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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE HOUSE OF REPRESENTATIVES

COMPANIES (ACQUISITION OF SHARES) BILL 1980

COMPANIES (ACQUISITION OF SHARES-FEES) BILL 1980

EXPLANATORY MEMORANDUM

(Circulated by The Hon. R.V. Garland M.P.,
Minister for Business & Consumer Affairs)

CONTENTS

INTRODUCTION

1. The purpose of this explanatory memorandum is to explain the contents of the proposed new Australian code on acquisition of company shares (hereafter referred to as the proposed code) set out in the Companies (Acquisition of Shares) Bill 1980 (hereafter referred to as 'the Bill' or 'the Acquisition of Shares Bill') and the Companies (Acquisition of Shares-Fees) Bill 1980 (hereafter referred to as the 'Fees Bill').

2. This explanatory memorandum (hereafter referred to as 'ex memo'):

(a) contains an introduction to, and a brief outline of, the Acquisition of Shares Bill and its relationship to the co-operative companies and securities scheme (pages 1 to 9);

(b) deals sequentially with each clause of the Acquisition of Shares Bill (pages 10 to 92);

(c) deals sequentially with each clause of the Acquisition of Shares Bill (pages 93 to 94); and

(d) mentions other matters that may be relevant to the proposed code (pages 95 to 97).

Formal Agreement

3. On 22 December 1978 the Commonwealth and the six States executed a Formal Agreement that provided the framework for a co-operative Commonwealth/State scheme for a uniform system of law and administration in relation to company law and the regulation of the securities industry in the six States and the Australian Capital Territory. The Formal Agreement also provides a procedure to enable the Northern Territory (agreement cl. 49) to become a party to the Agreement and to enable the Agreement to be extended to the various external Territories (Agreement cl. 50).

National Companies and Securities Commission Act 1979

4. The National Companies and Securities Commission Act (NCSC Act) came into operation of 1 February 1980. This was the first of a series of Acts to give effect to the legislative obligations of the Commonwealth under this Formal Agreement (a copy of which is set out in the Schedule to the NCSC Act).

5. A brief outline of the NCSC Act and the co-operative scheme is as follows:

(a) The NSCS Act establishes the National Companies and Securities Commission (hereafter referred to as the 'NSCS') which will have responsibility for the companies and securities laws covered by the Formal Agreement subject to directions from the Ministerial Council for Companies and Securities which is established by the Agreement. The NSCS will have such functions and powers as are conferred on it by the various pieces of Commonwealth, State and Territory legislation

that are required to give effect to the co-operative companies and securities scheme (hereafter referred to as the co-operative scheme legislation). One part of this legislation will be the proposed new Acquisition of Shares code. The administration of the co-operative scheme legislation within each State and Territory will, so far as practicable, be carried out by the relevant registering authority in that State or Territory under delegations from the NCSC.

(b) The content of the substantive laws under the scheme will be set out in legislation that will apply to the Australian Capital Territory. Each other jurisdiction that is covered by the Formal Agreement will then pass legislation which will apply the relevant Commonwealth law as the law of that jurisdiction to the exclusion of its present legislation as from the date of commencement of the Commonwealth law. Subsequently, any amendment to the Commonwealth law that are approved by the Ministerial Council will have automatic effect in those jurisdictions without the necessity of further and separate legislation in each other jurisdiction.

(c) The aim is that as far as possible any person or company in a particular Australian jurisdiction should be able to deal on all general companies and securities matters, including acquisition of company shares, as if that person or company wee only subject to one system of law and administration throughout Australia.

The Acquisition of Shares Bill and the related Fees Bill are the next pair of Bills to give effect to the legislative obligations of the Commonwealth under the formal Agreement.

Proposed new Australian code on the acquisition of company shares

7. Following the second interim report of the Company Law Advisory Committee a new Part VIB (ss. 180A to 180Y) and a new Tenth Schedule were inserted in the existing companies legislation of the five mainland States and the two internal Territories to regulate take-overs.

8. The central policy of the existing take-over legislation is contained in s. 180C which prohibits the dispatching of certain take-over offers or certain take-over invitations unless the conditions of that section are met.

9. The policy of the proposed code is very different in that it is aimed at regulating acquisitions by a person who holds between 20% and 90% of the voting shares of a company, or whose holding would increase to more than 20% through acquisition.

10. Because the new policy is so different from that of the existing legislation it is necessary to replace the whole of the present take-over legislation.

11. The Acquisition of Shares Bill sets out the substantive provisions of the proposed code and applies those provisions in the A.C.T. (see Bill cl. 3). The substantive provision of the code are in an appropriate form for application in any State or Territory by an Act of the State or Territory adopting these provisions as Law of that State or Territory (hereafter referred to as the 'Application Bills').

12. The code will be administered by the NSCS which, so far as practicable, will delegate its administrative responsibilities to the relevant registering authority in each jurisdiction.

13. A brief outline of the main features of the proposed code is as follows:

(a) There sill be a basic prohibition on any acquisition of shares in a company, otherwise than in accordance with the code, if the acquisition would:

(i) result in a person being entitled to more that 20% of the voting shares (see Bill s-cl. 11(1)); or

(ii) increase the entitlement of a person already entitled to between 20% and 90% of the voting shares (see Bill s-co. 11 (2));

unless the person adopts one of the following procedures:

(iii) he only acquires (in any way he chooses) on more than 3% each 6 months (see Bill cl. 15);

(iv) he makes a formal take-over offer with similar requirements to those under existing take-over legislation (see Bill cl. 16); or

(v) he makes a take-over announcement on the floor of the home exchange of the offeree company, undertaking unconditionally to take, for a period of one month and at a specified price, all shares offered (see Bill cl. 17).

(b) The code will not prohibit the following acquisitions:

(i) certain gifts, allotments or arrangements which do not need to be controlled by a take-over code (see Bill cl. 12)

(ii) where the target company may be regarded as not being owned by the public or a section of he public (see Bill s-cl. 13(1)).

(iii) on a stock exchange, by an offeror who proposes to acquire all the shares in the company, once a take-over bid is in progress (see Bill s-cls. 13(3) and (4)).

(iv) as a result of an allotment of shares on a pari passu basis where the allotment is made either to a share holder or to an underwriter or sub-underwriter of the allotment (see Bill cl. 14).

(c) The code generally applies only to voting shares (see ex memo para 43). However, holders of non-voting shares, renounceable options and convertible notes have the right to have their interests acquired by the offeror if the offeror has acquired 90% of the voting shares (see Bill cl. 43).

(d) In the case of a take-over offer (see Part III of the Bill):

(i) separate take-over schemes are required for each class of shares. The offers must be the same and must be made to each

share holder in the class and accompanied by a registered Part A statement (see Bill cls. 16 and 18).

(ii) offers may be for less than 100% of the shares in a company by the offeror must pro rata acquisitions equally amongst accepting shareholders where acceptances exceed the proposed acquisition number (see Bill cl. 26).

(iii) various conditions are not permitted (see Bill cl. 20). Making conditional offers unconditional is controlled (see Bill cls. 28 and 29). In certain circumstances conditional offers will become unconditional (see Bill cl. 30).

(iv) offers can only be varied in accordance with cls. 19 and 27 of the Bill.

(v) offers may be withdrawn provided the conditions of cl. 21 of the Bill are met.

(vi) the target company must respond to a bid by preparing a Part B statement (see Bill cl. 22) and an independent expert's report must be obtained if the offeror has a 30% or more shareholding in the target (see Bill cl. 23).

(e) In the case of take-over announcements:

(i) the offeror must hold less than 30% of the shares in the target company, unless the NSCS consents, in order to use this take-over method (see Bill s-cl. 17(3)).

(ii) the offeror must prepare a Part C statement (which contains similar detail to a Part A statement) (see Bill s-cl. 17(10)).

(iii) the target company must prepare a Part D statement (similar to a Part B statement) in response to the bid (see Bill cl. 32).

(iv) the offer can only be withdrawn in a restricted number of circumstances (see Bill cl. 33).

(f) In the case of both take-over offers and on-market announcements (see Part V of the Bill):

(i) the offeror cannot sell the target's shares unless there is a counter bid (see Bill cl. 35).

(ii) the bidder and the target company can only make profit forecasts with the consent of the NSCS (see Bill cl. 37) and the target company is only allowed to make statements o the valuation of assets with the consent of the NCSC (see Bill cl. 38).

(iii) the bidder must provide daily details of dealings in the target company's shares. Other persons who hold 5% or more of the shares must provide details of changes of 1% in their holdings (see Bill cl. 39).

(iv) compulsory acquisition procedures can be used once an offeror holds 90% of the voting shares in the target company and may be initiated by:-

- the offeror (see Bill cl. 42) or

- the remaining shareholders and holders of options, notes and non-voting shares (see Bill cl. 43).

(g) There are miscellaneous provisions (in Part VI of the Bill) dealing with matters such as:

(i) liability for mis-statements (see Bill cl. 44);

(v) the powers of the Supreme Court (see Bill cls. 45 to 49);

(vi) unfair or unconscionable agreements, payments or benefits (see Bill cl. 50);

(vii) bluffing bids (see Bill cl. 52);

(viii) offences (see Bill cl. 53);

(ix) NCSC's power of exemption (see Bill cl. 57);

(x) NCSC's power to declare that the Act applies as if modified (see Bill cl. 58)

(xi) NCSC's power to declare acquisition of shares or other conduct to be unacceptable (see Bill cl. 60);

(xii) NCSC's power of intervention in proceedings (sell Bill cl. 61);

(xiii) Various transitional provisions relating to acquisitions at the time the Act commences (see Bill cls. 63 and 64).

13A. A Company Take-overs Bill and a Company Take-overs (Fees) Bill were introduced into the House of Representatives on 20 November 1979. Attachment 'A' to this ex memo lists the main differences between the company take overs Bill 1979 and the Companies (Acquisition of Shares) Bill 1980.

COMPANIES (ACQUISITION OF SHARES) BILL 1980

14. The Acquisition of Shares Bill is divided into the following Parts:

- Part I – Preliminary
- Part II – Control of acquisition of shares
- Part III – Provisions relating to Take-over Offers
- Part IV - Provisions relating to Take-over announcements
- Part V.-. Provisions relating to both take-over Offers and Take-over Announcements
- Part VI – Miscellaneous
- Schedule – Part A to D statements

ACQUISITION OF SHARES BILL: PART I: PRELIMINARY

15. Part I of the Acquisition of Shares Bill (cls. 1 to 10) deals with various preliminary matters.

Cl. 1: short title

16. The Act will be cited as the Companies (Acquisition of Shares) Act 1980 (Bill cl. 1).

Cl. 2: commencement

17. The Act will come into operation on a date to be fixed by Proclamation (Bill cl. 2).

Cl. 3: object

18. The proposed code will only apply, so far as this Bill is concerned, to the acquisition of shares in companies incorporated in the Australian Capital Territory (Bill cl. 3).

19. This provision will:

(a) facilitate the incorporation of the proposed code into the existing A.C.T. Companies Ordinance (see Bill cl. 5); and

(b) be consistent with the provisions of s-cl. 6(1) of the NCSC Act which provides that the NCSC has such functions and powers as are conferred on it by any Commonwealth legislation that is a law of a kind referred to in s. 122 of the Constitution (the 'Territories power').

Cl. 4: repeal

20. The existing provisions in the A.C.T. Companies Ordinance regulating take-overs are repealed (Bill cl. 4). Certain consequential amendments will also be required to the existing companies legislation (see ex memo paras 195 and 196).

Cl. 5: incorporation

21. Subject to the provisions of the proposed code and the terms of the Companies and Securities (Interpretations and Miscellaneous Provisions) Bill, for the purpose of the application of the code in the A.C.T., it will be incorporated into, and read as part of, the A.C.T. Companies Ordinance, and regulations under the Ordinance will have effect for the purposes of the Ordinance and the code where applicable (Bill s-cl. 5(1)). This will ensure that the proposed code will operate in the Australian Capital Territory in the context of the existing companies legislation and regulations.
For example:

(a) Expressions used in the Bill but not defined in it (e.g., "officer in default", "related corporation", "subsidiary", and "voting share") will have the meanings given to the same expressions by the A.C.T. Companies Ordinance.

(b) Other provisions of the A.C.T. Companies Ordinance will be applicable such as:

- s-sec. 7(7) dealing with powers of inspection;

- s. 12 dealing, among other things, with the rejection of documents and appeals from decisions of the registering authority;

(c) The existing regulation prescribing matters in relation to lodged documents eg. Size of paper, types of copies and details required of persons lodging documents, will apply to the proposed code.

22. For the purpose of this incorporation, references to the A.C.T. Registrar of Companies will be read as reference to the NCSC (Bill s-cl. 5(2)). It is envisaged that the NCSC will delegate many of its functions and powers to the relevant State and Territory registering authorities (see Formal Agreement cl. 35). All documents required to be lodged with the NCSC in relation to companies incorporated in the A.C.T. Corporate Affairs Commission (see Companies and Securities (Interpretation and Miscellaneous Provisions) Bill c. 14). Similar provisions will be required in the relevant Application Bill of each other Jurisdiction to ensure that documents in relation to companies incorporated in that jurisdiction are lodged with the registering authority in that jurisdiction.

Cl. 6: definitions

23. There are a series of definitions for the purposes of the Bill.

24. Some of the terms defined (with examples of their use) are as follows:

- business rules is defined so as to exclude 'listing rules' (the definition is consistent in this respect with the corresponding definition in the proposed Securities Industry Bill) (see, e.g., Bill cl. 6: 'marketable parcel')

- company is defined in the same way as in ICAC Coy. As s-sec 180A (2).

- convertible note is defined by reference to s. 82L of the Income Tax Assessment Act 1936.

- director is defined along the lines of ICAC Coy. As s-sec 5(1) but has been expanded to include persons not validly appointed.

- executive officer in relation to a corporation, means any person, by whatever name called and whether or not he is a director of the corporation, who is concerned, or takes part, in the management of affairs of the corporation.

- expert is defined generally (along the lines of ICAC Coy. As s-sec 5(1) but without the specific reference to 'engineer, valuer, accountant') (see, e.g., Bill cl. 23).

- home exchange is defined in the same way as in the AASE Listing Requirements.

- invitation is defined in the same way as in ICAC Coy As s-sec 180A(2) (see, e.g., Bill s-cl. 11(3)).

- marketable securities is defined in the same way as in ICAC Coy As s-sec 5(1) except that it omits the word 'funds' and includes securities of an association (see, e.g. Bill s-cl. 42(16)).

- offeror means a person who dispatches, or two or more persons who dispatch, formal take-over offers (one of the two types of take-over offers (one of the two types of take-over scheme provided for in the proposed code). The definition includes a reference to offers made by a nominee (such as a nominee company). See, e.g., Bill cl. 16).

- officer is defined so that it only covers senior executives of the corporation and persons in an analogous position such as a receiver and manager, official manager, liquidator or trustee of a scheme of arrangement (cf ICAC Coy As s-sec 5(1)) (see, e.g., Bill s-cl. 38(2)).

- on-market offeror means a persons who makes, or tow or more persons who make, an unconditional undertaking to purchase at or above a specified minimum price on the floor of a stock exchange all shares tendered during a period of one month (the other type of take-over scheme provided for in the proposed code) (see, e.g., Bill cl. 17).

- prescribed condition is a definition of certain events in relation to a target company or a subsidiary (e.g. alteration of share capital, winding up, etc.) which would make the continuation of a take-over intolerable (see, Bill s-para 13(4) (b) (ii) and s-cl. 33(1) – the term is not used elsewhere).

- renounceable option is a new definition (see, e.g. Bill s-cl. 43(4)).

- stock exchange means a stock exchange prescribed in the regulations (same definition as in ICAC Coy As s-sec 180A(2)) (see, e.g., Bill cl. 6: 'home exchange'; 'business rules'; 'listing rules'; s-cl. 14 (3); cl. 17).

- take-over offer and take-over scheme are redefined to clarify their meaning. (cf ICAC Coy. As s-sec 180A(2) which defines 'take-over offer' by reference to s-sec 180C (1) and (3). S-sec 180C(1) sets out some of the particulars which an offer must contain or specify; it does not say what an offer is. S-sec 180C (1) refers to s-sec 180C (2) which sets out the kinds of offer to which s-sec 180C (1) does not apply. Similarly s-sec. 180C (3) sets out some of the particulars which an invitation must contain, but no definition is given. In practice many lodging parties confuse the terms "take-over offer" and "take-over scheme" in the existing ICAC Coy. As).

- trading day is a new definition (see, e.g. Bill s-cl. 17(2)).

Cl. 7: provisions relating to acquisition and disposal of, and entitlement to, shares, and associated persons

25. The proposed code distinguished between:

(a) An acquisition of shares.

- The circumstances in which a person is taken to acquire shares are set out in Bill s-cl. 7(1). Its effect is that the prohibition on the acquisition of shares (see Bill cl. 11) apply only to the person who actually acquires the shares. The provision is drafted to avoid catching gifts or bequests.

- The provision is designed to preclude use of trusts to avoid the controls on acquisitions imposed under the new code, but will not affect normal commercial financing of take-over operations. (see also Bill Cl. 9 which defines 'relevant interest').

- A person is deemed to have disposed of shares if he ceases to have a relevant interest, irrespective of the way in which that happens (Bill s-cl. 7(2)).

(b) An entitlement to shares. The shares to which a person is entitled include those in which he or, except where the person is an approved nominee corporation under s-cl. 7(8), any of his associates, has a relevant interest (Bill s-cl. 7(3) – same as ICAC Coy. As s-sec 180A (5) – 'relevant interests' are defined in cl. (9). The effect is that the interests of a person and his associates must be aggregated when applying provisions of the code which are based on share entitlements e.g.:

- in determining whether or not share entitlements have risen beyond allowable levels permitted in cl. 11.; and

- the notification requirements (see Bill cl. 39).

26. The provisions relating to the determination of association for the purposes of the proposed code are as follows;

(a) When calculating the shares to which a person is entitled because of the entitlement of an associate: a person will be regarded as an associate of another person where:

(i) related corporations, or directors or secretaries of related corporations, are involved (Bill para 7(4));

(ii) there is, or is proposed to be, an understanding ect. (which may be informal, and may be expressed or implied) impinging on the exercise of the voting power attached to a share or otherwise influencing the management of the company (Bill paras 7(4) (b) to (g)). Persons acting in concert are also deemed to be associates (Bill para 7(4) (c)). The test relates to present and not past conduct (see, however, Bill s-cl. 45(2)); or

(iii) the regulations so prescribed (Bill para 7(4) (e)).

(b) When considering whether a person is associated with another person for the purpose of the rest of the Bill, the tests will be as similar as practicable to those under s-cl. 7(4) which applies to the calculation of entitlement to shares (Bill s-cl. 7(5)). This will be relevant to provisions such as Bill s-cls. 17(7) and 23(1).

(c) Legitimate commercial relationships will be excluded (Bill s-cl. 7(6)). While an association constituted by the fact that one of the persons concerned is a bare trustee and the other a beneficiary under that trust is not excluded, an relevant interest of a bare trustee in a share that is subject to the trust will be disregarded (see Bill s-para 9(8) (c) (ii)).

(d) For the purposes of the provisions relating to warehousing (in paras 7(4) (b) and 7(5) (b)) limitations on power to control or influence voting are immaterial (Bill s-cl. 7(7) – cf ICAC Coy. As s-sec 180A(8)). The situation where a bidder consists of more than 1 person is covered (see Bill s-cl. 8(6)).

Cl. 8: other interpretative and evidentiary provisions

27. Other interpretative and evidentiary provisions are contained in cl. 8 of the Bill.

28. Where shares in a company are not divided into classes they will be deemed to constitute a class (Bill s-cl. 8(1)). This provision will be relevant to those provisions which are expressed to operate with respect to classes of shares (see, e.g., Bill s-cls. 28(3) and (6)).

29. Although an offeror makes an offer for all of the shares of an offeree (see Bill s-para 16(2) (a) (i)) the offeror is construed as an offeror who does not propose to acquire all the shares in a company if he specifies in his offer (see Bill s-para 16(2) (f) (iii)) that he proposes to acquire less than 100% of the shares in the company to which he is not already entitled. (Bill s-cl. 8(2)).

30. The period during which an offer remains open will be the period it would have remained open if not accepted (Bill s-cl. 8(3) – except for cl. 25 which refers to the period when the offer is actually open).

31. References to a 'number of shares' in relation to a company the whole or a portion of the share capital of which consists of stock includes a reference to a number of shares equal to that stock (Bill s-cl. 8(4) – same as ICAC Coy As s-sec 180A(3)).

32. An 'odd lot' is defined for the purposes of the Bill (Bill s-cl. 8(5) – this definition is in the same form as the corresponding definition in the proposed Securities Industry Bill). (see, e.g., Bill s-cl. 26(3)).

33. Where an offeror or an on-market offeror is constituted by 2 or more persons, reference in the Bill to an offeror or on-market offeror will be construed as a reference to either or any one or more of them (Bill s-cl. 8(6) – cf ICAC Coy As s-sec 180A(12)).

34. References to entering into a transaction in relation to shares will include a reference to entering into or becoming a party to an agreement, arrangement, understanding or undertaking (which may be formal or informal, express or implied) in relation to shares and to exercising an option to have shares allotted (Bill s-cl. 8(7).

35. References in the Bill to a corporation or to a body corporate include references to unincorporated societies, associations or other bodies which have been declared by the NCSC to be corporations or bodies corporate as the case may be for the purposes of the Bill. (Bill s-cl. 8(8)).

36. For the purposes of Bill s-cl. 13(3) and 40(3) an acquisition of shares in the ordinary course of trading on stock exchange shall not include "crossings" within the meaning of the stock exchange business or listing rules, and shall not include transactions described as "special" pursuant to stock exchange business or listing rules (Bill s-cl. 8(9)).

37. In any proceedings under or arising out of the Bill, knowledge of a servant or agent is to be imputed to the master or principal (Bill s-cl. 8(10) – based on s.69M of the present ICAC Companies Acts).

Cl. 9: relevant interests in shares

38. The circumstances in which a person is regarded as having a relevant interest in a share for the purposes of the proposed code are set out in cl. 9 of the Bill. This provision relates back to the test for associated persons (see Bill cl. 7 and ex memo para 26).

39. The provision is similar to s.6A of the existing Victorian Companies Act except for some changes necessary to take account of the requirements of the proposed code, e.g.:

- the increase from 15% to 20% (or such lesser percentage as prescribed) in Bill para 9(4) (e) to reflect the new control thresholds,

- Bill para 9(6) (c) covers only issued shares;

- Bill s-cl. 9(3) includes a reference to the revocation of trusts, etc,; and

- Bill s-cl. 9(7) deems a person to have a relevant interest in a share if that person is in a position to influence a body corporate that has a relevant interest.

It is envisaged that this provision will be similar to the corresponding provisions proposed for the Companies Bill and the Securities Industry Bill under the co-operative scheme.

Cl. 10: persons to whom Act will apply

40. The proposed code will apply to all persons and to all acts, without territorial limits (Bill s-cl. 40(1)). However, the new code of any given jurisdiction will not apply to the acquisition of shares in a company no incorporated in that jurisdiction (Bill s-cl. 10(2)). These provisions are to the same effect as ICAC Coy As s.180B.

ACQUISITION OF SHARES BILL: PART II – CONTROL OF ACQUISITION OF SHARES

41. Part II of the Bill (cls. 11 to 17) contains a series of controls on the acquisition of voting shares (see Bill s-cl. 7(1) for definition of 'acquisition ' and ex memo para 25. See also ex memo para 43 which discusses the position of holders of non-voting, renounceable options and convertible notes).

42. The Part begins with a basic prohibition of any acquisition (otherwise than as provided by the proposed code) by a person who holds between 20% (or such lesser percentage as prescribed) and 90% of the voting shares of a company or whose holding would increase to more than 20% (or such lesser percentage as prescribed) through acquisition (see Bill cl. 11). Cl. 12 of the Bill does not apply. Other acquisitions to which the basic prohibition does not apply are:

(a) four types of permitted acquisitions:

(i) those where the target company may be regarded as not being owned by the public or a section of the public (see Bill s-cl. 13(1));

(ii) purchases on a stock exchange by certain bidders once the take-over is in progress (see Bill s-cl. 13(3));

(iii) acquisitions pursuant to an allotment of shares on a pari passu basis where the allotment is made either to a shareholder or to an underwriter or sub-underwriter of that allotment (see Bill cl. 14); and

(iv)where the total of the relevant acquisition and net acquisitions in the preceding six month period does not exceed 3% of the voting shares in the company (see Bill cl. 15).

(b) a take-over conducted by a person (hereafter referred to as a 'bidder') in accordance with the code by means of formal take-over offers (see Bill cl. 16) or an on-market announcement (see Bill cl. 17).

Each of these clauses is dealt with in turn (see ex memo para 44 to 69).

Non-voting shares, convertible notes and renounceable options.

43. The basic controls under the proposed code apply only relation to voting shares (see ex memo paras 41 to 47). It is thought that adequate protection is given to the holders of non-voting shares, renounceable options and convertible notes by giving them the right (conferred on them by cl. 43) to have their interests acquired by the offeror if the offeror acquires 90% of the voting shares. This will ensure that the holders of non-voting interests are not disadvantaged by becoming a locked-in minority.

Cl. 11: restriction on acquisition of shares

44. Introduction. Cl. 11 of the Bill underpins the operation of the threshold requirements of the proposed code by prohibiting any acquisition (otherwise than in accordance with the code) of shares which would:

- s-cl. (1): result in a person becoming entitled to more than 20% (or such lesser percentage as prescribed) of the voting shares; or

- s-cl. (2): increase the entitlement of a person already entitled to between 20% (or such lesser percentage as prescribed) and 90% of the voting shares.

In all cases, the threshold test is based on the number of voting shares, not the number of votes which might be cast.

45. The main intention of cl. 11 is to limit the speed with which persons can acquire control of companies other than by formal take-overs or similar procedures which afford all shareholders equal opportunities:

(a) Part VIB of the ICAC Coy As and, in particular, ss. 180C and 180D have been shown to be ineffective in preventing the control of companies being acquired rapidly other than by way of formal take-overs.

(b) At the present moment, Part VIB permits a person to acquire up to 15% of the voting shares in any way on or off the market, and in addition to that 15% to make up to 4 individual offers or approaches to other shareholders in a period of 4 months for an unlimited number of further voting shares. The person is also free to acquire a further unlimited number of voting shares of the company by way of transactions which are "in the ordinary course of trading on a stock exchange".

(c) The right to make up to 4 individual offers for unlimited quantities of shares in any period of 4 months is unsatisfactory: the number of shares which might be acquired by those four offers is limited only by the size of the holdings of the persons approached and if those holdings are substantial, control can change.

46. 20% has been chosen as the appropriate threshold beyond which the acquisition controls imposed by the proposed code will apply. The 20% threshold is considered appropriate as in most cases it would fall short of the figure that could be regarded as the point beyond which control can be said to have passed. The whole basis of the proposed code is the control should not pass without the safeguards under the code applying (or alternatively that it should pass slowly enough for the people involved to make informed decisions). Cf:

(a) The ICAC Coy As where the threshold is 15% (see existing para 180C (a)).

(b) The London City Code where there is a 30% threshold figure. However, this figure is used for a different reason (and not as a control threshold) : the London City Code provides that once a 30% threshold is reached, an offer must be made for all outstanding shares. The present Bill contains no such requirement.

47. Provisions of cl. 11. Acquisitions otherwise than in accordance with the code which would result in a person becoming entitled to more that 20% (or such lesser percentage as prescribed) of the voting shares will be prohibited (Bill s-cl. 11(1)). Acquisitions otherwise than in accordance with the code which would increase the entitlement of a person already entitled to between 20% (or such lesser percentage as prescribed (Bill s-cl. 11(2)). AS person who is precluded by these provisions from acquiring shares will be prohibited from making an offer (or invitation) for the shares (Bill s-cl. 11(3) – see also ex memo para 66).

48. There will be a defence for inadvertent breaches of the acquisition controls (Bill s-cl. 11(4)). This provision is particularly necessary in view of the aggregation of the acquirer's interests with those of his associates when determining entitlement. Acquisitions will remain valid even though made in breach of the prohibitions on acquisition (Bill s-cl. 11(5)). In such an event the remedy is a Court order under cl. 45 of the Bill.

49. There is a danger in tightening up the takeover provisions that companies seeking to effect takeovers will attempt to do so under the guise of schemes of arrangement, or reconstructions. To overcome this problem, s-cl. 11 (6) of the Bill provides that the provisions of the Companies Ordinance relating to schemes of arrangement (ss. 181, 183 and 185) have effect subject to the take-overs provisions.

50. The effect of this provision is that any scheme of arrangement, amalgamation, reconstruction or compromise with creditors will be subject to the prohibition on acquisition of shares resulting in shareholdings in excess of 20%, etc. unless the acquisition is approved by the NCSC (Bill para 12(o)) or an exemption is granted by the NCSC (Bill cl. 57). This will enable the NCSC to permit genuine schemes of arrangement to proceed unaffected by the requirements of the Bill.

Cl. 12: acquisitions to which section 1 does not apply

51. The proposed new code will not apply to acquisitions:

(a) by will or operation of law;

(b) pursuant to a registered prospectus seeking subscriptions from the public;

(c) by a promoter in respect of a first prospectus;

(d) by underwriters under agreements disclosed in a prospectus;

(e) through allotments make before it would be necessary to issue a prospectus;

(f) pursuant to certain compromises or arrangements under the existing companies legislation (s. 270);

(g) under an allotment or sale provided the transaction is approved by majority vote of shareholders other than the acquirer and his associates;

(h) resulting from the exercise of an option or right where the shares could lawfully have been acquired at the time when the option or right was acquired;

(i) by acceptance of a take-over offer where the consideration includes shares;

(j) made directly through purchase of shares of a listed company with shareholdings in other companies. This covers the situation where the acquisition of shares of one company indirectly gives the offeror an entitlement to shares of another company by virtue of the first company's investment, and the indirect entitlement could otherwise be prohibited by cl. 11. It precludes the use of investments above the level prescribed in cl. 11 as an undesirable defence tactic to a take-over. The exemption does not apply to other companies because the provide greater scope for the misuse of interposed companies to avoid the provisions of the take-over code;

(k) in the ordinary course of the business of lending money e.g. by exercise of a poser of sale;

(l) of forfeited shares at an auction in the premises of a stock exchange;

(m) made in a prescribed manner or in prescribed circumstances; and

(n) any other acquisitions approved in writing by the NCSC e.g. by receivers and liquidators (this will alleviate the need for a formal instrument of exemption under cl. 57)

(Bill cl. 12).

Cl. 13: acquisition of shares permitted in certain circumstances

52. Introduction. Cl. 13 of the Bill sets out some of the circumstances in which the code will permit acquisitions of shares which would otherwise be prohibited under cl. 11. It relaxes the prohibitions in cl. 11 in the following circumstances:

- s-cl. (1): certain acquisitions where the company involved may be regarded as not being owned by the public or a section of the public.

- s-cl. (3): acquisitions on a stock exchange by certain offerors after service of the Part A statement on the target or by an on-market offeror after his announcement and, in both cases, for as long as the offer remains open.

53. Provisions of cl. 13. The prohibitions in cl. 11 will not apply to acquisitions of shares in:

(a) a company with less than 15 members (joint members will be treated as one member – Bill s-cl. 13(2)); or

(b) a proprietary company with more than 15 members all of whom consent in writing.

(Bill s-cl. 13(1) – cf ICAC Coy As paras 180C (2) (d) and (e)). The provisions as drafted will preclude the misuse of the exemption of the interposition between the acquirer and the real target of the company of the kind exempted (Bill paras 13(1) (c) and (d)).

54. The prohibitions in cl. 11 will also not apply to acquisitions by an offeror or an on-market offeror (but not associates unless they participate in the bid) outside a relevant take-over scheme or on-market announcement if those acquisitions are made on a stock exchange:

- para (a): by an offeror under a relevant take-over scheme (as defined in Bill s-cl. 13(4)) after service of the Part A statement on the target company within 28 days after service or, if offers are dispatched, for as long as the take-over offer remains open; or

- para (b): by an on-market offeror after his announcement and for as long as his offer remains open. (Bill s-cl. 13(3)).

55. Under this provision , the offeror under a take-over scheme will have access to the market after delivery of a Part A statement even though there is no certainty that an offer will be made (cl. 52 is far from sufficient to cope with all the reasons an acquirer may have for not proceeding). However, failure to provide such access would place the proposing offeror at an unfair disadvantage to any competitors and might enable countermeasures so successful as to defeat the bid and deprive shareholders generally of the benefits of the bid. Accordingly, as an offeror is permitted to purchase 'on market' as soon as his Part A statement is delivered, the Bill provides safeguards against the abuse of that right which would occur if the offeror failed to dispatch his take-over offer to shareholder:

(a) An offeror who fails to dispatch take-over offers in accordance with a Part A statement will not be entitled without the consent of the NCSC, to exercise, or to authorize another person to exercise, any voting rights attached to shares acquired by him after the apart A statement is served, where the acquisition of those shares would have contravened the prohibitions in cl. 11 if he had not served the Part A statement (Bill s-cl. 13(5)).

(b) Where offers are not dispatched within 28 days of the delivery of the Part A statement, the Court, on the application of the NCSC, will be able:

(i) to make any of the orders it could make in relation to a prohibited acquisition (under Bill s-cl. 45(1)); or

(ii) to order the dispatch of the offers (see Bill cl. 46).

56. A take-over scheme will be a relevant take-over scheme for the purposes of the exemption given to offerors under Bill para 13(3) (a) only if the following requirements are met:

(a) the acquirer is proposing to acquire under the scheme all of the shares to which he is not entitled (Bill para 13(4) (a)).

(b) where the offers are subject to conditions, these conditions only:

(i) relate to minimum acceptances not exceeding 90% of the shares concerned;

(ii) relate to certain prescribed occurrences (see Bill cl. 6 - generally they are events which would make continuation of the take-over intolerable for the offeror e.g. if the target company or subsidiary alters its capital structure or makes an allotment of shares – these specified events are the same as the events which permit an on-market offeror to withdraw his on-market offer – see s-cl. 33(1)); or

(iii) are such as are approved by the NCSC.

(Bill para 13(4) (b)). These requirements, together with the restriction placed on the right of withdrawal by Bill s-cl. 21(1), are designed to prevent abuse of the right to purchase on the market.

57. This limitation on the types of take-over schemes that will enable an offeror to purchase shares on a stock exchange is intended to preclude the making of token offers in order to gain access to stock exchange trading. The problem of token offers is also dealt with in the following further provisions of the Bill:

(a) Take-over offers with a minimum acceptance condition will be deemed by force of law to be unconditional if more than 20% of the shares in the company are purchased outside that offer (Bill s-cl. 30(1). This provision overrides cl.29 which provides that where a take-over offer is conditional on the offeror obtaining acceptances that give him more than 50% of the voting shares, the offeror may not declare the offer free from that condition until he has received sufficient acceptances to achieve that percentage shareholding.

(b) Where a cash offer is made and the offeror purchases for cash outside his offer, the offer price will be deemed to be varied to the highest price so paid whether of not the offeree has already accepted the bid (see Bill s-cls. 31(1) and (2)). Where an offer consists not solely of cash the offeror must give the offeree the option of accepting the highest price paid or the original consideration under the offer (see Bill s-cls. 31(3) and (4)).

Cl. 14: pari passu allotments

58. The prohibitions in cl. 11 will not apply to an acquisition by a shareholder pursuant to a pari passu allotment of shares or by an underwriter or sub-underwriter of the allotment (Bill s-cl. 14 (1)) provided that the allotment is to all persons registered as the holders of shares in proportion to their shareholding (Bill s-cl. 14(2)). Where there are foreign shareholders, a company is deemed to comply with the provisions of s-cl. 14(2) if, instead of making offers to the foreign shareholders, it allots the foreigners' entitlement to a nominee (approved by its home exchange, as if not listed, by the NCSC) for sale on approved terms, and then pays the proceeds of the sale to the foreign shareholders (Bill s-cl. 14(3)).

Cl. 15: acquisitions of not more than 3% of voting shares permitted in each 6 months

59. Notwithstanding the prohibition in cl. 11 of the Bill, a holder of between 20% and 90% of the voting shares in a company will be permitted to increase his holding by 3% each 6 months in any way he chooses (Bill cl. 15 – cf formula for calculating voting power in ICAC Coy. As s. 180D). The cl. 11 prohibition will be relaxed only where the total of the relevant acquisitions, plus net acquisitions in the preceding 6 month period, does not exceed 3% of the voting shares in the company.

60. The effect is to impose a 6 month freeze since the section operates only where a person has been entitled to at least 19% (the figure is 19% rather than 20% to ensure acquirers can bring their holding to between 19% and 20% rather than exactly 20%) for a continuous period of 6 months. If a lesser percentage than 20% is prescribed for the purposes of cl. 11, then the percentage for the purposes of cl. 15 will be reduced from 19% to 1% less than that prescribed percentage.

Cl. 16: take-over offers

61. Introduction. Under cl. 16 of the Bill, the prohibitions in cl. 11 will not apply to the acquisition of voting shares pursuant to formal offers under a take-over scheme that complies with its provisions – generally, to fall within cl. 16, separate take-over schemes are required for each class of share, the offers must be the same, must bear the same date and must be made to each share holder in the class (accompanied by a copy of the Part A statement). See also:

(a) Bill cls. 18 to 31 for other provisions relating to formal take-overs (Part III); and

(b) Bill cls. 35 to 43 for provisions relating to both take-over offers and take-over announcements (Part V).

62. Provisions of cl. 16. Cl. 11 will not prohibit an acquisition of shares pursuant to formal offers made under a take-over scheme that complies with the requirements of s-cl. 16(2) of the Bill.

63. Attention is drawn to the following requirements of s-cl. 16(2):

(a) Separate take-over schemes (and consequently, separate Part A statements) will not be required where there are differences in the price offered for shares flowing from differences in accrued dividends or in amounts paid up on shares (Bill s-para 16(2) (b) (ii)).

(b) The Part A statement and other relevant documents must be served on the target company between 14 and 28days before the offers are dispatched (Bill para 16(2) (d) – cf ICAC Coy As para 180C(1) (b)). The detailed information that must be included in a Part A statement is set out in that Part of the Schedule to the Bill (see ex memo paras 186to 188).

(c) The offeror must, on the day on which the Part A statement is served, lodge with the NCSC a notice stating that the Part A statement has been served (Bill s-para 16(2) (e) (I) – the NCSC will already have the other documents that have to be served on the home exchange of a listed target company under Bill s-para 16(2) (e) (ii)).

(d) A copy of the Part A statement and other relevant documents must be served on the home exchange of a listed target company on the date of service on the target company (Bill s-para 16(2) (e) (ii)).

(e) <u>The required contents of the offer</u> are dealt with in para 16(2) (f) of the Bill:

- The offer must be expressed to be open for between 1 and 6 months (Bill s-para 16(2) (f) (ii) – cf ICAC Coy As s-sec 180E(2) – see Bill s-cl. 27(1) which allows extension of the period if permitted by the regulations, or if approved in writing by the NCSC).

- Offers must be made to all share holders, but where it is desired to acquire only a proportion of the shares of a company and acceptances are received in excess of those for which the offer is made, the offeror must pro rata the acceptances equally between shareholders (Bill s-para 16(2) (f) (iii) – when read with Bill para 16(2) (c) and cl. 26 – see also ex memo paras 87 to 88). This will prevent an offeror from discriminating between shareholders.

- The offer must provide for the consideration, whether in cash or shares, to be paid within 30 days of the offer being accepted (Bill s-s-para 16(2) (f) (vii) (A)) or if the offer is conditional, within 30 days of the offer being accepted or the offer becoming unconditional, whichever is the later (Bill s-s-para 16(2) (f) (vii) (B)).

- Where an offer is conditional, offerees must be informed of a date for publication of the notice (under s-cl. 28(4)) that a conditional offer is free from the condition, or that the condition is fulfilled. (Bill s-para 16(2) (f) (v)).

64. Additional non-statutory information can be included in a Part A statement provided that the information must not be information that is false in a material particular or materially misleading in the form and context in which it appears (Bill s-cl. 16(3) – this proviso is in line with cl. 44 dealing with liability for mis-statements).

Take-overs invitations.

65. The ICAC Coy As include separate controls on take-over schemes by way of invitation (see s-sec 180C(3)) to avoid the use of invitations to circumvent the controls in the code on take-over offers. Invitations have been criticised on the grounds that they leave the bidder completely in control of the situation since he has no obligation to accept any offer made to him as a result of the invitation and it is unfair to allow the bidder that degree of control.

66. The proposed code is based on the regulation of acquisitions with all acquisitions that are not otherwise permitted being prohibited under cl. 11. Accordingly, the general prohibition will now preclude the use of invitations are there will be no provision for take-over schemes by way of invitation. (see Bill s-cl. 11(3)).

Cl. 17: take-over announcements

67. Introduction: the on-market alternative. The second from of take-over that is provided for under the proposed code is the acquisition of shares in a listed public company through announcement to the home exchange of the offeree company of an unconditional undertaking to stand in the market. The undertaking is to purchase on the floor of the exchange during a period of 1 month, all shares tendered at or above the specified minimum cash price. (Separate announcements are required for each class of share). The details of this on-market alternative are set out in cl. 17. See also:

(a) Bill cls. 32 to 34 for other provisions relating only to take-over announcements (Part IV); and

(b) Bill cls. 35 to 43 for provisions relating to both take-over offers and take-over announcements (Part V).

68. If a prospective bidder chooses to adopt the on-market alternative, it is a procedure which has substantial benefits for the shareholders in the target company:

(a) Those shareholders are guaranteed the right to sell at not less than a publicly announced cash price.

(b) They will receive basically the same information as they receive under a takeover offer.

(c) They will receive the benefit of being paid cash almost immediately upon delivery of scrip in lieu of having to wait for a considerable period as is usually the case under a formal takeover offer.

69. Provisions of cl. 17. Attention is drawn to the following requirements of cl. 17 of the Bill:

(a) The trading period commences 14 days after the announcement (Bill s-cl. 17 (2)). This will ensure that each shareholder has a copy of the Part C statement before trading commences (see Bill para 17(10) (b)).

(b) A holder of shares will be able to accept an offer in an announcement by notice served on the stock exchange itself (Bill para 17(2) (b)). This will ensure that the unconditional nature of the obligation is not prejudiced by such events as a broker not appearing on the floor or suspension of trading in the shares.

(c) Except with the consent of the NCSC the use of the on-market alternative will not be allowed where the offeror holds 30% or more of the target company (Bill s-cl. 17(3) – see also cl. 23). This will ensure that the procedure is not available in circumstances where, because of a common shareholding, collusion is possible (cf. Bill cl. 23 which provides that where an offeror has a 30% shareholding in the target company, and a formal Part A bid is made, the target company must provide an independent evaluation of the adequacy of the bid to meet this possibility).

(d) The stock exchange must notify the member of the exchange of acceptances under para 17(2) (b) as soon as practicable (Bill s-cl. 17(5)).

(e) The minimum price will be the highest price paid by the offeror or his associates in the 4 months preceding the announcement. (Bill s-cl. 17(6)). It will not be possible for an offeror or his associates to use escalation clauses in the 4 months preceding a bid to achieve an artificially low minimum price (Bill s-cl. 17(7)). These provisions relating to the minimum price should eliminate some of the opportunities for offering an unrealistic price. If the on-market offeror has acquired share on a stock exchange (see Bill para 13(3) (b)) at a higher price than the announced price, then the higher price paid will be deemed to be the price specified in the announcement for the purposes of any offer that is accepted after the acquisition takes place (Bill s-cl. 17(8)). However, the on-market offeror cannot acquire shares at a higher price during the last five trading days that the offer remains open (Bill s-cl. 17(9)). This provision is designed to overcome the problems that could arise from a last minute price rise which because of the time constraint would be available to only a limited number of offerees.

(f) On the day he makes the announcement the offeror must provide the target company, the home exchange and the NCSC with a Part C statement (which is to contain information similar to that required to be in a Part A statement involving a cash consideration – see Part C of the Schedule and ex memo para 192); and within 14 days of the announcement he must also wend in a manner approved by the NCSC a copy of the Part C statement to each shareholder (Bill s-cl. 17(10)).

(g) The price can be reduced with the consent of the NCSC, rather than a fresh start make, where the target company allots shares, grants, options or issues convertible notes, or declares a dividend and any reduced price allowed is deemed to be the price specified in the announcement unless or until the price is increased (by the operation of Bill s-cl. 17(8)) because the on-market offeror has acquired shares on a stock exchange at a higher price (Bill s-cl. 17(11)). The trading period can be extended for a period of up to a month at a time, but so that the total period for which the offers reman open does not exceed six months (Bill s-cl. 17(12)). Where the price is reduced or the period varied, the offeror must notify the home exchange, the target and the NCSC of the change (Bill s-cl. 17(13)).

(h) There is no right of withdrawal on grounds other than those set out in cl. 33 (Bill s-cl. 17(14)). Having made an announcement, all shares tendered during the trading period of one month must be accepted. Similar grounds of withdrawal to those in cl. 33 are often included in take-over offers: this provision seeks to ensure that on-market offerors are only unduly disadvantaged, by comparison with those sho proceed by formal offers, because of the unconditional nature of the offer to stand in the market for a fixed period of 1 month.

(i) The obligation under the alternative on-market procedure are placed on the broker himself (Bill s-cl. 17(15)). The broker is obliged to stand in the market in substitution for his client, but the broker/client relationship is not affected. (See also Bill para 17(2)(b) which is designed to ensure that members of an exchange to not avoid their obligations by not appearing on the floor, through suspension of dealing in the shares etc, and Bill s-cl. 33(5) dealing with the withdrawal of the on-market offer if the broker's position is affected by certain events).

(j) Where the broker is a member of a broking partnership, the obligations placed on the broker are also deemed to the obligations of the other members of the partnership (Bill s-cl. 17(16)).

(k) Additional statutory information can be included in a Part C statement (Bill s-cl. 17(17)). This brings the on-market alternative into line in this respect with the requirements for take-over offers (see Bill s-cl. 16(3)).

(l) Members of a stock exchange who are entitled to trade on the floor of another exchange (e.g., in the case of the Sydney and Melbourne exchanges,) may conduct on-market offers on the floor of that exchange (Bill s-cl. 17(18)).

ACQUISITON OF SHARES BILL: PART III – PROVISIONS RELATING TO TAKE-OVER OFFERS

70. Part III of the Bill (cls. 18 to 31) contains a series of provisions that relate only to take-over offers (and not to the on-market alternative provided for in cl. 17 of the Bill).

Cl. 18: registration of Part A statements and offers

71. A copy of the Part A statement and on one of the offers to which it relates must be registered by the NCSC not later than 21 days before the Part A statement is served on the target company (Bill s-cl. 18(1) – cf cl. 173 of the CSI Bill – it is only after the Part A statement is served on the target company that the offers can be dispatched to shareholders – see Bill para 16(2) (d)). The registration of offers should ensure that incorrect offers are not being sent out, and the 21 day restriction should ensure that the Part A statement and the offer contain up-to-date information. The ICAC Coy As do not require the present Part A statement or any offer to which it relates to be registered. This restricts the ability of the registering authorities to examine the material being sent to offerees. Yet the atmosphere of a take-over bid tends, if anything, to increase the risk of false statements and material omissions. The Bill gives effect to a view that there is need in such cases for take-over offerees to be provided with a document which sets out relevant information concerning the proposed issue and which has been registered by the NCSC.

72. The NCSC will be require to register the Part A statement unless in its option it does not comply with the Schedule to the Bill or it contains misleading information (Bill s-cl. 18(2) – the latter requirement brings the provisions into line with the prospectus registration provision into line with the prospectus registration provisions in ICAC Coy As para 42(2) (d). The NCSC will be able to compel production of supporting material so that it can form an opinion (see existing companies legislation s.12). A Part A statement will be totally ineffective (except for this section and section 44) until registered (Bill s-cl. 18(3)).

Cl. 19: extension of time for paying consideration

73. The offeror will be able to obtain from the NCSC an extension of time for payment of the consideration pursuant to a take-over offer for voting shares (Bill s-cl. 19(1) – see Bill s-para 16(2) (f) (vii) which provides for a basic maximum of 30 days).

74. An offeror will be obliged to pay the consideration before the end of the period (either as provided in cl. 16 or as extended under s-cl. 19(1)). (Bill s-cl. 19(2)).

Cl. 20: take-over offers not to be subject to certain terms or conditions

75. Take-over offers will not be able to be subject to the following:

(a) a requirement that the offeree approve of compensation for loss of office by a director, secretary or principal executive officer of the target company or related corporations (Bill s-cl. 20(1) – cf ICAC Coy As s-sec 180E(3) – any such compensation must be disclosed in the Part A or Part C Statement – see paras 4 (a) of those Statements); or

(b) a minimum acceptance condition if the minimum number is not specified in the offer (Bill s-cl. 20(2) – thereafter, the number can be varied only by formal variation of the offer under cl. 27); minimum acceptance conditions may be expressed as a number of shares or as a percentage of the total shares in the company or as a percentage of the number of shares not held by the offeror (Bill s-cl. 20(3)); Bill clauses 28-30 also relate to minimum acceptance conditions I offers – see ex memo paras 92-99.

Cl. 21 : withdrawal of offers

76. An offeror may not withdraw an offer during the 14 day period after the offer is dispatched, unless he receives the consent of the NCSC (Bill s-cl. 21(1)).

77. Where an offer to one shareholder is withdrawn, all other offers under the scheme must be withdrawn and, if offers have already been accepted, the resulting contracts will be voidable at the option of the offeree but the offeror will not be entitled to avoid such contracts (Bill s-cl. 21(2) – cf. ICAC Coy As s-sec 180E(4)). This will prevent discrimination by selective withdrawal of take-over offers. It will also protect an offeree who may have accepted the offer, went his scrip in and thus given the offeror a free option to purchase for the period of the offer.

78. The right of withdrawal (after 14 days) that is acknowledged by these provisions is qualifies by para 13(4) (b) of the Bill which only allows a formal take-over offeror to make purchases on a stock exchange if the formal offer is unconditional except for the conditions permitted under that provision.

79. People with rights to avoid contracts under this provision must be given notice of their rights at the time of withdrawal and copies of such notice must be given to the target company, the NCSC, and if the target company is listed, to the home exchange (Bill s-cl. 21(3)).

Cl. 22 : Part B statement

80. The target company must respond to a bid by preparing a Part B statement which complies with Part B of the proposed Schedule (Bill s-cl. 22(1) – cf. ICAC Coy As s. 180G – there will only be one document called a Part V statement, which will be given to the offeror: other persons will receive only a copy of the Part B statement). The target company must give the Part B statement to the offeror:

- either within 14 days of receiving the Part A statement (in which case the offeror will have to send copies of the Part B statement out with its offer documents – see Bill s-s-para 16(2) (f) (viii) (B));

- or within 14 days after the formal take-over offers are dispatched (in which case the target company must copy the Part b statement to its shareholders).

(Bill s-cl. 22(1)).

81. The details required for a Part B statement are set out in that Part of the Schedule to the Bill (see ex memo paras 189 to 191).

82. In addition, the Part B statement:

(a) must be signed (Bill s-cl. 22(2));

(b) must not refer to an expert's report, other than a report required by Bill cl. 23, unless:

(i) the report is set out in the statement; and

(ii) the expert has given his consent for the inclusion of the report. (Bill s-cl. 22(3)).

(c) must be copied to the NCSC and, in the case of a listed company, to the home exchange (Bill s-cl. 22(4)); and

(d) may contain additional non-statutory material (Bill s-cl. 22(5)).

(The provisions in cl. 22 of the Bill are similar to those in cl. 32 of the Bill which deals with the Part D statement that a target company ahs to prepare after it has received a Part C statement from an on-market offeror).

Cl. 23 : offeror connected with target company

83. Where an offeror has a prescribed shareholding in the target company, or the offeror and target company have common directors, the Part B statement must be accompanied by a report by an independent expert (bill s-cl. 23(1) – see also s-cl. 23(3) which specifies that 30% or more is the prescribed shareholding). Each report must be attached where there is more than one (Bill s-cl. 23(2) – to stop selective use of reports).

84. This provision will prevent the recurrence of situations where an offeror after gaining control of the offeree, makes a further and lower offer to minority shareholders, thus giving rise to an understandable scepticism in relation to recommendations in Part B statements, notwithstanding any assurances given that the common directors have taken no part in the deliberations prior to the second offer being recommended. A similar requirement was included in the European Economic Community Third Draft Directive on Company Law (chapter 2 – article 5) prepared in 1970, but not yet adopted by the E.E.C. It is a requirement of the London City Code on Take-overs and Mergers that the board of an offeree company must obtain competent independent advice on any offer (not only offers from companies with substantial holding in the offeree or common directorships), and the substance of such advice must be made known to the shareholders.

Cl. 24 : notice of offers to be served

85. Where take-over offers are dispatched, the offeror must notify the target company, the NCSC, and if the target is listed public company, its home stock exchange (Bill s-cl. 24(1) – cf. ICAC Coy As s. 180H), and the notice must be accompanied by a copy of one of the offers and a copy of every document that accompanied that offer (bill s-cl. 24(2)).

Cl. 25 : acceptance of take-over offers by third parties

86. Take-over offers will extend to all persons registered or entitled to be registered as the holder of shares to which the offer relates (Bill s-cl. 25(1) – based on ICAC Coy As s. 180K). This will cover the situation where third

parties buy shares during a bid, or have previously purchased shares but are not yet on the register. Bill s-cl. 8(3) does not apply to this provision (see ex memo para 30) so that where an offer is made for a proportion only on an offeree's shares and is accepted by the offeree, any person who purchases the remaining shares from the offeree will not also be able to accept the offer in respect of a proportion of the shares purchased.

Cl. 26 : offeror not proposing to acquire all shares in class

87. An offeror will be able to specify in his offer the maximum number of shares sought, but must make offers to each shareholder (see Bill s-para 16(2) (f) (iii) and para 16(2) (c)). Where an offeror is seeking less than 100% of a target company's shares he will not be able to acquire selectively the holdings of particular shareholders: if he receives acceptances in excess of the number proposed to be acquired (as set out in Bill s-cl. 26(1)) he must pro rata acceptances equally amongst all shareholders in the same proportions (Bill s-cl. 26(2)). This will prevent the offeror from discriminating between shareholders. The clause only applies where offers relate to all voting shares held by the offeree. If the offeror makes offers limited only to a proportion of the offeree's shares, (see Bill s-para 16(2) (a) (ii)) he is not entitled to pro rata.

88. Where the number of the offeree's shares that would be calculated as acceptable in accordance with the pro rata process would otherwise constitute an odd lot, then the number of the shares that can be accepted will be rounded up to the nearest marketable parcel (Bill s-cl. 26(3)). This should avoid the creation of an undue number of odd lots in the hands of offerees.

Cl. 27 : variation or extension of take-over offers

89. Introduction. Except for the variation of the date by which consideration must be paid (see Bill cl. 19), an offer under a take-over scheme can only be varied, and the offer period can only be extended, in accordance with cl. 27 of the Bill. The NCSC has been given a discretion in these matters as it is an area where flexibility is considered to be desirable.

90. Provisions of cl. 27. An offeror may not vary the terms of a take-over offer, or extend the period for which a take-over offer remains open, unless:

(a) the variation or extension is permitted by the regulations; or

(b) the NCSC consents in writing to the variation or extension, which may be subject to conditions.

(Bill s-cl. 27(1)).

91. Variations and extensions will have no effect if the offeror contravenes or fails to comply with a condition applicable under the regulations (Bill s-cl. 7(2)) or contravenes or fails to comply with a condition imposed by the NCSC (Bill s-cl. 27(3)).

Cl. 28 : declaration where take-over offers are conditional

92. Introduction. Cls. 28 to 30 of the Bill are three related provisions that apply where a take-over offer under a formal take-over scheme is subject to a condition. In brief:

(a) an offer will be able to be declared free from a condition by a public notice provided it is a term of the offer that this can be cone at least 7 days before close of the offer and provided that all offers under the scheme are declared unconditional at the same time (see Bill s-cl. 28(2)). An offeror must not purport to treat a take-over offer as being free from a condition in any other way (see Bill s-cl. 28(1)).

(b) where a take-over offer is conditional on the offeror obtaining acceptances that give him more than 50% of the voting shares, the offeror may not declare the offer free from that condition until he has received sufficient acceptances to achieve that percentage shareholding (see Bill s-cl. 29(1)).

(c) these last provisions (in cl. 29) are subject to s-cl. 30(1) under which take-over offers with a minimum acceptance condition are deemed by force of law to be unconditional if more than 20% of the shares in the company are purchased outside that offer (under s-cl. 13(3)). Where purchases outside a conditional offer do not result in an offer being declared unconditional they are counted in determining whether the minimum acceptance condition is fulfilled (see Bill s-cl. 30(2)).

93. Provisions of cl. 28. A take-over offer that is subject to a condition imposed by the offeror can only be freed from that condition if:

(a) it is a term of the offer that this can be done at least 7 days before close of the offer; and

(b) all offers under the scheme are declared unconditional at the same time.

(Bill s-cls. 28(1) and 28(2) – cf ICAC Coy As s. 180N).

94. However, the offeror must publish two notices:

(a) a notice stating that the offers are freed from the condition and specifying the offeror's percentage holding and his percentage increase since his offer – this notice must be published immediately offers are freed from the condition (Bill s-cl. 28(3) – see also Bill s-cl. 8(1)); and

(b) a notice as to the status of the conditional offers – this notice must be published on the date specified in the offer, or if the offer period has been extended as provided by cl. 27, on the date automatically varied by the extension (Bill s-cls. 28(4) and (5)). If this notice states that the offer is free from a condition it must specify the offeror's percentage holding in the target (Bill s-cl. 28(6) – see also Bill s-cl. 8(1)). Where a condition is not fulfilled and this notice is not published, any contracts formed by acceptance of offers under the schemes are void (Bill s-cl. 28(9)).

95. The procedural requirements in relation to these notices are as follows:

(a) the notice must be published in the jurisdiction of incorporation and, where the target is listed, in the jurisdiction where the shares are listed (Bill s-cl. 28(7)).

(b) a copy of the notice must be lodged with the NCSC and the case of a listed company, served on its home exchange (bill s-cl. 28(8)). Where the notice lodged with the NCSC relates to a minimum acceptance condition of more than 50%, the offeror must also provide a statement showing that he was entitled to declare the offer free from this condition (see Bill s-cl. 29(2)).

Cl. 29 : conditional take-over offers not to be made unconditional in certain circumstances etc.

96. Where a take-over offer is conditional on the offeror obtaining acceptances that give him more than 50% of the voting shares, the offeror may not declare the offer free from that condition before he has received sufficient acceptances to achieve that percentage shareholding (Bill s-cl. 29(1)). The notice declaring there offer free from such a condition that is lodged with the NCSC (under s-cl. 28(8)) must be accompanied by a statement setting out particulars of the matters by virtue of which the offeror was entitled to declare the offer unconditional (Bill s-cl. 29(2)). The response of shareholders to a take-over offer can be influenced by whether the offeror is attempting to acquire a majority interest or only a partial interest. It is undesirable that an offeror be permitted to stipulate that his offer is subject to a condition that he obtains the shares necessary to enable him to control more that 50% of the voting rights and then, on receiving acceptances for a lesser number of shares, declare his offer to be free of that condition. (cf CSI Bill cl.250).

97. This provision takes effect subject to cl. 30, under which offers are deemed by force of law to be unconditional if more than 20% of the shares in the company are purchased outside that offer (Bill s-cl. 29(3) – cls. 29 and 30 necessarily overlap and sub-cl. 29(3) ensures that cl. 30, which is directed at amore serious problem than that dealt with in cl. 29, remains paramount.)

Cl. 30 : take-over offers subject to conditions

98. While an offeror who proposes to acquire all the shares to which he is not entitled may be entitle to buy shares outside his offer without regard to the 205 and 3% restrictions (in Bill cls. 11 and 15 – see Bill para 13(3) (a)), if his

take-over offer has a minimum acceptance condition, and he acquires outside his offer more than 20% of the total number of voting shares in the company to which he was not entitled, the offer is deemed by force of law to be free from that condition (Bill s-cl. 30(1) – this provision overrides cl. 29 – see Bill s-cl. 29(3)). If the purchases outside the offer are not sufficient to make the offers unconditional, they will still be counted in determining whether the minimum acceptance condition is fulfilled (Bill s-cl. 30(2)).

99. Harm can occur if a person makes a conditional take-over offer, proceeds to buy large quantities of shares in the same company on the stock market, and then withdraws the take-over offer because the acceptance received at the time he gains control did not equal the minimum specified as a condition of a take-over offer. Shareholders who had in good faith sent in acceptances would be disadvantaged because by sending in their acceptance they would be unable to take the advantage of selling to anyone who was buying on the market. Accordingly, if an offeror purchases shares in excess of the 20% and 3% restrictions under the normal rules, his conditional offer will be deemed by law to become unconditional so that persons who have sent in acceptances are guaranteed payment under the offer.

Cl. 31 : effect of acquiring shares otherwise than under take-over scheme

100. Introduction. The purpose of cl. 31 of the Bill is to ensure that an offeror must pay any offeree the highest amount he has paid for a share acquired outside the take-over scheme. Such acquisitions are permitted by the offeror where the take-over scheme meets the requirements of s-cl. 13(4) (see Bill s-cl. 13(3)). There is already a similar requirement under the A.A.S.E. Listing Requirements (see Listing Requirement 3R(13)) and it ensures that

persons who accept under a take-over offer get the same benefits as those who sell direct or through the market to the offeror while the offer is open. An offeror will not, however, be obliged to pay the highest price paid by any associate. As associates are not given the right to purchase on the market under cl. 13 in circumstances which would otherwise be a breach of cl. 11, it is not considered reasonable that the price they pay should affect the price that the offeror is obliged to pay under cl. 31.

101. Provisions of cl. 31. Where an offer is for cash (alone or as one alternative), and the offeror purchases for cash outside his offer, the offer price is deemed to be varied to the highest price so paid (Bill s-cl. 31(1)). Where an offeree has already accepted the offer, the contract is deemed to be varied so that the offeree is entitled to receive the highest amount paid by the offeror and is entitled to receive the additional consideration resulting from the variation immediately (Bill s-cl. 31(2)).

102. Where the consideration under an offer is not solely cash, the offeror ahs 14 days after the offer period to notify the offeree of the highest cash price paid outside the offer: he must give the offeree the option of accepting, within 28 days, that highest cash price paid or the original consideration under the offer. If the offeree elects to accept the cash offer, he is entitled to receive that amount forthwith, or if he has already received the original consideration, immediately on returning that consideration to the offeror (Bill s-cl. 31(3)). This provision applies the principles of s-cls. 31(1) and (2) to the case where the consideration offered under the take-over offer was not purely cash but was in whole or in part a share swap. At present the A.A.S.E. Listing Requirements require the take-over offer to be withdrawn and a new offer made in these circumstances (see Listing Requirement 3R(13) (b)). The procedure in s-cl. 31(3) will achieve the same purpose as the existing listing requirements but with considerable savings in costs.

103. Similar provisions apply to offers conditional on the offeree using a cash consideration as a deposit or loan (Bill s-cl. 31(4)).

104. Where consideration returned consists of shares allotted by the offeror, the company may cancel the allotment of those shares, and any such cancellation will not be taken to be a reduction of capital (Bill s-cl. 31(5)).

ACQUISITION OF SHARES BILL : PART IV – PROVISIONS RELATING TO TAKE-OVER ANNOUNCEMENTS

105. Part IV of the Bill (cls. 32 to 34) contains provisions relating only to the on-market alternative (provided for in cl. 17 of the Bill). None of these provisions apply to a take-over offer under a formal take-over scheme (provided for in cl. 16 of the Bill).

Cl. 32 : Part D statement

106. Where a target company has received a Part C statement from the on-market offeror, it must serve its home exchange with the part D Statement within 14 days of the making of a take-over announcement under cl. 17. (Bill s-cl. 32(1) – cl. 32 contains provisions similar to those in cl. 22 which deals with the Part B statement that a target company has to prepare after it has received a Part A statement from an offeror under a formal take-over scheme). The detailed requirements for a Part D statement are set out in that Part of the Schedule to the Bill (see ex memo para 193).

107. In addition, the Part D statement:

(a) must be signed (Bill s-cl. 32(2));

(b) must not refer to an expert's report unless:

(i) the report is set out in the statement; and

(ii) the expert has given his consent for the inclusion of the report. (Bill s-cl. 32(3));

(c) must be copied to the NCSC and the on-market offeror (Bill s-cl. 32(4)); and

(d) may contain additional non-statutory material (Bill s-cl. 32(5)).

Cl. 33 : withdrawal of on-market offers

108. Introduction. Cl. 33 of the Bill seeks to ensure that on-market offerors (or their brokers) are not unduly disadvantaged, by comparison with those who proceed by formal offers, because of the unconditional nature of the offer to stand in the market for a fixed period of 1 month (see Bill s-cl. 17(13)).

109. Provisions of cl. 33. It does this by permitting the withdrawal of the on-market offer in the following circumstances:

(a) if certain prescribed occurrences take place in relation to the target, or one of its subsidiaries, which would make continuation of the take-over intolerable for the on-market offeror (Bill s-cl. 33(1) – these occurrences are defined in cl. 6). A formal take-over offeror can impose conditions in relation to the same occurrences and still purchase shares outside his offer on a stock exchange (see Bill s-para 13(4) (b) (ii)). Once he has reached a majority shareholding in the target company, the on-market offeror will not be able to withdraw on the grounds of action taken by the target company (Bills s-cl. 33(2)).

(b) if the offeror's own position is affected by certain events: bankruptcy, mental incapacity or death in the case of a natural person (Bill s-cl. 33 (3)) or official management, receivership or winding up in the case of a corporation (Bill s-cl. 33(4)).

(c) if the broker's position is affected by any of the following events:

- bankruptcy;

- a direction from the governing body of the Stock Exchange to cease to carry on the business of dealing in securities; and

- in the case of a sole trader: death or mental incapacity.

(Bill s-cl. 33(6)).

Cl. 34 : suspension of acceptance of offers made pursuant to take-over announcement

110. Acceptance of offers is suspended if the NCSC grants an order, on the application of the offeror or the member of the exchange who made the announcement on behalf of the offeror, declaring that offers that have not been accepted are not capable of being accepted while the order is in force (Bill cl. 34)).

ACQUISITION OF SHARES BILL : PART V – PROVISIONS RELATING TO BOTH TAKE-OVER OFFERS AND TAKE-OVER ANNOUNCEMENTS

111. Part V of the Bill (cls. 35 to 43) contains provisions which apply to any take-over conducted in accordance with the proposed code either by means of take-over offers under a formal take-over scheme (see Bill cl. 16) or by means of the on-market alternative (see Bill cl. 17). (References in this ex memo to a 'bidder' are to both an offeror under a formal take-over scheme and an on-market offeror).

Cl. 35 : restriction on disposal of shares by offeror or on-market offeror

112. An offeror will be prohibited from selling his shares after his Part A statement is served unless another person not associated with him makes a counter-bid (Bill s-cl. 35(1) – the test of association is set out in s-cl. 7(5)).

113. A similar restriction is placed on an on-market offeror once he make his announcement (Bill s-cl. 35(2)).

Cl. 36 : obligations of target company to provide information

114. A target company must, if requested, provide a bidder with a list of shareholders (and holders of renounceable options and convertible notes), together with details of their holdings, within 7 days of receipt of the prescribed fee (Bill cl. 36). This will provide the bidder with the addresses he will need to dispatch to all shareholders the offer and accompanying material in the case of a formal take-over offer (see Bill para 16(2) (c) and s-para 16(2) (f) (viii)) and the Part C statement in the case of an on-market offer (see Bill para 17(10) (a)) and to make general law offers to the holders on non-voting shares, convertible notes and renounceable options (see also ex memo para 43 in relation to the treatment of non-voting shares etc).

Cl. 37 : forecasts of profits

115. Introduction. The bidder and the target company can only make forecasts of profits during a take-over with the written consent of the NCSC. (Bill cl. 37-cf CSI Bill cl. 237 which applied only to statements made by the offeror and its associates). It is just as essential to place the same restrictions on public statements made by the offeree company as those statements, if misleading, can be equally detrimental to shareholders as misleading statements made by the offeror company.

116. Provisions of cl. 37. There will be a general prohibition on forecasts of profits by:

(a) bidders (Bill s-cl. 37(1)); and

(b) target companies (Bill s-cl. 37(2)).

117. This prohibition will not apply to a forecast that:

- is in writing; and

- is issued with the written consent of the NCSC which may impose conditions

(Bill s-cl. 37(3)).

118. The controls relating to forecasts of profits will also apply forecasts of profits of any business or income producing activity of a kind engaged in by the company or of any industry in which the company is engaged (Bill s-cl. 37(4)).

Cl. 38 : statements on asset valuations

119. Introduction. During a take-over, or whilst it is believed that a take-over offer is imminent, the directors of the target company, and its associates, will be prohibited from making public statements concerning the target company's asset valuations, without the written consent of the NCSC (Bill cl. 38). The object of this provision is to prevent the directors of the target company from giving unfounded but optimistic estimates of the asset values of the target company as a defence to the take-over bid.

120. Provisions of Cl. 38. There will be a general prohibition on statements by the directors of the target company, and by persons associated with the target company, to the effect that the market values of target company's assets differ from its book value, unless the statement:

- is in writing; and

- is issued with the written consent of the NCSC which may impose conditions

(Bill s-cl. 38(2)).

121. The controls will operate on any statement that the market value of any assets differs from the amount shown in the last accounts published, being accounts prepared under a statutory requirement to do so (Bill s-cl. 38(3)).

122. Accounts, and any document attached to such accounts, laid before an annual general meeting or prepared and lodged in accordance with s. 74F of the Companies Ordinance 1962 are excluded from the controls (Bill s-cl. 38(4)).

Cl. 39 : notification of acquisitions and disposals of shares

123. Introduction. During a take-over of a listed public company (and from the date of the announcement in the case of an on-market offer) the bidder will be required to keep the home stock exchange of the target company informed on a daily basis of details of any dealings in the shares. Any other person who holds 5% or more of the shares in the company at any time during the relevant period must notify the home exchange of the relevant particulars if he varies his holding by 1% or more. This information is essential information for an informed market. A defence will be provided for failure to notify because of ignorance of changes in entitlements.

124. Provisions of cl. 39. The periods during which the notification requirements apply, and the persons to whom they apply, are set out in s-cl 39(1). Associates of offerors or on-market offerors are not required to notify separately.

125. A person making a take-over bid must advise the home exchange of the target company of details of his holding in that company, even if his holding is nil, by 9.30am on the day after commencement of the period; thereafter he must give daily advice to the home exchange of details of any changes in his entitlement (Bill s-cl. 39(2) – see also Bill s-cls. 39(10) and (11) which set out the particulars required where there are changes).

126. The notification requirements will also apply to a person who becomes entitled to more than 5% of the shares during a relevant period (Bill s-cl. 39(3) – relevant period is defined in para 39(1) (a)). Where a person who has been required to notify because he holds more than 5% of the company reduces his entitlement to below 5% (as a result of dealings in the shares), he must notify

the stock exchange of the changes in entitlement which resulted in him dropping below the 5% level, and of any changes in his entitlement since last giving notice (Bill s-cl. 39(4)). A person entitled to more than 5% of the voting shares in the company must notify the required details of changes in entitlement only where the net fluctuation in his entitlement since he last gave notice is 1% or more of the number of the voting shares in the company (Bill s-cl. 39(5)).

127. Other provisions relating to the notification requirements are as follows:

(a) There will be a defence of ignorance of changes in entitlement in a prosecution for failure to notify under the clause (Bill s-cl. 39(6)). This defence is necessary because of the extended operation of the code through the provisions dealing with relevant interests.

(b) Notification will not have to be more frequent than daily (Bill s-cl. 39(7)).

(c) If two or more persons become entitled or cease to be entitled to the same shares by virtue of being associates, only one of those persons need give notice (Bill s-cl. 39(8)).

(d) The prescribed particulars of acquisitions which must be notified to the home stock exchange are set out in s-cls. 39(9) and (10). Under paras (9) (d) and (10) (e) other matters may be prescribed. Note that under the Schedule Part A, 4(e) and Part C, 4(e), disclosure of any escalation clauses entered into before the relevant periods is required; such clauses are prohibited after service of a Part A statement, or after an announcement (see Bill cl. 40).

(e) The prescribed particulars of dispositions which must be notified are set out in s-cl. 39(11).

(f) Specific separate notification will be required of the highest price paid in relation to acquisitions of shares, or the highest price obtained with respect to disposal of shares, during a relevant period (Bill s-cl. 39(12)).

Cl. 40 : offerees or on-market offerees not to be given benefits except under take-over scheme or take-over announcement

128. The grant, during a take-over, of special benefits including 'escalation clauses' to shareholders which are not provided for under the take-over scheme or take-over announcement is prohibited (Bill cl. 40 – cf. ICAC Coy. As s. 180M). The prohibition commences when the Part A statement is served on the target company or when the take-over announcement (in relation to the on-market alternative) is made (Bill s-cls. 40(1) and (2)). The prohibition does not apply to a formal variation of the take-over scheme (see Bill cl. 27) or to acquisitions in the ordinary course of stock exchange trading (Bill s-cl. 40(3)). Existing agreements etc. for special benefits must be disclosed in the Part A or Part C statement (see paras 4(e) of Part A and Part C of the Schedule).

Cl. 41 : expenses of directors of target company

129. Directors will be entitled to be recompensed reasonable expenses they incur in relation to a bid, including an on-market bid (Bill cl. 41 – based on ICAC Coy As s. 180P).

Cl. 42 : provisions relating to dissenting shareholders

130. Introduction. Cl. 42 of the Bill contains provisions relating to acquisition of the interests of minority holders who do not accept the bids in respect of their holding. These provisions are based on ICAC Coy. A s. 180X. The major modifications are as follows:

(a) The level at which the bidder can compulsorily acquire will be 90% of all shares in the class; and

(b) The provisions will apply where the 90% holding is reached as a result of the use of the on-market alternative.

131. Provisions of cl. 42. A person who proposes to acquire all the shares in a company (and who makes offers under a take-over scheme or an on-market announcement accordingly) will be able (provided he gives the required acquisition notice to dissenting offerees within one month after the close of his bid) to acquire compulsorily the interests of the remaining minority shareholders provided:

(a) during his bid he becomes entitle (by any means) to 90% of the shares in the company; and

(b) if the outstanding shares represent less than 90% of the company, 75% of the offerees have disposed of their shares in response to the bid.

(Bill s-cls. 42(2) and (3)).

132. There are a number of provisions designed to safeguard the interests of the parties involved in the compulsory acquisition process (Bill s-cls. 42(4) – (12)).

113. There are also provisions for the disposal of the consideration paid by the bidder for the compulsorily acquired holdings where the holder does not claim the consideration (Bill s-cls. 42(14) – (18) – based on ICAC Coy. As s-secs 180X(13) to (17)). These provisions will be modified in their application in jurisdiction other than the Australian Capital Territory so that they refer to the relevant unclaimed moneys legislation in that jurisdiction.

Cls. 43 : rights of remaining shareholders and holders of options or notes

134. Introduction. Cl. 43 of the Bill contains provisions to protect the rights of remaining holders who have not accepted the bid for their holdings. These provisions are based on ICAC Coy As s. 180Y. The major modifications are as follows:

(a) They will now cover the on-market alternative, and

(b) They will confer certain rights on the holders of non-voting shares, convertible notes and renounceable options.

135. Provisions of cl. 43. The main features of these provisions are as follows:

(a) A person who, after making a take-over offer under a take-over scheme or an on-market announcement, is entitled (irrespective of the time or method of acquisition) to more than 90% of the voting shares in a company, is required to notify the remaining shareholders (Bill s-cl. 43(1)). Those shareholders then have 3 months in which to require the person to acquire their whares on the same terms us under the offer or on-market announcement as the case may be (Bill s-cls. 43(2) and (3)).

(b) Where a bidder attains a holding of 90% of all the voting shares, he must also give notice to the holders of non-voting shares, convertible notes and renounceable options (Bill s-cl. 43(4)). If this notice proposes terms for acquisition, it must be accompanied by an expert's report (Bill s-cl. 43(5)).

(c) Where the holders of non-voting shares, renounceable options and convertible notes receive these notices they will be able to compel the person to acquire their interests on agreed terms or such terms as the Court orders (Bill s-cl. 43(6)).

(d) Where the bidder has given a notice or notices under Bill s-cls. 43(1) or (4), he shall forthwith lodge a copy of the notice or one of the notices with the NCSC (Bill s-cl. 43(7)).

ACQUISITION OF SHARES BILL : PART VI – MISCELLANEOUS

136. Part VI of the Bill (cls. 44 to 64) deals with various miscellaneous matters.

Cl. 44 : liability for mis-statements

137. Introduction. Criminal and civil liability will be imposed on certain specified persons for false or misleading material (or omissions) in documents and statements relating to the proposed code. Various defences will be provided (Bill cl. 44 – cf. ICAC Coy As s. 180J dealing with liability for mis-statements in Part A statements).

138. Provisions of cl. 44. Two groups of offences will be created:

(a) Offences for the inclusion of materially false or materially misleading matter in, or the omission of material matter from:

- a Part A statement or an offer (Bill s-cl. 44(1) – see Bill s-cls. 44(11) and (15) for persons covered;

- a Part B or Part D statement (Bill s-cl. 44(2) – see Bill s-cl. 44(12) for persons covered);

- a Part C statement (Bill s-cl. 44(3) – see Bill s-cl. 44(13) for persons covered);

- a notice under cls. 42 or 43 (Bill s-cls. 44(1) and (3));

- certain reports accompanying a Part B or Part D statement, a statement issued with the consent of the NCSC or a cl. 43 notice (Bill s-cl. 44(4)).

(b) Offences for the inclusion of materially false or materially misleading matter in statements advertisements or documents (see Bill para 44(8) (a)) relating to the affairs of, or to marketable securities of the target company or a related corporation or of the bidder (see Bill para 44(8) (b)) where:

- a person proposes to make a bid (Bill s-cl. 44(5))

- directors of a company believe it will be subjected to a bid (Bill s-cl. 44(6))

- take-over offers have been dispatched or an on-market announcement is made (Bill s-cl. 44(7) – see Bill s-cl. 44(14) for persons covered).

The penalty for these offences will be $5,000 or 1 year's imprisonment or both (see Bill s-cl. 44(20)).

139. Persons guilty of these offences will be liable to compensate persons who suffer loss, either because they acted or failed to act, because of the false or misleading matter or omission that constitutes the offence (Bill s-cls. 44(9) and (10)).

140. The persons who can be guilty of some of these offences are set out in s-cls. 44(11) to (14). The liability of an expert who has consented to the use of his report will be limited to liability for loss arising from the contents of the report (Bill s-cl. 44(15)).

141. Defences will be provided:

(a) defences for prosecutions under s-cls. 44(1) to (4) on the basis of a belief on reasonable grounds that false matter was true etc, provided that the belief was maintained until the date of commencement of the prosecution; if it was not, corrective advertising is a prerequisite for a defence to be made out (Bill s-cl. 44(16));

(b) similar defences in relation to s-cls. 44(5), (6) and (7) (Bill s-cls. 44(17));

(c) appropriate defences to actions for compensation under s-cls 44(9) and (10) (Bill s-cls. 44(18) and (19)).

142. The remainder of cl. 44:

(a) provides that the penalty for these offences is $5,000 or 1 year's imprisonment or both (Bill s-cl. 44(20) – this provision will apply to the exclusion of the general offence provisions – see Bill s-cl. 53(4)); and

(b) expressly preserves other remedies available under the general law (Bill s-cl. 44(21)).

Cl. 45 : orders where prohibited acquisitions take place

143. Introduction. Cls. 45 to 49 are a series of provisions dealing with the powers of each Supreme Court.
These powers are:

- to make orders where prohibited acquisitions take place (see Bill cl. 45) where offers are not dispatched pursuant to a Part A statement (see Bill cl. 46) or where rights under a take-over bid need protection (see Bill cl. 47); or

- to validate any acts or matters not in compliance with the code on the grounds that the non-compliance with the code on the grounds that the non-compliance was due to inadvertence, mistake or circumstances beyond the person's control (see Bill cl. 48).

144. Before exercising its powers under these provisions (or s-cl. 57(4)) the Court must satisfy itself that the order would not unfairly prejudice any person (see Bill s-cl. 49(1)). Each of these provisions is discussed in turn.

145. Provisions of cl. 45. Cl. 45 of the Bill confers wide powers on the relevant Supreme Court to make orders where prohibited acquisitions take place. The provision is similar to ICAC Coy As s. 69N which confers similar powers on Supreme Courts with respect to a defaulting substantial shareholder.

146. The nature of these powers is as follows:

(a) the target company, a member of the company, the NCSC or the person from whom the shares were acquired will be able to seek relief where there has been a contravention of cl. 11. The orders which the Court may make include orders directing divestiture or restraining the exercise of voting rights (Bill s-cl. 45(1));

(b) in certain circumstances the Court will be able to have regard to associations formed after the acquisition takes place (Bill s-cl. 45(2)). This provision has effect for the purpose of determining whether there has been a contravention of cl. 11 so as to empower the Court to make an order under s-cl. 45(1). The sub-clause operates in the following way:

- where 2 persons are "associated" at the time when an application under s-cl. (1) is considered by the Court (e.g. if they are acting in concert in respect of the shares in the company held by them), and one of them acquired all or any of his shares in the preceding 6 months, and those matters are proved to the satisfaction of the Court, then that proof constitutes prima facie evidence that those persons were associated at the time when those shares were acquired;

- if proved, it would have the effect that each of them is to be treated as having been entitled at that time to the shares of the other of them;

- it follows that, in determining whether the acquisition breached cl. 11 by increasing a person's entitlement to shares beyond the permitted level, the Court may look not only at that person's actual entitlement at the time of the acquisition but also at his entitlement as increased by virtue of his having been associated with another person at that time;

- the provision has effect only for the purpose of the making of orders by the Court and does not operate to make a person retrospectively guilty of an offence;

(c) The Court will not be ale to make an order (except an order restraining the exercise of voting rights) if the prohibited acquisition was due to inadvertence or mistake and the Court is satisfied that in all the circumstances the contravention ought to be excused (Bill s-cl. 45(3)).

Cl. 46 : orders where offers not dispatched pursuant to Part A statement

147. Where an offeror serves a Part A statement on the target company and subsequently acquires shares (by virtue of the enabling provision in para 13(3)(a)) but then does not dispatch offers to shareholders, the NCSC will be able to apply to the Supreme Court for an order requiring the person to dispatch offers and/or for an order of the kind (set out in s-cl. 13(5), which in similar circumstances, prohibits the exercising of voting rights without the consent of the NCSC).

147. Where the Court orders the dispatch of offers:

(a) it will be able to require an offeror to send additional information to shareholders (and to the other relevant parties) (Bill s-cl. 46(2)); and

(b) the offers dispatched will be deemed to be made under a take-over scheme (Bill s-cl. 46(3)) – see also Bill s-cl. 21(5) which prohibits the withdrawal of such offers without the consent of the NCSC).

Cl. 47 : orders to protect rights under take-over schemes or announcements

149. The Supreme Court will be able to make a wide range of orders to protect the rights of a person affected by a take-over scheme or take-over announcement where the proposed code has not been complied with. This will include orders restraining the registration of shares, cancelling contracts, and restraining or directing the disposal of shares. The right to seek relief will be given to bidders, the NCSC, individual offerees and the target company (Bill cl. 47 – based on ICAC Coy As s. 180R but the range of applicants and the range of orders the Court will be able to make has been widened).

150. The provision will apply to non-voting shares, convertible notes and renounceable options (Bill s-cl. 47(2) – see also Bill s-cl. 49(12) and ex memo para 43).

Cl. 48 : court may excuse contravention or non-compliance due to inadvertence etc.

151. The Supreme Court will be able to validate any acts or matters not in compliance with the proposed code on the grounds that the non-compliance was due to inadvertence, mistake or circumstances beyond the person's

control (Bill Cl. 48 – cf. ICAC Coy As s. 180S which does not contain specific provisions equivalent to s-cls. 48(2) and (3)). This clause has effect notwithstanding anything contained in any other provision of the Bill s-cl 48(4)).

Cl. 49 : miscellaneous provisions relating to orders

152. There are general provisions relating to orders under cls. 45 to 48 and cl. 57 of the Bill (Bill cl. 49 – cf. ICAC Coy As s. 180T).

153. Among other things:

(a) before making an order under those provisions the Supreme Court must satisfy itself that the order would not unfairly prejudice any person (Bill s-cl. 49(1) – based on existing s-sec. 180T(1)).

(b) the Court will be able to include ancillary or consequential provisions in such orders (Bill s-cl. 49(3)).

(c) an order for disposal of an interest in a share can be subject to any conditions the Court thinks fit (Bill s-cl. 49(4)).

(d) If an interest is not disposed of the Court will be able to vest it in the NCSC (Bill s-cl. 49(5)). The disposal procedure set out in s. 311 of the existing companies legislation will apply where interests are vested in the NCSC (Bill s-cl. 49(6)).

(e) the Court will be able to rescind, vary or suspend its order (Bill s-cl. 49(7)).

(f) the penalty for the breach of an order under cls. 45 to 47 and cl. 57 will be $1,000 or 3 months jail or both. (Bill s-cls. 49(8) to (10) – these provisions will apply to the exclusion of the general offences provisions – see Bill s-cl. 53(4)). (See also Bill cl. 54 which provides for a default penalty not exceeding $50 for each day that an offence continues after conviction for the original offence).

(g) the powers of the Supreme Court in relation to contempt of court are expressly preserved (Bill s-cl. 49(11)).

Cl. 50 : unfair or unconscionable agreements, payments or benefits

154. Introduction. The Supreme Court will be able to make certain orders where it is satisfied that the provision of a benefit etc., for management was unfair or unconscionable having regard to the interests of the corporation concerned (Bill cl. 50). This provision is directed at the use of service contracts by target companies as a defensive tactic and to confer unfair benefits on management. The provision applies only to those officers who take part in the management of the target company. This is to ensure that the provision does not affect contracts between companies and employees.

154. Provisions of cl. 50. A brief outline of cl. 50 is as follows:

(a) The provisions will apply:

(i) to agreements, payments or benefits etc. provided by a target company, within 12 months after commencement of a take-over or at any time when the directors of the company have reason to believe that a take-over is proposed (Bill s-cl. 50(1); and

(ii) to service contracts providing for a fixed period of tenure (Bill s-cl. 50(2).

(b) If the agreement, payment or benefit is made up the target company or a company related to the target company, it will be capable of approval by ordinary resolution at a general meeting of the target company, provided that the beneficiary and his associates do not vote on the resolution (Bill s-cl. 50(3)).

(c) An application to the Court for any of the orders specified in paras 50(4) (a) to (c) must be made within 12 months (unless the Court thinks a longer period is just in the circumstances) of the payment, benefit or agreement, and may be made by the NCSC, by the corporation concerned or by persons holding at least 10% of the aggregate nominal value of the shares in that corporation or in a related corporation (Bill s-cl. 50(4)). Giving standing in the case of shareholders of related corporations will ensure that if a take-over offer is made for a company and a related corporation makes the relevant agreement or payment or provides the benefit, shareholders in the related corporation itself will be able to approach the Court for an appropriate order.

Cl. 51: recording of resolutions

156. The minutes of a directors' resolution for the purposes of the proposed code must record the names of directors who vote against, or abstain from voting on, such a resolution (Bill cl. 51).

Cl. 52 : statements as to proposed take-over offers or announcements

157. Bluffing notices or announcements of take-overs will be prohibited (Bill s-cl. 52(1) – based on ICAC Coy As s-secs 180Q(1) and (2)). Where a proposed bid is announced, but not proceeded with within 2 months or such further period as the NCSC allows, the prohibitions will be deemed to be breached unless the person establishes that changed circumstances made it unreasonable for him to proceed with the bid (Bill s-cl. 52(2)). If the NCSC certifies that no extension of time was granted, it will be presumed, in the absence of proof to the contrary, that no further period was allowed (Bill s-cl. 52(3)).

158. There are also prohibitions on:

(a) the actual making of an offer or on-market announcement if the person has no reasonable or probable expectation of meeting his obligations under the bid (Bill s-cl. 52(4) – based on ICAC Coy. As s-secs 180Q(3) and (4)); and

(b) the causing of an offer or on-market announcement to be made by a person who has no reasonable or probable expectation that the person making the offer can meet his obligations (Bill s-cl. 52(5)).

Cl. 53 : offences

159. The general penalty for contravention of the proposed new code will be a fine of $2,500 or 6 months' imprisonment or both (Bill cl. 53 – based on ICAC Coy As s. 180W except that the fine has been increased from $2,000 to $2,500). The general offences provision (s. 379) and the general provision relating to default penalties (s. 380) of the existing companies legislation will not apply to the proposed code (Bill s-cl. 53(5)).

Cl. 54 : continuing offences

160. This clause provides that where failure to do an act or thing required under this code constitutes an offence, the offence continues until such time as the act or thing is done. The penalty provided is a fine not exceeding $50 for each day that the offence continues after conviction for the original offence (Bill s-cls. 54(1) and (2)).

161. Charges against the same person for any number of offences under Bill s-cls. 54(1) or (2) may be joined in the same information if those offences relate to a failure to do the same act or thing (Bill s-cl. 54(3)).

Cl. 55 : officers in default

162. References in the proposed code to the officer who is in default includes a reference to a person who has subsequently ceased to be an officer (Bill cl. 55).

Cl. 56 : service of documents and publication of notices

163. The following provisions will apply to the service of documents:

(a) Any document which is not required to be signed will be able to be served on a stock exchange by a telex etc. message to the effect of the document (Bill s-cl. 56(1)).

(b) A document that has to be given to a stock exchange or the NCSC on a particular day when those bodies are closed will be able to be given on the next day when they are open (Bill s-cl. 56(2)).

(c) A copy of a notice that is given to the NCSC or a stock exchange need not specify the individual to whom it was dispatched (Bill s-cl. 56(3)).

(d) Where a provision requires a person to publish a notice in a newspaper and due to circumstances beyond his control the notice is not published, the person is deemed to have complied with that provision:

- if his actions would have resulted in the publication of the notice, except for those circumstances, and

- he caused the notice to be published immediately those circumstances ceased to exist (Bill s-cl. 56(4)).

Cl. 57 : power to exempt from compliance with Act

164. The NCSC will be able to grant exemptions from compliance with any provisions of the proposed code (Bill s-cl. 57(1) – based on existing s. 180V). All exemptions and declarations must be notified in the Commonwealth Gazette (Bill s-cl. 57(2)). Persons must comply with any conditions attaching to an exemption (Bill s-cl. 57(3)) and the Court, on the application of the NCSC, may order a person to comply with the conditions (Bill s-cl. 57(4)).

Cl. 58 : power to declare that Act applies as if modified

165. The NCSC may, by instrument in writing, declare that provisions of the code apply in particular case as if modified or varied, and where such a declaration is made, the code has effect accordingly (Bill s-cl. 58(1)) e.g. in the case of a situation where the proposed code expressly prohibits an action in respect of which an exemption is sought under Bill s-cl. 57(1).

166. All declarations must be notified in the Commonwealth Gazette (Bill s-cl. 58(2)).

Cl. 59 : NCSC to take account of certain matters

167. This clause provides guidelines for the NCSC in exercising any of its powers under Bill cls. 57 and 58.

168. The NCSC shall take account of the desirability of ensuring that an acquisition of shares takes place in an efficient, competitive and informed market, and shall have regard to the need to ensure;

(a) that the identity of a person proposing to acquire a substantial interest is known to the shareholders and directors of the company concerned;

(b) the shareholders and directors have sufficient time to consider any proposal to acquire a substantial interest;

(c) that shareholders and directors have sufficient information to enable them to assess the merits of any proposal to acquire a substantial interest; and

(d) that as far as is practicable, all shareholders have equal opportunities to participate in the benefits of the acquisition.

(Bill s-cl. 59 – based on the general principles set out in the report of the Eggleston Committee).

Cl. 60: power to declare acquisition of shares or other conduct to be unacceptable

169. Introduction. The NCSC will be able to declare that, for the purposes of the code, a specified acquisition is an unacceptable acquisition, and that specified conduct (once a Part A statement has been served, or a take-over announcement has been made) is unacceptable conduct. Such a declaration will enable the Supreme Court to make a wide range of orders to protect the rights of persons affected by the acquisition or conduct.

170. The purpose of this provision is to discourage activities which would frustrate the aims of the code. This is to be achieved by the NCSC having poser to act in those circumstances where is considers that the acquisition or conduct does not satisfy certain criteria specified in the clause.

171. Provisions of Cl. 60. The NCSC may within 14 days, by instrument in writing, declare that a specified acquisition of shares is an unacceptable acquisition, and a person who acquires shares by virtue of an acquisition that has been declared unacceptable is deemed o have contravened Bill cl. 11 but only for the purposes of orders by the Supreme Court under Bill cl. 45 (Bill s-cl. 60(1)).

172. In lieu of the Court making an order under cl. 45 the Court may declare the specified acquisition not unacceptable and the declaration by the NCSC will cease to have effect (Bill s-cl. 60(2)).

173. The NCSC may also declare within 14 days, by instrument in writing, that specified conduct (once a Part A statement has been served, or a take-over announcement has been made) is unacceptable conduct (Bill s-cls. 60(3) and (4)) and where the NCSC so declares, the Court may, on the application of the NCSC, make any order it thinks necessary to protect the rights of any person affected by the conduct. The Court may on the other hand declare that the conduct is not unacceptable and the declaration by the NCSC will cease to have effect (Bill s-cl. 60(5)).

174. A person affected by a declaration made by the NCSC may apply to the Supreme Court for a declaration that the acquisition or conduct was not unacceptable (Bill s-cl. 60(6)).

175. Before the NCSC makes a declaration under this clause, it must be satisfied that;

(a) shareholders and directors of the company concerned:

(i) did not know the identity of proposed acquirers of a substantial interest;

(ii) did not have reasonable time to consider a proposal for an acquisition of a substantial interest; or

(iii) were not supplied with sufficient information; or

(b) shareholders did not have equal opportunity to participate in benefits of the acquisition.

(Bill s-cl. 60(7)).

176. Where the NCSC makes a declaration under this section, it shall as soon as practicable:

(a) serve a copy of the declaration on any person to whom the declaration relates; and

(b) publish the declaration in the Commonwealth Gazette (Bill s-cl. 60(8)).

Cl. 61 : power of NCSC to intervene in proceedings

177. The NCSC will be able to intervene in any proceedings under the Bill (Bill s-cl. 61(1)).

178. If it does intervene, it will be deemed to be a party to the proceedings with all rights, duties and liabilities of such a party (Bill s-cl. 61(2)).

179. The NCSC may be represented in any proceedings in which it intervenes by:

(a) an employee;

(b) any other person to whom it has delegated functions and powers which relate to a matter to which the proceeding relates; or

(c) a solicitor or counsel.

(Bill s-cl. 61(3))

Cl. 62 : regulations

180. The Governor-General will be able to make regulations in accordance with advice consistent with Ministerial Council resolutions (Bill s-cls. 62(1) and (2) – the provision in s-cl. 62(2) is the same as in s-cl. 53(4) of the NCSC Act).

181. Among other things, these Regulations will be able:

(a) to vary the requirements contained in the Schedule for Part A, B, C or D statements (Bill s-cl. 62(3) – based on ICAC Coy As s-sec 180U (1)); and

(b) to require the stock exchanges and the NCSC to be given signed copies or prescribed notices of specified documents (Bill s-cl. 62(4) – based on ICAC Coy As s-sec 180U(2)).

Cl. 63 : acquisitions of shares within 6 months after commencement of Act

182. A person will be able to increase his holding during the first 6 months of the operation of the proposed code beyond the levels that would be permissible under cl. 11 provided the net increase in entitlement through the acquisition in question plus any other acquisitions in the preceding 6 months is not more than 3% (Bill cl. 63). 3% will be the amount that can be acquired in any 6 months without infringing the code (see Bill cl. 15).

Cl. 64 : take-overs pending at commencement of Act

183. Where offers or invitations are dispatched more than 30 days before the commencement of the proposed code, and the take-over is still open before commencement, the person making the bid will not be subject to the controls imposed by the proposed code and the present law will continue to apply in relation to that bid for as long as that take-over remains of foot (Bill s-cl. 64(1)). Where a take-over bid is made in the 30 days before commencement of the proposed code, and is still open at the time of commencement, acquisitions by any person within 60 days of commencement will be exempted from the controls imposed by the proposed code. Any offers or invitations in respect of the company during that 60 day period will not be subject to the new code (but will need to comply only with the provisions of the present code) (Bill s-cl. 64(2)).

ACQUISITION OF SHARES BILL : THE SCHEDULE

184. The Schedule to the Bill sets out the detailed requirements in relation to four different statements under the proposed new take-over code:

- Part A : statement to be furnished by offeror
- Part B : statement to be furnished by target company to which take-over scheme relates
- Part C : statement to be furnished by on-market offeror
- Part D : statement to be furnished by target company to which take-over announcement relates.

185. This schedule takes the place of the present Tenth Schedule to the existing companies legislation, which is repealed by Bill cl. 4.

Part A : statement to be furnished by offeror

186. Part A of the Schedule sets out the requirements with which these Part A statements must comply

187. Among other things the Part A statement must contain:

- The Material set out in cls. 32, 33 and 34 of the Fifth Schedule of the A.C.T. companies Ordinance if the consideration includes debentures (s-para 1(e) (I));

- particulars of alterations in the capital structure of any subsidiary at any time during the preceding five years, if consideration includes marketable securities (s-para 1 (e) (iv));

- if the offer will seek to acquire any non-voting share, renounceable options or convertible notes: the terms proposed for any acquisition under cl. 43 (para 1(h));

- further details of the funding arrangements (cl. 3); and

- particulars of any escalation agreements prior to the bid (para 4(e)) – there is a prohibition of special benefits, including escalation clauses, which are not provided for in the take-over scheme once the Part A statement is served on the target company (see Bill cl. 40 and ex memo para 128).

188. Additional non-statutory information can be included in the Part A statement (see Bill s-cl. 16(3)).

Part B : statement to be furnished by target company to which take-over scheme relates

189. Part B of the Schedule sets out the requirements with which the statement given by the target company (Part B statement) must comply.

189. Among other things, the Part B statement must include:

- each director's reasons for making a recommendation, or not, as the case may be (cl.1);

- a statement as to whether there have been any material changes to the financial position of the target company since the date of the last accounts of the company provided that the change or changes are known to the directors of the target company (para. 2(j)); and

- any other material information, other than matter that is not permitted to be included in a statement referred to in cls. 37 or 38 without the consent of the NCSC, known to the target directors and not previously disclosed (para. 2(k)).

191. Copies of relevant experts' reports have to be attached (see Bill s-cl. 22(3)). Additional non-statutory material may be included (see Bill s-cl. 22(5)).

Part C : statement to be furnished by on-market offeror

192. Part C of the Schedule sets out the requirements with which the statement by the on-market offeror must comply. The Part C statement must include the same information as would be included in a Part A statement which involved only cash consideration, and also include information similar to that required be AASE Listing Requirements 3R(15) (a) which requires details of share dealing in the target company in the 3 month period preceding the announcement (para. 2(e)).

Part D : statement to be furnished by target company to with take-over announcement relates

193. Part D of the Schedule sets out the requirements with which the statement given by a listed target company for which an on-market bid is made must comply. The requirements are the same as those set out in Part B of the Schedule except for the omission of para. 2(h) of that Part which is not relevant to listed companies.

COMPANIES (ACQUISITION OF SHARES-FEES) BILL 1980

194. The fees that will be charged in connexion with the proposed new code will be set out in regulations to be made under the Fees Bill.

Cl. 1 : short title

195. The Act will be cited as the Companies (Acquisition of Shares-Fees) Act 1980.

Cl. 2 : commencement

196. The Act will come into operation on the same day as the Companies (Acquisition of Shares) Bill 1980

Cl. 3 : interpretation

197. Expressions used in the Fees Bill will have the same meaning as in the Acquisition of Shares Bill.

Cl. 4 : fees payable

198. There will be payable to the Commonwealth such fees as are prescribed (Fees Bill s-cl. 4(1)). This Bill will relate to fees payable under the proposed code so far as the A.C.T. is concerned. The fees payable under the proposed code as in force in each State will be payable to that State by virtue of provisions in the State adopting Bills.

199. A document will not be deemed to be lodged until the fee has been paid (fees Bill s-cl. 4(2)). The NCSC must not deal with any application until the appropriate fee has been paid (Fees Bill s-cl. 4(3)).

Cl. 5 : regulations

200. The Governor-General will be able to make regulations in accordance with advice consistent with Ministerial Council resolutions (Fees Bill cl. 5 – the provision is s-cl. 5(2) is the same as in s-cl. 53(4) of the NCSC Bill and s-cl. 62(2) of the Acquisition of Shares Bill).

OTHER MATTERS

Application legislation

201. The Acquisition of Shares Bill is the Bill that will apply the proposed code in the Australian Capital Territory. It will be part of the initial Commonwealth legislation referred to in para 8(1) (a) of the Formal Agreement:

> "8. (1) The Commonwealth will –
>
> (a) submit to the Commonwealth Parliament legislation which has been unanimously approved be the Ministerial Council to form the basis of the scheme and take such steps as are appropriate to secure the passage of the legislation"

202. Each State will pass legislation to apply the provisions of the proposed code in that State. The States' obligations are set out in paras 9(a) and (b) of the Formal Agreement:

> "9. Each State will as soon as practicable after the passage of the Commonwealth Acts submit to the Parliament of the State and take such steps as are appropriate to secure the passage of legislation which has been unanimously approved by the Ministerial Council and which–
>
> (a) to the extent necessary for the purposes of this agreement, repeals, amends or modifies the operation of the legislation of the State relating to companies and to the regulation of the securities industry referred to in the Second Schedule and any regulations made under that legislation;
>
> (b) as from the coming into force of that legislation, applies, in place of the legislation so repealed, amended or modified in operation, the legislation relating to companies and to the regulation of the securities industry enacted by the Parliament of the Commonwealth as provided in paragraph (a) of sub-clause 8(1) and , as from the respective dates of that coming into force, any legislation from time to time enacted in accordance with this agreement which amends, supplements or is substituted for that legislation"

Consequential amendments to existing companies legislation

203. The following consequential amendments will be necessary to the existing State and Territory companies legislation once the proposed code is bought into operation:

(a) The power to restrain certain persons from managing companies in s. 122 will require extension to a person convicted of an offence under cl. 44 of the Acquisition of Shares Bill.

(b) Sub-section 254(3) (relating to branch share registers) will also need to apply where a company or corporation is entitled, pursuant to the law of its home jurisdiction, to give a notice to a dissenting shareholder under cl. 42 of the Acquisition of Shares Bill.

(c) Section 185 will require amendment so that the following are also excluded from the operation of that section:

- take-over offers that have been made in respect of shares included in a class of shares; and

- a take-over announcement that has been made in respect of shares included in a class of shares.
(cf. Paras 42(1) (a) and (b) of the Acquisition of Shares Bill).

(d) In Tasmania, it will also be necessary to insert a provision along the lines of section 185 of the ICAC Companies Acts.

(e) The time period for notifying changes in shareholdings under s. 69D will be amended to 2 business days, rather than 14 days, to ensure more timely notification, having regard to the threshold percentage provided in cl. 11.

204. It is proposed to deal with these amendments as follows:

(a) In the A.C.T., the Commonwealth will introduce an appropriate Ordinance amending ss. 69D, 122 185 and 354(3) of the Companies Ordinance.

(b) In the six States, the Companies (Acquisition of Shares-Application of Laws) Bills will, in addition to applying the acquisition of shares law in force in the A.C.T. as the law in force in that jurisdiction, also amend ss. 69D, 122, 185 and 354(3).

ATTACHMENT 'A'

Summary of main differences between the Company Take-overs Bill 1979 and the Companies (Acquisition of Shares) Bill 1980

Provision Nature of change

Cl. 1: The short title has been changed so that the Act may be cited as the Companies (Acquisition of Shares) Act 1980.

Cl. 3: The reference to the seat of Government (Administration) Act 1901 has been omitted. The reference is now in cl. 9 of the Companies and securities (Interpretation and Miscellaneous Provisions) Bill 1980 – see definition of "The Territory".

Cl. 4: This clause is not titles "Repeal" and states that Part VIB of, and the Tenth Schedule to, the Companies Ordinance 1962 are repealed.

Cl. 5: The words "The Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980" have been inserted before the reference to the Companies Ordinance 1962, in s-cl. 5(1). The following words have been inserted at the end of the s-cl. 5(1):

> "and any regulations under that Ordinance shall have effect for the purposes of that Ordinance as so incorporated with this Act".

In s-cl. 5(2) the following paragraph has been inserted:

"(c) references in those regulations to the Companies Ordinance 1962 shall be construed as references to that Ordinance as incorporated with this Act by reason of sub-section (1)."

Cl. 6: The definition of "nominee corporation" has been altered to read:

> "means a corporation whose principal business is the business of holding marketable securities as a trustee or nominee".

The following definitions have been deleted and inserted in cl. 9 of the Interpretation and Miscellaneous Provisions Bill 1980:

- Agreement;
- Commission;
- constituent documents;
- Ministerial Council;
- participating State; and
- participating Territory.

The words "a count' have been substituted for "the Court" in the definition of "officer". The definition is also extended to cover the following:

"(e) a trustee or other person administering a compromise or arrangement made between the corporation and its creditors."

The definition of "principal executive officer" has been omitted. The following definition of "executive officer" has been included:

> ""executive officer", in relation to a corporation, means any person, by whatever name called and whether or not he is a director of the corporation, who is concerned, or takes part, in the management of affairs of the corporation."

The word "property" has been substituted for the word" undertaking" in reference to receivers in the definition of "Prescribed occurrence."

Cl. 7: Paragraphs 7(1) (a) and (b) have been deleted New paragraphs 7(1) (a) and (b) now read as follows:

> "(a) he acquires a relevant interest in the shares concerned as a direct or indirect results of a transaction entered into by him or on his behalf in relation to those shares, in relation to any other securities of that company or in relation to securities of any other corporation; or
>
> (b) he acquires any legal or equitable interest in securities of that company or in securities of any other corporation and, as a direct or indirect result of the acquisition, another person acquires a relevant interest in the shares concerned."

Sub-clause 7(3) has the following inserted after the word "person" where first occurring:

> "(in this sub-section and sub-section (4) referred to as the "person concerned")".

Paragraph 7(3) (b) now reads:

> "except where the person concerned is a nominee corporation in respect of which a certificate by the Commission is in force under sub-section (8) – shares in which a person who is an associate of the person concerned has a relevant interest".

In sub-paragraphs 7(4) (a) (i), (ii) and (iii) the words "an executive officer" have been deleted.

There have been minor drafting changes to existing s-cl. 7(4) and a new paragraph 7(4) (e) has been inserted. This reads:

> "a person with whom the person concerned is, by virtue of the regulations to be regarded as associated in relation to the acquisition or proposed acquisition of shares in the company referred to in sub-section (3)."

Old paras (e) and (f) are now (f) and (g). In s-cl. 7(5) references to "executive officer" have been omitted. There have been minor drafting changes to s-cl. 7(5) and a new paragraph 7(5) (d) has been inserted. This reads:

> "a person with whom the other person is, by virtue of the regulations to be regarded as associated in respect of the matter to which the reference relates."

Old paras (d) and (e) are now (e) and (f). Sub-clause 7(6) has a new paragraph 7(6) (c) which reads:

> "one of those persons –
>
> (i) has dispatched or proposes to dispatch to the other person a take-over offer in relation to shares in a company held by the other person; or

(ii) has made, or proposes to make, a take-over announcement that relates to shares held be the other person."

Cl. 8: Sub-clause 8(7) has been omitted. It is now cl. 11 in the Companies and Securities (Interpretation and Miscellaneous Provisions) Bill 1980.

Old s-cl. 8(8) is now sub-clauses 8(7) and has been altered to read as follows:

> "In this Act, a reference to entering into a transaction in relation to shares includes-
>
> (a) a reference to entering into or becoming a party to an agreement, arrangement, understanding or undertaking, whether formal or informal and whether express or implied, in relation to shares; and
>
> (b) a reference to exercising an option to have shares allotted."

Old s-cl. 8(9) is now new s-cl. 8(8).

There is new s-cl. 8(9) which reads as follows:

> "A reference in sub-section 13(3) or 40(3) to an acquisition of shares in a company a an official meeting of a stock exchange in the ordinary course of trading on the stock market of that stock exchange does not include –

(a) a reference to an acquisition of shares pursuant to a transaction that is a "crossing" within the meaning of the business rules or listing rules of that stock exchange; or

(b) a reference to an acquisition of shares pursuant to a transaction that, when it is reported to the relevant stock exchange, is , pursuant to the business rules or listing rules of that stock exchange, described as "special"."

Cl. 9: Paragraph 9(4) (e) now refers to "the prescribed percentage" rather than "20%".

There is a new s-cl. 9(7) which reads as follows:

"For the purposes of this section, where a body corporate is deemed by sub-section (6) to have a relevant interest in a share in a corporation and –

(a) the body corporate is, or its directors are, accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of a person in relation to the exercise of, or the control of the exercise of, the right to vote attached to shares in the corporation, or in relation to the disposal of, or the exercise of control over the disposal of, shares in the corporation;

(b) a person has a controlling interest in the body corporate; or

(c) a person has power to exercise, or to control the exercise of, the voting power attached to not less than the prescribed percentage of the voting shares in the body corporate,

that person shall be deemed to have a relevant interest in that share."

Old s-cls. (7), (8) and (9) are now new s-cls. (8), (9) and (10).

There is a new s-cl. 9(11) which reads as follows:

"In this section, a reference to the prescribed percentage is a reference to 20% or where a lesser percentage is prescribed by regulations in force for the time being for the purposes of this section, to that percentage."

Cl. 10: Old cl. 10 is now new cl. 12 in the Bill. Clauses 11 and 12 of the old Bill are now cls. 10 and 11 of the new Bill. New cl.12 now refers to acquisitions to which section 11 does not apply.

All references to cl. 12 in the old Bill have been altered to refer to cl. 11 in the new Bill.

There have been drafting changes to sub-paragraph 12(b) (I) and paragraph 12(d).

Old paragraph 10(f) has been deleted and paragraphs 10(g) to (n) are now 12 (f) to (m).

There is a new paragraph 12(n) which reads as follows:

> (n) any other acquisition of shares made in a prescribed manner or in prescribed circumstances; or".

Cl. 12: Old cl. 12 is now new cl. 11 in the Bill.

All references to 20% in s-cls. 11(1) and (2) have been changed to "the prescribed percentage".

There is a new s-cl. 11(7) which reads as follows:

> "In this section, a reference to the prescribed percentage is a reference to 20% or where a lesser percentage is prescribed by regulations in force for the time being for the purposes of this section, to that percentage."

Paragraph 12(o) has been amended by the addition of the words "in writing" after "Commission".

Cl. 13: Paragraph 13(4) (a) has been replaced with the following:

> "the offeror proposes to acquire all the shares in the company that are included in the class of shares to which the take-over scheme relates, other than shares to which the offeror was entitled at the time when the relevant Part A statement was served; and"

Sub-paragraph 13(4) (b) (i) has been replaced with the following:

> "a condition that the offeror receives an acceptance or acceptances of an offer or offers under the take-over scheme in respect of a number of shares referred to in the condition, being a number that does not exceed a number equivalent to 90% of the shares in the company included in the class of shares concerned".

Sub-clause 13(5) has the words "without leave of the Court" replaced by "without the consent of the Commission".

Cl. 14: Sub-paragraph 14(3) (a) (I) now allows for approval by the Commission.

Cl. 15: Old cl. 15 is now new s-cl. 15(1).

The reference to 19% in old cl. 15 has been replaced by the words "the prescribed percentage".

There is a new s-cl. 15(2) which states that in that section, a reference to the prescribed percentage is a reference to:

(a) 19%; or

(b) if a percentage less than 20% has been prescribed by regulations in force for the time being for the purposes of section 11, then 1% less than that lesser percentage.

Cl. 16: Sub-paragraph 16(2) (a) (i) has been replaced with the following:

> "(i) each offer relates to all the shares in the target company included in the relevant class of shares that the offeree holds, whether the offeror proposes to acquire all the shares in the target company to which he is not already entitled that are included in the relevant class of shares or proposes to acquire only a proportion of the shares in the target company to which he is not already entitled that are included in the relevant class of shares".

Sub-paragraph 16(2) (f) (iii) has the words "after the Part A statement is served but" inserted after the word "proposed to be acquired".

Sub-paragraph 16(2) (f) (v) has the words "and not more than 14 day" inserted after the words "7 days".

Cl. 17: Sub-clause 17(2) has had drafting changes to establish clearly that it refers to cash price only.

Sub-clause 17(8) has been replaced with the following:

"(8) Nothing in this section prohibits an on-market offeror from acquiring in accordance with paragraph 13(3) (b), during the period commencing when the take-over announcement is made and ending at the expiration of the sixth trading day before the expiration of the period in which offers constituted by the take-over announcement

relates at a price (in this sub-section referred to as a "relevant price") that is higher than the price specified in the announcement or is higher than any price that is deemed by a previous operation of this sub-section or of sub-section (11) to be specified in the announcement but, if the on-market offeror acquires shares at a relevant price during that period, that relevant price shall, for the purposes of any offer that is accepted after the acquisition takes place, be deemed to be the price specified in the announcement unless and until another price is deemed by virtue of the operation of this sub-section or of sub-section (11) to be specified in the announcement."

There is a new s-cl. 17(9) which reads as follows:

"(9) An on-market offeror shall not, during the period commencing at the end of eh period referred to in sub-section (8) and ending at the expiration of the period during which offers constituted by the take-over announcement remain open, acquire shares to which the take-over announcement relates at a price that is higher than the price that, at the expiration of the period referred to in sub-section (8), is, or is deemed to be, the price specified in the announcement."

Old s-cls. 17(9) and (10) are now new s-cls. 17(10) and (11).

Old s-cl. 17(11) has been omitted.

New s-cl. (12) reads as follows:

"(12) An on-market offeror who has made offers constituted by a take-over announcement in relation to shares in a company may cause an announcement to be made on his behalf by a member of the stock exchange that is referred to in sub-section (2) at an official meeting of that stock exchange before the expiration of the sixth trading day before –

(a) the end of the period of one month referred to in that sub-section; or

(b) if that period has been extended pursuant to the previous exercise on one or more occasions of the power conferred by this sub-section – the end of the extended period,

extending that period or that extended period, as the case may be, for a further period of one month, but so that the total period for which the offers remain open does not exceed 6 months."

Old s-cls. 17(12) to (18) are now new s-cls. 17(13) to (19) with relevant drafting changes.

Cl. 18: Sub-clause 18(3) ahs the words "and section 44" inserted before the words "be deemed".

Cl. 21: New s-cl. 21(1) reads as follows:

> "A take-over offer is not capable of being withdrawn without the consent of the Commission during the period of 14 days after the day on which the offer was dispatched."

Old s-cls. 21(1) and (2) are now new s-cls. 21(2) and (3).

New s-cl. 21(4) is as follows:

> "For the purpose of calculating the period of one month referred to in paragraph (2) (a), the take-over offers referred to in that paragraph shall be taken to have been withdrawn on the day on which notices are despatched to offerees under paragraph (3) (a)."

Old s-cl. 21(3) is now new s-cl. 21(5).

Cl. 27: Old. cl. 27 has been replaced. The new heading is:

"Variation or Extension of Take-over offers".

The new text is as follows:

"27(1) An offeror may not vary the terms of a take-over offer, or extend the period for which a take-over offer remains open, except –

(a) where the regulations permit, either unconditionally or subject to conditions, variations in the terms of take-over offers or of a class of take-over offers in which the take-over offer is included or extensions of the period for which take-over offers or such a class of take-over offers remain open- in accordance with the regulations; or

(b) in any case – with the consent in writing of the Commission and subject to such conditions (if any) as are specified in the instrument of consent.

(2) Where –

(a) an offeror purports to vary the terms of a take-over offer, or to extend the period for which a take-over offer remains open, in accordance with the regulations; and

(b) the offeror contravenes or fails to comply with a condition applicable under the regulations in relation to the variation or extension,

the terms of the take-over offer shall be deemed not to have been so varied, or the period for which the take-over offer remains open shall be deemed not to have been so extended, as the case may be.

(3) Where –

(a) the Commission consents, subject to a condition, to a variation of the terms of a take-over offer, or to an extension of the period for which a take-over remains open; and

(b) the offeror contravenes or fails to comply with the conditions,

the terms of the take-over offer shall be deemed not to have been so varied, or the period for which the take-over offer remains open shall be deemed not to have been so extended, as the case may be.

(4) Nothing in this section affects the operation of section 19."

Cl. 28: There are drafting changes to s-cl. 28(4) to change "a date specified" to "the prescribed date."

There is a new s-cl. 28(5), which is as follows:

"(5) A reference in sub-section (4) to the prescribed date shall be construed as a reference to –

(a) the date specified in the take-over offers in accordance with sub-paragraph 16(2) (f) (v); or

(b) if the period for which the take-over offers are to remain open has been extended as provided by section 27 – the date that is later than the date referred to in paragraph (a) by a period equal to the period of the extension."

Old s-cls. 28(5) to (9) are now new s-cls. 28(6) to (10).

Cls. 31: There is a new s-cl. 31(5) which is as follows:

"(5) Where, in accordance with sub-section (3) or the provision of a law of a participating State or a participating Territory that corresponds with that sub-section, an offeree returns to a company any certificates (together with any necessary documents or transfer) in respect of shares allotted by the company as the consideration or part of the consideration for the acquisition of shares in a corporation, the company may cancel the allotment of those shares, and any such cancellation shall not be taken to be a reduction of capital."

Cl. 32: In s-cl. 32(4) the words "and give to the on-market offeror" have been inserted after the words "lodge with the Commission".

Cl. 35: Clause 35 has a new heading which is as follows:

"Restriction on disposal of shares by offeror or on-market offeror".

There is a new s-cl. 35(1) which is as follows:

"(1) During –

(a) the period commencing when a Part A statement is served on the target company and ending at the expiration of 28 days after the day on which the statement is served or, if take-over offers are dispatched pursuant to the statement within those 28 days, at the expiration of the period during which the take-over offers remain open; and

(b) if take-over offers are dispatched, in accordance with an order under section 46, pursuant to the statement – the period during which the take-over offers remain open, the offeror shall not dispose of any shares in the target company included in the same class of shares as the shares to which the Part A statement relates unless another person (not being a person associated with the offeror) has, after the Part A statement is served and before the disposal take place, made a take-over announcement to be made I respect of shares in the target company included in that class of shares."

Old cl. 35 is now new s-cl. 35(2).

Cl. 35 has been moved from Part IV of the Bill to be the first clause in Part V.

Cl. 36: The following words "and there is paid to the company such amount (not exceeding the prescribed amount)" have been inserted after the words "and where such a request is made".

The fist six lines of cl. 36 have been replaced with the following:

"36. Where a Part A statement or a Part C statement has been served on a target company, the offeror or on-market offeror may request the company to supply a written statement setting out –

(a) the names and addresses (so far as they are known to the company) of the persons who, at the date of service of the Part A statement or the Part C statement, as the case may be, held shares in, or renounceable options or convertible notes granted or issued by, the company;

(b) in respect of each person who held shares – the number of shares held;

(c) in respect of each person who held renounceable options – particulars of the renounceable options and the numbers of shares to which the options relate; and

(d) in respect of each person who held convertible notes – the number of shares into which the notes may be converted."

Cl. 38: Clause 38 is now titled "Statements on asset valuations".

New para 38(4) (b) is as follows:

"(b) any accounts made out and lodged –

(i) in accordance with section 74F of the Companies Ordinance 1962; or

(ii) in accordance with a provision of a law of another State or Territory that corresponds with section 74F of the Companies Ordinance 1962; or"

Old para 38(4) (b) is now new para 38(4) (c).

Cl. 42: The words "and dissenting holders of options or notes" have been deleted from the heading.

Sub-clause 42(4) has been deleted.

Old s-cls. 42(5) to (8) are now new s-cls. 42(4) to (7).

Sub-clauses 42(9), (10) and (11) have been deleted.

Old s-cls. 42(12) to (14) are now new s-cls. 42(8) to (10).

Sub-clause 42(15) has been deleted.

Old s-cl. 42(16) is now new s-cl. 42(11) with some drafting changes.

Old s-cls. 42(17) to (23) are now new s-cls. 42(12) to (18).

Cl. 43: The last 4 lines of para 43(1) (b) have been replaced with the following:

> "may be, give, as prescribed, a notice to the holders or remaining shares included in that class who, when the notice is given, had not been given notice under sub-section 42(2) or (3) stating that he became entitled to shares as mentioned in paragraph (a) or (b), as the case may be, and containing such other information (if any) as is prescribed."

The last 5 lines of paragraph 43(4) (b) have been replaced with the following:

> "case may be, give, as prescribed, notice to the holders of non-voting shares in the company to which he is not entitled, and to the holders of renounceable options or convertible notes granted or issued by the company to which he is not entitled, stating that he became entitled to shares as mentioned in paragraph (a) or (b), as the case may be, and containing such other information (if any) as is prescribed."

Cl. 44: Sub-clause 44(9) has been replaced with the following:

> "A person to whom sub-section (1), (2) or (3) applies, or a person referred to in sub-section (4), is, in the circumstances referred to in that sub-section, whether or not he has been

convicted of an offence under that sub-section, liable, subject to this section, to pay compensation to a person who acts, or refrains from acting, on the faith of the contents of the relevant statement, offer, notice or report for any loss or damage sustained by that person by reason of his reliance on the false or misleading matter or by reason of the omission of material matter."

Sub-clause 44(10) has been replaced with the following:

> "A person referred to in sub-section (5), (6) or (7) is, in the circumstances referred to in that sub-section, whether or not he has been convicted of an offence under that sub-section, liable, subject to this section, to pay compensation to a person who acts, or refrains from acting, on the faith on the contents of the relevant statement, advertisement or document for any loss or damage sustained by that person by reason of his reliance of the false or misleading matter."

There have been drafting changes to paras 44(18) (b) and (19) (b).

Sub-clause 44(20) has been deleted.

Old s-cls. 44(21) and (22) are now new s-cls. 44(20) and (21).

Cl. 49: Sub-clauses 49(1), (2), (3), (7) and (8) refer to section "57" rather than "55".

In s-cl. 49(10) the words "or imprisonment for a period not exceeding 3 months or both" have been inserted after the figure "$1,000".

References to default penalties have been deleted.

Cl. 50: Sub-paragraphs 50(1) (c) (i), (ii), (d) (ii) and s-cl. 50(3) have had drafting changes.

New s-cl. 50(5) reads as follows:

> "The references in paragraph (1) (c) to a Part A statement having been served on, or a take-over announcement having been made in respect of shares in, a corporation or to a take-over offer or take-over announcement that is to be made in respect of shares in a corporation shall, in the case of a corporation that is not a company, be construed as a reference to a Part A statement, take-over announcement or take-over offer under the corresponding law of the State or Territory in which the corporation is incorporated."

Cl. 54: Old cl. 54 is now new cl. 56.

New cl. 54 is titled "Continuing Offences".

New cl. 54 reads as follows:

"54(1) Where –

(a) by or under a section, or a sub-section of a section, of this Act an act or thing is required or directed to be done within a particular period or before a particular time;

(b) failure to do that act or thing within the period or before the time referred to in paragraph (a) constitutes an offence; and

(c) that the act or thing is not done within the period or before the time referred to in paragraph (a),

the following provisions have effect:

(d) the obligation to do that act or thing continues, notwithstanding that that period has expired or that time has passed, until the act or thing is done;

(e) where a person is convicted of an offence that, by virtue of paragraph (d), is constituted by failure to do that act or thing after the expiration of that period or after that time, as the case may be that person is guilty of a separate and further offence in respect of each day after the day of the conviction during which the failure to do that act or thing continues; and

(f) the penalty for each separate and further offence is a fine not exceeding $50.

(2) Where –

(a) by or under a section, or a sub-section of a section, of this Act an act or thing is required or directed to be done but no period within which or time by which that act or thing is to be done is specified;

(b) failure to do that act or thing constitutes an offence; and

(c) a person is convicted of an offence in respect of a failure to do that act or thing,

that person is guilty of a separate and further offence in respect of each day after the day of the conviction during which the failure to do that act or thing continues and the penalty applicable to each such separate and further offence is a fine not exceeding $50.

(3) Charges against the same person for any number of offences under sub-section (1) or (2) may be joined in the same information if those offences relate to a failure to do the same act or thing.

(4) If a person is convicted of more than one offence under paragraph (1) (e) or more than one offence under sub-section (2), the court by which he is convicted may impose one penalty in respect of all the offences of which the person is so convicted under that paragraph or sub-section, as the case may be, but that penalty shall not exceed the sum of the maximum penalties that could be imposed if a penalty were imposed in respect of each offence separately."

Cl. 55: Old cl. 55 is now new cl. 57

New cl. 55 is titles "Officers in default".

New cl. 55 reads as follows:

"55. Where a provision of this Act provides that an officer of a corporation who is in default is guilty of an offence, the reference to the officer who is in default shall, in relation to a provision, be construed s a reference to any officer of the corporation (including a person who subsequently ceased to be an officer of the corporation) who is in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention or failure."

Cl. 56: Old cl. 56 is now new cl. 63.

New cl. 56 is old cl. 54. Old s-cl. 54(4) has been deleted and is now cl. 14 of the Companies and Securities (Interpretation and Miscellaneous Provisions) Bill 1980.

Cl. 57: Old cl. 57 is now new cl. 64.

New cl. 57 is old cl. 55, and has been re-drafted as follows:

"57.(1) The Commission may, by instrument in writing, exempt a person, as specified in the instrument and subject to such conditions (if any) as are specified in the instrument, from compliance with all or any of the requirements of this Act.

(2) A copy of an instrument executed under this section shall be published in the Gazette.

(3) A person who is exempted by the Commission, subject to a condition, from compliance with a requirement of this Act shall not contravene or fail to comply with the condition.

(4) Where a person has contravened or failed to comply with a condition to which an exemption under this section is subject the Court may, on the application of the Commission, order the person to comply with the condition."

Cl. 58: Old cl. 58 is now new cl. 62.

New cl. 58 is titles "Power to declare that Act applies as if modified" and reads as follows:

"58. (I) The Commission may, by instrument in writing, declare that this Act shall have effect in its application to or in relation to a particular person or persons in a particular case as if a provision of provisions of this Act specified in the instrument was or were omitted or was or were modified or varied in a manner specified in the instrument, and, where such a declaration is made, this Act has effect accordingly.

(2) A copy of an instrument executed under this section shall be published in the Gazette."

Cl. 59: New cl. 59 is titles "Commission to take account of certain matters", and reads as follows:

"59. In exercising any of its powers under section 57 or 58, the Commission shall take account of the desirability of ensuring that the

acquisition of shares in companies takes place in an efficient, competitive and informed market and, without limiting the generality of the foregoing, shall have regard to the need to ensure –

(a) that the shareholders and directors of a company know the identity of any person who proposes to acquire a substantial interest in the company.

(b) that the shareholders and directors of a company have a reasonable time in which to consider any proposal under which a person would acquire a substantial interest in the company;

(c) that the shareholders and directors of a company are supplied with sufficient information to enable them to assess the merits of any proposal under which a person would acquire a substantial interest in the company; and

(d) that as far as practicable, all shareholders of a company have equal opportunities to participate in any benefits accruing to shareholders under any proposal under which a person would acquire a substantial interest in the company,

but nothing in this section shall be taken to require the Commission to exercise any of its powers in a particular way in a particular case."

Cl. 60: New cl. 60 is titles "Power of Commission to declare acquisition of shares or other conduct to be unacceptable", and reads as follows:

"(1) The Commission may, within 14 days after an acquisition of shares in a company, by instrument in writing, declare that acquisition of shares in a company to have been an unacceptable acquisition and, where such a declaration is made, the person who acquired those shares shall be deemed, for the purposes only of section 45, to have acquired those shares in contravention of section 11.

(2) Where an application is made to the Court under section 45 in relation to an acquisition of shares that has been declared by the Commission pursuant to sub-section (1) to be an unacceptable acquisition of shares, the Court, may instead of making any of the orders referred to in section 45, declare that the acquisition of shares in not an unacceptable acquisition of shares and where the Court so declares, the declaration of the Commission has no further effect.

(3) Where a Part A statement has been served in respect of shares in a company, the Commission may, within 14 days after particular conduct has been engaged in by a specified person in relation to shares in, or the affairs of, the target company during the period commencing when the statement was served and ending at the expiration of 28 days after the day on which the statement was served or, if take-over offers are dispatched pursuant to the statement within those 28 days, at the expiration of the period during which the take-over offers remain open, by instrument in writing, declare that conduct to have been unacceptable conduct.

(4) Where a take-over announcement has been made in respect of shares in a company, the Commission may, within 14 days after particular conduct has been engaged in by a specified person in relation to shares in, or the affairs of, the target company during the period commencing when the take-over announcement was made and ending at the expiration of the period during which the offers constituted by the take-over announcement remain open, by instrument in writing, declare that conduct to have been unacceptable conduct.

(5) Where the Commission declares, pursuant to sub-section (2) or (3), conduct that has been engaged in by a person to have been unacceptable conduct, the Court may, on the application of the Commission make –

(a) any order that it thinks necessary or expedient t protect the rights of any person affected by the conduct or to ensure, as far as possible, that the relevant take-over scheme or take-over announcement proceeds as if that conduct had not taken place;

(b) without limiting the generality of paragraph (a), any one or more orders of the kinds referred to in paragraphs 47(1) (a), (c), (d), (e), (f), (g) and (h); and

(c) for the purpose of securing compliance with any order made pursuant to paragraph (a) or (b), an order direction a person to do or refrain from doing a specified act, or instead of making any order, the Court may declare that the conduct concerned is not unacceptable conduct, and, where the Court so declares, the declaration of the Commission has no further effect.

(6) Where the Commission makes a declaration under sub-section (1), (3) or (4), the Court may on the application of a person in relation to an acquisition of shares by whom, or a person in relation to conduct engaged in by whom, the declaration has effect, declare that the acquisition o shares, or the conduct, as the case may be, is not an unacceptable acquisition of shares, or is not unacceptable conduct, as the case may be and, where the Court so declares, the declaration of the Commission has no further effect.

(7) The Commission shall not make a declaration under sub-section (1), (3) or (4) unless it is satisfied that the acquisition of shares to which the declaration relates occurred in circumstances where, or that as a result of the conduct to which the declaration relates –

(a) the shareholders and directors of a company did not know the identity of a person who propose to acquire a substantial interest in the company;

(b) the shareholders and directors of a company did not have a reasonable time in which to consider a proposal under which a person would acquire a substantial interest in the company;

(c) the shareholders and directors of a company were not supplied with sufficient information to enable them to assess the merits of a proposal under which a person would acquire a substantial interest in the company; or

(d) the shareholders of the company did not all have equal opportunities to participate in any benefits accruing to shareholders under a proposal under which a person would acquire a substantial interest in the company.

(8) Where the Commission makes a declaration under this section, the Commission shall as soon as practicable –

(a) cause a copy of the instruments of declaration to be given to, or served on any person to whom the declaration relates; and

(b) cause a copy of that instrument to be published in the Gazette."

Cl. 61: New cl. 61 is titled "Power of Commission to intervene in proceedings", and reads as follows:

"61. (1) The Commission may intervene in any proceeding relating to a matter arising under the Act.

(2) Where the Commission intervenes in any proceeding referred to in sub-section (1), the Commission shall be deemed to be a party to the proceeding with all the rights, duties and liabilities of such a party.

(3) Without limiting the generality of sub-section (2), the Commission may appear and be represented in any proceeding in which it wishes to intervene pursuant to sub-section (1) –

(a) by an employee of the Commission;

(b) by a natural person to whom, or by an officer or employee of a person to whom or to which, the Commission has delegated its functions and powers under this Act or such of those functions and powers under this Act or such of those functions and powers under this Act or such of those functions and powers as relate to a matter to which the proceeding relates; or

(c) by solicitor or counsel."

Cl. 62: New cl. 62 was old cl. 58.

Cl. 63: New cl. 63 was old cl. 56.

Cl. 64: New cl. 64 was old cl. 57. In new s-cl. 64(2) and para 64(2) (b) the words "during that period" have been replaced by the words "before the end of that period".

That is a new s-cl. 64(4) which reads as follows:

> "(4) Nothing in this section affects the operation of sub-section 29(2) of the Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 in its application by virtue of section 4 of this Act in relation to matters not specifically dealt with by sub-sections (1) and (2) of this section."

SCHEDULE

PART A

Cl. 1: There have been drafting changes to para. 1(b).

In s-para 1(e) (iii) the words "served on the target company" have been replaced by the word "lodged with the Commission for registration".

Sub-paragraph 1(h) (i) has been deleted.
Sub-paragraph 1(h) (ii) is now new para. 1 (h).

Cl. 4: In paras. 4(a), (b) and (d) the work "whether" has been replaced by the work "where" at the beginning of each paragraph.

The following words have been inserted in para. 4(f) after the word "information" where first occurring:

> "(other than matter that is not permitted to be included in a statement referred to in section 37 or section 38 without the consent of the Commission)".

Cl. 7: In para. 7(a) the words "lodged with the Commission for registration " replace the words "served on the target company".

PART B

Cl. 1: Clause 1 has been replaced by the following:

"1. The statement shall set out –

(a) except in the case of a target company that is in the course of being wound up or is under official management, in relation to each director of the target company –

(i) if the director desires to make and considers himself justified in making, a recommendation in relation to the offers – whether the director recommends the acceptance of offers made or to be made by the offeror or recommends against such acceptance and, in either case, his reasons for so recommending;

(ii) if the director is not available to consider the offers – that the director is not so available and the reasons for his being not so available; or

(iii) in any other case – that the director does not desire to make a recommendation or does not consider himself justified in making a recommendation and his reasons for not so desiring or for so considering; or

(b) in the case of a target company that is in the course of being wound up or is under official management, in relation to each liquidator or each official manager, as the case requires –

(i) if the liquidator or official manager, as the case may be, desires to make and considers himself justified in making, a recommendation in relation to the offers – whether the liquidator or official manager, as the case may be, recommends the acceptance of offers made or to be made by the offeror or recommends against such acceptance and, in either case, his reasons for so recommending; or

(ii) in any other case – that the liquidator or official manager, as the case may be, does not desire to make a recommendation or does not consider himself justified in making a recommendation and his reasons for not so desiring or for so considering."

Cl. 2: In paras. 2(e) and (f) the word "where" replaces the word "whether" at the beginning of each paragraph. The last 3 lines of para. 2(j) have been replaced by the following:

"the financial position of the target company has materially changed since the date of the last balance-sheet laid before the company in general meeting or dispatched to shareholders in accordance with section 164 of the Companies Ordinance 1962 and, if so, full particulars of any such change or changes; and"

The following words have been inserted in para. 2(k) after the work "information" where first occurring:

> "(other than matter that is not permitted to be included in a statement referred to in section 37 or section 38 without the consent of the Commission)".

PART C

Cl. 2: Sub-paragraph 2(f) (i) has been deleted.
Sub-paragraph 2(f) (ii) is now para. 2(f).

Cl. 4: In paras. 4(a), (b) and (d) the word "whether" has been replaced by the word "where" at the beginning of each paragraph.

The following words have been inserted in para. 4(f) after the word "information" where first occurring:

> "(other than matter that is not permitted to be included in a statement referred to in section 37 or section 38 without the consent of the Commission)".

PART D

Cl. 1: Clause 1 has been replaced by the following:

"1. The statement shall set out –

(a) except in the case of a target company that is in the course of being wound up or is under official management, in relation to each director of the target company –

> (i) if the director desires to make and considers himself justified in making, a recommendation in relation to the offers – where the director recommends the acceptances of offers constituted by the take-over announcement or recommends against such acceptance and, in either case, his reasons for so recommending;

(ii) if the director is not available to consider the offers – that the director is not so available and the reasons for his being not so available; or

(iii) in any other case – that the director does not desire to make a recommendation or does not consider himself justified in making a recommendation and his reasons for not so desiring or for so considering; or

(b) in the case of a target company that is in the course of being would up or is under official management, in relation to each liquidator or each official manager, as the case requires –

(i) if the liquidator or official manager, as the case may be, desires to make and considers himself justified in making, a recommendation in relation to the offers – whether the liquidator or official manager, as the case may be, recommends the acceptance of offers constituted by the take-over announcement or recommends against such acceptance and, in either case, his reasons for so recommending; or

(ii) in any other case – that the liquidator or official manager, as the case may be, does not desire to make a recommendation or does not consider himself justified in making a recommendation and his reasons for not so desiring or for so considering."

Cl. 2: In paras. 2(e) and (f) the word "whether" is replaced by the word "where" at the beginning of each paragraph.

The following replaces the last 3 lines of para. 2(h):

"the financial position of the target company has materially changed since the date of the last balance-sheet laid before the company in general meeting or dispatched to shareholders in accordance with section 164 of the Companies Ordinance 1962 and, if so, full particulars of any such change or changes; and"

The following words have been inserted in para. 2(j) after the word "information" where first occurring:

"(other than material that is not permitted to be included in a statement referred to in section 37 or section 38 without the consent of the Commission)".