

PROPOSALS UNDER THE
SECURITIES ACT 1978
FOR
REGULATIONS RELATING TO
CONTRIBUTORY MORTGAGES

SECURITIES COMMISSION

Greenock House,
102-112 Lambton Quay,
Wellington,
New Zealand.

7 December 1981

SECURITIES
COMMISSION
LIBRARY

No.

CONTENTS

Introduction

	<u>Page</u>
1. The Securities Act 1978 and Contributory Mortgages	1
2. Historical Background	3
3. Analysis of Contributory Mortgage Arrangements	9
4. Universal Nominees Limited	12
5. Securitibank	19
6. The Need for Regulations	22
7. The Principles of the Proposed Regulations	25
8. The Distinction Between Contributory Mortgages and Other Securities	28
9. Outline of the Proposed Regulations	33
10. Additional Amendments to the Act	46
11. Notification of Intention to Make Recommendations	49

CONTRIBUTORY MORTGAGES

PROPOSALS FOR REGULATIONS

1. The Securities Act and Contributory Mortgages

1.1 Contributory mortgages are defined in s.2 of the Securities Act 1978 (hereinafter referred to as the "Act") to mean:

"a mortgage of land that -

- (a) Secures money owing to 2 or more persons or to a nominee on behalf of 2 or more persons, whether or not the mortgage originally secured money owing to only one person; or
- (b) Has the same priority in respect of the land as another mortgage or mortgages on that land."

This definition encompasses not only the traditional concept of the contributory mortgage ("a mortgage to several persons who each advance distinct sums.")¹ but also includes:

- (a) A mortgage held in the name of a single nominee if the nominee holds the mortgage on behalf of two or more persons; and
- (b) Two or more mortgages on the same parcel of land which rank *pari passu* with each other.

1. Tyler, E.L.G., M.A. (Oxon.) 1977. Fisher and Lightwood's Law of Mortgage 9th ed. London, Butterworths, p.176).

- 1.2 It is clear that a contributory mortgage, like any other form of mortgage, comes within the broad definition of 'security' in s.2 of the Act. Were it not for the exception contained in the definition, it is equally apparent that a contributory mortgage would fit within the definition of a "Debt security". However, as that definition, also in s.2 of the Act, expressly provides that the term "Debt security ... does not include an interest in a contributory mortgage", then contributory mortgages fall within the heading of a "Participatory security", which includes "any security other than an equity security or a debt security". We will return to this matter of classification in section 8.
- 1.3 The Act deals with offers of contributory mortgages in a different manner from other securities. While the emphasis of the Act is primarily directed towards disclosure, with the requirement in most cases for a prospectus containing material to be prescribed by regulation, s.5(4) of the Act exempts contributory mortgages from these provisions, leaving them subject to the advertising provisions of s.36, the prohibition against door-to-door selling contained in s.35, the record keeping provisions of ss.51-54, and the criminal liability provisions of s.59.
- 1.4 Section 70(1)(h) of the Act enables regulations to be made on the recommendation of the Securities

Commission "regulating the offer to the public of interests in contributory mortgages; and prescribing requirements relating to the management of such interests, including requirements relating to the auditing thereof".

- 1.5 Thus contributory mortgages have been exempted from the prospectus requirements of the Act, on the basis that the Commission will recommend for enactment regulations governing not only the offer of interests in contributory mortgages to the public, but also the management and auditing of those interests after the sale of the interests has been completed.

2. Historical Background

- 2.1 While it has long been possible for more than one lender to advance funds to a single borrower on the security of a mortgage, contributory mortgages first became a significant feature on the New Zealand scene in the early 1970's. As a significant form of investment contributory mortgages appear to be a uniquely New Zealand phenomenon, and it is worth exploring the reasons for this.
- 2.2 As will be discussed more fully in section 3, although superficially simple, the contributory mortgage as an investment vehicle is a singularly complex and cumbersome set of arrangements. A number

of factors on both the supply and demand sides of the equation have contributed to create a climate in which the rewards outweigh the technical complexities.

2.3 During the period 1972-76, the Interest on Deposit Regulations (S.R. 1972/61) prescribed maximum rates of interest that could lawfully be paid by trading companies and investment societies as defined on deposits accepted by them. The Finance Companies (Investment) Regulations (No.2) 1969 (S.R. 1969/216) - which are still in force - require many kinds of financial institutions to invest a proportion of their portfolio in Government securities which generally provide a lower yield than other forms of investment. An indirect effect of these regulations, coupled with the effects of inflation, was that some traditional sources of mortgage loans - were unable to attract sufficient capital to meet the growing demand.

Other legislation also inhibited the development of financial intermediaries which could, as principals, borrow money from the investing public and lend to borrowers. They included the provisions of the Companies Act 1955 relating to borrowings, the Protection of Depositors Act 1968, and the Money Lenders Act 1908. The important point with respect

to all of this legislation is that it did not apply to the mobilisation of an individual's money by an intermediary for the purpose of organising direct lending from the individual to the borrower.

2.4 Another important factor is the role of taxation. Where money is invested with a financial institution by way of loan or deposit and is, in turn, invested by that institution in loans, the interest received by the institution is included in its taxable income, subject to a deduction for interest paid by the institution to investors. In the case of equity investments in financial institutions, either by the purchase of shares or units in a unit trust, the interest earned by the institution is taxable to it and there is no corresponding deduction for distributions to the investors. Distributions received by investors, whether by way of interest or dividends are taxable subject to a modest exemption (s.61(13) Income Tax Act 1976). Under this regime, the net return to investors is usually lower than the return from a contributory mortgage where interest is subject to tax once only when it accrues to them.

2.5 Solicitors faced with heavy demand from their clients on the one hand for housing finance, and on the other for an outlet for relatively short term fixed interest investments at rates nearer to the rate of

inflation than the controlled institutions could lawfully pay, began to develop the contributory mortgage market. Largely as a result of the factors described above, these securities have become an increasingly important avenue of both mortgage finance and short term investments, providing about 21% of the annual amount of housing loans.

2.6 Following a number of malpractices in this area which resulted in claims against the Solicitors' Fidelity Guarantee Fund, the Council of the New Zealand Law Society, acting pursuant to s.100(1)(e) of the Law Practitioner's Act 1955, formulated detailed rules which govern, among other things, the operation of contributory mortgage schemes by solicitors. In addition to those rules, the Solicitors Audit Regulations 1969 (S.R. 1969/53) provide equally detailed rules governing the audit requirements of contributory mortgages operated by solicitors. We stress that these rules apply only to contributory mortgages offered by solicitors acting in their capacity as law practitioners.

2.7 There are three principal sets of rules: the Solicitors Nominee Company Rules 1975; the Solicitors Trust Account Rules 1969; and the Solicitors Audit Regulations 1969. In brief summary, these rules require that: contributory mortgages are to be held

only in the names of the investors or a solicitors nominee company; no solicitor may operate more than one nominee company; nominee companies used in conjunction with contributory mortgage schemes are to be formed in accordance with prescribed memoranda and articles and may act only as a bare trustee to hold securities for loans on behalf of the beneficial owners and for no other purpose; investment authorities must be on forms prescribed by the rules; where there is investment discretion, reports giving full details of the investment must be forwarded to the lender client as investments are made; all monies must pass through the solicitor's trust accounts; records of all receipts and disbursements must be kept in separate trust journals; and all accounts and supporting documents must be audited periodically by an independent auditor.

2.8 The development of the solicitors' nominee company contributory mortgage schemes has not passed unnoticed by others interested in the market for mortgage money. The fact that such a large number of contributory mortgages are financed through solicitors has lent an aura of safety to contributory mortgages as a class that is not necessarily justified in those cases where the agent involved is not a solicitor and thus is not subject to the detailed rules and resulting audits described above.

2.9 Conversely the volume of investment in mortgages through building societies has, we think, been affected by their poor image, reflecting a movement until recently divided between Permanent and Terminating Societies and by widespread publicity given to various unsatisfactory features of the operations of the latter. With the passage of the Building Societies (Amendment) Act 1980 these factors should abate and there are clear indications that the now unified Building Society movement is obtaining a rapidly increasing share of the housing finance market. Moreover, building societies are exempt from income tax as a general rule - s.61(4) Income Tax Act 1976.

2.10 It is noteworthy that the interest rates offered by persons advertising contributory mortgage schemes are generally higher than those offered to investors by building societies. This must reflect, among other things, the higher interest rates that borrowers are charged, and indicates that the contributory schemes carry a greater risk.

The risk is increased if the property securing the mortgage is either commercial, (so that the value of the property is intimately connected with the success of the enterprise it houses), or is in the course of development.

3. Analysis of Contributory Mortgage Arrangements

3.1 The typical contributory mortgage scheme is a complex of contracts. There are usually at least four parties - the borrower; an intermediary; and at least two lenders. In this model, the term "intermediary" is used to describe the individual (or company) who arranges the mortgage but who has no direct participation in the sense that he neither lends nor borrows any of the mortgage funds. It is obvious that it is possible to have, and there are, contributory mortgages in which there is no intermediary at all as where the borrower solicits funds directly from the lenders. Such transactions, however, are the exception and raise separate problems which are discussed at section 8.

3.2 In a contributory mortgage transaction, there are also at least four distinct contracts. There are separate contracts between each of the lenders and the borrower and separate contracts between each of the lenders and the intermediary. The two contracts between the lenders and the borrower will normally be contained in a single document - the mortgage - while, in many cases, there will be no written or formal documentation of any kind evidencing the terms or nature of the contracts between the intermediary and each of the lenders.

3.3 Depending upon the circumstances and the purpose for which they are sought, there may be other contractual relationships arising out of a single contributory mortgage transaction. The situation becomes further complicated when, as is not uncommon, the contributory mortgage is taken in the name of a nominee company - usually controlled by the intermediary - on behalf of the lenders.

3.4 In the usual contributory mortgage, there will rarely be any express contract between the intermediary and the borrower nor will there be express contracts between the lenders themselves. Hence, the rights of lenders inter se are usually left for determination by the Courts if necessary, by applying rules of law and equity.

3.5 It is the intermediary who usually (but not necessarily) announces the availability of the contributory mortgage to the public; gathers up funds from lenders; distributes the funds to the borrower and often holds the mortgage on behalf of the lenders.

3.6 The essential point to note is that though investment funds are made available from the lenders by the actions of the intermediary, he is not himself the borrower. He may, but usually does not, become a surety for the borrower by himself guaranteeing the repayment.

- 3.7 The contracts between the lenders and the intermediary relate to the obligation of the intermediary to manage the lenders' funds and to invest such funds according to the lenders' instructions. They are essentially agency contracts which define the authority of the agent (the intermediary) to act on behalf of his principals (the lenders) in investing the funds in the type of mortgage investment specified by his principals and to oversee the repayment of the loan so arranged.
- 3.8 The contracts between the lenders and the borrower are formed when the intermediary (as agent for the lenders) delivers the lenders' funds to the borrower in return for an undertaking to repay, secured by a mortgage which is often in favour of a nominee company as trustee for the lenders. The contracts concerning the repayment of funds are necessarily made between the borrower as debtor and the lenders as creditors. The terms of the contracts will be contained in the mortgage document.
- 3.9 In order to identify some of the mischiefs for which remedies are needed, we think it appropriate next to examine two recent collapses involving contributory mortgages.

4. Universal Nominees Ltd

4.1 The collapse of Universal Nominees Ltd ("Nominees") and its associated companies led to a number of lawsuits, both civil and criminal, which have not yet been finally resolved. It is not our aim to comment on the eventual outcome of the litigation but to illustrate the problems that surround contributory mortgages under the present law.

4.2 In 1969 and the early 1970's, Rodney and Maxwell Hand, who are brothers, established several companies for the purpose of purchasing land to be developed for commercial and residential use and re-sold. At the top of a chain of associated companies was Universal Management Holdings Limited ("Holdings"), a public company whose assets were investments in subsidiary companies. The principal subsidiary was Universal Management Limited ("Management") which, in turn, was the parent of Universal Properties Limited ("Properties"). The Hands were substantial shareholders of Holdings and directors of all three companies.

4.3 In order to finance the development activities of Management and Properties, funds were solicited from the public by Donaldson Hand Associated Limited, a broking company which was a wholly owned subsidiary of Management. By means of brochures and other forms

of advertising, members of the public were invited to subscribe in contributory mortgages secured on properties owned by Properties and Management. The mortgages were guaranteed by Holdings.

4.4 Initially, the funds raised for investment in the properties being developed by Properties and Management were paid through the solicitor who acted for the group. As security for the capital sums so advanced, the solicitors' nominee company then took mortgages in its own name over the land being developed. In 1973, these arrangements had to be modified.

Nominees was incorporated as a separate company for the purpose of handling funds in much the same manner as the solicitor's nominee company.

4.5 The Group collapsed in 1976 and both Management and Properties were placed in liquidation. On 25 August 1976, New Zealand Insurance Company Limited ("NZI") was appointed as trustee of the monies and land or interests in land held by Nominees.

4.6 Criminal proceedings were brought against the Hands and one Douglas Edwards, an accountant who joined the group as secretary in October 1973 and who became a director of Holdings and of certain of its subsidiaries (but not of Nominees) in 1975. The Hands and Edwards were charged with conspiracy to defraud under s.257 of the Crimes Act 1961. They were con-

victed in the High Court, but appeals were allowed by the Court of Appeal - primarily on the basis that the Crown had not proved the existence of a conspiracy in terms of the charges that were made - and a new trial was ordered. At the second trial the same defendants were again convicted. Edwards has appealed against conviction.

4.7 The judgment of the Court of Appeal on the first appeal delivered by Woodhouse J., (R. v. Rodney Hand, Maxwell Hand and Douglas Edwards, Unreported, C.A. Nos. 216/79, 217/79 and 218/79, Judgment 18 June 1980) is mainly directed towards the nature and elements of proof of a conspiracy. Nonetheless, the following facts appear which are relevant to our inquiry:

- (a) The forms of authority completed by investors were, in many cases, general authorities (i.e., not limited to authority to invest on mortgage of specified properties) which, on their face, included authority to make advances on mortgages on land with provision for re-investment on mortgages of other land, for the advances to be made on the security of first or subsequent mortgages and for investment of monies at call - apparently without any security at all.
- (b) Investors' interests were frequently switched from one mortgage to another without the consent

or knowledge of the investors.

- (c) Running records were not kept of the interests of individual investors in the various contributory mortgages held in the name of Nominees.
- (d) Mortgages were released to enable institutional finance to be obtained by Management or Properties on the security of the property concerned. Where this was done, the investors' money was switched on a contributory basis into another nominee security, was left with the borrowing company on call, or a new mortgage was taken over the same land by Nominees which was subject to the first mortgage given to the institutional investors.
- (e) It was alleged that the Hands and Douglas Edwards continued to offer contributory mortgages to the public when they knew that there was no equity in the properties owned by Management and Properties so that it was impossible to offer adequate security.

4.8 The amounts involved in this venture were by no means insignificant. The order of the Supreme Court appointing NZI as trustee vested in NZI mortgages purportedly securing principal sums totalling \$1.522

million, which amount is approximately equal to the total of all investments made by over 300 investors through Nominees and not repaid as at 2 June 1976.

- 4.9 In at least one instance, although monies were advanced, no mortgage securing those monies was given to Nominees. A number of mortgages have been, or are likely to be, rendered valueless because of sales by prior mortgagees or because they secure amounts in excess of the value of the properties. The liquidators of Management and Properties have initiated court proceedings questioning the validity and priority of some of the mortgages granted by those companies to Nominees on the basis that the relevant mortgages amounted to voidable preference under s.309 of the Companies Act 1955 or were not registered under the provisions of the Land Transfer Act 1952.
- 4.10 NZI has instituted proceedings in the Supreme Court seeking a determination of certain issues arising in connection with its duties as trustee (The New Zealand Insurance Company Limited v. Universal Nominees Limited, et al, High Court of New Zealand, Wellington Registry No.A53/78). The questions raised for determination are summarised below:
1. Was the relationship between Nominees and each of the individual investors that of trustee and beneficiary?

2. If the answer to question 1 is in the affirmative, was it a term of the agreement between Nominees and the investors:-
 - (a) That Nominees would apply the investors' monies in acquiring equitable interests in specific mortgages specified by the investors;
 - (b) That Nominees would apply the investors' monies in acquiring equitable interests in specific mortgages to be chosen by Nominees at its sole discretion;
 - (c) That Nominees was entitled to switch mortgage investments at its sole option; and
 - (d) That Nominees was entitled to invest the investors' monies at call.
3. Have each or any of the investors an equitable interest in any specific part of the property held by NZI as trustee (the 'property')?
4. If so, in what part of the property?
5. If so, is the investor limited by that interest or does he have other entitlements?
6. If not, is the property impressed with a general trust in favour of all the investors?

7. If so, do each of the investors have a pro rata interest in the property?
 8. If some investors have a specific interest do the others have a pro rata interest in either:
 - (a) Other portions of the property?
 - (b) The remainder of the beneficial interest, if any, in specifically attached property?
 9. If any investor has an interest in a specific part of the property which is insufficient to repay his investment does he have a right to share pro rate in the balance?
 10. If the answer to any of questions 5-9 is in the negative, what is the proper entitlement of each of the investors?
 11. If the answer to question 1 is in the negative, does each investor have a pro rata interest in the property?
 12. If not, what is the proper entitlement of each of the investors?
 13. Who must bear the cost of the proceedings?
- 4.11 We express no opinion concerning the merits of any of the claims raised in the various proceedings. Our concern is that these issues should have arisen at

all in connection with the offer and sale of interests in contributory mortgages to the public.

5. Securitibank

5.1 Another recent case concerning the collapse of a contributory mortgage scheme is Re Mortgage Management Ltd [1978] 1 NZLR 494. Mortgage Management Ltd ("MML") was a company in the Securitibank group. It began operations in early 1975 for the purpose of soliciting funds from the general public for investment in contributory mortgages. The mortgages were taken in the name of Safe Custody Nominees Ltd ("SCNL") and were either guaranteed or performance bonded by Merbank Corporation Ltd ("Merbank"), both companies also being members of the Securitibank group. When MML and SCNL were placed in liquidation on 2 February 1977, the total value of mortgages under MML's management was in excess of \$13 million of which amount \$12.332 million had been contributed by some 2,843 individuals. The liquidator applied to the High Court for directions.

5.2 There are several noteworthy aspects of this scheme. The first is the way in which mortgages were arranged. Borrowers were generally offered "contributory mortgage facilities" up to a specified

amount. Interest was payable quarterly and the rates varied depending upon the actual rates to be paid by MML to the individuals whose contributions made up the principal sum advanced during the quarter for which the interest payments became due. In many instances, MML had previously entered into joint venture arrangements with the borrowers. The arranging of the rates was left to the discretion of MML. Mortgages did not secure any specific sum but rather secured future advances to be made to the mortgagor. In his judgment on an application for directions by the liquidator, Barker J. observed, at p.503, that "several of these mortgages did not contain a provision charging the land". Evidently, rectification proceedings were commenced and, for the purposes of the judgment, it was assumed that the mortgages constituted valid charges over land.

5.3 Funds were raised from the public by means of newspaper advertisements, brochures and the direct sales efforts of MML's staff. Investors executed a general authority in favour of MML authorising it to invest a specified sum "from time to time in the security of Contributory Mortgage(s)". The authority specified the amount of the initial investment, the term and the interest rate and specifically authorised MML to use its "discretion in arranging these investments". Upon receipt of the investment

authority and the investor's cheque, MML then issued a "certificate" showing the principal sum invested, the rate and term, and containing a guarantee by Merbank of the repayment of both principal and interest. Neither the investment authority nor the certificate identified the mortgage to which the investors funds were allocated. This was evidently a deliberate policy on the part of MML. In a paper prepared for MML's staff by one of its senior officers and quoted in the judgment, selling staff were told that "One of the features of our operations is the necessity to be able to transfer investments from one mortgage to another, should the need arise. For this reason we are unwilling to commit ourselves to providing investors with detailed information on the mortgage and property in which their funds are invested." In fact, substantial switching of investments took place. Investors were not advised of this switching but clear records were kept of the application of all funds by MML.

- 5.4 It appears that the primary reason for the collapse of the scheme was that, in the words of Barker, J., "MML enjoyed little good fortune in picking impeccable mortgagors". Accordingly it is not surprising that investors whose mortgage securities were valueless, raised the contention that all the mortgages held by SCNL were held on trust for the benefit

of all investors pro rata to their contributions. In holding that no such "global trust" had been created, the Court placed reliance on the fact that despite the widespread use of switching, each investors' funds could be traced on the books of MML to a particular mortgage.

5.5 We note one other point raised, but not decided in the judgment, that may cause some concern. While specifically rejecting the argument that the contributory mortgage scheme run by MML was a unit trust as the term is defined in the Unit Trusts Act 1960, Barker, J. noted that the definition of "unit trust" in s.24 of the Income Tax Act 1976 differs from that set forth in the Unit Trust Act 1960. As the Commissioner for Inland Revenue declined to present argument on the point, the learned judge simply noted, at p.512, that the distinction between the two Acts "could mean that something which was not a unit trust under the Unit Trusts Act might still be regarded as a unit trust for taxation purposes."

6. The Need for Regulation

6.1 It is not our function to determine whether offers of contributory mortgages to the public should be subject to regulation. That decision has already been taken by Parliament by its enactment of the

Securities Act 1978. The task before us is to make recommendations concerning the form which regulation should take in the light of the policy embodied in the Act and the abuses that have taken place in the past.

6.2 As noted in para. 1.3, it is our view that one of the fundamental principle of the Act is disclosure of relevant information so that investors will have available to them the facts necessary to make an informed decision. In this context, we are aware that it is always difficult to predict whether the disclosure of a specific item of information will influence a particular investor's decision.

6.3 In addition to prompting informed decisions on the part of the investors, disclosure of information can serve an equally important substantive role. By imposing, for example, an obligation to disclose the particular contributory mortgage in which the lender's funds will be invested, a corresponding limitation can be placed upon the authority of the agent to deal with the investor's money. One of the considerations, therefore, in determining the degree of disclosure should be to elucidate the scope of the authority given by the investor with respect to the use or uses to which his funds will be applied on his behalf.

- 6.4 In paras. 6.5 to 6.11 we summarise some of the factors of the Universal and Securitibank schemes which indicate the mischiefs that need attention.
- 6.5 In both cases the intermediaries obtained exceptionally broad authorities which enabled them not only to switch funds from one mortgage to another but, in the Universal case, to invest funds "at call" in unsecured and unspecified short term investments.
- 6.6 In both cases the majority of investors had no knowledge of the particular mortgages in which their funds were to be invested, nor were they given any relevant information concerning the financial affairs or prospects of the borrower. Correspondingly, the intermediaries were under no obligation to place the investor's funds into any particular mortgage.
- 6.7 In both cases, as is common with contributory mortgages, the mortgages were held in the name of nominee companies. In the case of Universal, the intermediary was thus able without consulting its principals to release the mortgage entirely or to allow a subsequent mortgagor to gain priority. In both cases, the nominee format allowed the intermediary to switch investor's funds from the security of one mortgage to another without their knowledge. It is probably fair to assume that such switching was done primarily for the benefit of the

borrowers without proper regard for the interests of the investors.

6.8 In both cases there was an undisclosed link between the intermediary and the ultimate borrower. In the case of Universal, the borrowers were related companies and in Securitibank the borrowers were often joint venturers with MML, the guarantor of the mortgage.

6.9 In both cases, the contributory mortgages were advertised as 'guaranteed'. Although the guarantees were in fact there, in the event they proved to be essentially worthless.

6.10 In both cases the mortgage loans were primarily used to finance speculative commercial development projects.

6.11 In neither case was there an adequate independent review of the documentation to ensure that proper records were maintained and that contractual conditions were fulfilled. In the case of Mortgage Management Limited, it appears that in fact adequate records were kept.

7. The Principles of the Proposed Regulations

7.1 The Commission intends to recommend a regulatory scheme for contributory mortgages based upon four

ideas: -

disclosure of relevant information;

restriction of the interests that may be offered to interests registrable under the Land Transfer Act 1952;

an independent review of the application of investors' money;

and the tracing of funds.

These concepts are necessarily closely inter-related.

7.2 We accept that it is not feasible to require an intermediary ('broker') to provide each investor ('contributor') with a prospectus in relation to each mortgage for which a contribution is being sought. There is nevertheless a body of information which can and should be provided. The timing of disclosure and the quantity of relevant information will depend upon the nature of the broker's authority and upon the nature of the land that is the subject matter of the mortgage. But where the mortgagor offers interests in contributory mortgages directly to the public for subscription, there is no sufficient reason, in our opinion, to treat his offer differently from offers of other types of debt securities. We therefore propose to recommend that the Act be amended to provide that direct offers by mortgagors of interests in contributory mortgages should be treated as offers of debt securities, thus requiring a prospectus.

- 7.3 We also propose that the interests that may be offered as "contributory mortgages" should be limited to mortgages registered under the Land Transfer Act 1952. In cases where it is desired to offer mortgages on land which has not been registered under that Act, or unregistered mortgages, the reasons should be carefully reviewed before interests are offered to the public. Brokers who wish to offer such interests as contributory mortgages will be entitled to apply to the Commission for an exemption under s.5(5) of the Securities Act 1978.
- 7.4 An adequate independent review to ensure compliance with the regulations can only be provided by a qualified auditor. To this end, the regulations should require the appointment of an auditor as a pre-condition to the offer of interests in contributory mortgages by a broker to the public. The regulations should make provision for the auditor to review the broker's accounts and records on a regular basis so that any problems should be brought to light at an early stage.
- 7.5 It is important that all funds handled by the broker in relation to contributory mortgages should be capable of being traced. The regulations therefore should require every broker to maintain a trust account at a trading bank. Every transaction

relating to the mortgage, from the raising of contributions, payments to borrowers, receipts of interest and repayment of principal should be required to pass through the trust account. In addition, checks will be required to ensure that funds are applied only to mortgages in which investment has been authorised, and that such funds remain in those mortgages until they are repaid.

8. The distinction between contributory mortgages and other securities

8.1 In para. 1.2 we pointed out that, under the definitions in section 2 of the Act, a contributory mortgage is included within the definition of "security" but is excluded from that of a "debt security", with the consequence that it is included within the definition of a "participatory security".

8.2 Although a contributory mortgage scheme has some elements of participation, inasmuch as the contributors share the rights of mortgagees under the scheme, and usually, as we have noted earlier, the scheme is managed on their behalf by a "manager" as defined in section 2, we think it will be very confusing in practice to regard them as a sub-class of participatory securities. As with the conventional forms of debt security the principal characteristic of a contribu-

tory mortgage is the debt liability of the borrower or borrowers

8.3 We believe, however, that there are differences between contributory mortgages and other types of debt securities which warrant a different regulatory approach. The Act is based, in large measure, upon the concept that every offer of securities to the public should be accompanied by a prospectus and "that the prospectus should contain within its four corners all the terms of the offer and securities other than those implied by law or contained in a document for public regard that is referred to in the prospectus". (Proposed Recommendations for Securities Regulations, 31 March 1980 at para. 7.21, p.72.) A moment's reflection will show how difficult it is to apply this prescription to contributory mortgages. The person who goes to the public is usually the intermediary. As noted above, he is not normally, in contract terms, the offeror of the security. He is offering securities issued, or intended to be issued, by someone else. The intermediary will at any one time have available a number of opportunities to invest in different contributory mortgages over different properties. The terms of each may vary in any of a number of different ways. Thus, to contain all the terms of the offer, it would be necessary to prepare a separate prospectus for each different contributory

mortgage as it became available. We apprehend that the principal reason why the Legislature saw fit to exempt contributory mortgages from the prospectus provisions of the Securities Act in s.5(4) was to assist a secondary market operation.

8.4 We believe that there is an additional reason for the distinction. A person who purchases a conventional debt security in the form of a company debenture not only obtains contractual rights which govern his relationship with the borrower, but he also obtains a fairly well-defined relationship with his fellow investors. In most cases, the nature of those rights will be defined by the terms of a trust deed. The same is true with many forms of participatory securities which often take the form of partnerships, limited partnerships or different types of syndicates. As we noted in para.3.4, this is generally not the case with contributory mortgages.

8.5 We consider that the Act in its present form does not draw a satisfactory distinction between contributory mortgages and other forms of securities. The point is essentially one of drafting, but there is a matter of substance in it. It is necessary that there should be absolute clarity as to the regime that will apply to the securities. An example will bring out the nature of the problem. The New Zealand Dairy Board embarked

on an extensive scheme of assisting the development of dairy factories. The Board made loans to dairy companies, secured by debentures issued by the companies. In some cases the debentures were further secured by collateral mortgages of land. To replenish its loanable funds, the Board made a public issue of Dairy Industry Development Bonds. The Bonds were secured by a sub-mortgage in favour of a trustee for bond-holders, over the debentures and mortgages held by the Board. As the Act now stands, the question whether such an arrangement constitutes a contributory mortgage depends upon the interpretation and application of the phrase "a mortgage of land that secures money owing to two or more persons". It seems to us that on this wording the mortgages by the dairy companies to the Board are not "contributory mortgages", but that the sub-mortgages of those mortgages are "contributory mortgages". Moreover, if the mortgages taken by the Board were assigned absolutely to contributors (instead of being sub-mortgaged) then it would seem that the mortgages become "contributory mortgages". The example may be extended. Although the funds raised by the Board by the issue of Bonds were secured over existing mortgages held by the Board for loans made in the past, the money was required to finance future loans. A scheme could be devised to enable investors in the Board's Bonds to become

contributors to the future loans to dairy companies, acquiring interests in the mortgages that would be obtained as and when the future loans are made to the dairy companies. Is a scheme of that kind to be treated as a contributory mortgage scheme or as a debt security?

8.6 Our conclusion upon this problem is that the schemes described in para. 8.5 above should all be treated as offers of debt securities because in each case the Board, as borrower, is going directly to the public to obtain funds. The considerations described in para. 8.3 do not apply and the borrower should be obliged to issue a prospectus. To this end, we intend to recommend the following amendments to the Act -

- (A) That the definition of "debt security" in s.2 be amended by deleting the words "but does not include an interest in a contributory mortgage" and
- (B) That the definition of "contributory mortgage" be amended to provide that a contributory mortgage does not include a mortgage of land, interests in which are offered to the public for subscription by or on behalf of the mortgagor.
- (C) Consequential amendments to s.5 will be necessary.

9. Outline of the Proposed Regulations

9.1 A preliminary question is whether these regulations should form part of the Securities Regulations, or be a separate set of "Securities (Contributory Mortgage) Regulations". We think the balance of advantage lies in keeping all the securities regulations together as one set of regulations divided into Parts. We envisage that the regulations about contributory mortgages will become a separate Part of a single set of regulations. This will produce a bulky volume, but the inconvenience of that does not seem to us to outweigh the convenience of having all the regulations under the Act collated as a coherent body of securities law.

9.2 The following explanatory notes relate to the draft regulations annexed.

9.3 Regulation 1 - The commencement date will be fixed after the draft has been settled in accordance with s.70 of the Act.

9.4 Regulation 2 - Interpretation.

9.4.1 The interpretation section draws important distinctions between "residential", "farm" and "development property". There is a fourth class of property, not defined, which may be termed commercial property. The relevance of these distinctions lies in the

nature of the information that the law should require to be given to the contributor. In the case of residential and farm property what is needed is information about the property itself, about the mortgagor, and about any guarantor. Where the property is to be developed, no more is necessary if the mortgage is secured with an adequate margin as shown by a valuation of the land in its undeveloped condition. If, however, the valuation will only support the mortgage when the development has taken place different considerations apply, and much more will have to be said. Similarly, where the value of the property depends ultimately on the success of the business which it houses there is more relevant material to be disclosed. In both these latter cases it is important to secure that no commitment of the contributor's investment is made to the mortgagor until the contributor has had an opportunity to assess this information.

9.4.2 Of particular importance is the definition of "development property". It is apparent from the Universal and Securitibank cases that one of the major problems in the past was that contributory mortgages were offered on the security of land which was in the process of being developed. When the mortgagor was unable to complete the development, the value of the security in a partially developed con-

dition was often less than the amount advanced on the mortgage. In these situations, we believe that it is essential that contributors be given enough information to weigh the inherent risks. It is equally apparent that where the proposed development is of a relatively minor nature, or the amount of the mortgage with respect to the value of the land is such that the security is sufficient regardless of the ability of the developer to complete the project, then the need for disclosure is diminished. To strike a balance between the need for disclosure and the cost of providing additional information, the broker will be required to provide the more detailed information required by Part II of the First Schedule only when the principal sum, however contributed, which is to be secured by the mortgage is more than two-thirds of the mortgagor's equity in the land at the time that the mortgage is executed. Provision is also made to take into account any diminution (or increase) in the value of the land resulting from the demolition of existing structures.

9.4.3 An important distinction is made between a special authority (an authority which identifies the mortgage in which the contributor's funds are to be invested) and a general authority.

9.5 Regulation 3 - Solicitors Exemption

Regulation 3 proposes to exempt contributory mortga-

ges offered by solicitors who are presently subject to the Solicitors Nominee Company Rules 1975, the Solicitors Trust Account Rules 1969 and the Solicitors Audit Regulations 1979 as well as the more general obligations of the Law Practitioners Act 1955. We believe that this exemption is appropriate in light of the existing regulatory scheme presently governing practising solicitors who engage in this. We will suggest to the New Zealand Law Society that these rules and in particular the disclosure requirements should be reviewed in the light of the new securities regulations when these have been settled.

9.6 Regulation 4 - Mortgage Brokers

Regulation 4 proposes that every person intending to act as a broker should deliver to the Registrar at the Wellington Companies Office a notice giving details of his name and address, the name and address of his nominee company, the name and address of the bank where his trust account is located, and the name and address of his auditor. The notice will be accompanied by a consent signed by the auditor. The notice will be updated in the event of any changes in the information and, in any event, will be confirmed annually. This regulation is intended to secure that no person will operate as a broker unless there is an auditor currently obliged to perform the audit functions required by the regulations. The Registrar's

file will serve as a central repository of publicly available data to identify those persons (other than solicitors) who act as brokers and their auditors.

9.7 Regulation 5 - Payment of Mortgage Contributions

Regulation 5 is designed to prevent the broker from paying to the mortgagor any money on behalf of a contributor until he has received a form of special or general authority signed by the contributor. Before the contributor signs a special authority he must have been given a statement specifying the matters set out in regulation 6, and before he signs a general authority he must have been given a statement specifying the matters set out in regulation 8(1). General authorities may only permit contributions to be invested in residential or farm property. In our opinion, experience has shown that the risks attached to lending on development or commercial property are such that there should be express disclosure of the relevant information before the contributor is committed. Therefore regulation 5(b)(ii) provides that where a general authority is taken, the contributions may be invested only in contributory mortgages secured by a charge on residential or farm property.

9.8 Regulation 6 - Information for Special Authority

Regulation 6 sets out the matters to be contained in

the written statement given to a contributor before he signs a special authority. As noted in para. 9.4.1 above, the amount of information required to be disclosed will depend upon the nature of the property to be charged with the mortgage.

9.9 Regulation 7 - Information for General Authority

Because a general authority, by definition, does not specify the mortgage in which the contributor's funds are to be invested, the disclosure requirements are divided into two parts. Sub-clause (1) will require the broker to furnish specified information concerning himself before the authority is signed. In addition, the regulation will require that within 7 days after investing the contributor's funds in a contributory mortgage, the broker must send the specified information to the contributor.

9.10 Regulation 8 - Restriction on Disbursement

9.10.1 Regulation 8 is designed to prevent a number of abuses which surfaced in the Universal and Securitibank cases by limiting the ability of the broker to pay over contributor's funds from his trust account to the mortgagor. Two simple examples illustrate the nature of the problems that can arise.

9.10.2 After reading the disclosure statements, A decides to invest \$10,000 in a \$50,000 contributory mortgage on

land valued at \$100,000 with no other encumbrances. His decision is based in part upon the knowledge that should the mortgagor fail to repay, there is a cushion of \$50,000 to protect his investment. If the mortgage contains provisions for future advances, and a further \$50,000 has been lent on the security of the same mortgage, the broker must retain A's contribution.

9.10.3 After having read the disclosure statements, B is prepared to invest \$10,000 in a \$50,000 contributory mortgage to C who is going to use the funds to erect a building on land with a present value of \$5,000 but expected to have a value of \$75,000 upon completion of the building. B's position will be substantially prejudiced if after his \$10,000 is advanced, the broker is unable to raise the additional \$40,000 with the result that C is unable to complete the building. The broker should retain B's contribution.

9.10.4 Subclause (a) of regulation 8 prohibits the payment if the broker knows, or ought to know, that any of the information provided to the contributor is false or misleading in a material particular or is inconsistent with the mortgage. The need for this provision is, we believe, self-evident. Subclauses (b), (c) and (d), when read together, require that the broker may not pay over contributor's funds unless

the amount of the payment is equal to the principal sum to be secured by the mortgage. When read in conjunction with the definition of "principal sum" proposed in Regulation 2, this will effectively prohibit future advances (in all but a limited number of situations) on contributory mortgages. The proviso in subclause (d) takes account of the fact that construction mortgages often call for progress payments. In that situation the broker will be required to hold the full amount of the funds before any partial payment is made so that contributors do not bear the risk that the broker may not be able to raise the balance of the mortgage. Subclause (e) ensures that the mortgagor's obligation to repay coincides with the contributor's right to repayment. Subclause (f) will significantly reduce the possibility that a contributor's security may be diminished because his particular mortgage was not properly registered under the provisions of the Land Transfer Act 1952.

9.11 Regulation 9 - Continuing Management

Regulation 9 will require a broker to ensure that there is a successor in respect of a continuing mortgage for which he has acted before he can avoid liability.

9.12 Regulation 10 - Trust Accounts

Regulation 10 provides for the establishment of trust

accounts. The regulation is intended to ensure that the trust account is used only for purposes relating to the management of contributor's funds to provide a focal point for auditing.

9.13 Regulation 11 - Contributions to be paid into Trust Account

Regulation 11 will require that all monies received by the broker in connection with the sale and management of contributory mortgage interests are paid into his trust account and then promptly paid to the contributor or the mortgagor as the case may be. Subclause 1 will also prohibit brokers from putting contributions into short-term or other investments (as happened in both Securitibank and Universal) with one significant proviso. In the case of contributory mortgages which contemplate instalment payments for construction projects, it would be unduly restrictive to require that the balance of the funds be held in a non-interest bearing trust account pending advance to the mortgagor. Therefore, the broker is allowed to invest those contributions in short-term investments provided that all of the conditions set forth in that paragraph are met. Subclause 5 allows the broker to take any agreed fees from the trust account.

9.14 Regulation 12 - Nominee Companies

Regulation 12 defines a nominee company. The

memorandum of association will be in the form prescribed in the Second Schedule to these regulations. This requirement is taken from the Solicitors Nominee Company Rules 1975, and is designed to protect mortgages taken in the name of the nominee company from liens or charges of the broker's creditors. Subparagraph (1)(c), which requires that the shares in the nominee company be held by or on behalf of the broker, should prevent brokers from distancing themselves from their nominee companies and then disclaiming responsibility if the company operates in a manner inconsistent with the regulations. We consider this to be particularly important because a nominee company which holds the legal title to a contributory mortgage has the authority to deal with the mortgage. As the Universal and Securitibank cases demonstrate, this authority has, in the past, been abused on occasion with disastrous results for contributors who learn too late that their security has been discharged or displaced in priority.

9.15 Regulation 13 - Name of Mortgagees

Regulation 13 provides that the mortgage may be taken either in the names of all of the contributors who are beneficially entitled to invest therein, or in the name of the broker's nominee company.

9.16 Regulation 14 - Credit Contracts Act 1981

Regulation 14 requires the broker to act on behalf of the contributors in fulfilling the obligations to provide information to the mortgagor under the Credit Contracts Act 1981. Although this regulation is basically administrative in nature, it is necessary to protect contributors from loss in the event of non-compliance with that Act.

9.17 Regulation 15 - Registration and Custody of Mortgages

Regulation 15 will require prompt registration of all contributory mortgages and will require the broker to see to the safe custody of the relevant documents of title on behalf of contributors.

9.18 Regulation 16 - Transfers of Mortgages

Regulation 16 will prohibit any transfer of a mortgage held in the name of a nominee company without the consent in writing of all contributors. This will prevent the practice of 'switching' without notice - another feature of the Universal and Securitibank cases.

9.19 Regulation 17 - Pari Passu or Prior Charges

Regulation 17 will prohibit the creation of pari passu or prior charges over the property and any discharge of the mortgage before repayment of all moneys due thereunder without the written consent of all contributors. As the Securitibank and Universal

cases demonstrate, such prohibitions are necessary where the mortgage is taken in the name of a nominee company because the nominee has the ability to dilute or discharge the contributors' security. The proviso in subclause (b) covers the situation of a mortgage on land which is being subdivided by allowing the mortgagor to sell individual lots free of encumbrances.

9.20 Regulation 18 - Mortgagor's Default

Regulation 18 deals with the broker's duty to enforce the mortgage when a mortgagor is in default. Because prompt enforcement of the terms of the mortgage should be the ordinary course, the broker must call a meeting of contributors and secure the consent of the majority in number and value there present, if he wishes to grant time to the mortgagor.

9.21 Regulation 19 - Contributor's Names

Regulation 19 will put the broker under an obligation to furnish to any contributor who so requires a statement showing the names and last known addresses of all his co-contributors to that mortgage. Its purpose is to allow contributors to contact each other should the need arise.

9.22 Regulation 20 - Meetings of Contributors

Regulation 20 deals with meetings of the contributors. A broker may always call a meeting of

contributors and contributors holding not less than one-third in nominal value of the mortgage may require him to do so. The auditor may also require the broker to call a meeting or can in the last result call one himself, acting, in this respect, only as the agent for the contributors.

9.23 Regulation 21 - Authorities

We have given consideration to specifying the form of special and general authorities - primarily to prevent brokers from obtaining authorities so wide in scope as to render the protections afforded by these regulations to be meaningless. We concluded that such a step would unnecessarily limit the ability of the parties to conclude mutually satisfactory contractual arrangements. Nonetheless, we believe that regulation 21 is necessary to ensure that contributors do not surrender the protection of these regulations by contract.

9.24 Regulation 22 - Auditors

Regulation 22 deals with audit requirements, and is largely self-explanatory. If the mortgage is registered under the Land Transfer Act, has been taken in the names of the contributors to the mortgage, and payments due under the mortgage are to be made directly to the contributors, then the auditor has no further role to play in respect of that

particular mortgage. We would be particularly interested in submissions concerning the frequency of audits which we propose should be three times each year.

9.25 Regulation 23 - Offences

Regulation 23 specifies that any person who contravenes any provision of the regulations commits an offence and is liable on summary conviction to a fine not exceeding \$5,000.

9.26 Schedules

The First Schedule sets out, in three Parts, particulars of the information that ought to be given for the three classes of contributory mortgages.

The Second Schedule contains the form of Memorandum of Association for a Nominee Company.

The Third Schedule contains three prescribed forms required under the draft regulations.

10. Additional Amendments to the Act

10.1 There are two significant matters relating to contributory mortgages which are not, and cannot be, dealt with in the regulations as the Act now stands.

10.2 Although s.70(1)(k) of the Act empowers the Commission to prescribe offences in respect of the

contravention or non-compliance with any regulations made under the Act, there is no provision enabling it to recommend regulations specifically dealing with civil liability. It is our view that the existing civil liability provisions of the Act are not apt to deal with non-compliance by brokers (who would fall within the definition of "Manager" in s.2 of the Act) in contributory mortgage schemes. For example, ss.56 and 57 of the Act would be inapplicable to contributory mortgage schemes because they relate to liability for untrue statements contained in a prospectus. There is no prospectus for contributory mortgages.

10.3 In order to deal with this problem, and to provide a civil remedy for contributors, it is our recommendation that the Act should be amended to provide that a broker (and where the broker is a body, the directors of the broker) who breaches the regulations should be civilly liable to any contributor who suffers loss by reason of that breach.

10.4 We think it would also be desirable to amend the Act to provide that the validity of a mortgage is not affected by any breach of the Act or regulations.

10.5 We recognise that in many cases, civil liability will not provide sufficient protection - particularly where the broker's assets are insufficient or where the broker has left the jurisdiction. Further, if

the auditor's review is to be effective, there must be some person or body able to step in and protect both existing contributors and potential investors. We therefore propose to recommend that the Act be amended to provide that when an auditor files an adverse audit report with the Registrar, pursuant to Regulation 22(3)(b), the Registrar may send the report to the Commission. Upon receipt of this report, the Commission would be empowered to:-

- (a) Order that the broker be prohibited from offering any further interests in contributory mortgages to the public; and
- (b) Appoint another person to act as manager in respect of any contributory mortgages which have already been offered to the public.

10.6 Section 5(4) of the Act provides, in effect, that s.36 and ss.51 to 70 of the Act will apply in respect of interests in contributory mortgages. We propose that the advertising provisions of the Second Draft Proposed Recommendations for Securities Regulations released by the Commission earlier this year will apply to advertisements relating to the offer of interests in contributory mortgages. In order to clarify the application of proposed regulation 12 to contributory mortgages, the Commission intends to amend the draft regulation by inserting the words "or

mortgagor under a contributory mortgage" after the words "the issuing group or borrowing group" where they appear. The amendment will enable advertisements relating to contributory mortgages to state the amount of the net assets of the mortgagor or of a guarantor of the mortgage but not of the broker unless he is a guarantor of the mortgage.

11. Notification of Intention

- 11.1 Pursuant to s.70 of the Act, the Securities Commission hereby gives public notice that the Commission proposes to make recommendations to his Excellency the Governor-General in Council for the enactment of regulations under the Act in the terms of the draft regulations set out in Appendix A hereto.
- 11.2 A copy of the recommendations may be inspected at the offices of the Commission and at the offices of each District Registrar of Companies. Copies may be purchased from Government Bookshops and from the Commission.
- 11.3 The Commission invites all persons who wish to make submissions to the Commission about the recommendations to signify their intention to do so by letter to the Commission before 20 January, 1982. Submissions should be made before 28 February, 1982.

Consideration will be given to requests to appear before the Commission in person should that be requested in any particular case.

DATED at Wellington this 7th day of December, 1981.

The Seal of the
SECURITIES COMMISSION
was hereto affixed
in the presence of:)
)
)
)



El Paterson

Chairman

DRAFT SECURITIES REGULATIONS 1981

PART OO, CONTRIBUTORY MORTGAGES

1. Commencement - This Part of these regulations shall come into force on the

2. Interpretation - (1) In this Part of these regulations, and in the Schedules referred to in this Part, unless the context otherwise requires, -

"The Act" means the Securities Act 1978:

"Auditor" means a qualified auditor within the meaning of the Act:

"Broker" means a person (not being a mortgagor under the mortgage) -

(a) By whom or on whose behalf an interest in a contributory mortgage is offered to the public for subscription; or

(b) Who manages interests in a contributory mortgage (other than interests held beneficially by him) that have been offered to the public for subscription:

"Capital value" of land has the same meaning as in the Valuation of Land Act 1951:

"Contributions" means money paid for the purpose of obtaining, or that is used to obtain, an interest in a

contributory mortgage; and includes a broker's own money if so used:

"Contributor" means a person who makes a contribution, or who holds an interest in a contributory mortgage (whether the interest was obtained by advancing part of the original sum secured by the mortgage or by purchasing the interest from an original or subsequent holder of the interest or otherwise):

"Contributory mortgage" has the same meaning as in the Act:

"Development property" in relation to a contributory mortgage means -

- (a) Land that is being, or is intended to be, subdivided or improved; or
- (b) Land on which buildings or other improvements are being, or are intended to be, constructed, altered or developed -

if, and only if, the total amount of the principal sum of the mortgage and of all mortgages ranking prior to or equally therewith is greater than two-thirds of the value of the land (being the higher of the capital value shown on the latest Government valuation or the capital value determined by a registered valuer) at the time the mortgage is entered into:

Provided that, if it is intended that buildings or other improvements on the land be removed, demolished, or destroyed, the capital value of the land shall be an amount equal to the capital value thereof after the removal, demolition, or destruction less the costs of removing, demolishing or destroying the buildings or other improvements:

"Farm property" means land (other than development property) used principally for farming purposes:

"General authority" means a written authority from a contributor to a broker authorising the broker to invest contributions on behalf of the contributor which is not a special authority:

"Government valuation" in relation to any land means the most recent valuation of the land recorded on a district valuation roll or a supplementary roll, as the case may be, and that has been prepared in accordance with the Valuation of Land Act 1951:

"Interest in a contributory mortgage" means an interest in or right to receive the whole or part of any moneys secured by a contributory mortgage:

"Nominee company" has the meaning assigned to it in regulation 12 of these regulations:

"Nominee mortgage" means a contributory mortgage held in the name of a nominee company as mortgagee:

"Principal sum" in relation to a contributory mortgage, means, the sum specified in the mortgage as the amount payable by the mortgagor to the mortgagee, other than the following amounts:

- (a) Interest and other finance charges:
- (b) Payments by the mortgagee of any insurance premiums, rates, taxes, and charges that become due in respect of the land described in the mortgage:
- (c) Payments by the mortgagee to repair, or to keep in good and substantial repair and condition, any buildings or improvements situate on the land described in the mortgage:
- (d) Costs incurred by the mortgagee in lawfully exercising or enforcing any power, right, or remedy pursuant to the mortgage:

"Registered valuer" has the same meaning as in the Valuers Act 1948:

"Registrar" means the District Registrar of Companies, Wellington:

"Residential property" means land (other than development property) designed or used principally as a residence for a single household; and includes a part of any land (other than development property) designed or used

principally as residences for more than one household if that part is designed or used principally as a residence for a single household:

"Special authority" means a written authority from a contributor to a broker authorising the broker to invest contributions on behalf of the contributor in a contributory's mortgage and that specifies the particular land charged or to be charged by the mortgage:

"Trading bank" has the same meaning as in the Reserve Bank of New Zealand Act 1964:

"Trust account" means a trust account established and maintained in accordance with regulation 10(1) of these regulations.

(2) For the purposes of this Part of these regulations and of the Schedules referred to in this Part, a person acts as a broker if -

- (a) An interest in a contributory mortgage (not being a mortgage under which the person is a mortgagor) is being offered to the public for subscription by or on behalf of the person; or
- (b) The person manages interests in one or more contributory mortgages (other than interests held beneficially by him) that have been offered to the public for subscription.

(3) For the purposes of this Part of the regulations and of the Schedules referred to in this Part, 2 persons are associated persons, and a person is associated with another person, if -

- (a) The persons are immediate relatives; or
- (b) The persons are related bodies corporate; or
- (c) At least one of the persons is a body corporate that is managed or controlled by the other person or by any relative or related body corporate of the other person (or by any one or more of them acting together); or
- (d) At least one of the persons is a body corporate, and the aggregate amount of its equity capital held by the other person, or any relative or related body corporate of the other person, is not less than one fifth of the total equity capital of the body corporate; -

and, for the purposes of this Part of these regulations and of these Schedules, the terms "immediate relative" and "related body corporate" have the same meanings as in Part 00 of these regulations.

(4) A reference to a valuation of land in the First Schedule to these regulations means -

(a) If the reference is to a government valuation of the land, a government valuation that states -

(i) The situation, description and area of the land;

(ii) The nature and value of any improvements situate on the land;

(iii) The capital value of the land; and

(iv) The land value of the land.

(b) If the reference is to a valuation of the land prepared by a registered valuer, a valuation report, prepared and signed by a registered valuer, that states -

(i) The situation, description, and area of the land;

(ii) The nature and value of any improvements situate on the land;

(iii) The capital value of the land;

(iv) The land value of the land; and

(v) The basis upon which the valuation was made and any assumptions used in making the valuation.

For the purposes of this subclause, the terms "improvements", and "land value" have the same meaning as in the Valuation of Land Act 1951.

3. Exemption - These regulations shall not apply to any solicitor who is subject to the Solicitors Audit Regulations 1969.

Notice of Contributory Mortgage Brokers

to be Given to Registrar

4. Notice to Registrar - (1) No person shall act as a broker unless -

(a) During the 12 months preceding the date on which the person so acts there has been delivered to the District Registrar of Companies, Wellington -

(i) A notice of particulars that complies with this regulation and is signed by the person; or

(ii) A notice signed by the person that confirms as correct an earlier notice of particulars that has been delivered to the Registrar for the purposes of subparagraph (i) of this paragraph; and

- (b) The notice registered pursuant to paragraph (a) (i), or confirmed pursuant to paragraph (a) (ii), of this subclause is correct as at a date that is not more than 14 days before the day on which the person acts as a broker; and
- (c) An auditor has consented to act as auditor for the broker and has not ceased to so act.

(2) Every notice of particulars delivered to the Registrar for the purposes of subclause (1) (a) (i) of this regulation shall be in the form set out in Part I of the Third Schedule to these regulations and shall state -

- (a) The full name and address of the person, and where the person is a body corporate or other body, the full name and addresss of its registered office and the full name and address of every director thereof:
- (b) If shares in a nominee company are held by or on behalf of the person, the full name of the nominee company and the address of its registered office:
- (c) The name and address of the trading bank where the person's trust account is located:
- (d) The name and address of the person's auditor.

(3) Every notice delivered to the Registrar for the purposes of subclause (1) (a) (ii) of this regulation shall be

in the form set out in Part II of the Third Schedule to these regulations.

(4) Every notice of particulars delivered to the Registrar for the purposes of subclause (1)(a)(i) of this regulation, and every confirming notice delivered to the Registrar for the purposes of subclause (1)(a)(ii) of this regulation, shall have attached thereto a consent to act, signed by the auditor named in the notice of particulars delivered or confirmed, as the case may be. The consent shall be in the form set out in Part III of the Third Schedule to these regulations and shall be signed not earlier than 14 days before the date the notice is delivered to the Registrar.

(5) The Registrar shall forthwith file every notice delivered to him for the purposes of this regulation:

Restrictions on Distributing Mortgage Contributions

5. Special or general authority required before money distributed to mortgagor or vendor of contributory mortgage interest - Without limiting regulations 7 and 8 of these regulations, no broker shall permit contributions to be paid to a mortgagor under, or to a vendor of an interest in, a contributory mortgage in respect of which he acts as broker unless -

(a) The contributions are paid in accordance with a special authority that -

(i) States the principal sum, term, interest rate, description of the land charged, and the name of the mortgagor under the mortgage; and

(ii) Is properly completed and signed by the contributor; -

and, before signing the authority, the contributor has received from the broker a written statement, signed by the broker, specifying the matters set out in regulation 6 of these regulations; or

(b) The contributions are paid in accordance with a general authority that -

(i) States the kind of mortgages in which the money may be invested, including the kind of land to be charged, and the term and interest rate thereof; and

(ii) Authorises the investment of money only in mortgages of residential property or farm property; and

(iii) Is properly completed and signed by the contributor, -

and, before signing the authority, the contributor has received from the broker a written statement signed by the

broker specifying the matters set out in regulation 7(1) of these regulations.

6. Information to be given to contributor giving special authority - Every statement required to be received by a contributor for the purposes of regulation 5(a) of these regulations shall state -

- (a) That the contributor's rights are limited to those arising under the mortgage deed, any guarantees of repayment of the loan secured by the mortgage, and the personal covenant of the mortgagor; and that the broker accepts no liability under the mortgage:
- (b) The name and address of the broker and (where the broker is a body corporate or other body) of every director thereof. If any broker or (where the broker is a body corporate or other body) any director of the broker, has been adjudged bankrupt during the last 5 years, a statement to this effect:
- (c) The name and address of the bank where the broker's trust account is located:
- (d) The name and address of the broker's auditor:
- (e) A description of the contributory mortgage in which an interest is offered, including in each case -

- (i) Whether the mortgage is, or is to be, taken in the names of the contributors or in that of a nominee company; and, if in the name of a nominee company, its name and the address of its registered office:
- (ii) If the mortgage is, or is to be, secured by a charge on residential property or farm property, the information specified in Part I of the First Schedule to these regulations:
- (iii) If the mortgage is, or is to be, a charge on development property, the information specified in Part II of the First Schedule to these regulations:
- (iv) If the mortgage is, or is to be, secured by a charge on land other than that to which subparagraph (ii) or subparagraph (iii) of this paragraph applies, the information specified in Part III of the First Schedule to these regulations.

7. Information to be given to contributor giving general authority - (1) Every statement required to be received by a contributor for the purposes of regulation 5(b) of these regulations shall state -

- (a) The information specified in paragraphs (a) to (d) of regulation 6(1) of these regulations:
- (b) In respect of each interest in a contributory mortgage offered by the broker, whether the mortgage is, or is to be taken in, the names of the contributors or in that of a nominee company; and, if in the name of a nominee company its name and the address of its registered office.

(2) Where contributions are paid to a mortgagor under, or a vendor of an interest in, a contributory mortgage in accordance with a general authority, the broker shall, not later than 7 days after the day the contributions are paid, send to the contributor a written statement signed by the broker that states -

- (a) The amount of money paid; and
- (b) The information specified in Part I of the First Schedule to these regulations in respect of the contributory mortgage interest obtained.

8. Restrictions on distribution of money to mortgagor or vendor of mortgage interest - No broker shall permit contributions to be paid to a mortgagor under, or to a vendor of an interest in, a contributory mortgage in respect of which he acts as broker if -

- (a) At the time of payment the broker knows or ought to know that the information contained in the statement received by, or to be sent to, the contributor in accordance with regulations 5 to 7 of these regulations is false or misleading in a material particular in the form and context in which it is included, or is inconsistent with the mortgage; or
- (b) In the case of a payment pursuant to a special authority, after that payment the principal sum secured by the mortgage would exceed the amount specified, in the special authority, as the principal sum of the mortgage; or
- (c) In the case of a payment pursuant to a general authority, after that payment the principal sum secured by the mortgage would exceed the amount specified in the statement sent to the contributor pursuant to regulation 7(2) of these regulations, as the principal sum of the mortgage; or
- (d) At the time of the payment, the total amount of the contributions paid to the mortgagor under the mortgage, is less than the principal sum or of the mortgage:

Provided that this paragraph shall not apply if -

- (i) The mortgage is secured by a charge on development property; and
- (ii) The broker holds a specific written authority, signed by each of the contributors to the mortgage, authorising the broker to pay the principal sum to the mortgagor by instalments; and
- (iii) At the time of the payment the broker holds in his trust account, on behalf of the contributors to the mortgage, a sum equal to the amount of the principal sum of the mortgage; or
- (e) The maturity date of the mortgage is later than any date specified, in the authority given by the contributor, as the date for repayment of the money to the contributor; or
- (f) The mortgage, in a form that is registrable under the Land Transfer Act 1952, has not been received by the broker or his agent.

Management of Contributory Mortgages

9. Duty of broker to ensure continuing management of contributory mortgages - Every person who acts as a broker in respect of a contributory mortgage shall continue to act as broker in respect of the mortgage until -

(a) If the mortgage is not a nominee mortgage -

- (i) All of the contributors having an interest in the mortgage have agreed in writing that the broker is not responsible for collecting any monies payable to them under the mortgage; and
- (ii) The signed, stamped, and registered, mortgage instrument has been delivered to a person, approved by all of the contributors, for holding in safe custody on their behalf; or

(b) If the mortgage is a nominee mortgage -

- (i) All of the contributors having an interest in the mortgage have agreed in writing to the appointment of another person to act as broker in respect of the mortgage; and
- (ii) The mortgage, and memorandum of transfer (registrable under the Land Transfer Act 1952), transferring the

interest of the broker's nominee company in the mortgage to the person so appointed, or his nominee company, have been delivered to the person so appointed.

- (c) All money payable to the contributors under the mortgage is paid to them or the mortgage is discharged.

10. Trust accounts - (1) Every broker shall establish and maintain a trust account at a trading bank.

(2) No broker shall permit his trust account -

- (a) To be overdrawn; or
- (b) To be used for any purposes other than those of receiving, holding, and dispersing contributions, and payments of principal and interest and other monies due to contributors.

11. Mortgage contributions and repayments to be held in trust account pending investment or distribution to contributors - (1) Every broker shall ensure that all money paid to him or his nominee company by any person for the purpose of obtaining an interest in a contributory mortgage is forthwith paid into his trust account, and held there in trust for the person until it is paid to the

mortgagor or the vendor of the interest (as the case may be) or repaid to the person:

Provided that money so paid for the purpose of obtaining an interest in a contributory mortgage of development property may, pending its advance to the mortgagor, be invested by the broker on behalf of the contributor if, and only if, -

- (a) The special authority signed by the contributor authorises the investment of the money in named short-term investments; and
- (b) The money is invested in accordance with the terms of the special authority; and
- (c) The broker does not undertake or guarantee to the contributor that the money so invested will earn a specified rate of interest; and
- (d) Immediately before the money is so invested, the broker holds in his trust account contributions to the mortgage equal to the principal sum thereof.

(2) Every broker shall ensure that any contribution held in his trust account for more than 30 days is repaid to the contributor forthwith after receipt by the broker of a request for repayment from the contributor.

(3) Every broker shall ensure that -

- (a) Every payment of interest, repayment of principal, and other money received by him or his nominee company from a mortgagor under a mortgage in respect of which he acts as broker; and

- (b) All money received by him or his nominee company as consideration for a transfer of any interest in a contributory mortgage in respect of which he acts as broker, -

is immediately paid into his trust account, and is held there in trust for the contributor entitled thereto.

(4) All money held in a broker's trust account in accordance with subclause (3) of this regulation shall be paid to the contributors entitled thereto forthwith after being paid into the trust account:

Provided that, where a contributor for whom money so held has given a special authority or general authority to the broker to use the money as a contribution to another contributory mortgage, the money need not be repaid to the contributor if a notice to the effect that the money is being held in trust pending re-investment is sent to the contributor forthwith after the money is paid into the trust account.

(5) Notwithstanding subclauses (1) to (4) of this regulation, where a special authority or general authority

signed by a contributor authorises a broker to pay fees to himself out of money held in the broker's trust account on behalf of the contributor, and the authority specifies the amount or rate of the fees, the broker may pay the fees from his trust account in accordance with the terms of the authority.

12. Nominee companies - (1) In these regulations, the term "nominee company", in relation to a broker, means a company (as defined in section 2(1) of the Companies Act 1955) -

- (a) That has a memorandum of association in the form set out in the Second Schedule to these regulations; and
- (b) That has a name that has a recognisable connection with the broker and ends with the words "Nominee Company Limited"; and
- (c) All the shares in which are held by or on behalf of the broker.

(2) No broker shall hold, or be beneficially entitled to, shares in more than one nominee company.

13. Contributory mortgages to be in name of contributor or nominee company only - Every broker shall ensure that every contributory mortgage in respect of which he acts as broker shall state as the mortgagee or mortgagees thereunder either:

- (a) The names of all of the contributors who are beneficially entitled to the interests in the mortgage; or
- (b) The name of the broker's nominee company:

Provided that, for the purposes of paragraph (a) of this regulation, the name of a nominee, trustee, or agent for such a person may be stated in the mortgage as a mortgagee if the nominee, trustee, or agent is not a nominee company within the meaning of these regulations or the broker or any person associated with the broker.

14. Broker to comply with Credit Contracts Act 1981 -

Every broker who acts in respect of a contributory mortgage shall ensure that all obligations that the contributors to the mortgage have under the Credit Contracts Act 1981 are performed in accordance with that Act.

15. Registration and custody of contributory mortgages -

Every broker shall ensure, in respect of every contributory mortgage for which he acts as broker, that -

- (a) The mortgage is registered under the Land Transfer Act 1952 as soon as possible after any of the money secured by the mortgage has been received by the mortgagor; and
- (b) The mortgage (and, where the mortgage is a first mortgage, the certificate of title to

the land charged) is at all times safely held on behalf of the contributors.

16. Restriction on transfer of nominee mortgages - No broker shall permit a contributory mortgage, or a contributory mortgage interest, that is held in the name of his nominee company to be transferred on behalf of the contributors or contributor entitled thereto to another person or other persons unless -

- (a) The contributors have, or the contributor has, received written notice of the proposed transfer (including the name of the transferees or transferee and the consideration to be paid therefor); and
- (b) After receiving such notice, the contributors have each, or the contributor has, consented in writing to the transfer.

17. Restrictions on creation of prior charges and discharges of nominee mortgages - No broker shall permit -

- (a) A mortgagor under a nominee mortgage in respect of which the broker acts to give over the mortgaged land any other mortgage or charge that ranks prior to or equally with the nominee mortgage, except with the prior written consent of all contributors; or

- (b) A nominee mortgage in respect of which he acts as broker to be discharged before payment to or on behalf of the contributors thereto of all money due under the mortgage, except with the prior written consent of all contributors:

Provided that this paragraph shall not apply to partial releases of a nominee mortgage secured by a charge on development property if -

- (i) The statement given to the contributors for the purposes of regulation 5(a) of these regulations specifically states that such partial releases may be given, and describes the conditions on which they may be given; and
- (ii) All of those conditions to the grant of the partial release have been fulfilled.

18. Default by mortgagor - Every broker shall ensure that, where there is -

- (a) A default for at least 14 days in repayment of the principal sum or the payment of any interest due under a contributory mortgage in respect of which he acts as broker; or

- (b) Any other material default by the mortgagor under the mortgage which is not remedied within 14 days of its occurrence -

the powers of the mortgagee under the mortgage that arise on such default are promptly exercised, unless the default is remedied or a majority in number and value of contributors present at a meeting of contributors decide that those powers shall not be exercised.

19. Broker to furnish names of contributors - A broker for a contributory mortgage shall ensure that, forthwith after he receives a written request to do so from a contributor to the mortgage, a written statement of the names and last known addresses of all of the contributors to the mortgage is sent to the contributor.

20. Meetings of contributors - (1) A broker who acts in respect of a contributory mortgage may at any time, and shall if requested by his auditor or by contributors holding not less than one third in nominal value of the mortgage, summon a meeting of all contributors to the mortgage.

(2) A person who acts as auditor to a broker may at any time, and shall if requested by contributors holding not less than one third in nominal value of the mortgage, summon a meeting of all contributors to a contributory mortgage in respect of which the broker acts. Any auditor who summons a

meeting pursuant to this subclause shall be deemed to be acting only as the agent of the contributors in doing so.

(3) Every meeting of contributors to a contributory mortgage shall be summoned by sending by post a notice, specifying the time and place of the meeting, to every contributor at his last known address not later than 14 days before the date of the proposed meeting. The meeting shall be held under the chairmanship of the person appointed as chairman by the contributors present at the meeting.

21. Limitations on authorities - No special authority, general authority, or any other agreement or contract between a broker and a contributor shall contain any provision authorising the broker to do any act or thing in contravention of these regulations and any such provision shall be void and of no effect.

General Provisions

22. Auditors - (1) Subject to subclauses (2) and (4) of this regulation, every person who has consented to act as auditor for a broker, shall, at least 3 times during each year, audit all accounting and other records relating to the contributory mortgages in respect of which the broker acts, in order to ascertain whether -

(a) The broker is complying with the Act and these regulations;

- (b) The broker is keeping proper accounting records in accordance with section 53 of the Act; and
- (c) Money is being received and disbursed in accordance with the terms of the special authorities or general authorities given by the contributors.

(2) An auditor need not audit any records relating to a contributory mortgage if-

- (a) The mortgage has been registered under the Land Transfer Act 1952; and
- (b) The mortgage states as the mortgagees thereunder the names of the contributors to the mortgage; and
- (c) Each of the contributors has agreed in writing that payments due to him under the mortgage from the mortgagor are to be made directly to him.

(3) Forthwith after the completion of each audit of a broker's records, the auditor shall -

- (a) Send to the broker a report of the results of the audit; and
- (b) If the report discloses any breach of the Act or of these regulations or of the terms of the

contributors' authorities, send a copy of the report to the Registrar.

(4) A person who has consented to act as auditor for a broker shall be released from his obligations under this regulation if, and only if, -

- (a) He has sent to the Registrar written notice stating that he has ceased to act; or
- (b) Subsequent to his consenting to act, another auditor has consented to act for the broker and the consent has been given to the Registrar.

23. Offences - Every person who contravenes, or fails to comply with, any provision of these regulations commits an offence, and is liable on summary conviction to a fine not exceeding \$5,000.

FIRST SCHEDULE

INFORMATION TO BE GIVEN TO CONTRIBUTOR

PART I

RESIDENTIAL PROPERTY AND FARM PROPERTY

1(1) The address, legal description, and proposed use of the land which is, or is to be, charged by the mortgage.

(2) If the mortgagor is not the registered proprietor of the freehold estate in the land, a description of the mortgagor's estate therein.

(3) If the mortgagor's estate is leasehold, the description of the estate shall include a brief summary of the material terms of the lease including -

(a) The name and address of the lessor;

(b) The term of the lease; and

(c) The amount of rent payable under the lease.

2. The principal sum secured by, the rate of interest payable under, and the securities (if any) ranking ahead of or equally with the mortgage.

3(1) The latest government valuation of the land and the date of that valuation; and, if any other valuation is

included in the statement to the contributor, the name of the valuer and the date of the valuation.

(2) If the land is farm property and the principal sum secured by the mortgage and any mortgages ranking prior to or equally therewith is more than two-thirds of the amount of the capital value of the land as shown on the latest government valuation, a valuation of the land prepared by a registered valuer as at a date not earlier than 4 months before the date on which the statement is given to the contributor.

4. The name, address, and occupation of each mortgagor and of each guarantor (if any).

5(1). The latest annual accounts of each mortgagor that is a body corporate or other body, signed by a person authorised to sign on behalf of the mortgagor. The accounts shall be as at a date not earlier than 15 months before the date on which the statement is given to the contributor, and shall include a balance sheet and a profit and loss account and, if the accounts are audited, a copy of the auditor's report shall be attached.

(2) A signed statement by each mortgagor who is a natural person setting forth his annual income and expenses as at a date not earlier than 3 months before the date on which the statement is given to the contributor.

6. The latest audited annual accounts of each guarantor that is a body corporate or other body, together

with a copy of the auditor's report, specifying the date as at which the accounts were audited.

7(1). The terms and dates of the payments of interest and principal to the contributor.

(2) A brief description of the manner in which, and the person by whom, payments due from the mortgagor will be collected and distributed to the contributor and, if any amounts are to be deducted from such payments before distribution to the contributor, a separate statement to that effect specifying the amounts to be so deducted.

8. A description and quantification of any sums paid or to be paid to the broker in connection with the mortgage, including the name of the person who has paid, or is to pay, that sum.

9. A statement to the effect that a copy of the mortgage will be available for inspection by the contributors or their authorised representatives at the offices of the broker at all times during usual business hours.

10. If the broker or any guarantor is associated with the mortgagor or has any interest in the land charged by the mortgage, a separate statement to that effect describing the nature of the association or interest.

11. A statement by the broker to the effect that to the best of his knowledge and belief the information in the

statement is not misleading and there are no material matters relating to the mortgage that are not set out therein.

12. If any information given to the contributor by or on behalf of the broker includes a statement by an expert, a separate statement, signed by the expert, to the effect that the expert has given his consent to his statement being given to the contributor, and a statement of the expert's qualifications.

PART II

DEVELOPMENT PROPERTY

1(1) The address, and legal description, of the land which is, or is to be, charged by the mortgage.

(2) If the mortgagor is not the registered proprietor of the freehold estate in the land, a description of the mortgagor's estate therein.

(3) If the mortgagor's estate is leasehold, the description of the estate shall include a brief summary of the material terms of the lease including -

(a) The name and address of the lessor;

(b) The term of the lease; and

(c) The amount of rent payable under the lease.

2. The present use of the land; and a brief description of the development, or proposed development, of the land.

3. The amount of the latest government valuation of the land, and the date of that valuation.

4. A valuation of the land prepared by a registered valuer which shall include -

- (a) A valuation of the land as at a date not earlier than 4 months before the date on which the statement is given to the contributor; and
- (b) The registered valuer's opinion as to the valuation of the land after completion of the development.

5. The name and address of each mortgagor.

6. A statement, signed by each mortgagor, stating -

- (a) The expected cost of the development and a description of the basis on which such costs have been calculated; and
- (b) The source of funds to be used to repay all money borrowed in respect of the property including that to be secured by the mortgage.

7. A brief description of the business of the mortgagor.

8. The latest audited annual accounts of each mortgagor, which shall be as at a date not earlier than 15 months before the date on which the statement is given to the contributor, and shall include a balance sheet, an income and expense statement, and a copy of the auditor's report.

9. A statement, signed by each mortgagor, as to whether since the date of the audited accounts required by clause 8 of this Part of this Schedule there have arisen any circumstances that materially affect the trading or profitability of the mortgagor, the value of the land, the ability of the mortgagor to pay his liabilities due within the next 12 months, or the ability of the mortgagor to complete the development of the land.

10. The name and address of each guarantor (if any).

11. The latest audited annual accounts of each guarantor that is a body corporate or other body, together with a copy of the auditor's report, specifying the date as at which the accounts were audited (which shall not be earlier than 15 months before the date on which the statement is given to the contributor).

12(1) The principal sum, the rate of interest payable under, and the securities (if any) ranking ahead of the mortgage.

(2) The terms and dates of the payments of interest and principal to the contributor.

(3) All other terms of the mortgage (other than those implied by law).

13. A brief description of the manner in which, and the person by whom, payments due from the mortgagor will be

collected and distributed to the contributor and, if any amounts are to be deducted from such payments before distribution to the contributor, a separate statement to that effect specifying the amounts to be so deducted.

14. A description and quantification of any sums paid or to be paid to the broker in connection with the mortgage, including the name of the person who has paid, or is to pay, the sum.

15. A statement to the effect that a copy of the mortgage will be available for inspection by the contributors or their authorised representatives at the offices of the broker at all times during usual business hours.

16. If the broker or any guarantor is associated with the mortgagor, or has any interest in the land charged by the mortgage, a separate statement to that effect describing the nature of the association or interest.

17. A statement by the broker to the effect that to the best of his knowledge and belief the information in the statement is not misleading and there are no material matters relating to the mortgage that are not set out therein.

18. If any information given to the contributor by or on behalf of the broker includes a statement by an expert, a separate statement, signed by the expert, to the effect that

the expert has given his consent to his statement being given to the contributor, and a statement of the expert's qualifications.

PART III

PROPERTY OTHER THAN RESIDENTIAL, FARM,

OR DEVELOPMENT PROPERTY

1(1) The address, and legal description, of the land which is, or is to be, charged by the mortgage.

(2) If the mortgagor is not the registered proprietor of the freehold estate in the land, a description of the mortgagor's estate therein.

(3) If the mortgagor's estate is leasehold, the description of the estate shall include a brief summary of the material terms of the lease including -

(a) The name and address of the lessor;

(b) The term of the lease; and

(c) The amount of rent payable under the lease.

2. The principal sum secured by, the rate of interest payable under, and the securities (if any) ranking ahead of the mortgage.

3. The amount of the latest government valuation of the land, and the date of that valuation.

4. A valuation of the land prepared by a registered valuer which shall be as at a date not earlier than 4 months

before the date on which the statement is given to the contributor.

5. The name and address of each mortgagor.

6. A brief description of the business of the mortgagor and the use to which the land is, or is to be put and, if the land is or is to be leased, -

(a) The name and address of the lessee; and

(b) A brief description of the lease, including the term of the lease and the rent payable thereunder.

7(1). The latest annual accounts of each mortgagor that is a body corporate or other body, signed by a person authorised to sign on behalf of the mortgagor. The accounts shall be as at a date not earlier than 15 months before the date on which the statement is given to the contributor, and shall include a balance sheet and a profit and loss account and, if the accounts are audited, a copy of the auditor's report.

(2) A signed statement by each mortgagor who is a natural person setting forth his assets and liabilities and his annual income and expenses as at a date not earlier than 3 months before the date on which the statement is given to the contributor.

8. A statement, signed by each mortgagor, as to whether since the date of the accounts required by clause 7

of this Part of this Schedule, there have arisen any circumstances that materially affect the trading or profitability of the mortgagor, the value of the land, or the ability of the mortgagor to pay his liabilities due within the next 12 months.

9. The name and address of each guarantor (if any).

10. The latest audited annual accounts of each guarantor that is a body corporate or other body, together with a copy of the auditor's report, specifying the date as at which the accounts were audited (which shall not be earlier than 15 months before the date on which the statement is given to the contributor).

11(1) The terms and dates of the payments of interest and principal to the contributor.

(2) A brief description of the manner in which, and the person by whom, payments due from the mortgagor will be collected and distributed to the contributor and, if any amounts are to be deducted from such payments before distribution to the contributor, a separate statement to that effect specifying the amounts to be so deducted.

12. A description and quantification of any sums paid or to be paid to the broker in connection with the mortgage, including the name of the person who has paid, or is to pay, the sum.

13. A statement to the effect that a copy of the mortgage will be available for inspection by the contributors or their authorised representatives at the offices of the broker at all times during usual business hours.

14. If the broker or any guarantor is associated with the mortgagor, or has any interest in the land charged by the mortgage, a separate statement to that effect describing the nature of the association or interest.

15. A statement by the broker to the effect that to the best of his knowledge and belief the information in the statement is not misleading and there are no material matters relating to the mortgage that are not set out therein.

16. If any information given to the contributor by or on behalf of the broker includes a statement by an expert, a separate statement, signed by the expert, to the effect that the expert has given his consent to his statement being given to the contributor, and a statement of the expert's qualifications.

SECOND SCHEDULE

FORM OF MEMORANDUM OF ASSOCIATION OF NOMINEE COMPANY

The Companies Act 1955
Private Company limited by shares

MEMORANDUM OF ASSOCIATION
OF
..... NOMINEE COMPANY LIMITED

1. THE name of the Company is Nominee Company Limited.
2. THE Company is a Private Company.
3. THE objects for which the Company is established are:
 - (a) To act as a nominee company holding mortgages charges debentures instruments by way of security and securities of all kinds (whether contributory or otherwise) or any interest therein upon a bare trust for the legal or beneficial owner or owners thereof and as such nominee to lend moneys.
 - (b) On behalf of the beneficial owner or owners to exercise and enforce all and any powers remedies

or benefits conferred by or attaching to or resulting from or incidental to or consequent upon the holding of any such security or interest therein.

(c) On behalf of the beneficial owner or owners to buy in at the sale by the Company as mortgagee of any land subject to any such mortgage or interest therein and to resell such land or any part or parts thereof by public auction private contract or otherwise and pending such resale to exercise all or any of the rights and powers of an owner of land and pay and discharge the rates and other outgoings in respect thereof and generally manage the same.

(d) On behalf of the beneficial owner or owners to execute and give all such variations discharges transfers instruments acknowledgements and other documents and perform all such acts and things as may be required in respect of any security or interest therein held by the Company.

AND IT IS HEREBY DECLARED that the objects specified in each paragraph of this clause shall except where otherwise expressed in such paragraph be separate and independent objects and shall be in no wise limited or restricted by reference to or inference from the terms of any other paragraph or the name of the Company.

4. THE objects and powers set forth in the Second Schedule to the Companies Act 1955 are hereby expressly excluded.
5. THE liability of the members is limited.
6. THE share capital of the Company is dollars
(\$) divided into shares of one dollar (\$1)
each.

WE, the several persons whose names, addresses and descriptions are subscribed hereto, are desirous of being formed into a Company in pursuance of this Memorandum of Association and we respectively agree to take the number of shares in the capital of the Company set opposite our respective names.

DATED this day of 19 .

Name in full		Number of Shares	
Description	Signature	taken by each	Witness
and address		subscriber	

THIRD SCHEDULE

FORMS

PART I

Notice of Particulars of Contributory Mortgage Broker

Pursuant to regulation 4 of Part OO of the Securities Regulations 1981, (Full name of broker) ("the broker") hereby gives notice of his/her/its intention to act as a contributory mortgage broker and of the following particulars:

1. Broker's full address:
- 2.* Broker's registered office:
- 3.* Full name and address of every director of the broker:
- 4.* Full name of the broker's nominee company and address of its registered office:
5. Name and address of bank holding broker's trust account:
6. Name and address of broker's auditor:

Dated this day of , 19 .

Signature of broker

* Delete if inapplicable

PART II

Notice Confirming as Correct a Notice
of Particulars of Contributory Mortgage Broker

Pursuant to regulation 4 of Part OO of the Securities Regulations 1981, (Full name of broker) (the "broker") hereby confirm that the notice of particulars of the broker dated the day of , 19 , and filed at the District Companies Office, Wellington, is correct as at the date of this notice.

Dated this day of , 19 .

Signature of broker

PART III

Consent of Auditor

Pursuant to regulation 4 of Part 00 of the Securities Regulations 1981, (Full name of auditor) of (Full address of auditor)

- (a) Hereby consents to act as auditor for (Full name of broker) of (Full address of broker); and
- (b) Confirms that he/she will continue to so act until he/she is released from his obligations as auditor in accordance with regulation 22(4) of the regulations.

Dated this day of , 19 .

Signature of auditor