, Justice and Company Affairs (Department of Company Affairs No. 7/6/77—CL—V, dated 23rd June, 1977) as a Member of the said Committee with effect from 1st March, 1978 on his retirement from the Indian Administrative Service on 28th February, 1978.

The Central Government also hereby appoints Shri M.K.Kukreja, at present working as a Joint Secretary in the Department of Company Affairs as Secretary of the above said Committee in addition to his own duties with effect from 1st March, 1978.

ORDER

Ordered that a copy of this Resolution also be communicated to all the State Governments, Union Territories, Ministries and Departments of the Government of India, Prime Minister's Office, Cabinet Secretariat, Military Secretary to the President of India, and Private Secretary to Vice President of India.

Ordered also that it be published in the Gazette of India, Extra-ordinary.

Sd/—
P. Krishnamurti,
Secretary to the Government of India.

NOTICE RELEASED TO THE DAILY
NEWSPAPERS THROUGH D.A.V.P.

High-Powered Expert Committee for reviewing
Companies Act, 1956 and MRTP Act, 1969.

The Government of India has constituted a 11-member High-Powered Expert Committee under the chairmanship of Justice Shri Rajindar Sachar of the Delhi High Court and consisting of three Members of Parliament and representatives from the legal and other professions, Industry and Labour for undertaking a comprehensive review of the provisions of the Companies Act, 1956 and the Monopolies and Restrictive Trade Practices Act, 1969 and to consider and report on the changes necessary in the two enactments so as to simplify them and make them more effective, wherever necessary, and also to remove the obscurities and lacunae which have been noticed in the provisions of the two Acts. The Committee has been requested to consider and report *inter alia* on

- (a) Classification and formation of companies and the constitution of Board of Directors with special reference to protection of the interests of the shareholders who are in a minority;
- (b) Exercise of managerial powers and protection of shareholders and creditors' interests and their relations, *inter se*;
- (c) Measures by which workers' participation in the share capital and management of companies could be brought about;
- (d) Provisions which are required to be made to prevent mis-management, with special reference to safeguarding of company's own interest and the public interest;
- (e) Measures necessary to promote professionalisation of management and regulation of managerial and executive remuneration commensurate with their responsibilities;
- (f) Measures by which re-orientation of managerial outlook in the corporate sector could be brought about so as to ensure the discharge of social responsibilities by companies.
- (g) changes required to be made in the Companies Act, 1956, to streamline the winding-up procedures so as to expedite the realisation and distribution of assets to the creditors and contributories;
- (h) Whether it is desirable to enact special provisions applicable to the Government Companies as a class so as to exclude the provisions of the Companies Act, 1956 generally in their applicability to such companies;
- (i) what adaptations and modifications are necessary in the provisions of the Companies Act, 1956 in their application to entrepreneurs in medium and small scale sectors carrying on business as joint stock companies;
- (j) What further changes are required to be made in the Companies Act, 1956 regarding the establishment of places of business and operation of foreign companies in India;
- (k) What improvements, if any, are required to be made in the present administrative structure and procedures regarding the enforcement of the provisions of the Companies Act, 1956 and the Monopolies and Restrictive Trade Practices Act, 1969;
- (l) What changes are required to be made in the Monopolies and Restrictive Trade Practices Act, 1969, in the light of the experience gained in the administration and operation of the said Act; and
- (m) Any other matter incidental or ancillary to the administration of the Companies Act, 1956 and the Monopolies and Restrictive Trade Practices Act, 1969, having regard to the growth and development of trade and industry.

The members of the public and others interested in the subject are requested to forward 15 copies (if convenient) of their suggestions, if any, on matters coming within the scope of the Committee's terms of reference, to the Member-Secretary, High-Powered Expert Committee, C/o-Department of Company Affairs, Shastri Bhawan, New Delhi- 110001 so as to reach him not later than the 6th October, 1977.

New Delhi
Dt. 31st Aug., '77.

Sd/-
(K.K.Ray)
Member Secretary and
Secretary to the Government of India
Deptt. of Company Affairs
Ministry of Law, Justice and Company Affairs

LIST OF DAILY NEWSPAPERS AND OTHER PERIODICALS
TO WHOM THE NOTICE OF THE HIGH POWERED
COMMITTEE WAS RELEASED BY THE
D.A.V.P. FOR PUBLICATION

1. Hindustan Times, Delhi.
2. Times of India, Delhi/Ahmedabad/Bombay
3. Hindu, Madras
4. Statesman, Delhi/Calcutta
5. Amrita Bazar Patrika, Calcutta/Allahabad
6. Business Standard, Calcutta.
7. Tribune, Chandigarh.
8. Deccan Herald, Bangalore.
9. Search Light, Patna.
10. Assam Tribune, Gauhati.
11. Pioneer, Lucknow.
12. Deccan Chronicle, Secunderabad.
13. Nagpur Times, Nagpur.
14. Economics Times, Bombay.
15. Financial Express, Delhi/Bombay.
16. Nav Hind Times, Panaji.
17. News of the World, Cuttack.
18. Hitavarda, Bhopal/Raipur
19. Kashmir Times, Jammu.
20. Eastern Economist, Delhi (Weekly)
21. Commerce, Bombay.
22. Capital, Calcutta.

PRESS INFORMATION BUREAU
GOVERNMENT OF INDIA

Revision of Companies and M.R.T.P. Acts
suggestions invited

New Delhi, September 2, 1977.
Bhadra 11, 1899

The High-powered Expert Committee appointed by the Central Government under the Chairmanship of Justice Shri Rajindar Sachar of Delhi High Court to review Companies and M.R.T.P. Acts has called for suggestions on matters coming within the scope of its terms of reference from the interested members of the general public in addition to organisations of trade, industry and commerce. Besides the Chairman, the Committee consists of three Members of Parliament and representatives from legal and other professions, industry and labour.

The Committee has been set-up by Government with a view to removing obscurities and lacunae noticed in the working of the Companies and M.R.T.P. Acts and to consider the changes necessary to realise the basic objectives underlying these two enactments and also to simplify their working and make them more effective wherever necessary. Matters relating to professionalisation of management, regulation of managerial and executives' remuneration commensurate with their respective participation in the share capital and management of companies are among the Committee's other terms of reference.

The suggestions from the general public as well as from those interested may be submitted by October 3, 1977.

KSR:MYS:RKS

Letter No.5/2/77-EC dated 30th September, 1977 from Member Secretary forwarding the printed Questionnaire to all concerned.

Subject:—Review of the provisions of the Companies Act and the Monopolies and Restrictive Trade Practices Act by High Powered Expert Committee-Issue of questionnaire eliciting replies.

As you may be aware, a 11-member High Powered Expert Committee has been set up by Government for undertaking a comprehensive review of the provisions of the Companies Act, 1956 and the Monopolies and Restrictive Trade Practices Act, 1969 and to consider and report on the changes necessary in the two Acts with a view to simplifying them and making them more effective wherever necessary and also remove the obscurities and lacunae which have been noticed in the provisions of the two Acts. The Committee's terms of reference are embodied in the Resolution No. 7/7/77-CL-V dated the 23rd June, 1977 published in the Gazette of India Extra-ordinary Part I section 1 of the same date. The Committee has been asked to submit its report to Government not later than the 31st December, 1977.

2. At its first meeting held on the 19th September, 1977 under the Chairmanship of Shri Justice Rajindar Sachar, the Committee decided to issue a detailed questionnaire to all bodies and institutions interested in the subject, on several aspects of the Companies and the MRTP Acts and having regard to its terms of reference. A copy of this questionnaire is enclosed for your perusal with a request that your replies thereto (with five additional copies thereof) may kindly be forwarded to the undersigned at the address given at the top of this letter so as to reach the Committee not later than the 31st of October, 1977.

3. I am to add that you may, if considered necessary consult the various constituents of your organisation before forwarding your replies to the questionnaire.

4. The Committee has also decided to hear at Delhi representatives of various bodies who wish to appear before the Committee. In case, therefore, your organisation wishes to be heard in person in this connection, it may kindly be intimated to the Committee alongwith your replies to the questionnaire.

Yours faithfully,
Sd/-
(K.K. Ray)
Member-Secretary

IV. Production of Shareholders' Interests

43. In your opinion, what are the areas in corporate management where shareholders need protection of their rights (return on investment share capital, corporate assets, corporate management and disclosure of corporate information) ?
44. Do you think the existing provisions giving specific rights to the share holders are inadequate and/or ineffective to protect their rights ? If so, in what respect are they inadequate and/or ineffective ?
45. Would further enlargement of the rights of the shareholders improve their position (representation on board, right of proxy to speak and vote, postal ballot etc. If not, what further rights would you like to give to the shareholders ?
46. Should the provisions in section 399(1) (a) of the Act be changed and the right given therein be enlarged? Should sub-section (4) of the said section be amended and the right to apply for protection be made available to a single shareholder without the sanction of the Central Government ?
47. In your opinion, do better and greater disclosure in company's audited report and director's report reduce the mistrust of shareholders? Do you think the contents of the annual reports and accounts give complete disclosure ? If not, what further disclosures would you recommend ?
48. Should companies be compelled to publish quarterly or half-yearly financial statements in addition to the annual reports furnished to the shareholders ? Would such a step help the shareholders in any manner ?
49. Can you think of giving a definition of minority shareholders ?
50. What is your reaction to the definition of minority as constituting that section of shareholders, whether holding majority shares in the company or not which is not represented on the Board of Directors of the company ?
51. Do you think that there should be a lower or a higher limit of shareholding in order to constitute minority group of shareholders ?
52. Would it help the minority shareholders if specific acts of the Board of Directors are made subject to definite percentage of voting of all the members of the company not necessarily present and voting at the meeting ? If so, please specify.
53. Do you think the voting rights on shares held by financial institutions and trusts should be exercised by the Government to promote and protect the investments made in companies by these entities ?
54. In your opinion what role the institutional shareholders like the L.I.C., U.T.I., I.F.C., etc., could play in giving protection to the minority shareholders ?
55. Are the existing provisions contained in sections 408 and 409 inadequate to give protection to minority shareholders? If so, how would you like these sections to be modified ?
56. Do you recommend establishment of shareholders' associations and giving recognition to them ? What role such associations can play in protecting the rights of the shareholders ? What safeguards in law would you recommend to ensure that these associations work for general good and not for promoting individual or sectional interests ?
57. What should be the criteria for granting recognition to the shareholders' association ? What legal status they should enjoy ?

58. If a shareholders' association is to be recognised under the law, what would be your suggestions as regards the following :
- (a) the membership of the association should be confined to the shareholders of a particular company or to a number of companies;
 - (b) the organisation, function and the legal constitution of such association;
 - (c) the rights and duties that can be enjoined on such association; and
 - (d) the safeguards against a few shareholders holding majority shares in a company controlling such an association ?

V. Winding Up

59. What specific suggestions you would make for simplification of winding-up procedure for early realisation and distribution of assets ?
60. As a step in that direction, do you recommend simplifying and combining some of the matters covered in Chapter I and II under Part VII of the Act, especially those relating to procedural matters, before the Court ?
61. Has the existing system of compulsory winding-up impeded the quick realisation and disposal of assets of companies in liquidation ?
62. Do you favour vesting of power in the Court only upto the stage of passing winding-up order, and all further proceedings entrusted to an administrative tribunal/body/officer and providing a right of appeal to the aggrieved party ?
63. Would incorporating provisions of the Banking Regulation Act, 1949 especially sections 45-D, 45-O and 45-T contained in Part III-A of the said Act, in the Companies Act help in quicker realisation of the assets of companies in liquidation ?
64. As an alternative to the above question do you suggest that the liquidators should have more powers including power to make a call and pass necessary certificates (having the force of a decree) ?
65. (a) Is the existing provision in section 454 regarding statement of affairs satisfactory ? What alternative procedures would you suggest ?
- (b) Should sub-section (5) of section 454 be amended to expressly cast the burden of reasonable excuse for not filing the statement of affairs on the director ?
- (c) Should the reference to "the relevant date" in sub-section (8) of section 454 be amended ? If so, on what basis ?
66. In your opinion is it necessary to provide for two different types of voluntary winding-up, i.e. 'members and creditors'? Would not one single type be more advantageous ?
67. Do the existing section 497(6) and 509(6) cause delay in disposal of winding-up matters ? Have these provisions served any useful purpose ? If not, should they be repealed ?
68. Is it desirable to subject the voluntary liquidation to outside control and supervision other than the Court ?
69. What measures would suggest for quicker realisation of the debts due to a company under liquidation ? Should provision similar to section 45-T of the Banking Regulation Act or the provisions of the Public Debt Recovery Act be made applicable ?

70. In your opinion, should the priorities of debts (preferential payments) in section 530 of the Act need revision? Should the arrears of wages due to the employees and staff and tax liabilities be paid in full without any ceiling?
71. Have the existing provisions of the Act regarding mis-feasance matters (sections 543 and 545) worked satisfactorily? Do you suggest any alternative or a more effective procedure?
72. Do the provisions relating to winding-up subject to supervision of Courts (Sections 522 to 527) serve any purpose?
73. Do you recommend allowing some of the State laws which prevent or restrict early recovery of the debts due to companies in liquidation, e.g. Kerala Debts Relief Ordinance, 1977 which effects chit fund companies and hire purchase companies mostly to have their effect on the winding-up?
74. In the case of compulsory winding-up, is it necessary for the Official Liquidator to file two sets of accounts, one to the Court under section 462 and the other set with the Registrar of Companies under section 551 of the Act?
75. Is it necessary to amend sub-sections (4), (5) and (6) of section 477 of the Act to remove practical difficulties of realising the assets of the company?
76. Should a provision on the lines of sections 45-J of the Banking Regulation Act be added in the Companies Act to try offences under Sections 538/541?
77. Do you recommend any special period of limitations for debts and claims due to the company in liquidation? If so, what should be the period? Should section 458A be amended?

VI. Inter Se Rights of Creditors and Shareholders

78. Do you think that the creditors' right to nominate directors which, at present, is confined to an agreement between the large lenders and the company should be extended to other lenders by a statutory provision?
79. Do you think that the trade creditors should have further rights other than asking for the winding-up of the company in case of non-payment of dues?
80. Do you want any additional information or explanation to be given by the Board in the Annual Report and Accounts as regards the position of creditors?

VII. Management

Structure and Pattern

81. Do you think certain seats in the Board of Directors should be reserved for the nominees of shareholders' associations, chambers of commerce and industries and professional institutions?
82. (a) Assuming there are three tiers of management, respectively at the shop-floor or unit level, at the functional level or inter-divisional level and at the policy level, what qualifications and conditions would you like to prescribe for each tier of management?
- (b) What is the extent of delegation of managerial powers you would like to recommend at each level?
83. What is your reaction to the proposal that there should be only one category of managerial personnel viz., whole time directors who shall be members of the functional or second-tier board?

84. For the functional board, would you insist on all the directors being whole-time directors with the definite specialisation in any functional area of corporation's working? Do you think these whole-time directors must belong to certain professions?
85. Please indicate your reaction to the suggestion that the policy level board should consist of directors who shall not receive any remuneration except fixed sitting fees, their appointments also not being subject to Central Government approval so long as certain basic eligibility criteria are satisfied?
86. Please give your concrete suggestion as to the manner in which each tier of the Board including Committees thereof may be serviced by a proper secretariat.

Workers' Participation

87. What is your concept of workers' participation in management?
88. Please offer your suggestions relating to workers' participation in management.
89. Drawing your attention to Question No. 82, at what level would you recommend workers' participation?
90. Do you think the lowest tier of the board should function as unit level committee of board with each member of the functional board as the Chairman thereof?
91. What method do you suggest for electing workers as representatives to the boards?
92. How do you think the representatives of the workers could be chosen for purposes of participation?
93. What proportion of such boards should consist of workers alone?
94. What proportion of the board at any level would you like to be reserved for the workers/their nominees?
95. Do you recommend issue of fully paid shares to workers and employees in lieu of bonus? If so —
- (a) would you like the full or only a part of the amount of bonus to be adjusted against issue of shares?
 - (b) would you like to suggest the circumstances under which an employee should be entitled to sell or surrender the shares?
 - (c) what conditions would you like to prescribe for transfer of shares by employees?
 - (d) would you like the shares so issued to be without voting rights or would you like voting rights to remain attached to them?
96. Please state whether there should be a new class of shares called workers' shares and, if so, what proportion of the share capital of the company should be reserved therefore and what rights should be attached to such shares?
97. Please state whether this participation in share capital should or should not be linked to participation in management.
98. Would you like, in the interest of employees, any special information or particulars to be incorporated either in the annual report and accounts, or in any special report to be given by the management at annual intervals?

APPENDIX—IX

EXPERT COMMITTEE FOR REVIEW OF THE COMPANIES ACT AND
THE MONOPOLIES AND RESTRICTIVE TRADE PRACTICES ACT

QUESTIONNAIRE

A. COMPANIES ACT

I. Concepts and definitions.

1. Do you think the existing section 2 dealing with "definitions" is exhaustive? What changes, if any, would you like to be made therein?
2. If, in your opinion, some concepts have become obsolete or have lost practical utility, can you list them out and suggest deletion/modification?
3. Do you think some concepts have been repeated in too many places in the Act and can conveniently find place under "definition" section? If so, please list them out.
4. Would you like to incorporate certain concepts defined in the operative provisions of various sections under "definition" section? If so, please list them out.
5. How would you like to retain the basic concept, of section 43-A company? Please give suggestions.
6. Would you like the definition of books of accounts to be given in definition section and the provisions relating to inspection combined with those in section 234 to 251 of the Act?
7. Would you like the financial institutions to be so re-defined as to include all those included in sections 224A and 619B? Would you also like to include any other corporation or institution within the meaning of financial institution?
8. Would you like a re-definition of "associate" to include associates of all those in the control and management of the company and persons claiming under them?
9. Would you like the exact connotation of "investments" alluded to in section 49 to be spelt out in the light of the provisions of sections 297, 372, Schedule VI etc.?
10. Drawing your attention to section 175, do you think that the term "Chairman" should be defined? If so, can you suggest a definition?
11. Can you suggest a legal definition of "oppression and mis-management" in sections 397 and 398 of the Act?
12. What further concepts would you like to be defined and how?

NOTES:—

1. Reasons for all answers may please be given. Wherever necessary, affirmative or negative answers like 'Yes' or 'No' should be accompanied by detailed thinking on the subject.
2. The Questionnaire along with replies may be separately typewritten or printed, suitable spaces between Questions being provided to meet individual requirements.
3. Six copies of the replies to Questionnaire should be sent to the Member-Secretary of the Expert Committee.

II. Corporate Structure Classification

13. Do the guarantee companies and unlimited companies serve any useful purpose ?
14. Do you visualise any difficulty if companies are simply classified as public and private ?
15. What is your view on the provisions relating to deemed public limited company being subsumed in the definition of public limited company ?
16. Should the definition of public limited company itself include a private company which is a subsidiary of public limited company.
17. What exemptions and privileges do you suggest for Government companies if they are included in the definition of public limited company ?
18. (a) Please give your views on the following criteria for a private limited company;
 - (i) authorised capital not exceeding Rs. 25 lakhs;
 - (ii) restriction on inviting public to subscribe to any shares or offer debentures, loan and deposits;
 - (iii) Participation by public financial institutions and companies and corporations promoted by Government to assist trade and industry in shares or loan capital being limited to 50 per cent of paid-up capital and free reserves;
 - (iv) restriction on transfer of shares only at the option of the company.
 - (v) no restriction of the maximum number of members.
 (b) should the above criteria find a place in Memorandum and Articles of Association of the company at the time of registration ?
19. What definition would you like the legislature to adopt for classifying companies into medium, small and large ?
20. What are the criteria for making such a classification ?
21. Should paid-up capital, authorised capital, total assets or turn-over form the basis of such classification ? Please elaborate.
22. Please indicate your reaction to the proposal that only companies fulfilling the following criteria should be allowed to be formed and to operate as investment companies :
 - (a) It should have a minimum of 100 members;
 - (b) Its shares shall have no par value;
 - (c) Shares shall be in units of Rs. 10.
 - (d) The shareholders can exchange the share for cash;
 - (e) It should not invest in the shares or debentures or the other companies exceeding in the aggregate the value of 5 per cent of the total value of shares or debentures issued, as the case may be, except by way of underwriting/undertaking obligations in respect of shares or debentures issued to the public and listed with the Stock Exchange.
 - (f) It has to be registered only as a public limited company;
 - (g) Shares held by it shall not carry any voting rights; and
 - (h) Company itself should be listed with the Stock Exchange.

Formation and Commencement of Business

23. Do you think that the following conditions should be imposed before a company is allowed to be registered under the Act:
- (a) either there is an existing undertaking not yet incorporated or sufficient steps have been taken towards the establishment of such an undertaking;
 - (b) expert opinion by professionals stating that an undertaking when incorporated will be a viable undertaking or will serve national objectives;
 - (c) some credential and physical presence before the Registrar of the persons desirous of forming themselves into a company ?
24. What further modifications would you suggest as regards registration of companies, especially in the light of your answers above ?
25. Drawing your attention to sections 149 of the Act, would you like any time limit to be prescribed commencing from the date of passing of the special resolution, within which new business should be commenced ? What, according to you, should be the criteria for defining "commencement"?
26. Do you think that the Registered Office of the company must be located in the State from where substantial activities of the company originate ?

Memorandum and Articles of Association

27. Drawing your attention to section 17(3), can you suggest a simpler procedure for obtaining consent of creditors, say, by obtaining acquiescence (vide CLB Bench Rules in this behalf)?
28. Do you think that even a person not being a member of the company and having dealings or contract with the company should be supplied with a copy of Memorandum and Articles of Association against any payment ?

Conversion of Companies

29. For converting a private limited company into a public limited one and vice-versa what is your view on the following requirements/pre-conditions :
- (a) special resolution passed by the company approving the conversion;
 - (b) an application in the prescribed form to the Registrar of Companies;
 - (c) one or more certificates by members of recognised professions authenticating the information contained in the application; and
 - (d) change in the Memorandum and Articles to be effected by the Registrar of Companies ?

Mergers & Amalgamations

30. Do you think that the present procedure relating to compromise, arrangement, reconstruction, merger and amalgamation should be substituted by a smaller procedure of holding certain meetings of the company and approval by the Company Law Board (Bench) against petition accompanied by certain verification and expert opinion ? At the same time, do you think that the above proposal in respect of companies where atleast one of them attracts the Monopolies and Restrictive Trade Practices Act, 1969, should be heard and decided finally by the Monopolies Commission in future ?

Multinationals

31. In order to compel multinationals to submit to a code of conduct, do you suggest the inclusion of certain rules and principles in the Memorandum of Association, particularly with regard to :
- (a) ensuring that the multinational does not conduct its affairs in such a way as to impede or negate the realisation of benefits that should arise from the liberalisation of tariff and non-tariff barriers affecting world trade particularly those affecting the trade and development of the country;
 - (b) striving continuously for greater efficiency in accordance with the national ends of economy and social development and avoiding concentration of economic power and restrictive business practices;
 - (c) protecting and promoting social and economic welfare in general and, in particular, the interests of the consumers and the public;
 - (d) helping to maximise the country's benefits from international commerce ?

III. Shares & Share Capital

32. (a) Do you agree that share capital of a company should consist of equity shares only ?
- (b) Do you feel the need for issue of no par value equity shares?
33. Do you advocate abolition of preference shares as a class ?
34. Do you advocate compulsory listing of shares with Stock Exchange by all public limited companies ?
35. Drawing your attention to sections 153, 187C, etc. can you suggest any better alternative for disclosure of trust and benami holdings?
36. If, in your opinion, the procedures prescribed in section 187C are irksome, what other alternatives would you suggest ?
37. Would you like to combine the essence of sections 108A to 108H and section 250 in a single section ?
38. What are your views on the legal and procedural difficulties in the working of sections 108A to 108H of the Act ? Please indicate your reaction to the suggestion that these provisions could be suitably incorporated in the M.R.T.P. Act.
39. Can you suggest some guidelines the observance of which may enable the companies to dispense with prior approval of the Central Government for inter-company investments ?
40. Drawing your attention to sections 55 and 56 and Schedule II, can you suggest a simpler procedure/form to make it intelligible to common investors ?
41. (a) Do you agree that prospectus could be issued by a company only after its incorporation ?
- (b) Would you like issues exceeding certain amounts to be handled by or through a specialised agency like issue houses ?
42. Private companies are prevented from issuing prospectus. Do you think they should be allowed to issue an advertisement inviting deposits, which itself amounts to issue of prospectus, vide section 2(36) ?

Professionalisation of Management

99. What according to you is exact connotation of the term 'professionalisation of management'?
100. Is it necessary for purpose of professionalisation of management, to insist on management by members of certain recognised professions ?
101. What are the professions which in your view must participate in management ?
102. Do you suggest any particular level of participation of professional managers ?
103. Do you advocate that the Managing Director should be a professional not holding shares beyond a specified limit by way of qualification shares either by himself or through his relatives ?
104. What legal professions would you like to introduce in the Act for purpose of ensuring professionalisation of management ?
105. Considering the possibility that there may be companies making continuous losses which work as a disincentive for both the company to appoint qualified Company Secretary and for Secretary to take up a job on such a company do you suggest that the word "paid-up capital" should be substituted by the words "paid-up capital and free reserves" in section 383A of the Act ?

Proportional Representation

106. Do you advocate proportional representation of the shareholders on the Board of Directors? If so, how such proportional representation is to be given effect to ?
107. Do you think that shareholders holding certain percentage of the share capital of the company must have the right to nominate certain percentage of the Board of Directors ?
108. Would you suggest a specific system of proportional representation to ensure adequate participation by (a) shareholders; (b) employees; and (c) other interests ?
109. Would proportional representation by single transferable vote or cumulative vote afford sufficient protection to minority in all companies of a certain size.

Managerial Remuneration

110. Please give your view on the existing law and procedure governing approval of managerial appointment and remuneration.
111. Would you like to suggest any proportion between the lowest and the highest salaries (including pay and wages) in a company ?
112. Do you suggest that the approval of Central Government to appointment and remuneration of whole-time Directors should not require Central Government approval, if the appointment satisfies the specified criteria and is also within the slabs of remuneration prescribed ?
113. Can you suggest certain slabs of remuneration relating to size and profitability of the company for the whole-time Directors, such slabs being prescribed in a schedule to the Act ?
114. As regards perquisites do you want a provision in the Act to the effect that no separate approval of Central Government would be required if the money value of

the perquisites does not exceed a fixed proportion of the remuneration falling within the prescribed slabs ?

115. Drawing your attention to section 198 of the Act would you consider it desirable to allow benefits of gratuity, pension/super-annuation fund, provident fund to Managing Directors or whole-time Directors who are paid commission on profits only ?
116. Would you suggest a provision on the lines of section 108E to the effect that the approval to appointment and remuneration should be deemed to have been automatically given unless within a certain period of the making of application the refusal is sent ?
117. Do you advocate a provision to the effect that minimum remuneration can be automatically paid by a company if the same is within a slab falling within a specified number of stages below the slab to which the company belongs according to its size*? Please specify whether paid-up capital or capital employed should be the norm, for determining size.

***Illustration**

For size 'A' company the remuneration slab is 'X'. For the purpose of minimum remuneration the company will be deemed to be a size 'C' company falling under the lower slab of 'Z'.

118. What are your views regarding regulation of the remuneration of executives (not appointed to the Board of Directors) of a company ? Would you like to impose any limit ? If so, whether it should be only in regard to the salary element or in regard to other allowances and perquisites as well of such executives ?

Meetings & Proceedings

119. Do you agree that the holding of separate statutory meeting (Section 165) should be done away with and the requirements of statutory meeting should be complied with simultaneously with the holding of the first annual general meeting ?
120. Do you think that Secretary of a company should also be statutorily empowered to make an application to Central Government to call annual general meeting in terms of section 167 of the Act ?
121. Drawing your attention to section 174 do you think the quorum for a meeting could be (a) in certain proportion to the number of members; or (b) in certain proportion to the total voting power ?
122. What should be the minimum requirement for demanding a poll and whether the existing provision in section 179 in this regard needs any change ?
123. Do you suggest any modification in the law relating to proxy ? If so, please give your suggestions. Should the proxy be given a right to speak at annual general meeting ?
124. What specific steps would you suggest for preventing canvassing for proxies, even if such canvassing is not at the expense of the company ?
125. Do you recommend the system of postal ballot or direct personal poll or both in relation to the meetings of a company ? If so, can you suggest a viable scheme ?
126. Do you recommend the system of voting by postal ballot for certain important business of the company like the following :
 - (a) election of directors ;
 - (b) conversion of private limited-company into public limited company and vice-versa;

- (c) substantial expansion, diversification, establishment of new undertaking or the disposing of the whole or substantially the whole of the undertaking of the company;
- (d) borrowings by the Board of Directors of the company beyond certain limits; and
- (e) effecting change in management, except where such changes are brought about through appointment of Government Directors ?

127. What is your view on the restriction on the managerial powers as suggested in Question No. 126 ?

Board of Directors/Directors

128. Would you recommend a common period of twelve months to be adopted by the company for purposes of holding requisite number of Board meetings, holding the Annual General Meeting and presentation of annual accounts ?
129. Would you like to ensure a specific frequency of Board meetings and that not more than certain period should elapse between two Board meetings ?
130. In place of existing provisions in this behalf would you like a provision to the effect that except for specified circumstances, loans and guarantees to directors and their associates are completely prohibited ?
131. Would you like a provision to the effect that disclosures should be made in the annual report of the director's interest, direct or indirect financial or otherwise, in all transactions and activities of the business, whether by way of contract or not ? Do you think the Board should be authorised statutorily to obtain the disclosure of information ?
132. Drawing your attention to the provisions of section 293(1), please indicate your reaction to the requirement of obtaining consents of the shareholders by special resolution.
133. Would you desire that a ceiling on sitting fees per meeting should be statutorily prescribed ? If so, what should be sitting fees? Please indicate your reaction to (a) specifying in the Articles of Association Rs. 300 as sitting fees without Central Government's approval and (b) empowering the Board to fix sitting fees upto Rs. 500 with the approval of the Central Government.

Oppression and Mismanagement

134. For determination of the question of "oppression of minority, would you like to make a distinction by enacting special provisions between :—
- (a) cases where majority of the shareholders are incharge of management; and
 - (b) cases where majority of the shareholders are not incharge of management ?
135. For prevention of oppression and mismanagement can you list out certain acts on the part of the company or its officers which are prejudicial to the interests of the public, the consumer or any other category or class which should entitle any member of the public representing the whole or any class thereof to make a complaint with specific facts which should empower the Central Government to take steps to bring the matters complaint of to an end ?
163. Should isolated acts of oppression and mismanagement be sufficient for a complaint and not necessarily continued course of oppressive acts ?

137. Do the twin requirements viz. alleged acts of oppression and circumstances justifying the winding up of the company throw additional burden on the complaining shareholders to make out a case of oppression? If so, should not clause (b) of sub-section (2) of section 397 be deleted?
138. Do the existing provisions give sufficient powers to the Courts to deal with cases of oppression and mismanagement (section 402 of the Act)? Should the Court's powers be enlarged?
139. Do you suggest that the powers presently exercised by the Courts should be transferred to any special tribunal or authority?
140. Would 'Appraisal remedy' as prevailing in the USA help in protection of minority interest? Should such a right be expressly conferred in the statute?

Returns, registers, books of account etc.

141. What changes and streamlining in the existing registers would you suggest?
142. What additional statutory registers would you recommend (e.g. a register showing the delegation made by the Board)?
143. Do you think the annual returns should contain such other additional information and particulars as should do away with the need for giving intimation, sending notice, or filing documents or returns with the Registrar from time to time and within specified periods? If so, can you list them out?
144. Do you advocate the maintenance of minute book, members' register on loose-leaf system? If so, what safeguards would you like to prescribe?
145. Do you envisage any difficulty in providing that all books of accounts to be maintained by a company should be kept at its registered office only and in deleting proviso to section 209(1)? In the alternative would you like to provide that a resolution will have to be passed by a company and filed with the Registrar every time it shifts its books of accounts from one place to another?

Charges and Mortgages

146. Do you suggest that obligation to file particulars of the charge with the Registrar should be specified as being equally on the company and the person holding the charge?
147. Do you suggest the doing away with the existing procedure by which condonation for delay in filing the charge or and modification thereof has to be sanctioned by Company Law Board? Would you like to empower the Registrar of Companies to accept registration with additional fee per day of delay?

VIII. Social Audit and Social Report

148. Would you like an annual social report, in addition to the existing annual report, by the Board of Directors, indicating in quantitative as well as qualitative terms, supported by facts and figures as far as possible :—
 - (a) the extent to which the corporation has been able to achieve some of the social goals while carrying its usual activities;
 - (b) the extent to which it has accomplished or is in the process of accomplishing any of social objectives quite independent of its usual activities?

149. Under Question No. 148(a) above, would you like to include the following :
- (a) complaint from the consumers regarding quality of the product;
 - (b) distribution margin as represented by the difference between actual selling price and the ex-factory/ex-godown price;
 - (c) creditors' turnover ratio and debtors' turnover ratio expressed in terms of number of days of credit enjoyed from suppliers and allowed to purchasers;
 - (d) what the corporation has done for workers' housing, their children's education, their physical and cultural development and providing them with social security;
 - (e) facilities and capacities remaining unutilised;
 - (f) maximum and minimum total remuneration received by the highest paid officer and the lowest paid worker of the corporation;
 - (g) providing employment to the physically, financially and socially handicapped;
 - (h) providing technical and managerial training;
 - (i) research and development?
150. Under 148(b) above, would you like to include the following :
- (a) keeping the environment clean and free from pollution;
 - (b) contributing towards the preservation of ecological balance in any manner including wild life preservation;
 - (c) anything done in the field of rural health and medicine;
 - (d) anything done to prevent the ill-effect of un-planned urbanisation;
 - (e) spreading education and literacy;
 - (f) improving the level of cultural level of the community;
 - (g) anything done in the field of the family welfare;
 - (h) donations given, their amounts and purposes;
 - (i) any measure to provide relief to the poor, the distressed and destitute;
 - (j) anything done towards rural upliftment including adoption of villages for social welfare programme ?
151. What other norms of responsible social behaviour of a corporation would you like to prescribe in addition to what is contained above ?
152. Drawing your attention to Question No. 148 to 150 what provisions would you like to be specifically incorporated for purpose of social audit of the company and for preparation of social report annually?
153. Do you want that the social report by the company should, besides being certified by the management, be also verified by independent professional people ?
154. Do you think a member of the public should have a right to ask for investigation into the affairs of the company showing absolute lack of concern for social good or indulging in activities leading to social detriment ?

IX. Accounts and Audit

155. Do you think that the determination of net profit for different purposes under the Act should form part of the auditor's report itself ?

156. Do you think that the Act should provide for depreciation to be allowed on the written down value method as under the Income-tax Act to the exclusion of any other method ?
157. Do you think any special provision is to be made in the Act to ensure that adequate provision is maintained for timely replacement of fixed assets ?
158. What changes would you suggest in the matter of presentation of annual accounts ?
159. Do you think that cost audit should be made a regular annual feature alongside the statutory audit ? What should be the form in which cost audit report, if prescribed, should be given ?
160. When do you think cost audit should begin in order to provide alongwith cost audit report a reconciliation of the costing and financial results ?
161. To what extent do you think the cost audit report, if published, can disclose information relating to costs ? In case of publication do you think mention of specific figures or data is to be avoided ?
162. What should be the form in which cost accounting information is to be disclosed ?
163. What is your reaction to the present practice of the auditors' qualifying remarks on the accounts by way of notes on accounts coming from the directors ? What changes would you recommend ?
164. What should be the basis for distinguishing *notes* amounting to qualifications in the auditors' report and the *notes* forming the part of the accounts as approved by the Board ?
165. Do you think that some of the Notes appearing below Schedule VI should appropriately form part of a cost auditors' report (inventory valuation, for example) ?
166. Do you think that the provisions of sections 224A and 619B can be combined for purpose of determining the question of appointing the auditors ?
167. Please indicate your reaction to imposing statutory obligation on statutory auditors of a company to include in their report on accounts, any reporting of :—
- (a) wastage of national resources by the company;
 - (b) economies of scale achieved and further scope thereof;
 - (c) unreasonable profit, if any, made by the company and effects thereof on labour and consumer;
 - (d) contravention, if any, by the company of certain specified laws (e.g. Tax Laws, MRTP Act etc. and other Acts dealing with economic offences).
- In case you consider that such obligation should not be cast on statutory auditors, what other agency or machinery would you suggest for the purpose ?
168. Drawing your attention to section 233A, would you like all types of audit, financial audit, cost audit, social audit, internal audit, to be covered under that section ?
169. Do you think the matters included in Manufacturing and Other Companies (Auditors' Report) Orders, 1975 can be distributed as between the statutory auditors' report itself, the cost audit report and the annual social audit report ?

X. Administrative Machinery

170. What are the simplifications necessary for the better administration of the two Acts ?
171. What are your views on the adequacy or inadequacy of the remedies under the existing company law and do you have any suggestion in this regard ?
172. Would you consider the existing set-up of Company Law Board a satisfactory arrangement for administrative action or would you suggest any further body or any changes in the existing set-up ?
173. Do you think that the powers and functioning of the Central Government under the Act should be decentralised to the level of field officers ? If so, please specify those powers ?
174. What alternative to criminal prosecution would you suggest for dealing with technical and minor violations punishable with fine under the Act ?
175. Do you recommend the establishment of a separate Appellate Body with quasi-judicial authority for this purpose ?
176. Do you think it necessary to provide for specific appellate jurisdiction of the High Court and Supreme Court for certain matters arising out of decision of the proposed Appellate Body under the Act ?
177. Would you like to make a clear-cut distinction between penalty and prosecution under the Act, conferring the jurisdiction in respect of the former on the proposed Appellate Body and jurisdiction in respect of the latter only with the Courts ?

XI. Miscellaneous

178. Would you like to exempt any State/Union Territory other than Nagaland regarding applicability of the Act on the same lines as proviso to section 1 ?
179. Do you suggest any limitation on, or modification with respect to, the scope and the applicability of the Act to any category, class or type of companies ? Would you also like to bring in the exceptions made in the Act under various provisions at one place ?
180. Drawing your attention to sections 15A and 15B would you like to have a more generalised provision in this behalf ?
181. Companies registered under section 25 have been exempted from certain provisions by Notifications. Would you like them to be recodified ?
182. Drawing your attention to sections 51 and 52,
- (a) would you like a distinction to be drawn between filing and service of document ? If so, the distinction may be spelt out;
- (b) whether the need for certificate of posting may be deleted from section 51 ?
183. Do you suggest one comprehensive section dealing with all matters relating to dividends including the matters dealt with in dividend section ?
184. What are your views on the working of section 58-A of the Act and do you have any suggestion for the better working of this provision ?

185. What are your views regarding adequacy or otherwise of the existing provisions for regulating the appointment of the relatives of the Directors to offices/places of profit under the company? Do you think any regulation is necessary for the appointment of relative of executive and the grant of remuneration or other allowances to such personnel?
186. Do you suggest the elimination of existing sections 204 and 204-A and redrafting of section 314 to take care of all appointments to office of profit?
187. Assuming that system of sole-selling agency is completely abolished, what measures would you recommend for streamlining the system of distribution while ensuring that channels of distribution do not lead to seepage of corporate revenue and increase in costs?
188. Are you satisfied with the present provisions of awarding of fine only for non-compliance of certain provisions of the Companies and MRTP Acts? What other alternatives would you suggest?
189. Would you like to suggest any other specific rights and/or remedies being conferred on individuals/minority shareholders? If so, please enumerate?

XII. General

190. What are your specific suggestions as to the lines on which the two Acts can be simplified?
191. Do you think that the High Courts also should be empowered to frame rules which are not inconsistent with the Companies (Court) Rules, 1959?
192. Keeping in view the Terms of Reference of the Committee, give your views on what changes are necessary in the Companies Act, 1956 and the MRTP Act, 1969 which are not covered in your answers above.
193. You may make any other suggestions or comments as are relevant to the subject matter.

B. MONOPOLIES & RESTRICTIVE TRADE PRACTICES ACT

I. Concepts and Definitions

194. Do you think any changes are called for in existing definitions contained in the Act? If so, please give your suggestions?
195. Do you consider that the existing definition of —
 - (a) dominant undertaking;
 - (b) goods;
 - (c) inter-connected undertakings;
 - (d) undertaking;
 - (e) value of assets;

in the Act require redefinition? If so, on what lines? Are there any other terms which you would like to be redefined? If so, how?

196. In the light of your answer to Question 195 what according to you should be a "new undertaking" for the purposes of section 22 of the Act?

197. Do you favour adoption of any criteria, other than the existing ones, in the Act for determining the size of an undertaking (e.g. capital employed, gross fixed assets etc.) for the purpose of section 20(a) of the Act? If so, what should be the cut-off limit?
198. Do you consider that the concept of "public interest" envisaged in section 28 of the Act is adequate? If not, how would you like to expand it?
199. In view of the Supreme Court's decision in the TELCO case regarding the registrability of dealership agreements, do you consider any change in the definition of "restrictive trade practice" contained in section 2(o) of the Act, is called for?
200. Please indicate your reaction to expanding the scope of the concept of "resale price maintenance" to cover resale of goods:
- (a) at a price specified by supplier/dealer;
 - (b) at a mark-up or discount specified by supplier/dealer;
 - (c) at a mark-up not less than a minimum mark-up specified by the supplier/dealer;
 - (d) at a discount not greater than maximum discount specified by the supplier/dealer.

II. Restrictive Trade Practices

201. Do you consider that certain trade practices *per se* restrict competition? If so, please list out such trade practices.
202. What is your view regarding the suggestion for making the practices referred to in clauses (a) to (1) of sub-section (1) of Section 33 of the Act as "restrictive trade practices" *per se*?
203. If the practices referred to in the question No. 202 above are not to be so treated, would you favour the deletion of the word 'restrictive' occurring in sub-section (1) of section 33 of the Act?
204. In case any restrictive trade practices is to be declared illegal which such practices would you like to be so declared? To what extent should they be punishable?

III. Unfair Trade Practices

205. As a consumer protection measure, would you like to extend the scope of the Act? If so, what specific aspects would you like to be covered?
206. Would you like to expand the scope of the Act by including unfair trade practices? Please indicate your reaction to the inclusion of following as unfair trade practices:
- (a) mis-representation as to price at which goods will ordinarily be sold;
 - (b) publication of false, misleading, deceptive advertisement for promotion or sale of goods;
 - (c) hoarding/cornering of goods;
 - (d) agreement to supply or sell a product in short supply only with the condition that the purchaser shall purchase specific product, or products of a minimum value.

IV. Substantial Expansion

207. Do you think that the existing explanation of what amounts to substantial expansion for purposes of approval under section 21 of the Act should undergo any change ?
208. Do you suggest that the undertakings registered under the Act should be allowed to expand freely and establish new undertaking if they follow certain prescribed guidelines ?
209. Please give your views on the following criteria being prescribed in exempting registered undertakings from obtaining previous approval of Central Government under the Act;
- (a) the expansion would not result in the market share of the product or the services going beyond the existing level;
 - (b) the expansion is by way of replacement, modernisation or diversification within the existing licensed capacity and without increasing the share of the undertaking in the national total installed capacity for the product and involving no fresh investment or only marginal investment in the nature of balancing equipment;
 - (c) the expansion or establishment of a new undertaking is in a field of activity specially declared to be exempt for specified period in the interest of the national economy;
 - (d) the expansion or establishment of a new undertaking by registered undertakings is the only feasible alternative following any specific declaration in this behalf by the Government;
 - (e) where the expansion is shown, according to prescribed form, in resulting economies of scale by analysis of cost and technical data;
 - (f) not less than three-fourths of the production resulting from the proposed expansion is undertaken to be exported outside India;
 - (g) not less than three-fourths of the cost of financing the project is from internal resources;
 - (h) the undertaking is set-up for collaboration in joint ventures abroad or for formation of consortium involving export of products or services on hundred per cent basis for some specified minimum period;
 - (i) the proposed manufacture, or the rendering of service is in a field where the distribution of consumption is wholly under the control of the Government;
 - (j) the proposed manufacture or expansion is intended to utilise the existing waste products/by-products for the manufacture of a new article.
210. Do you consider that the present exemption covered by section 21(4) of the Act for expansion by non-dominant undertakings in the same or similar lines of production covered under the Industries (Development and Regulation) Act, 1951 calls for any modification? If so, on what lines ?
211. Do you favour the suggestion that any diversification of the business activities of a dominant undertaking by way of taking up the manufacture of a new article should have prior approval of the Central Government under the Act ?
212. Do you consider that provisions of Section 22 of the Act should be made applicable to an undertaking covered under section 20(b) of the Act ?

V. Power of Commission/Registrar/Director of Investigation/Central Government

213. Do you suggest that the existing law should be changed to provide for prosecution

before the Monopolies and Restrictive Trade Practices Commission for violation of any specific provision relating to :—

- (i) concentration of economic power;
 - (ii) monopolistic trade practices; and
 - (iii) restrictive trade practices ?
214. Do you think that the present administrative machinery of the Commission is in adequate to find the existence of monopolistic and restrictive trade practices on its own ?
215. Do you think that the present advisory role of the Commission under Chapter III of the Act should undergo any change?
216. (a) Do you think that the Commission should have independent power of investigation which should be more clearly specified in section 12(3) of the Act ?
- (b) For this purpose, do you think the Commission should have power to appoint inspectors, whether officials or non-officials, all over the country ?
217. Section 37(1) of the Act empowers the Commission to pass mandatory orders only in respect of any alleged restrictive trade practices, while sub-section (4) thereof empowers the Commission to submit a report to the Central Government in respect of any "monopolistic trade practices" which may be indulged in by a monopolistic undertaking in addition to a restrictive trade practice. What do you think of the suggestion for empowering the Commission to make independent investigation and inquiry into not only restrictive trade practices but also into monopolistic trade practices indulged in by both monopolistic undertaking and others and pass appropriate orders ?
218. At present, the powers of the Commission in respect of restrictive trade practices enquired into by it are limited to the passing of the 'cease and desist' order in terms of clauses (a) and (b) in sub-section (1) of section 37 of the Act. Do you consider it desirable to empower the Commission to award compensation or damages to those affected by indulgence of such a practice by an undertaking ?
219. (a) Do you think that the Director of Investigation should be charged with the statutory duty to investigate into all the prevailing restrictive trade practices and monopolistic trade practices on his own and also, on the results of such investigation, go before the Commission as applicant/prosecutor ?
- (b) Do you think that the offices of the Registrar of Restrictive Trade Agreements and the Director of Investigation can be combined into one single office ?
220. (a) What is your view on empowering the Director of Investigation on setting up an independent statutory authority with wide powers to investigate into matters relating to :
- (i) restrictive trade practices;
 - (ii) monopolistic trade practices;

and to institute proceedings before the Commission which would in turn, be clothed with powers to bring any matters complained of to an end by appropriate orders and to impose penalty and order imprisonment as per the provisions of law ?

- (b) Please indicate your reaction to the suggestion that this statutory authority should be empowered to institute "class action" on behalf of a section or whole of the community and ask for appropriate remedies in favour of individuals, groups or the community?

221. Would you suggest the establishment of separate Directorate of Inspection and Investigation working directly under the Commission ?
222. Do you think that the powers of inspection and investigation of the Central Government under the Companies Act should be combined with the powers of inspection and investigation under the M.R.T.P. Act also ?
223. Do you think the powers of the Central Government under section 27 of the Act can be given to the Commission itself ?
224. What machinery would you suggest for the implementation of the order of the Commission/Central Government ?
225. Do you think that the Registrar of Restrictive Trade Agreements should be redesignated as Registrar of Restrictive Trade Practices and also statutorily charged with the duty of investigation into any prevailing restrictive trade practices, bring the results of such investigation on record and go before the Commission as applicant/ prosecutor ?

VI. Miscellaneous

226. Do you think that the MRTP Rules framed by the Central Government are adequate ? If they require any modification, please suggest the lines on which they should be modified ?
227. Do you have any specific suggestions regarding issue of public notices by undertakings under the Act ?
228. Do you think the existing classification of goods calls for any rationalisation and whether this classification should be in relation to the concept of dominance or for all purposes of the Act ?
229. Do you think special provision should be introduced as regards monopolistic and/or restrictive trade practices indulged in, or likely to be indulged in, by multinational corporations, especially in respect of the following matters :—
- (a) merger with or take-over of local undertakings;
 - (b) international cartels, collusion or boycott or any other monopolistic/restrictive trade practices to which the multinational in India is also a party;
 - (c) furnishing at regular intervals information as may be prescribed;
 - (d) any special obligation of any kind to the national economy, particularly as regards the use of patents, copyright, technical know-how or any other industrial property of any kind ?
230. What is your view regarding the suggestion that the provisions of the Evidence Act should not be made applicable to enquiry proceedings before the Commission ?

APPENDIX X

LIST OF ADDRESSEES TO WHOM QUESTIONNAIRE WAS SENT

Government Departments/Agencies

1. The Director General,
Bureau of Public Enterprises,
Ministry of Finance,
Mayur Bhawan, New Delhi.
2. The Director,
Stock Exchange Division,
Ministry of Finance,
North Block,
New Delhi-1.
3. The Secretary,
Ministry of Petroleum, Chemicals &
Fertilizers, Shastri Bhawan,
New Delhi.
4. The Secretary,
Ministry of Finance,
Department of Expenditure,
North Block,
New Delhi.
5. The Secretary,
Ministry of Finance,
Department of Economic Affairs,
North Block,
New Delhi.
6. The Secretary,
Ministry of Industry,
Udyog Bhawan,
New Delhi-1.
7. The Chairman,
Bureau of Industrial Costs & Prices,
Hans Bhawan,
(Near Tilak Bridge),
New Delhi.
8. The Secretary,
Ministry of Commerce, Civil
Supplies and Co-operation,
Udyog Bhawan,
New Delhi-1.
9. The Secretary,
Ministry of Labour,
Shram Shakti Bhawan,
New Delhi.
10. The Secretary,
Ministry of Steel & Mines,
Shastri Bhawan,
New Delhi.
11. The Secretary,
Ministry of Information and
Broadcasting,
Shastri Bhawan,
New Delhi.
12. The Member,
MRTP Commission,
Travancore House,
Kasturba Gandhi Marg,
New Delhi.
13. The Registrar,
Restrictive Trade Agreements,
Kasturba Gandhi Marg,
New Delhi.
14. Director of Investigation,
MRTP Commission,
Travancore House,
Kasturba Gandhi Marg,
New Delhi-1
15. The Secretary,
Planning Commission,
Yojana Bhawan,
New Delhi.
16. The Controller of Capital Issues,
Ministry of Finance,
North Block,
New Delhi-1.
17. The Director,
Advertising & Visual Publicity,
PTI Building,
Parliament Street,
New Delhi-1
18. The Director General (Adv.)
All India Radio,
(Commercial/Advertising Section)
Akashwani Bhawan,
Parliament Street,
New Delhi-1.
19. The Director General (Adv.),
'Doordarshan',
(Commercial/Advertising Section),
Mandi House,
New Delhi.

20. The Development Commissioner,
Small Scale Industries,
7th Floor, 'A' Wing,
Nirman Bhawan,
New Delhi.
21. The Director General Supplies &
Disposal,
Parliament Street,
New Delhi-110001.
22. The Director General Technical
Development,
Udyog Bhawan,
New Delhi.
23. The Registrar of Newspapers,
Tolstoy Marg,
New Delhi-110001.
24. The Director,
Labour Bureau,
Simla.
25. The Director General,
Indian Institute of
Foreign Trade,
93, Ashok Bhawan,
Nehru Place,
New Delhi.
26. The Director General,
National Productivity Council,
Plot 5-6, Institutional Area,
Lodi Road,
New Delhi-3.
27. The Dean,
National Labour Institute,
AB-6, Safdarjung Enclave,
New Delhi-110016.
- Institutes/Associations
(Other than Chambers of Commerce)**
28. Indian Institute of Economics,
Himayatnagar,
Hyderabad-29.
29. The Chairman,
Consumer Council of India,
27, Safdarjung Road,
New Delhi.
30. The President,
Institute of Company Secretaries of
India,
A-1/111, Safdarjung Enclave,
New Delhi-110016.
31. The President,
Institute of Chartered Accountants of
India,
P.B. No. 268,
Indraprastha Marg,
New Delhi-110001.
32. International Confederation of Free
Trade Unions,
Asian Regional Organisation,
P-20, Green Park Extn.,
New Delhi-110016.
33. The President,
Institute of Cost & Works
Accountants of India,
12, Sudder Street,
Calcutta-700016.
34. Indian Consumers' Union,
Institute of Marketing and
Management,
62-F, Sujan Singh Park,
New Delhi.
35. Indian Law Institute,
Bhagwan Dass Road,
New Delhi-110001.
36. The President,
All India Management Association,
51-53, Deepak,
13, Nehru Place,
New Delhi.
37. The Director General,
National Council of Applied
Economic Research,
Parshila Bhawan,
11, Indraprastha Estate,
New Delhi.
38. Institute of Economic Growth,
University Enclave,
Delhi-110007.
39. Indian Institute of Labour Studies,
'B' Block,
2-E-6, Curzon Road Barracks,
Kasturba Gandhi Marg,
New Delhi-110001.
40. The Chairman,
Management Development Institute,
A-21, Palam Marg,
Vasant Vihar,
New Delhi-110003.
41. The Secretary General,
Institute of Marketing &
Management,
62-F, Sujan Singh Park,
New Delhi-110003.

42. The Indian Institute of Public Opinion,
DGS & D Building,
Parliament Street,
New Delhi-110001.
43. The President,
Institute of Secretaries,
Lentin Chambers,
Dalal Street,
Bombay.
44. The Registrar,
Indian Institute of Public Administration,
Indraprastha Estate,
Mahatma Gandhi Road,
New Delhi-1.
45. Indian Institute of Management,
3, Lanford Road,
Bangalore-560027.
46. Jamnalal Bajaj Institute of Management Studies,
Dadabhoy Naoroji House,
Plot No. 164, Backbay Reclamation,
Bombay-20.
47. Indian Institute of Management,
Emerald Tower,
Diamond Harbour Road,
P.O. Joka,
Calcutta-27.
48. The Executive Director,
Delhi Stock Exchange,
Asaf Ali Road,
New Delhi-110001.
49. The President,
Madras Stock Exchange,
322-323, Linghi Chetty Street,
Madras-600001.
50. The President,
Ahmedabad Stock Exchange,
Ahmedabad.
51. The President,
Bangalore Stock Exchange,
Chamber of Commerce Bldg.,
K.G. Road,
Bangalore-9.
52. The President,
Bombay Stock Exchange,
Dalal Street,
Bombay.
53. The President,
Calcutta Stock Exchange Association ,
Ltd., 7, Lyons Range,
Calcutta-700001.
54. Mysore Shareholders' Association,
Bank of India Bldg.,
Kempagowdha Road,
Bangalore-560009.
55. Madras Shareholders' Association,
Room No. 29,
Bombay Mutual Bldg., Annexe,
322/323, Linghi Chetty St.,
Madras-600006.
56. National Forum of Shareholders,
4, Synagogue Street,
2nd Floor,
Calcutta-700001.
57. Bombay Shareholders' Association,
Aga Khan Bldg.,
Dalal Street,
Bombay-400001.
58. The Chairman,
Indian Investment Centre,
Jeevan Vihar Bldg.,
Parliament Street,
New Delhi-110001.
59. Economic & Scientific Research Association,
India Exchange,
India Exchange Place,
Calcutta-700001.
60. The Director,
Indian Institute of Management,
Vastarpur,
Ahmedabad-380015.
61. Junior Chamber of Cottage and Small Industries,
E-49/6, Phase II,
Okhla Industrial Estate,
New Delhi-110020.
62. Federation of Association of Small Industries of India,
23/B-2, New Rohtak Road,
New Delhi-110005.
63. Association of Small Scale Industries of India,
Bombay Life Building,
45, Veer Nariman Road,
Bombay-400023.

64. All India Small Scale Manufacturer Association, 14, Garibdas Street, Bombay-400023.
65. Small Investors Association, D-4, Green Park, New Delhi-110016.
66. National Alliance of Young Entrepreneurs, C-20/B, Green Park Extn., New Delhi-110016.
67. All India Organisation of Employers, Federation House, New Delhi-110001.
68. Employers Federation of India, Army & Navy Building, 148, Mahatma Gandhi Road, Bombay-400023.
69. Fair Trade Practices Association, Green Western Bldg., 130-132, Apollo Street, Bombay-400023.
70. All India Institute of Management Studies, 14, Lal Baug Society, Vadodara-390004.
71. The Secretary, Indian & Eastern Newspapers Society, IENS Building, New Delhi-110001.
72. The Director, Xavier Labour Institute, P.B. No. 47, Jamshedpur-831001.
73. The Director, Shree Ram Centre for Industrial Relations, 5, Sadhu Vaswani Marg, New Delhi-110005.
74. The Director, Tata Economic Consultancy Services, Oriental House, Mangalore Street, Bombay-400028.
75. The Director, Indian Social Institute, D-25, N.D.S.E. Part II, New Delhi-110049.
76. The Secretary, Forum of Free Enterprises, Arya Bhawan, Jor Bagh, New Delhi-110003.
77. The Navjivan Trust, Near Gujarat Vidya Peeth, Ahmedabad-14.
78. The Chairman, Standing Conference on Public Enterprises, 1st Floor, Chandralok, 36, Janpath, New Delhi.
- Trade Union Centres**
79. The General Secretary, Indian National Trade Union Congress, 2/44, Royapettah High Road, Madras-14.
80. The General Secretary, All India Trade Union Congress, 24, Canning Lane, New Delhi-110001.
81. The General Secretary, Hind Mazdoor Sabha, Nagindas Chambers, 167, P.De'Mello Road, Bombay-400038.
82. The General Secretary, United Trades Union Congress, 249, Bepin Behari Ganguli St., Calcutta-700012.
83. The General Secretary, Rashtriya Mill Mazdoor Sangh, Mazdoor Manzil, G.D. Ambekar Marg, Bombay-400012.
84. The General Secretary, Centre of Indian Trade Unions, 172, Lenin Sarani, Calcutta-13.
85. The General Secretary, Bharatiya Mazdoor Sangh, 14, Windsor Place, New Delhi-1
86. The President, National Front of Indian Trade Unions, 2, Jawaharlal Nehru Road, Calcutta-700013.

87. Hind Mazdoor Panchayat, 204, Raja Ram Mohan Roy Rd., Bombay-400004.
88. The General Secretary, United Trades Union Congress, 77/2/1, Lenin Sarani, Calcutta-700013.
89. The President, National Labour Organisation, Gandhi Mazdoor Sevalaya, Bhadra, Ahmedabad.
- Chambers of Commerce**
90. Madras Chamber of Commerce, Dare House, First Line Beach, Post Box No. 35, Madras-1
91. The Southern India Chamber of Commerce, Indian Chamber Buildings, Post Box No. 1208, Madras-1.
92. The Punjab, Haryana and Delhi Chamber of Commerce, Phelp Building, Connaught Place, New Delhi-110001.
93. Orissa Chamber of Commerce and Industry, Post Box No. 83, Barabati Stadium, Cuttack-1.
94. Jaipur Chamber of Commerce and Industry, Johri Bazar, Jaipur City (Rajasthan).
95. Merchant's Chamber of U.P., 15/57, Civil Lines, Kanpur, (U.P.).
96. The Coimbatore Chamber of Commerce, Coimbatore (Madras).
97. The Indian Chamber of Commerce, P.O. No. 136, Cochin-2 (Kerala).
98. The National Chamber of Industry and Commerce, U.P.G.G. Industries, P.O. Agra, Agra (U.P.).
99. The Merchants' Chamber of Commerce, 3/1/2, Armenian Street, Calcutta-1.
100. The Madura Ramnad Chamber of Commerce, 90-92, East Avanimoola St. 2nd Floor, Madurai.
101. The Federation of Indian Chamber of Commerce, Federation House, Barakhamba Road, New Delhi-110001.
102. Kanara Chamber of Commerce, P.O. Box No. 116, Mangalore (Kanara Dist.) Karnataka State.
103. Northern India Chamber of Commerce, Desi Beopar Mandal, Ambala Cantt (Punjab).
104. Rajasthan Chamber of Commerce and Industry, Johri Bazar, Jaipur City (Rajasthan).
105. The Andhra Chamber of Commerce, Andhra Chamber Building, 272/3, Angappa Naicken St., Madras-1.
106. The Kashmir Chamber of Commerce, Srinagar (Jammu & Kashmir).
107. The Poone Merchants' Chamber, 185, Bhawanipeth, Poona-2.
108. The Indo-German Chamber of Commerce, Vulcan Insurance Bldg., Vir Nariman Road, Churchgate, P.O. Box No. 1689, Bombay.
109. The Upper India Chamber of Commerce, Civil Lines, Kanpur (U.P.).

110. The United Provinces Chamber of Commerce,
15/197, Civil Lines,
Kanpur (U.P.).
111. The Vizagapatam Chamber of Commerce,
Visakhapatnam (A.P.).
112. The Bombay Chamber of Commerce and Industry,
Mackinnon Mackenzie's Bldg,
Ballard Estate,
Fort,
Bombay-1
113. The Maharashtra Chamber of Commerce,
12, Rampart Road, 3rd Floor,
Fort, Bombay-1.
114. The Surat Chamber of Commerce,
Surat (Gujarat).
115. The Federation of Commerce and Industries,
352, Sultan Bazar,
Hyderabad (A.P.).
116. The Associated Chambers of Commerce and Industries of India,
Allahabad Bank Bldg.,
17, Parliament Street,
New Delhi.
117. The Bharat Chamber of Commerce,
State Bank Bldg.,
(Bara Bazar Branch),
Mahatma Gandhi Road,
Calcutta-7.
118. The Hindustan Chamber of Commerce,
14/2, Clive Row,
Calcutta-1.
119. The Western U.P. Chamber of Commerce,
Meerut (U.P.).
120. The Bihar Chamber of Commerce,
Patna (Bihar).
121. The Indian Merchants' Chamber,
Lalji Naranji Memorial,
Indian Merchants Chamber Bldg.,
Backbay Reclamation, Fort,
Bombay-1.
122. The Maharashtra Chamber of Commerce and Industries,
587/9, Shukrawar Peth,
Tilak Road,
Poona-2.
123. The Saurashtra Chamber of Commerce and Industry,
Mahatma Gandhi Road,
Lokhand Bazar,
Bhavnagar (Gujarat).
124. The Andhra Chamber of Commerce,
68-B, Rashtrapati Road,
Secundrabad (AP).
125. The Bengal National Chamber of Commerce and Industry,
P-11, Mission Row Extn.,
Calcutta-1.
126. The Indian Chamber of Commerce,
India Exchange,
Royal Exchange Place Extn.,
Calcutta-1.
127. Mysore Chamber of Commerce,
Bangalore (Karnataka).
128. Marwar Chamber of Commerce,
5, Haider Building,
Sajati Gate,
Jodhpur (Rajasthan).
129. Agra Merchants Chambers Ltd.,
Bari Kothai,
Belaganj,
Agra (U.P.).
130. Bengal Chamber of Commerce and Industry,
India Exchange
6, N.S. Road,
Calcutta-1.
131. Orient Chamber of Commerce,
6, Clive Row,
Calcutta.
132. Northern India Chamber of Commerce,
Lucknow.
133. Cochin Chamber of Commerce and Industry,
Post Box No. 503,
Bristow Road,
Willington Road,
Island,
Cochin-3.

134. Indian Chamber of Commerce,
P.B. No. 1350,
Jagadialaya,
Coimbatore-18.
135. Kamrup Chamber of Commerce,
Gauhati (Assam).
136. Tamil Chamber of Commerce,
310/311, Linghi Chetty Street,
1st Floor,
Madras-1.
137. Upper Assam Chamber of Commerce,
P.O. Jorhat,
Assam.
138. Karnatak Chamber of Commerce and
Industry,
Hubli.
Mysore State,
(Karnataka).
- Financial Institutions**
139. Industrial Credit and Investment
Corpn. of India Ltd.,
163, Backbay Reclamation,
Bombay-400020.
140. Industrial Development Bank of
India,
Jolly Maker Chamber,
1, Nariman Point,
Bombay-400021.
141. Industrial Finance Corpn. of India,
Bank of Baroda Bldg.,
16, Parliament Street,
New Delhi-110001.
142. Unit Trust of India,
Bombay Life Bldg.,
45, Veer Nariman Road,
Bombay-400023.
143. Life Insurance Corpn. of India,
Yogakshema,
Jeevan Bima Marg,
Bombay-400021.
144. Indian Bank Association,
Stadium House,
Block 3, 6th Floor,
81/81, Veer Nariman Road,
Bombay-20.BR.
145. Comptroller and Auditor General
of India,
Indraprastha Estate,
New Delhi.
- Bar Associations**
146. The Supreme Court Bar Association
Tilak Marg,
New Delhi-110001.
147. Bar Association of India,
AB-21, Mathura Road,
New Delhi-110001.
148. Bar Association,
High Court of Uttar Pradesh,
Allahabad.
149. Bar Association,
High Court of Andhra Pradesh,
Hyderabad.
150. Bar Association,
High Court,
Assam, Nagaland,
Gauhati.
151. The Bar Association of India,
Room No. 20,
Supreme Court Bldg.,
New Delhi-1.
152. Bar Association,
High Court,
Bangalore.
153. Bar Association,
High Court,
Bombay.
154. Bar Association,
High Court of Gujarat,
Ahmedabad.
155. Bar Association,
High Court,
Calcutta.
156. Bar Association,
High Court of Himachal Pradesh,
Simla.
157. Bar Association,
High Court of J & K,
Srinagar.
158. Bar Association,
High Court of Kerala,
Ernakulam.
159. Bar Association,
High Court of Madhya Pradesh,
Jabalpur.

160. Bar Association,
High Court of Orissa,
Cuttack.
161. Bar Association,
High Court of Tamil Nadu,
Madras.
162. Bar Association,
High Court of Bihar,
Patna.
163. Bar Association,
High Court of Rajasthan,
Jodhpur.
164. Bar Association,
High Court of Punjab and Haryana,
Chandigarh.
165. Bar Association,
Rajasthan High Court,
Jaipur Bench,
Jaipur.
166. Bar Association,
High Court of Sikkim,
Gangtok.
- Individual Experts**
167. Shri A. Ramaiya,
Advocate,
Madurai (T.N.).
168. Shri Shantilal Mohanlal Shah
(Author on Lectures on
Company Law),
C/o M/s. N.M. Tripathi (P) Ltd.,
164, Samaldas Gandhi Marg,
Bombay-400002.
169. Shri C.R. Datta,
C/o Bar Library Club,
High Court,
Calcutta.
170. Shri S.C. Sen,
Bar-at-law,
C/o Eastern Law House (P) Ltd.,
54, Ganesh Chandra Avenue,
Calcutta-13.
171. Shri S.S. Kumar,
Editor,
Company Law Digest,
Asaf Ali Road,
P.B. No. 7071,
New Delhi-110002.
172. C.S. Vidyashankar,
Madras.
- Others**
173. The Institute for Social & Economic
Change,
Carlton House,
Palace Road,
Bangalore-560001.
174. Bombay Chartered Accountants
Society,
69-71, Ghogha Street,
Bombay-400001.
175. Bombay Mill Owners' Association.,
Elphinstone Bldg.,
10, Veer Nariman Road,
Bombay-400001.
176. Ahmedabad Mill Owners' Association
Ranchond Lal Marg,
Navrangpura,
Ahmedabad-9.
177. Bombay Incorporated Law Society,
High Court New Building,
Bombay-400032.

LETTER NO. 4/11/77 EC DATED 30.9.77 FROM THE CHAIRMAN,
EXPERT COMMITTEE TO THE CHIEF JUSTICES OF ALL
HIGH COURTS

You must have read in the press that the Central Government has constituted a Committee to consider and report as to what changes are necessary in the Companies Act, 1956 and Monopolies and Restrictive Trade Practices Act, 1969, with particular reference to the modifications which are required to be made in the form and structure of the Companies Act, 1956, and the Monopolies and Restrictive Trade Practices Act, 1969, so as to simplify them and to make them more effective, wherever necessary.

The Committee has also been asked to consider the provisions of the Companies Act, 1956 and to report *inter alia*—

- (a) classification and formation of companies and the constitution of board of directors with special reference to protection of the interests of the shareholders who are in minority ;
- (b) exercise of managerial powers, and protection of shareholders' and creditors' interests and their relations, *inter SE* ;
- (c) measures by which workers' participation in the share capital and management of companies could be brought about ;
- (d) provisions which [are required to be made to prevent mismanagement with special reference to safeguarding of company's own interest and the public interest ;
- (e) measures necessary to promote professionalisation of management and regulation of managerial and executive remuneration commensurate with their responsibilities ; and
- (f) measures by which re-orientation of managerial outlook in the corporate sector could be brought so as to ensure the discharge of social responsibilities by companies.

The Committee has also been requested to consider and report on :

- (i) what changes are required to be made in the Companies Act, 1956 to streamline the winding up procedures so as to expedite the realisation and distribution of assets to the creditors and contributories ;
- (ii) whether it is desirable to enact special provisions applicable to the Government companies as a class so as to exclude the provisions of the Companies Act, 1956 generally in their applicability to such companies ;
- (iii) what adaptations and modifications are necessary in the provisions of the Companies Act, 1956, in their application to entrepreneurs in medium and small scale sectors carrying on business as joint stock companies ;
- (iv) what further changes are required to be made in the Companies Act, 1956, regarding the establishment of places of business and operation of foreign companies in India ;
- (v) what improvements, if any, are required to be made in the present administrative structure and procedures regarding the enforcement of the provisions of the Companies Act, 1956, and the Monopolies and Restrictive Trade Practices Act, 1969 ;
- (vi) what changes are required to be made in the Monopolies and Restrictive Trade Practices Act, 1969 in the light of the experience gained in the administration and operation of the said Act ; and

- (vii) any other matter incidental or ancillary to the administration of the Companies Act, 1956 and the Monopolies and Restrictive Trade Practice Act, 1969, having regard to the growth and development of trade, commerce and industry.

You will see from the terms of reference, that not only is the Committee expected to deal with the lacunae and problems that have arisen with regard to the day to day problems which have arisen with reference to the two Acts but also has to suggest what further changes are necessary keeping in view the requirements of the existing situation. An important part of the Company Law which requires to be reviewed in depth is that dealing with the winding-up procedure. That part has remained unchanged since 1913 and the provisions need a fresh review so as to ensure early disposal of the winding-up procedures and settlement of the claims of the creditors and contributories of the companies in liquidation. The High Courts daily have occasion to administer the Companies Act in a very intimate and extensive way. In the actual administration of the Companies Act, more so on the liquidation side, experience gained by the Judges would undoubtedly be of great help and assistance to the Committee.

I have no doubt that there will be many worthwhile suggestions which the High Court would like to be implemented so as to see that the purpose of these Acts is effectuated and the problems which are faced by the Courts and by the companies are minimised. I know the Judges have a great demand on their time with their normal daily work in Courts. But considering that quite an important part of the Companies Act is really to be administered by the High Court, the Committee would be greatly handicapped in its deliberations if it did not have the benefit of the views and experience of the High Court. May I therefore, request you and your brother Judges to favour the Committee with the advice and suggestions which in your opinion would better subserve the purpose of these Acts. I am enclosing a Questionnaire, which the Committee has issued. This may assist the Hon'ble Judges to identify the topics and problems. Of course, if there are any other suggestions and problems not raised in the Questionnaire which you feel the Committee should address itself to, I shall be grateful to receive those suggestions also.

I do hope that it will be possible for the High Court to send us advice, suggestions, so that the Committee may benefit by it. I shall be grateful if the same are sent by the end of October, 1977.

APPENDIX XII

LIST OF CERTAIN EXPERT BODIES/PERSONS SEPARATELY ADDRESSED
BY THE COMMITTEE FOR THEIR VIEWS

Mr. Justice B.R. Tuli,
Sector-9,
Chandigarh.

Mr. Justice J.L. Nain,
10-A, Nizamuddin West,
New Delhi.

Federation of Indian Manufacturers,
17-B/14, W.E.A.,
Karol Bagh,
New Delhi.

All India Automobile & Ancillary
Industries Association,
80, Dr. Annie Besant Road,
Worli,
Bombay-18.

Calcutta Study Circle on Corporate Law &
Allied Subjects,
C/o Regional Director,
Company Law Board,
Calcutta.

Secretary,
Standing Conference on Public Enterprises,
Chanderlok Building,
Janpath,
New Delhi.

Secretary General,
Council of State Industrial Dev. & Inv.
Corp. of India & Others,
A3/4, State Emporia Bldg.,
Baba Khadak Singh Marg,
New Delhi.

Association of Indian Eng. Industry,
172, Jor Bagh,
New Delhi.

British High Commission,
New Delhi.

Office of Member
Audit Board & *Ex-Officio*
Director of Commercial Audit,
Madras.

Vice President,
Institute of Secretaries
Dhamapada,
9/1, 1st Main,
V, Block, Kumar Park West
Bangalore-560020.

Federation of Andhra Pradesh,
Chambers of Commerce & Industries,
11-6-841, Red Hills,
Post Box No. 14,
Hyderabad-560004.

Indian Social Institute,
Lodhi Road,
New Delhi.

Government of Tamil Nadu,
Industries Department,
Fort Street,
Madras.

Shri Tenneti Vishwanathan,
Ex-Member of Parliament,
Visakhapatnam-2 (AP).

Dr. C.H. Bhabha,
49, Cuffee Parade,
Colaba,
Bombay.

Dr. C.D. Deshmukh,
2-2-1850, C.T.I.
Hyderabad-500768 (A.P.)

The Jammu & Kashmir Bank Ltd.,
Residency Road,
Srinagar.

Management Development Institute,
F-45, South Extension Part I,
New Delhi-110049.

Officers of the Department

All Regional Directors,
Company Law Board.

All Registrars of Companies,
Offices of the Registrars
of Companies.

All Official Liquidators,
Office of Official Liquidators.

NAMES OF BODIES/PERSONS FROM WHOM REPLIES WERE
RECEIVED IN RESPONSE TO PUBLIC NOTICE

I. Chambers of Commerce

1. Bengal Chamber of Commerce & Industry, Calcutta.
2. Bharat Chamber of Commerce, Calcutta.
3. Bombay Chamber of Commerce & Industry, Bombay.
4. Chamber of Commerce & Industry, U.P., Meerut.
5. Merchants' Chamber of Commerce, Calcutta.
6. Madura-Ramnad Chamber of Commerce, Madurai, Tamil Nadu.
7. Orissa Federation of Chamber of Commerce & Industry, Bhubaneshwar.

II. Associations

8. All India Manufacturers' Organisation, Bombay.
9. All India Manufacturers' Organisation (Gujarat State Board), Ahmedabad.
10. Bombay Gumastha Mahamandal, Bombay.
11. Chandigarh Management Association, Chandigarh.
12. Citizens' Action Group, Bombay.
13. Hubli Dharwar Chartered Accountants Association, Hubli.
14. Indian & Eastern Newspapers Society, New Delhi.
15. Indian Non-Ferrous Metals Manufacturers' Association, Calcutta.
16. Kanpur Press Owners' Association, Kanpur.
17. National Forum of Shareholders, Calcutta.
18. Northern India Shareholders' Association, New Delhi.
19. Small Investors' Association, New Delhi.
20. Standing Conference on Public Enterprises, New Delhi.
21. Shareholders' Association, Trichur.
22. U.P. Shareholders' Association, Meerut.
23. U.P. Electronic & Television Dealers' Association, Kanpur.

III. Institutions

24. A.V. College, Mayuram.
25. Institute of Chartered Accountants of India, New Delhi.

IV. Government Departments/Agencies

26. Regional Director, Madras.
27. Official Liquidator, Hyderabad.
28. Regional Director, Bombay.
29. Official Liquidator, Delhi.
30. Registrar of Companies, Delhi.
31. Regional Director, Calcutta.
32. Regional Director, Kanpur.

V. Trade Unions

33. Buckingham & Carnatic Mills Staff Union, Madras.

VI. Corporations

34. Alembic Chemical Works Company Limited, Baroda.
35. Balrampur Sugar Company Limited, Calcutta.
36. I.D.L. Chemicals Limited, Hyderabad.
37. Kirloskar Oil Engines Limited, Poona.
38. Mewar Sugar Mills Limited, Bhupalsagar.
39. Southern Synthetics Limited, Madras.
40. Walchandnagar Industries Limited, Bombay.
41. Tamilnadu Transport Development Finance Corporation.
42. India Tourism Development Corporation Limited.
43. Council of State Industrial Development and Investment Corporation of India.
44. Vyas and Vyas Private Limited, Bombay.

VII. Individuals

45. Alagundgi G.S., Hubli.
46. Ayily A. New Delhi.
47. Arvind R. Parikh, Bombay.
48. Ashok G. Pratap, Bombay.
49. Arora S.P., Delhi.
50. Baghyalakshmi M., Tirupur.
51. Badri Das Dwani, Calcutta.
52. Bagaria G.L., Delhi.
53. Basu R.N., New Delhi.
54. Bine Chand, Delhi.
55. Basant Ram & Sons, Lucknow.
56. Bose A.K., Calcutta.
57. Bhargava M.N., Lucknow.
58. Borkar G.S., Bombay.
59. Bhattacharjee A., Gauhati.
60. Bansal R.D., Kasauli (H.P.).
61. Chojar G.L., Chandigarh.
62. Durairajan T., Madras.
63. Dave P.M.
64. Dixit S.C., Bombay.
65. Datta J.P., Calcutta.
66. Dalip Chakravarty, Hooghly.
67. Dahiben R., Patel.
68. Dastur J.S., Bombay.
69. Dhanbhoora S.J., Bombay.
70. Firodia N.K., Poona.
71. Godbole W.N., Bombay.
72. Gopaldaswamy, New Delhi.
73. Govindaraja S.A., Cochin.
74. Gupta K.N., Delhi.
75. Gangadhar De.
76. Govindarajulu G.R., Coimbatore.
77. Goenka N.K., New Delhi.
78. Gopaldasamy N., Bhopal.

79. Gyani G.S., Chandigarh.
80. Hariharan T.N., Bombay.
81. Hari Ghate.
82. Iswar Das Malhotra, Delhi.
83. Indra Kulshreshta, Chiruy.
84. Ishwar Bhai Desai.
85. Jain, D.C., Dehradun.
86. Joy Jackot, Trivandrum.
87. Jankiraman, A. Bombay.
88. Jayshree V. Patel, Vidyanagar.
89. Smt. Jyotana B. Shah, Ahmedabad.
90. Jhunjhuwala, P.K., Calcutta.
91. Jagdish Chander Seth, New Delhi.
92. Kantilal Desai, 92-A. Krishnamurthy P.R., New Delhi.
93. Mrs. Kumar N.R., Bombay.
94. Kalika Prasad, Pathankot.
95. Karamchandani R.C., Bombay.
96. Krishnamoorthy N., Pondicherry.
97. Kaimal C.S.T., Bombay.
98. Kale, K.D.
99. Kuppuswamy, C.M., Madras.
100. Kulkarni K.S., Pune.
101. Lal Dewani, Baroda.
102. Lohia, R.K., Bombay.
103. Murlidhar Desraj Agarwala, Jalpaiguri.
104. Mallick, D.K., Bombay.
105. Mahna, G.C., New Delhi.
106. Mulwani, T.T., New Delhi.
107. Mirza, U., Hyderabad.
108. Merchant, K.T., Bombay.
109. Manjunath, K., Bangalore.
110. Malti Laliwala, Rattam.
111. Majumdar, S.C., Calcutta.
112. Mehra, J.K., C/o Orr. Dignam & Company, New Delhi.
113. Maheshwary, M.L., Calcutta.
114. Mahadevan, N., Madurai.
115. Narasimha Murthy, G.S., Mandya.
116. Narsim, S., Almora.
117. Narohna, S.T., Bombay.
118. Narsimha Acharya S. Gangali.
119. Onkar Shankar Gupta, Calcutta.
120. Pareek, O.P., New Delhi.
121. Prabhu, S.M., Coimbatore.
122. Parulkar, S.N. Pune.
123. Pugh, T.O., Shillong.
124. Puttaistim Ramaiya N., Bangalore.
125. Patel, M.J., Bombay.
126. B.R. Phause, Bombay.
127. Parmeshwaran, A., Palghat.

128. Parimal Das Gupta, Calcutta.
129. Rameshwar Lal Sharma, Jaipur.
130. Ravinder Kumar Bhatia, New Delhi.
131. Raj Kumar Tandon, New Delhi.
132. Rammohan R., Bombay.
133. Rajagopalan T.R., Tiruchi.
134. Rajasekhar Shelter, Dharwar.
135. Raj Ojha, P., Jodhpur.
136. Raj Gopal, S., New Delhi.
137. Ramashankar Prasad, Howrah.
138. Ram Narain Agarwal, Sultanpur.
139. Rao, V.M., Madras.
140. Ravisa, K.A., Bombay.
141. Rakesh Khurana (Indian Institute of Management, Ahmedabad).
142. Saxena, R.C., New Delhi.
143. Sharma, S.G., Trichur.
144. Shah, S.M., Bombay.
145. Subramaniam, P.T., Trichur.
146. Shah, H.S.
147. Sree Narayana, Muzaffarnagar, U.P.
148. Sarna, R.S., New Delhi.
149. Sastry, K.P., Surat.
150. Shirish H. Pattani, Bombay.
151. Shetty, C.S.S., Madras.
152. Shiv Kumar Gupta, New Delhi.
153. Shah, S.P., Naya Nangal.
154. Satyanarain Rao, K.N., Bangalore.
155. Shah, N.N., Gujarat.
156. Seth, B.H., Bombay.
157. Sunita Mallick, Hazaribagh (Bihar).
158. Sahu, V., Moradabad.
159. Sunith, K. Mallick, Hazaribagh.
160. Sivasubrahmanyam K.S., Madras.
161. Speedare Electricals, Jaipur.
162. Santhanam T.S., Madras.
163. Thakkar V.G., Dhanbad.
164. Tarachand Brij Mohanlal, Delhi.
165. Thadani N.R., New Delhi.
166. Taxali B.R., Delhi.
167. Smt. Usha Goyal, Agra.
168. Vurgese G.I., Bombay.
169. Venkateswaran V, New Delhi.
170. Smt. Vijayalakshmi Sogani, Jaipur.
171. Vinod K. Singhanian, New Delhi.
172. Vinoo Bhai Apabhai Patel, Vidyasagar.
173. Vaithishwaran K., Madras.
174. Vishwanathan S., New Delhi.
175. Vasudeva B. Kamath, Bombay.
176. Agarwal I.C., Calcutta.
177. Major B. Ohri.

178. Pandey T.N., New Delhi.
179. Sukhavaneshar, Madras.
180. Vidyasankar C.S.
181. Gae R.S., New Delhi.
182. Jaini K.A., Ahmedabad.
183. J.G. Prabhukhmuthan, Bombay.
184. Sen A.K.

APPENDIX—XIV

NAMES OF BODIES/PERSONS FROM WHOM MEMORANDA
HAVE BEEN RECEIVED IN RESPONSE TO QUESTIONNAIRE

I. Chambers of Commerce

1. Associated Chamber of Commerce & Industry of India, New Delhi.
2. Andhra Chamber of Commerce, Madras.
3. Bombay Chamber of Commerce and Industry, Bombay.
4. Bharat Chamber of Commerce, Calcutta.
5. Bengal National Chamber of Commerce and Industry, Calcutta.
6. Bengal Chamber of Commerce and Industry, Calcutta.
7. Cochin Chamber of Commerce & Industry, Cochin.
8. Federation of Indian Chamber of Commerce and Industry, New Delhi.
9. Federation of Karnataka Chamber of Commerce and Industry, Bangalore.
10. Hindustan Chamber of Commerce, Madras.
11. Indian Merchants Chamber, Bombay.
12. Indian Chamber of Commerce, Calcutta.
13. The Madras Chamber of Commerce & Industry, Madras.
14. Merchants' Chamber of Uttar Pradesh, Kanpur.
15. Merchants' Chamber of Commerce, Calcutta.
16. Maharashtra Chamber of Commerce & Industry, Poona.
17. Punjab, Haryana and Delhi Chamber of Commerce and Industry, New Delhi.
18. Southern India Chamber of Commerce & Industry, Madras. (pursuance to oral evidence).
19. Tamil Chamber of Commerce, Madras.
20. Upper India Chamber of Commerce.

II. Associations

21. Association of Company Secretaries, Executives and Advisers, Calcutta.
22. Ahmedabad Mill Owners' Association, Ahmedabad.
23. All India Management Association, New Delhi.
24. Association of Indian Engineering Industry, New Delhi.
25. Bombay Study Circle on Corporate Law & Allied Subjects, Bombay.
26. Bombay Chartered Accountants Society, Bombay.
27. Bombay Incorporated Law Society, Bombay.
28. Bombay Shareholders' Association, Bombay.
29. Calcutta Study Circle on Corporate Law & Allied Subjects, Calcutta.
30. Company Law Study Circle, Madras.
31. Consumer Education and Research Centre, Ahmedabad.
32. Indian Investment Centre, New Delhi.
33. Madras Shareholders' Association, Madras.

III. Institutions

34. Institute of Chartered Accountants of India, New Delhi.
35. Institute of Company Secretaries of India, New Delhi.
36. Institute of Cost and Works Accountants of India, Calcutta.
37. Life Insurance Corporation of India, Bombay.

38. Institute of Chartered Secretaries and Administrators.
39. Xavier Labour Relations Institute, Jamshedpur.
40. Industrial Development Bank of India, Bombay.

IV. Stock Exchanges

41. Bangalore Stock Exchange Limited, Bangalore.
42. Calcutta Stock Exchange Association Limited, Calcutta.
43. Delhi Stock Exchange Association Limited, Delhi.
44. Madras Stock Exchange Limited, Madras.
45. Stock Exchange, Bombay.
46. Stock Exchange, Ahmedabad.

V. Government Departments/Agencies

47. Atomic Energy Commission, Bombay.
48. Bureau of Public Enterprises, Ministry of Finance, New Delhi.
49. Ministry of Labour, New Delhi.
50. MRTP Commission (Sh. H.M. Jhalla), New Delhi.
51. Registrar, Restrictive Trade Agreements, New Delhi.
52. Director of Investigation, New Delhi.
53. Comptroller and Auditor General of India, New, Delhi.
54. Development Commissioner (Small Scale Industries), Ministry of Industries and Civil Supplies, New Delhi.
55. Ministry of Finance (Stock Exchange Division), New Delhi.

VI. Trade Unions

56. Indian National Trade Union Congress.
57. Centre of Indian Trade Unions (pursuance to oral evidence).

VII. Individuals

58. Agarwal O.S., Bombay.
59. Berarwala F.L., Bombay.
60. C.H. Bhabha, Colaba, Bombay.
61. Deodhar V.V., Bombay.
62. Dhajelb, Bombay.
63. Mehta D.D., Bombay.
64. Narinder Kr. Khetrapal, Delhi.
65. Prabhu J.M., Coimbatore.
66. Ramaiya A., Madurai.
67. Ramanathan A.R., New Delhi.
68. Shah S.M., Bombay.
69. Shah D.D., Bombay.
70. Vaitheeswaran K., Madras.
71. V. Sankar Aiyar & Co., Chartered Accountants, New Delhi.
72. Tholiya B.L., C/o Tholiya & Co., Cost Accountants, Bombay.
74. Ramesh M. Bhatt., Ahmedabad.

APPENDIX—XV

STATEMENT SHOWING THE TOTAL NUMBER OF PAGES OF
MEMORANDA RECEIVED

Sl. No.	Bodies	No. and pages of memoranda in response- to public notice		No. and pages of memoranda in response to questionnaire	
1	2	3	4	5	6
1.	Chambers of Commerce	7	275	20	1140
2.	Associations	16	134	14	505
3.	Institutions	2	65	7	400
4.	Stock Exchanges	—	—	6	55
5.	Government Departments/Agencies	7	127	9	259
6.	Trade Unions	1	2	2	25
7.	Companies/Corporations	11	184	—	—
8.	Individuals	141	1298	16	360
TOTAL		185	2085	74	2744

NAMES OF BODIES, ETC WHO APPEARED BEFORE THE COMMITTEE TO TENDER ORAL EVIDENCE

Madras (16th and 17th Jan., '78)	Calcutta (18th and 19th Jan., '78)	Bombay (20th to 22nd Jan., '78)	Delhi (3rd to 5th Feb. '78)
1	2	3	4
<p>1. Madras Chamber of Commerce & Industry, Madras</p> <p>(a) Sh. A. K. Sivaramakrishnan (b) Sh. C. S. Vidyasankar (c) Sh. R. N. Ratnam (d) Sh. M. M. Muthiah</p>	<p>1. Bengal Chamber of Commerce & Industry, Calcutta</p> <p>(a) Sh. J. Sen Gupta (b) Dr. S. Chakravorty (c) Sh. D. K. Basu (d) Sh. K. V. Shanbhogue (e) Sh. M. Ghosh</p>	<p>1. The Stock Exchange, Bombay</p> <p>Sh. Jeejee Bhoy</p>	<p>1. Monopolies and Restrictive Trade Practices Commission</p> <p>Sh. H. M. Jhala</p>
<p>2. Company Law Study Circle, Madras</p> <p>(a) Sh. V. R. Virmani (b) Sh. M. Sundaraman (c) Sh. N. Srinivasan (d) Sh. M. Swaminathan</p>	<p>2. Indian Chamber of Commerce, Calcutta</p> <p>(a) Sh. S. K. Birla (b) Sh. R. P. Mody (c) Mrs. J. Singhi (d) Sh. M. Chaudhuri (e) Sh. P. K. Khaitan</p>	<p>2. Hind Mazdoor Sabha, Bombay]</p> <p>(a) Sh. Mahesh Desai (b) Sh. Vasant Gupta (c) Sh. R. Desai</p>	<p>2. Director of Investigation, MRTD Commission, N. Delhi</p> <p>Sh. Hargobind</p>
<p>3. Andhra Chamber of Commerce Secunderabad</p> <p>(a) Sh. V. L. Dutt (b) Sh. J. V. Samayajulu (c) Sh. P. Brahmayya (d) Sh. M. S. Sambasivam</p>	<p>3. Institute of Cost & Works Accountants of India, Calcutta</p> <p>(a) Sh. S. K. Mitra (b) Sh. Shyamal Banerjee (c) Sh. S. Suryanarayana (d) Sh. V. Kalyanaraman (e) Sh. M. P. Pandit (f) Sh. H. P. Ray Chaudhury</p>	<p>3. Indian Merchants' Chamber, Bombay</p> <p>(a) Sh. V. B. Haribhakti (b) Sh. Pratap Bhogilal (c) Sh. Y. P. Trivedi (d) Sh. Ramu Pandit (e) Sh. H. Y. Gailendu</p>	<p>3. Associated Chamber of Commerce & Industry of India, New Delhi</p> <p>(a) Sh. F. A. A. Jasdandvalla (b) Sh. Dara P. Mehta (c) Sh. K. V. Shanbhogue (d) Sh. R. N. Ratnam (e) Sh. A. K. Sivaramakrishnan (f) Sh. S. H. Gursahni (g) Sh. D. D. Puri (h) Sh. C. Balakrishnan</p>

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4. Company Law Advisory Committee, Madras Sh. T. S. Santhanam	4. Institute of Chartered Secretaries and Administrators of India Assn, Calcutta (a) Sh. P. R. Ray (b) Sh. K. V. Shambhogue (c) Sh. D. Ganguly (d) Sh. Aloke De	4. Incorporate Law Society (a) Sh. J. P. Thacker (b) Sh. D. M. Poppat	4. Upper India Chamber of Commerce Ramesh Srivastva
5. Southern India Chamber of Commerce, Madras (a) Sh. M. V. Arunachalam (b) Sh. S. Narayanaswamy	5. Bharat Chamber of Commerce, Calcutta (a) Sh. A. K. Rungta (b) Sh. Sripati Singhanía (c) Sh. R. N. Bangur (d) Sh. Mohan Singhi (e) Sh. L. R. Puri	5. Bombay Shareholders' Assn. Bombay (a) Sh. J. C. Mashruwala (b) Sh. C. P. Merchant (c) Sh. Tanubhai D. Desai (d) Sh. Dhiraj Lal Madan Lal	5. Merchants Chamber of Uttar Pradesh, Kanpur (a) Sh. P. D. Singhanía (b) Sh. J. V. Krishnan (c) Sh. A. B. Tandon (d) Sh. A. P. Jain (e) Sh. R. S. Vajpaye
6. Madras Stock Exchange, Madras (a) Sh. K. Krishnamoorthy (b) Sh. V. K. Sundaram (c) Sh. S. Narayanaswamy (d) Sh. E. R. Krishnamurthy	6. Calcutta Study Circle on Corporate Law & Allied Subjects (a) Sh. R. Krishnan (b) Sh. Aloke De (c) Sh. M. L. Maheshwari (d) Sh. R. N. Bhaduri	6. Bombay Study Circle on Corporate Law & Allied Subjects (a) Sh. M. V. Iyer (b) Sh. M. L. Bhakta (c) Sh. Divesh Modi (d) Sh. E. J. Dastoor (e) Sh. Pardivala (f) Sh. Pratap Gandhi	6. Federation of Indian Chambers of Commerce and Industry, N. Delhi (a) Sh. H. Singhan (b) Sh. R. S. Lodha (c) Sh. D. M. Puri (d) Sh. O. P. Khaitan (e) Sh. K. C. Mehta (f) Sh. C. K. Hazari (g) Sh. N. Krishnamurthy
7. Madras Shareholders Association Madras, (a) Sh. V. Papu (b) Sh. S. M. B. Easwaran (c) Major Vaikundam (d) Sh. C. Harikrishnan	7. Calcutta Stock Exchange Association Ltd. (a) Sh. S. C. Chaturvedi (b) Sh. S. R. Dutt (c) Dr. B. B. Ghosh (d) Sh. B. Mazumdar	7. Bombay Chartered Accountants Society (a) Sh. Ishwar Mehta (b) Sh. K. C. Narang (c) Sh. I. H. Shah (d) Sh. H. N. Shah (e) Sh. Santilal H. Shah	7. Indian National Trade Union Congress (a) Sh. S. L. Passey (b) Sh. S. N. Rao (c) Sh. P. S. Khera
8. Civil Liberties Councils, Madras Sh. Basheer Ahmed Sayeed	8. Association of Company Secretaries, Executives and Advisers, Calcutta (a) Sh. R. L. Bathwal (b) Sh. S. R. Dutta	8. Bombay Chamber of Commerce and Industry Bombay (a) Sh. T. Thomas (b) Sh. M. L. Apte	8. Sh. R. S. Gae, New Delhi.

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	(c) Sh. S. Bhattacharya	(c) Sh. H. H. Mody (d) Sh. S. S. Gurusahni (e) Sh. R. C. Khanna (f) Sh. Dara P. Mehta (g) Sh. B. P. Gunaji (h) Dr. C. J. Dadachandji (i) Sh. Billimoria	
9. Sh. C. M. Kuppuswamy, Madras	9. Centre of Indian Trade Unions, Calcutta (a) Dr. M. K. Pandhi (b) Sh. Shanti Shankar Bose (c) Sh. Biven Roy	9. Rashtriya Mill Mazdoor Sangh, Bombay (a) Sh. B. N. Datar (b) Sh. D. S. Pavasker	9. Punjab, Haryana and Delhi Chamber of Commerce & Industry (a) Sh. D. D. Puri (b) Sh. Mohindra Puri (c) Sh. C. K. Hazari (d) Sh. M. M. Sabharwal (e) Sh. V. P. Arya (f) Sh. R. Rai (g) Sh. Vinod Chandiook (h) Sh. Dina Nath (i) Sh. M. L. Nandrajog (j) Sh. D. K. Kapoor
10. Small Scale Sick Industries Association, Madras (a) Sh. C. T. Devaraj (b) Sh. Loyala Joseph (c) Sh. M. Natarajan	10. Merchants Chamber of Com- merce, Calcutta (a) Sh. D. M. Kothari (b) Sh. B. P. Agarwala (c) Sh. L. Swaminathan (d) Sh. H. P. Agarwala (e) Sh. H. L. Somani (f) Sh. A. Kothari (g) Sh. H. R. Bose		10. Standing Conference on Public Enterprises, New Delhi (a) Sh. R. C. Dutt (b) Sh. I. M. Puri
	11. Bengal National Chamber of Commerce and Industry, Calcutta (a) Sh. S. R. Chakravorty (b) Sh. B. P. Roy		11. U. P. Shareholders' Association Sh. G. S. Gupta

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12. Institute of Company Secretaries of India, New Delhi
 - (a) Sh. C. R. Shah
 - (b) Sh. P. A. S. Rao
 - (c) Sh. L. R. Puri
 - (d) Sh. T. P. Subbaraman
 13. Sh. K. D. Kale, Secretary India Tourism Development Corporation Limited, New Delhi
 14. Sh. Vinod K. Singhania, Delhi
 15. IENS, New Delhi
Sh. J. M. Mukhi and
five others
 16. Sh. A. R. Ramanathan,
Cost Accountant, New Delhi
 17. Institute of Chartered Accountants of India, New Delhi
 - (a) Sh. B. L. Kabra
 - (b) Sh. P. K. Mallik
 - (c) Sh. N. Srinivasan
 - (d) Sh. P. S. Gopalakrishnan
 - (e) Sh. A. L. Majumdar
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BODIES ETC. WHO TENDERED ORAL EVIDENCE

PARTICULARS OF MEETINGS OF HIGH POWERED EXPORT COMMITTEE

No. of Meeting	Date(s)	Day (s)
1st Meeting	19th September, 1977	1
2nd Meeting	3rd October, 1977	1
3rd Meeting	28th and 29th October, 1977	2
4th Meeting	18th and 19th November, 1977	2
5th Meeting	1st, 2nd and 3rd December, 1977	3
6th Meeting	14th, 15th and 16th December, 1977	3
7th Meeting	5th and 6th January, 1978	2
8th Meeting	2nd February, 1978	1
9th Meeting	2nd, 3rd and 4th March, 1978	3
10th Meeting	21st, 22nd and 23rd March, 1978	3
11th Meeting	5th, 6th and 7th April, 1978	3
12th Meeting	1st, 2nd, 3rd, 4th, 5th and 6th May, 1978	6
13th Meeting	17th, 18th and 19th May, 1978	3
14th Meeting	29th, 30th and 31st May, 1978	3
15th Meeting	12th to 17th June, 1978	6
16th Meeting	5th to 8th July, 1978	4
17th Meeting	26th to 28th July, 1978	3
18th Meeting	21st to 23rd August, 1978	3
19th Meeting	29th August, 1978	1
TOTAL		53