

# THE CLASSIFICATION OF COMPANIES UNDER THE SOUTH AUSTRALIAN COMPANIES ACT, 1962.

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## I. THE OLD LAW

### (i) *The Categories*

The South Australian Companies Act 1934-1960, divided the companies which could be incorporated pursuant to its provisions into ten basic classes. These were companies limited by shares,<sup>1</sup> which could be either public, proprietary or private,<sup>2</sup> companies limited by guarantee only,<sup>3</sup> companies limited by guarantee and having a share capital,<sup>4</sup> which could also, at least theoretically, be public, proprietary or private,<sup>5</sup> unlimited companies with or without share capital,<sup>6</sup> and no-liability companies.<sup>7</sup> Although the Act contained detailed requirements and limitations for each class of companies, the ultimate placement of a particular company within any one of these classes depended on the choice of its promoters, who were at liberty to select for the incorporation of their organization that class of company which they considered to be most suitable for its purposes.

To some extent the choice was restricted by the objects of incorporation, the nature of the future company's activities and the number of its shareholders. Thus a no-liability company could be formed only for mining purposes,<sup>8</sup> and the choice between public, proprietary and private companies depended on the number of shareholders in the proposed company and its intended fund-raising methods. But by and large the statutory classification, which, except for the category of private companies, bore a similarity to the

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1. South Australian Companies Act, 1934-1960, ss. 10 and 11. (This Act hereinafter referred to as the "1934-1960 Act".)
2. *ibid.*, ss. 37 and 38.
3. *ibid.*, ss. 10 and 13.
4. *ibid.*, s. 13.
5. According to ss. 37 and 38 of the 1934-1960 Companies Act any company limited by shares, not being a no-liability company, could be incorporated as a proprietary or private company. As companies limited of guarantee and having a share capital invariably placed a limit on the liability of their shareholders they became also companies limited by shares and, therefore, could acquire a proprietary or private status.
6. *ibid.*, ss. 10 and 14.
7. *ibid.*, ss. 10 and 12.
8. *ibid.*, s. 12 (2), and see s. 8 for a definition of the term "mining purposes".

classifications of companies in the United Kingdom and the other Australian States, was regarded as being sufficiently adequate to accommodate the requirements of every business entity seeking incorporation. No suggestions were ever made, if the published reports of the various committees investigating the state of company law either in Australia or the United Kingdom can be taken as a guide, that the needs of business organisations demanded a further expansion of the classification.<sup>9</sup>

In addition to these classes of companies the old Act, following the United Kingdom legislation of the time, also introduced the categories of holding and subsidiary companies<sup>10</sup> and foreign companies requiring registration within the State.<sup>11</sup> The placement of a particular company within either of these categories, in contrast to the aforementioned classes, depended entirely on its subsequent asset-holdings and operations.

(ii) *The Reasons*

It must not be concluded that all these classes and categories of companies arose as a result of an attempt to establish a scientifically infallible and logically coherent system of classification of corporate entities. They were, rather, the products of a gradual and pragmatic approach by the legislature to the creation of suitable legal forms of incorporation for the various types of business organizations. They also represented an attempt to strike an equitable and practical balance between two important and mutually incompatible manifestations of corporate practice: that of allowing companies to keep their activities secret, which has been and still is regarded as one of the essential prerequisites to commercial success, and, after the wide powers of company managers and the dangers associated therewith became apparent towards the end of the last century,<sup>12</sup> that of requiring wider and more comprehensive disclosure of such activities for the benefit of company investors, creditors and the public at large.

Thus companies limited by guarantee were created to enable the incorporation of charitable and similar organizations, and no-liability companies were introduced to encourage the incorporation of enterprises engaged in the highly speculative industry of mineral explora-

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9. See the Report of the Western Australian Royal Commission on Companies Bill (Western Australian Parliamentary Papers, 1941-1942, Vol. I) and the Cohen Committee Report on Company Law Amendment in the United Kingdom, 1945 (Cmd. 6659). Incidentally, the Western Australian Royal Commission rejected the suggestion that, in addition to public and proprietary companies, it should be made possible to incorporate private companies of the South Australian model in Western Australia.

10. 1934-1960 Act, s. 146.

11. *ibid.*, s. 351.

12. See A. A. Berle and G. E. Means, *The Modern Corporation and Private Property*, 1933, *passim*.

tion and mining.<sup>13</sup> A compromise between the demand for secrecy and the need for disclosure was established by dividing certain companies into public and, depending on which terminology was adopted in the particular country, proprietary or private;<sup>14</sup> by creating the categories of holding and subsidiary companies; and, to some extent, by requiring foreign companies carrying on business within the jurisdiction to register and file certain returns.

(iii) *Public and Proprietary Companies*

The difference between public and proprietary companies was that the latter were required to insert provisions in their articles (i) restricting the right to transfer their shares; (ii) limiting the number of their members, subject to certain exceptions, to not more than fifty; (iii) prohibiting them from making invitations to the public to subscribe for their shares, debentures, stock or bonds; and (iv) prohibiting them from receiving deposits from any other persons than their members.<sup>15</sup>

Public companies were not subjected to these restrictions. On the other hand, proprietary companies were not required to comply with the many disclosures and other formalities imposed on public companies. The object of the legislature in creating these two classes of companies is easily understandable. It wished to differentiate between small companies, which were no more than incorporated partnerships with a limited number of members, and large corporate organizations, which sought their funds from the public at large and therefore had to be subjected to a more stringent control.

The foregoing method of differentiation, however, was too simple to be effective. By a skilful combination of the two classes of companies, such as the formation of inter-locking chains of public and proprietary companies, the object of the legislature was almost completely defeated.

(iv) *Holding and Subsidiary Companies*

The South Australian Companies Act 1934-1960, attempted to counteract the avoidance of its disclosure requirements by introducing the categories of holding and subsidiary companies.<sup>16</sup> It defined a holding company as one which either held more than fifty per cent. of the issued share capital in another company, or which held shares in such company entitling it to more than fifty per cent. of the voting power therein, or which had the power to appoint the

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13. W. Harrison Moore, *A Century of Victorian Law* (1934) 16 J.C.L. & I.L. 175 at p. 193.

14. Thus the Australian proprietary company is called private company in the United Kingdom and New Zealand.

15. 1934-1960 Act, s. 37 (1).

16. *ibid.*, ss. 144-146.

majority of directors in the other company.<sup>17</sup> A power to appoint directors pursuant only to a debenture trust deed or shares issued thereunder did not make the company having that power a holding company, and shares held by a company, the ordinary business of which included the lending of money, as a security only were excluded from the calculation.<sup>18</sup>

In cases caught by the Act the other company was deemed to be the subsidiary of the holding company. Even so, a holding company was required to do no more than disclose as separate items in its balance sheet the shares which it held in its subsidiaries, the debts owed to it by the subsidiaries, and its own indebtedness to the subsidiaries.<sup>19</sup> A statement of the profits and losses of its subsidiaries also had to be attached to the holding company's balance sheet, but this had to contain only such particulars as concerned the holding company,<sup>20</sup> and, in any event, the actual amounts of the profits or losses did not have to be specified.<sup>21</sup>

The ineffectiveness of these provisions was succinctly summarized by the Cohen Committee as follows:

Thus, where the profits or losses or any part of the profits or losses are taken into account in the profit and loss account of the holding company, a statement to that effect without necessarily disclosing the amounts, is all that is required; where they are not so taken into account, it must be stated how they have been dealt with, but a mere statement that they have been carried forward in the accounts of the subsidiaries is sufficient and this gives no real information as to the results of their operations unless particulars of the profits and losses of the subsidiaries are made available. Further, the limited disclosure . . . as to the amount of the aggregate interests in subsidiary companies affords no real information as to their financial position unless particulars of their liabilities, reserves and assets are published to supplement the accounts of the holding company. The definition of a subsidiary company . . . is defective, notably because it does not cover sub-subsidiary companies or, in other words, companies which are subsidiaries to subsidiary companies.<sup>22</sup>

In South Australia, however, the disclosure requirements were in any event made completely nugatory by the legislature itself at the same time as it introduced them. In addition to public and proprietary companies the South Australian Companies Act 1934-1960, created

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17. *ibid.*, s. 146.

18. *ibid.*

19. *ibid.*, s. 144.

20. *ibid.*, s. 145.

21. *ibid.*, s. 145 (1) (ii).

22. Cohen Committee Report, 1945, Cmd. 6659, para. 116.

private companies, a class unique to South Australia and without a counter part in any other British Commonwealth country.<sup>23</sup>

(v) *Private Companies*

The notable feature of this class of company was that it had the advantages of both public and proprietary companies. It was allowed to have an unlimited number of members. Its shares were transferable without any restrictions. And it could solicit the public for loans and deposits without complying with the statutory disclosure and publicity requirements to which public companies were subjected.<sup>24</sup> Although it could possibly have been argued that the receipts or other forms of record issued by a private company to its depositors and lenders were in effect debentures,<sup>25</sup> the matter was never raised judicially and, in any event, section 38 of the South Australian Companies Act 1934-1960, made it unequivocally clear that, in so far as private companies were concerned, a difference existed between shares, debentures, stocks and bonds on the one hand and deposits and loans on the other.<sup>26</sup>

In effect the private company cut right across the aims of the legislation in creating public and proprietary companies. By changing its fund-raising methods from the issue of shares and debentures to the acceptance of deposits and loans a private company could achieve with impunity that which a proprietary company could not do at all and a public company at a considerable expense only. It is not surprising that it became the most popular class of company among South Australian as well as many inter-State company promoters.<sup>27</sup>

The paradoxical origin of the private company can be explained, first as the result of misinterpreting the English and other Australian statutes of the time by contending that a difference existed between the English private companies and the recently introduced Victorian proprietary companies,<sup>28</sup> and, secondly, after the initial mistake was discovered, as an attempt to preserve the powers of a group of

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23. 1934-1960 Act, s. 38.

24. *ibid.*, s. 38.

25. See the definition of debenture in 1934-1960 Act, s. 8, where it is deemed to include "debenture stock, bonds, and other securities of a company, whether constituting a charge on the assets of the company, or not".

26. Compare ss. 37 and 38 of the 1934-1960 Act and see *Maddaford v. De Vantes* [1951] S.A.S.R. 259 for detailed analysis of the word "debenture".

27. On the 31st December, 1961, 12827 companies were registered in South Australia. Of these 9752 were private companies and only 350 and 229 were public and proprietary companies respectively. The information has been supplied by courtesy of the South Australian Registrar of Companies.

28. U.K. Companies Act 1929, s. 26; Vic. Companies Act 1928, s. 130.

South Australian companies.<sup>29</sup> These were companies which were "freely" borrowing money from the public, but had otherwise what was loosely described as a "private character".<sup>30</sup>

Sir Shirley Jeffries, the Attorney-General in office at the time, said in his introductory speech to the South Australian House of Assembly before the Bill was finally enacted,<sup>31</sup> that private companies were "introduced to meet the case of many companies in South Australia which are not public companies, but do not wish to become proprietary companies".<sup>32</sup> He added that "it would be impracticable and disastrous to change the practice".<sup>33</sup>

After this brief and distinctly inadequate explanation the provisions relating to private companies<sup>34</sup> were accepted by both sides of the South Australian Parliament without debate. This is not the place to examine the effect of the South Australian private company on the economy and corporate practice of South Australia. However, it may be added as a matter of interest that when subsequently a similar attempt was made in Western Australia<sup>35</sup> it was rejected as unnecessary and undesirable.

## II. THE NEW LAW

The classification of companies in the new Act follows the pattern of the South Australian Companies Act 1934-1960, in enabling the formation of companies as limited by shares, as limited by guarantee, as limited both by shares and guarantee, as unlimited and, in the case of mining purposes, as no-liability companies.<sup>36</sup> But the classification of companies in the new Act is not identical with that of the old Act. The new Act introduces a number of new classes of companies and considerably alters the nature and scope of the earlier classes.

### (i) *Private Companies*

Undoubtedly the two most important changes affecting the South Australian structure of companies classification are the prohibition

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29. See the Report of the Select Committee of the House of Assembly on the Companies Bill, 1931 (South Australian Parliamentary Papers, 1931, No. 74), the Report of the Joint Select Committee on the Companies Bill, 1933 (South Australian Parliamentary Papers, 1933, No. 70) and South Australian Parliamentary Debates, 1931, pp. 1311-1321, 1549-1556 and 1621-1626; 1933, pp. 418-422, 454-455 and 461-466; 1934, pp. 1120-1123, 1252-1253, 1415-1421, 1702-1715.
  30. See the Report of the Joint Select Committee on the Companies Bill, 1933, *op. cit.*
  31. The Bill took five years of drafting and deliberation before it was enacted as the South Australian Companies Act, 1934.
  32. South Australian Parliamentary Debates, 1933, p. 419.
  33. *ibid.*
  34. 1934-1960 Act, s. 38.
  35. See the Report of the Western Australian Royal Commission on the Companies Bill (Western Australian Parliamentary Papers, 1941-1942, Vol. I).
  36. South Australian Companies Act, 1962, s. 14. This Act is hereinafter referred to as the "1962 Act".

on forming new private companies and the imposition of serious restrictions and obligations on existing private companies. First, these are permitted to retain their present status only until the 1st July, 1965, when they will either have to convert to proprietary companies or become public companies.<sup>37</sup> Secondly, private companies are now forbidden to seek deposits or loans of money from the public. The combined effect of sections 5(5) and 38 of the new Act makes all invitations to the public to deposit money with a company or lend money to it akin to invitations to subscribe for debentures therein, and this private companies are not permitted to do if they wish to retain their status.<sup>38</sup> This limitation is supplemented by a provision forbidding solicitors, brokers, agents and any other persons, whether officers of the company or not, to invite the public by advertisement to deposit money with a private company,<sup>39</sup> and by another provision giving power to the Registrar in the event of a breach of the first provision to terminate the private status of the company.<sup>40</sup>

Thirdly, private companies must now also attach copies of balance sheets and profit and loss accounts to their annual returns and file them with the Registrar<sup>41</sup> unless they fall within the category of prescribed private companies.<sup>42</sup> A prescribed private company is one

the number of members of which (counting joint holders of shares as one person and not counting any person in the employment of the company or of its subsidiary or any person who while previously in the employment of the company or of its subsidiary was and thereafter has continued to be a member of the company) does not exceed . . . fifty

and which has no place of business outside South Australia and does not carry on business in any place outside the State.<sup>43</sup> If the beneficial interests in the shares of prescribed private companies are held only by "natural persons", prescribed proprietary companies,<sup>44</sup> or other prescribed private companies, they need not make public their balance sheets and profit and loss accounts.<sup>45</sup>

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37. *ibid.*, s. 399.

38. 1934-1960 Act, s. 38 (1) (a) and 1962 Act, s. 5 (1), definition of "private company".

39. 1962 Act, s. 27 (7).

40. *ibid.*, s. 27 (2) (b).

41. *ibid.*, 8th Schedule.

42. *ibid.*, s. 398.

43. *ibid.*, s. 397. The word "place of business" and "carry on business" are not defined in the context of the present restriction, but it is reasonable to assume that they have the same meaning as is attributed to them in the case of foreign companies required to register in South Australia, see *ibid.*, s. 344.

44. The meaning of prescribed proprietary companies is discussed below.

45. *ibid.*, s. 398.

Finally, private companies, whether prescribed or not, may not appoint as their auditors either officers of the company, or partners, employers or employees of officers of the company, or partners or employees of employees of officers of the company.<sup>46</sup> It should be added that private companies must also comply with many new requirements and obligations which the new Act places on all classes of companies and which are considerably wider than the obligations contained in the old Act.

(ii) *Proprietary Companies and Exemption from Disclosure*

Another change, which in time, after its practical advantages are recognized, may have far-reaching consequences, is the sanction to incorporate unlimited companies with a share capital as proprietary companies.<sup>47</sup> The new Act alters to some extent the restrictive provisions which proprietary companies must insert in their memoranda or articles. Although the number of members which a proprietary company may have is still limited to fifty, shareholders who are employees or former employees of its subsidiaries are excluded from the calculation of that number.<sup>48</sup> Contrary to the old Act, which prohibited a proprietary company from receiving deposits from persons other than its members, the new Act only prohibits the making of invitations to the public to deposit money with the company.<sup>49</sup>

The new Act considerably narrows the class of companies which may avoid compliance with its disclosure requirements, which in themselves are much wider than formerly. It does this, first by dividing the class of proprietary companies into non-exempt, exempt and prescribed; secondly by improving the definitions of holding and subsidiary companies and by compelling the former to include more information relating to their subsidiaries in their returns; thirdly by expanding the obligations with which foreign companies must comply; and finally, by authorising the Governor to declare by proclamation that certain companies should be deemed investment companies.

A proprietary company is an exempt company when, subject to certain limited exceptions,<sup>50</sup> no beneficial interest in any of its shares is held, either directly or indirectly, by—

- (a) a public company;

46. *ibid.*, s. 9 (1) (c), cf. 1934-1960 Act, s. 154 (3).

47. 1962 Act, ss. 5 (1) and 15. The 1934-1960 Act only allowed companies "limited by shares" to become proprietary. S. 15 of the new Act permits every company "having a share capital (other than a no-liability company)" to acquire a proprietary status, and s. 5 (1) includes unlimited companies with a share capital within the definition of companies having a share capital.

48. 1962 Act, s. 15 (1) (b), cf. 1934-1960 Act, ss. 37 (1) (I) (b) and 40.

49. 1962 Act, s. 15 (1) (d), cf. 1934-1960 Act, s. 37 (1) (I) (d).

50. These are enumerated in 1962 Act, s. 5 (8).



- (b) a proprietary company a beneficial interest in a share in which is held, directly or indirectly, by a public company; or
- (c) a proprietary company a beneficial interest in a share in which is held, directly or indirectly, by a proprietary company a beneficial interest in a share in which is held, directly or indirectly by—
  - (i) a public company or
  - (ii) another proprietary company a beneficial interest in a share in which is held directly or indirectly, otherwise than by a natural person.<sup>51</sup>

Unfortunately this definition of exempt proprietary companies is not a happy one. It contains a number of vague and uncertain terms which are bound to create problems of construction and interpretation. Instead of making the exempt status of proprietary companies dependent on the holding of the legal title in their shares the definition, no doubt to close all possible loopholes, refers to the "beneficial interest" in such shares. Section 5(8)(d) of the Act defines "beneficial interest" as follows:—

a person (including a corporation) shall be deemed to hold a beneficial interest in a share—

- (i) If that person, either alone or together with other persons, is entitled (otherwise than as trustee for, on behalf of or on account of, another person) to recover, directly or indirectly, any dividends in respect of the share or to exercise, or to control the exercise of, any rights attaching to the share; or
- (ii) If any person, being a corporation, holds any beneficial interest in a share of another corporation which holds, or a subsidiary of which holds, any beneficial interest in that first-mentioned share.

Paragraph (ii) does not create any insurmountable difficulties of interpretation. It merely extends the ambit of the term "beneficial interest" to a wider number of companies and their subsidiaries. But the same is not true of paragraph (i). There is no doubt that this paragraph has the object of encompassing all types of arrangements, whether legal, equitable or otherwise, whereby an entitlement to a dividend or the exercise of a right under a share may accrue to some person. However, in combination with the words "directly or indirectly", which also appear in this paragraph, it may become very difficult to decide precisely in what circumstances the entitlement to the receipt of a dividend will be of such a nature as not to create a beneficial interest. Even more unfortunate is the use of the words "exercise" and "control" as these are terms of considerable uncertainty in present-day company law.

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51. 1962 Act, s. 5 (7), and see s. 5 (1), definition of "exempt proprietary company".

Further difficulty arises from the repetition of the words "directly and indirectly" in sections 5(7) and 5(8)(d). If they add anything of value to what is already contained in these provisions and if their meaning is interpreted literally there is no doubt that any form of connection between a person and several companies will be able to create a situation where any of the companies will be deemed to hold a beneficial interest in the other companies. As this is probably not the course which the court will adopt in interpreting the words "directly or indirectly", their existence only adds confusion to the already complicated meaning of sections 5(7) and 5(8)(d).

However, the Act does not contain any provisions prescribing a method of ascertaining the exempt or non-exempt status of proprietary companies. On the contrary, the Eighth Schedule of the Act provides that the exempt status of a proprietary company is entirely dependent on the issue of a certificate to that effect by a director and a secretary of a company, and that such certificate must be made to the best of their knowledge and belief.

The Act does not require the company officers to make any investigations or to fulfil any requirements to determine the exact status of their company. Buckley<sup>51a</sup> suggests that such status therefore entirely depends on the belief of the directors and secretaries irrespective of whether or not their company is in fact an exempt company. It is true that section 156(5) of the Act requires persons holding shares in proprietary companies<sup>51b</sup> as trustees for, or otherwise on behalf of or on account of, corporations<sup>51c</sup> to disclose this fact in writing to their respective companies. Undoubtedly, in the event of such disclosure being made the directors and secretaries will be presumed to have knowledge thereof. But it is unlikely, considering the confusing state of the definition of exempt and non-exempt proprietary companies, that such information will ever be disclosed. In any event the disclosure will refer only to the holding of shares in the company seeking the exemption and not in the company holding the shares or any subsequent companies. In the absence of such knowledge company directors and secretaries will always be able with impunity to declare their companies to be exempt.<sup>51d</sup> It is submitted that in the absence of more realistic procedural provisions in the Act the present classification of proprietary companies as exempt and non-exempt, except in the few

51a. Buckley, *Companies Act* (13th ed., 1957), p. 316.

51b. This provision also applies to shares held in prescribed private companies which are discussed below.

51c. The word corporation is defined in the 1962 Act, s. 5 (1).

51d. Palmer (*Company Law*, 20th ed., 1959, pp. 45-46) suggests that the directors of a company may further protect themselves by adopting articles in a form similar to s. 156 (5) of the 1962 Act. A specimen article is in *Palmer's Company Precedents* (17th ed., 1956), No. 281, p. 751.

apparent instances where such are directly related to public companies, is completely onerous.

Section 5(7) of the Act also does not elucidate upon the status of proprietary companies which hold shares in non-exempt companies. On its present reading it is possible that in a chain of five proprietary companies the first is a non-exempt company whilst the other four are exempt. This result, of course, offers possibilities for an indefinite variety of combinations.

It would also appear that where a share in a proprietary company is held by a private company, irrespective of whether the shares of the latter are held by a public company or not, the proprietary company is nevertheless exempt. Also, contrary to the provisions of the United Kingdom Companies Act 1948, an exempt proprietary company may issue debentures and other similar types of securities to other companies without prejudicing its status.<sup>51e</sup>

This division of proprietary companies was recommended by the Cohen Committee in 1945<sup>52</sup> to overcome the abortive consequences which arose from the classification of companies into public and proprietary. It is of some interest that in the United Kingdom the Jenkins Committee has considered even this division of companies to be ineffective and has suggested the abolition of exempt companies and the treatment of all limited proprietary companies as non-exempt.<sup>53</sup>

The prescribed proprietary company, like the prescribed private company, is a South Australian addition to the uniform companies legislation of Australia and does not appear in the companies statutes of the other States and Territories. A proprietary company is prescribed when it does not carry on business and has no place of business outside South Australia, and where the beneficial interests in its shares

are held solely by natural persons or by other prescribed proprietary companies or prescribed private companies or by a combination of such companies or of natural persons and such companies and neither a public company nor a foreign company, directly or indirectly, owns a beneficial interest in a share in any of such companies or in any corporation that, by virtue of sub-section (5) of section 6, is deemed to be related to any of them.<sup>54</sup>

All other proprietary companies are non-exempt and not prescribed.

### (iii) *Proprietary and Public Companies Compared*

It is doubtful whether non-exempt and unprescribed proprietary

51e. U.K. Companies Act 1948, s. 129 and 7th Schedule.

52. See the Cohen Committee Report, 1945 (Cmd. 6659), paragraphs 50-53.

53. Jenkins Committee Report, 1962 (Cmnd. 1749), paragraph 63.

54. 1962 Act, ss. 397 and 398 (1) (a). For the meaning of "corporations" and "related corporations" see *ibid.*, ss. 5 (1) and 6 (5) respectively.

companies have now any real practical advantage over public companies. Their most important privilege, that of not publishing their accounts,<sup>55</sup> is now taken away from them.<sup>56</sup> However, they are still distinguishable in many important respects from public companies. The differences between the two are as follows:

- (i) A proprietary company is required to have only two members<sup>57</sup> or, if it is wholly owned by a public company, only one member.<sup>58</sup> A public company, on the other hand, must have at least five members.<sup>59</sup>
- (ii) A proprietary company need not file a statement in lieu of prospectus.<sup>60</sup>
- (iii) A proprietary company need not comply with all the requirements regarding the allotment of shares and debentures which are imposed on a public company,<sup>61</sup> and may commence business immediately after incorporation, whereas a public company must receive a further certificate from the Registrar and perform all the formalities connected with its receipt.<sup>62</sup>
- (iv) A proprietary company is not required to hold a statutory meeting<sup>63</sup> and need not prepare and file with the Registrar a statutory report.<sup>64</sup>
- (v) A proprietary company need have only one director whereas a public company must have three.<sup>65</sup> Furthermore, a director of a proprietary company is not required to lodge with the Registrar a statutory declaration stating the number of shares in the company which are registered in his name and an undertaking to take from the company and pay for his qualification shares.<sup>66</sup>
- (vi) Subject to the provisions contained in the memorandum or articles of a proprietary company, its directors need not be elected individually.<sup>67</sup> They may assign their directorships without the approval by a special resolution of the Company<sup>68</sup> and cannot be removed by the company before the expiration of their terms of office.<sup>69</sup>

55. 1934-1960 Act, s. 150.

56. 1962 Act, 8th Schedule.

57. *ibid.*, s. 14 (1).

58. *ibid.*, s. 36.

59. *ibid.*, s. 14 (1).

60. *ibid.*, s. 50.

61. *ibid.*, ss. 48 and 49.

62. *ibid.*, s. 52. However, Gower, *Modern Company Law*, 2nd ed. (1957), p. 285, points out that a company may avoid this requirement by incorporating as a proprietary company and then converting to a public company.

63. This is a relaxation of the 1934-1960 Act which required every limited company to hold a statutory meeting (s. 132).

64. 1962 Act, s. 135.

65. *ibid.*, s. 114.

66. *ibid.*, s. 115. Qualification shares are described *ibid.*, s. 116.

67. *ibid.*, s. 118.

68. *ibid.*, s. 130.

69. Gower, *Modern Company Law*, 2nd ed. (1957), p. 124, and 1962 Act, s. 120.

However, they are removable by other directors if a power to that effect is contained in the memorandum or articles of the company.<sup>70</sup>

- (vii) A proprietary company may issue options to take its shares for any period of time. In the case of a public company the validity of such options is limited to five years.<sup>71</sup>
- (viii) The quorum and proxy provisions for a proprietary company are different from those of a public company.<sup>72</sup>
- (ix) On the other hand, a proprietary company cannot invite the public to subscribe for its shares or debentures<sup>73</sup> or issue interests,<sup>74</sup> and the Act contains a strange provision requiring any of its shareholders who hold their shares as trustees for or on behalf of a company, including a company incorporated outside South Australia, to declare this in writing to its secretary.<sup>75</sup> This rule does not apply to public companies.

These differences do not constitute a very coherent pattern but nevertheless make it clear that there are some cumbersome formalities which a non-exempt proprietary company, in contrast to a public company, is able to avoid.

(iv) *Exempt and Prescribed Proprietary Companies*

By and large, the main feature of exempt proprietary companies, and the only distinctive feature of prescribed companies, is that they do not need to publish their balance sheets and profit and loss accounts.<sup>76</sup>

The differences between exempt proprietary companies and prescribed proprietary companies are not so easily discernible. The first difference, of course, follows from their respective definitions. A prescribed company may not carry on business or have a place of business outside the State, and the beneficial interest in any of its shares may not be owned, directly or indirectly, by a foreign company or a company related to it according to the formula set out in section 6 of the new Act. However, there is nothing in the Act preventing a prescribed company from forming a subsidiary, either within or outside the State, for the purpose of operating outside South Australia. If the subsidiary is incorporated as a proprietary company it does not lose its exempt character simply by

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70. 1962 Act, s. 121.

71. *ibid.*, s. 68.

72. *ibid.*, ss. 140 (1) (a) and 141.

73. *ibid.*, ss. 15 (1) and 27.

74. *ibid.*, ss. 76 and 81.

75. *ibid.*, s. 156 (5).

76. *ibid.*, 8th Schedule and s. 398.

77. *ibid.*, ss. 397 and 398.

virtue of being owned by a prescribed company.<sup>78</sup> On the other hand, prescribed companies may exist in a chain of more than four companies, which exempt proprietary companies may not do without the risk of becoming non-exempt.<sup>79</sup>

The other differences are that an exempt proprietary company need not appoint an auditor if all its members agree to this effect;<sup>80</sup> that it may appoint as its auditor its own officer or a partner, employer or employee of such officer;<sup>81</sup> that it may lend money to its directors;<sup>82</sup> and that a liquidator in a members' voluntary winding up of an exempt proprietary company need not be a registered liquidator.<sup>83</sup> None of these provisions applies to prescribed companies, which are therefore required to comply with the more stringent provisions of the Act on any of these matters.

#### (v) *Holding and Subsidiary Companies*

With regard to holding and subsidiary companies the new Act follows substantially the recommendations of the Cohen Committee.<sup>84</sup> It includes within the definition of subsidiary companies, which is otherwise similar to the definition in the old Act, subsidiaries of subsidiary companies,<sup>85</sup> and it introduces a new term in the classification of companies by calling all interlocked holding and subsidiary companies, companies which are "related to each other".<sup>86</sup> The Act further provides that a subsidiary company may not own shares in its holding company except where they are acquired prior to the commencement of the Act, but even in that case the subsidiary is not allowed to vote at the meetings of its holding company.<sup>87</sup>

Other provisions of the new Act forbid a subsidiary to give financial assistance to anyone for the acquisition of shares in its holding company;<sup>88</sup> forbid a management company which is issuing interests pursuant to Part IV, Division V of the Act, to lend its funds to its related companies;<sup>89</sup> require the directors of holding companies to comply with certain formalities in relation to the receipt of direct benefits from their subsidiaries;<sup>90</sup> and allow inspectors to investigate at their own discretion the affairs of related companies.<sup>91</sup>

78. See the definition of exempt proprietary companies in 1962 Act, s. 5 (1) and (7).

79. See *ibid.*, s. 5 (7).

80. *ibid.*, s. 165 (10).

81. *ibid.*, s. 9 (1) (c).

82. *ibid.*, s. 125 (1) (a).

83. *ibid.*, s. 10 (2).

84. Cohen Committee Report, 1945 (Cmd. 6659), para 116.

85. 1962 Act, s. 6 (1) (b).

86. *ibid.*, s. 6 (5).

87. *ibid.*, s. 17.

88. *ibid.*, s. 67 (1).

89. *ibid.*, s. 80 (1) (d).

90. *ibid.*, ss. 126 (1), 129 (1), 131, 134 (2) (c).

91. *ibid.*, s. 171 (1).

The balance sheet of a holding company must show under separate headings particulars of its investments in subsidiaries, the amounts owing to it by subsidiaries and its own debts to the subsidiaries.<sup>92</sup> The profit and loss account must show the income the holding company receives from investments in its subsidiaries, but not the amount of interest on loans to them.<sup>93</sup> In the case of subsidiaries where the holding company holds more than half of the issued capital it must attach to its return either a separate balance sheet and profit and loss account for each of its subsidiaries or a consolidated balance sheet and profit and loss account.<sup>94</sup> For some reason unknown to the writer this requirement does not apply where the holding company controls the composition of the board of directors of its subsidiary or controls more than one half of the voting power therein.<sup>95</sup>

(vi) *Foreign Companies*

As used to be the case under the Companies Act 1934-1960, the new Act requires foreign companies either having a place of business in South Australia or carrying on business here to register.<sup>96</sup> However, in doing so the new Act clarifies a number of problems which were never properly solved by the provisions of the old Act. It supplies a fairly clear definition of the term "carrying on business",<sup>97</sup> which previously presented considerable difficulties of interpretation.<sup>98</sup> The economically unwise provision in the old Act that only registered foreign companies incorporated in the United Kingdom or in a British possession may hold land in South Australia<sup>99</sup> is repealed in favour of allowing all foreign companies registered in South Australia to acquire land here.<sup>100</sup>

All registered foreign companies, except those which are exempt private companies under the law of the United Kingdom or which are of a class declared by the Governor to be "substantially the same" as South Australian exempt proprietary companies, or prescribed companies or non-profit corporations or associations, must lodge copies of their balance sheets with the Registrar.<sup>101</sup> This provision avoids the very vague wording of subsection (4) of section 358 of the old Act, which exempted all registered foreign companies not required to publish their balance sheets according

92. *ibid.*, 9th Schedule, clause 2 (h) (ii), (i) (i) and (o).

93. *ibid.*, 9th Schedule, clause 1 (b).

94. *ibid.*, 9th Schedule, clause 4.

95. *ibid.*, 9th Schedule, clause 4 (7).

96. *ibid.*, ss. 344-361.

97. *ibid.*, s. 344 (2) and (3).

98. See, for instance, *Gibson Battle & Co. Ltd. v. King & Sons* [1915] S.A.L.R. 14.

99. 1934-1960 Act, s. 355.

100. 1962 Act s. 345.

101. *ibid.*, s. 348.

to the laws of their respective countries of incorporation from lodging such balance sheets with the South Australian Registrar of Companies.

An ingenious innovation in the new Act is its method of controlling invitations and offers by foreign companies to the public to subscribe for their securities or to lend money to them. It does this by introducing into the body of the Act the term "corporation", which includes within its meaning every company "formed or incorporated whether in the State or outside the State",<sup>102</sup> and by requiring every corporation to comply with its fund-seeking restrictions and prospectus provisions.<sup>103</sup> This avoids the repetition of virtually identical provisions, once for local companies and a second time for foreign companies, which occurred in the old Act.<sup>104</sup>

(vii) *Investment Companies*

Finally, the new Act empowers the Governor to declare by proclamation that "any corporation which is engaged primarily in the business of investment in marketable securities for the purpose of revenue and for profit and not for the purpose of exercising control" is an investment company.<sup>105</sup> This class of companies was first introduced in Victoria by the Companies Act of 1938, for the purpose of controlling the borrowing and investment activities of such companies. Thus an investment company may not borrow money in excess of fifty per cent. of its net tangible assets,<sup>106</sup> and where debentures are not issued for the borrowed money the borrowing must not exceed twenty-five per cent. of the net tangible assets.<sup>107</sup>

The Act places equally stringent restrictions on the investment, lending and underwriting operations of investment companies.<sup>108</sup> Also their prospectuses must specify the types of securities in which, in accordance with their objects, they may invest their funds, and whether they are entitled to make investments in Australia only or also in other countries.<sup>109</sup> The balance sheets of investment companies, in addition to the other matters which must appear therein in accordance with the requirements of the 9th Schedule of the new Act, must contain a detailed statement of their various investments.<sup>110</sup>

102. *ibid.*, s. 5 (1).

103. See *ibid.*, ss. 37-47, 74, 76-89, 184-185, 374-375 and 381.

104. The 1934-1960 Act contained its main prospectus provisions in ss. 49-53 and then restated them in relation to foreign companies in ss. 365-367. These latter sections are incorporated in the new Act into the main body of prospectus provisions, see 1962 Act, ss. 37 et seq.

105. 1962 Act, s. 334, and for a definition of "marketable securities" see *ibid.*, s. 5 (1).

106. *ibid.*, s. 335 (1).

107. *ibid.*, s. 335 (2).

108. *ibid.*, s. 336-337, 339-340.

109. *ibid.*, s. 338.

110. *ibid.*, s. 341.



## III. CONCLUSION

To sum up, the new Act has created many new forms of companies. Altogether it contains twenty-four different, but considerably overlapping, classes of companies as against only thirteen classes in the old Act.<sup>111</sup> So far as can be discovered, new classes of companies have not been introduced to facilitate and widen the choice of corporate promoters, but rather for the purpose of bringing more companies within the disclosure and publicity provisions. Whatever the other merits of this approach may be, it is certainly not conducive to the simplification of company legislation. On the contrary, it is one more step in making company legislation artificial and esoteric.

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111. The following classes of companies were mentioned in the 1934-1960 Act:

- (i) companies limited by shares: either public, proprietary or private (3)
  - (ii) companies limited by guarantee (1)
  - (iii) companies limited by guarantee and having a share capital: either public, proprietary or private (3)
  - (iv) unlimited companies (1)
  - (v) no-liability companies (1)
  - (vi) foreign companies (1)
  - (vii) holding and subsidiary companies (2)
- (Note: The figures in brackets represent the number of classes of companies under each heading.)

The list of companies under the new Act is as follows:

- (i) companies limited by shares:
  - (a) public
  - (b) proprietary (non-exempt, exempt and prescribed)
  - (c) private (prescribed and not prescribed) (6)
- (ii) companies limited by guarantee (1)
- (iii) companies limited by guarantee and shares:
  - (a) public
  - (b) proprietary (non-exempt, exempt, and prescribed)
  - (c) private (prescribed and not prescribed). (6)
- (iv) unlimited companies with a share capital and public or proprietary (non-exempt or exempt) and without a share capital (4)
- (v) no-liability companies (1)
- (vi) foreign companies (1)
- (vii) investment companies (1)
- (viii) holding and subsidiary companies (2)
- (ix) related companies (1)
- (x) corporations (1)