

1988

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

AUSTALIAN SECURITIES COMMISSION BILL 1988

EXPLANATORY MEMORANDUM

(Circulated by authority of the Honourable Lionel Bowen. M.P.,  
Deputy Prime Minister and Attorney General)

AUSTRALIAN SECURITIES COMMISSION BILL 1988OUTLINE

The main purpose of the Australian Securities Commission Bill 1988 ('the Bill') is to establish an Australian Securities Commission ('ASC') to regulate companies and the securities and futures industries in Australia. The Bill is part of a package of Bills to replace the existing co-operative scheme under which the Commonwealth shares regulatory responsibilities with the States and Northern Territory. The Bill also provides for the formation of a broadly based Advisory Committee to assist the responsible Commonwealth Minister in the ongoing review of the new companies and securities legislation and its administration, and for the formation of an independent Corporations and Securities Panel to conduct hearings into certain designated matters. In addition, the Bill reconstitutes the Accounting Standards Review Board and creates a single Companies Auditors and Liquidators Disciplinary Board in place of the 8 which currently exist.

2. The Bill responds to the April 1987 report of the bipartisan Senate Standing Committee on Constitutional and Legal Affairs in which the Committee found that the co-operative scheme had outlived its usefulness. The Committee unanimously recommended that the Commonwealth Parliament should enact comprehensive legislation covering the field currently regulated by the co-operative scheme.

3. The ASC will be an independent statutory Commission based on the existing national Companies and Securities Commission (NCSC). It will have up to 8 members, at least 3 of whom will be full-time. It will report direct to the responsible Commonwealth Minister and through the Minister to the Commonwealth Parliament.

4. The Bill confers broad investigation, information-gathering and hearings powers on the ASC. The other functions and powers of the ASC are set out in the Corporations Bill and the Close Corporations Bill. All Bills are being introduced together. The Bill makes provision for agreements to be entered into between Commonwealth and State/Territory Governments for the administration of the legislation by State/Territory agencies as delegates of the ASC.

Financial impact statement

5. The costs of establishing and maintaining the ASC and the other bodies established under the Bill will be covered by revenues received from companies and securities and futures industry participants who are regulated by the proposed national scheme legislation. Any agreements with State/Territory Governments for administration of the legislation by their agencies as delegates of the ASC would necessarily involve the Commonwealth retaining revenues sufficient to fund the ASC and other bodies established under the ASC Bill.

Explanatory memorandum

6. The remainder of this explanatory memorandum:
- (a) provides additional background on the existing and proposed companies and securities schemes;
  - (b) contains a list of abbreviations used in this explanatory memorandum;
  - (c) contains an index of clauses of the Bill; and
  - (d) deals sequentially with each clause of the Bill.

BACKGROUND

Co-operative companies and securities scheme

7. 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 Northern Territory became a party to the co-operative companies and securities scheme on 28 January 1986.

8. Under the scheme, the National Companies and Securities Commission (NCSC) derives its functions and powers from various pieces of Commonwealth, State and Territory legislation which give effect to the co-operative scheme.

9. The co-operative scheme has the following inherent structural defects:

- (a) Lack of accountability - There is no effective parliamentary scrutiny of co-operative scheme legislation. Commonwealth and State Governments are bound by the Formal Agreement to act in accordance with the legislative policies and views of the Ministerial Council for Companies and Securities; even where these conflict with a Government's own policies or the views of Parliament.

The Commonwealth Government is not only obliged to introduce co-operative scheme legislation that it disagrees with but also cannot introduce scheme legislation that it wishes to introduce but which is not supported by sufficient other members of the Ministerial Council.

The Commonwealth Parliament is reluctant to move amendments to scheme legislation because to do so

would jeopardise the scheme. If the Parliament were to insist that amendments be made, the Commonwealth Minister would have no choice but to refer the amendments to the Ministerial Council for its approval. This would be very unwieldy.

Officials and Ministers can deflect responsibility by suggesting that they couldn't persuade the Ministerial Council to adopt a particular course of action. The quality of decisions suffers as nobody is exposed to the discipline of having to defend them.

The NCSC is not responsible to any Minister because only the Ministerial Council can give it directions.

The State and Northern Territory Parliaments have no opportunity to consider amendments to scheme laws. Amendments take effect automatically in the States and the Northern Territory, subject only to the making of necessary 'translator' regulations to effect very minor modifications.

Outside parties wishing to influence the outcome of a Ministerial Council decision are forced to lobby every Ministerial Council member and their officials.

- (b) Division of functions between National Companies and Securities Commission (NCSC) and its State and Territory delegates - This has led to administrative inefficiencies, unnecessary duplication and additional costs to both government and business. To the business community this has meant costly efforts to find the body or person with the appropriate administrative responsibility to deal with a particular problem. Although over \$135m is raised from, and 1500 staff are involved Australia-wide in, corporate affairs regulation it has not been possible to establish a nationally uniform and efficient administration. The NCSC does not have a free hand in

determining its priorities because the State and Territory Corporate Affairs Commissions regard themselves as being responsible to their relevant Minister rather than the NCSC. For example, the NCSC cannot decide to devote more resources to investigations and less to prospectus examination if a particular Corporate Affairs Commission takes a different view.

- (c) Burdensome and lowest common denominator legislation  
 - The business community has criticised the over-involvement of scheme administrators in legislative policy development which leads to frequent legislative changes and increases the burden of unnecessary business regulation. On the other hand the 'lowest common denominator' effect makes it difficult to achieve significant and desirable legislative policy changes.

10. These defects led the bipartisan Senate Standing Committee on Constitutional and Legal Affairs to conclude in its April 1987 report that the co-operative scheme had outlived its usefulness. The Committee unanimously recommended that the Commonwealth Parliament should enact comprehensive legislation covering the field currently regulated by the co-operative scheme.

Role of the ASC and Advisory Committee

11. The ASC will be an independent statutory Commission with the same sort of discretionary powers which the NCSC now has. It will be responsible for the day-to-day administration of scheme legislation and will report direct to the responsible Commonwealth Minister and through the Minister to the Commonwealth Parliament. The ASC will be more independent of political interference than the NCSC. The Ministerial Council has the capacity to give a direction to the NCSC in respect of particular cases. The ASC will not be subject to any such influence from Government. The ASC will also have a policy

role. The Bill provides that if in the course of performing its functions or exercising its powers the ASC encounters problems which, in its opinion, require a national scheme law to be amended it will be able to advise the Minister accordingly.

12. It is envisaged that the ASC will not be located in Canberra but will be located in a major State capital. The ASC will be able to determine its own policies for administration of the new legislation. Negotiations with the States and Northern Territory are continuing with respect to a proposal whereby their Corporate Affairs Commissions would administer the new national companies and securities legislation as delegates of the ASC. It is envisaged that where the Commonwealth reached an agreement with a State or the Northern Territory for State or Territory personnel and entities to be used to administer the Commonwealth legislation as a delegate of the ASC, the ASC would ensure that the administration was carried out, to the maximum extent practicable, by those personnel and entities. However, the ASC would have power to give directions to its delegates to ensure proper managerial control. The ASC would be able to withdraw a delegation if a delegate failed to conform with the ASC's management plan. In such a case the revenue that would otherwise have been reimbursed to that delegate's State or Territory would be retained by the Commonwealth.

13. The Bill also provides for the establishment of a statutory Advisory Committee, drawn from all sectors of the business community in Australia. The Advisory Committee will ensure that the avenues of advice to the Commonwealth Minister are not limited to the bureaucracy. It is envisaged that the ASC and Advisory Committee will consult each other where practicable before recommending changes in the law and its administration.

14. The ASC's main functions and powers will be conferred by the Corporations Bill which covers the regulation of



companies, and the securities and futures industries. The Corporations Bill is being introduced in conjunction with the ASC Bill.

15. The legislation for the most part, follows the existing companies and securities legislation. Changes of form from the existing legislation, although not of substance derive from the expression of the Bill in language to reflect the Commonwealth constitutional powers and to reflect its character as national legislation. Although principally based on the Commonwealth's constitutional power over trading and financial corporations, a wide range of other supporting constitutional powers have been relied on where appropriate. These include the powers in respect of interstate trade and commerce, posts and telecommunications, banking and insurance, and cheques and negotiable instruments. The opportunity has also been taken to rationalise the structure of the legislation and to correct some minor anomalies.

16. Significant improvements have been made. The consolidation of the existing law into the Corporations Bill and the Australian Securities Commission Bill has led to the removal of much duplicated material and to a major rationalisation of the structure and arrangement of the legislation. In addition, large groupings of sections have, wherever possible, been broken up into smaller groupings, and long sections and subsections split into shorter ones, thus allowing a much greater use of Part, Division and section headings. This should help the reader to find the provisions of concern to him or her and make them easier to follow.

17. The existing law has, in some important areas, been reworked to give it clarity and simplicity. These include, in particular, the constitution and powers of the ASC and the Parts of the Corporations Bill that deal with financial statements of companies, names of corporations, registration of foreign companies, and the transfer of marketable securities.

18. Consideration has been given to a number of areas in which reforms are desirable either to remove unnecessary regulation or to overcome specific inefficiencies or burdens in the existing legislation.

19. However, with the exception of the areas outlined below, the scope of the legislative provisions of the Corporations Bill will be along the lines of the existing law.

#### Fundraising

20. There is a need to reform the rules applying to companies seeking to raise funds from the public. The present system of prospectus registration has been justly criticised for its inefficiency and complexity, for its imposition of unnecessary delays and costs on business and for its lack of utility for investors. The legislation will remove the current regulatory 'deadwood' and introduce a new approach involving more effective self-enforcement by the market to provide a more efficient framework to facilitate the process of raising funds from the investing public, improve the quality of information to be provided to investors and maintaining appropriate measures for investor protection.

21. Key elements of the proposal are as follows:

- (a) A general provision prohibiting misleading and deceptive conduct in relation to the issue, dealing in or trading in securities. This will take the form of a general catch-all liability clause based on s.52 of the Trade Practices Act 1974. It will apply, inter alia, to prospectuses.
- (b) Prospectuses will be filed but not registered. ASC will not pre-vet prospectuses. Vetting is costly, time consuming and may not reveal prospectus defects. A study by the Victorian Corporate Affairs Commission has found that only approximately 5% of investors

read prospectuses. Even the Securities Information Review Committee established by the NCSC is considering a proposal that for most cases of issues no registered prospectus be required.

- (c) To protect the public against misfeasance, the ASC will be able to audit a filed prospectus on the basis of sample techniques or following a complaint. Following such an audit the ASC will be able to issue stop-orders in respect of an issue involving serious misrepresentation or malpractice. This approach will not preclude bodies such as the stock exchanges from scrutinising the content of prospectuses of listed issues.
- (d) The complex and excessively detailed rules as to the content of prospectuses will be replaced by much more basic disclosure rules and a general requirement that the prospectus contain a fair and accurate presentation of all material information relevant to a decision by an investor to invest in the offering. Despite detailed rules at present there is no guarantee that investors receive all relevant information. The amendments aim to provide investors with the information they require to make an informed investment decision.
- (e) Persons licensed under the Bill and issuers will be able to advertise issues. Allotments will still be on the basis of a form attached to a filed prospectus. False or misleading advertisements will be prohibited.
- (f) New form prospectuses will need to be provided for all issues other than for specified categories e.g. issues to persons in the business of buying and selling shares. (These categories will be similar to the existing exemptions from the prospectus

12.

provisions). Complex problems relating to the meaning of 'offers to the public' and 'section of the public' will thereby be removed.

22. These proposals will also apply to the prescribed interest offer document.

### Shareholder Disclosure

23. There has been considerable debate over the last few years as to whether the mix of provisions involving disclosure of beneficial shareholdings is appropriate, in particular disclosure of substantial shareholdings above 10% under s.137-139 of the Companies Act and tracing of beneficial ownership of shares under s.261. The procedure provided by s.261 is cumbersome, ineffective and has been abused. Companies have expressed concern about the excessive paperwork involved in being required to disclose insignificant shareholdings below 1% under s.261.

24. The following approach is proposed:

- (a) reduction of the substantial shareholding threshold from 10% to 5%;
- (b) the tracing provisions of the CA (i.e. s.261) have been altered so that only the ASC will have power to obtain information as to beneficial ownership of shares;
- (c) the existing remedies in s.261A are to be applied to a breach of the substantial shareholdings provisions;
- (d) the abolition of the requirement that substantial shareholder disclosures be in a prescribed form (to enable the existing requirements to be set out more simply in the statute).

Company names

25. It is proposed that the company names provisions be amended to remove the "subjective tests" on whether a name is available for reservation (that is, it will not be necessary to consider if a proposed company name so closely resembles an existing name as to be likely to be mistaken for it; whether a proposed name is undesirable; or whether a proposed name is misleading in relation to the nature, objects or purposes of the business to be conducted under that name). From the standpoint of the incorporator, the existing subjective tests lead to delay in incorporation times, and result in the over zealous rejection of many names which, although on paper appear to be similar, would otherwise have no connection with the business or activity of another company so as to lead to the possibility of confusion arising in anyone's mind. At the same time, substantial bureaucratic resources are invested in determining questions of whether names are in fact similar or are likely to confuse the public or are otherwise undesirable. These resources could be put to better use elsewhere. In the end the registration of a name confers no protection on the registrant in an action for passing off etc. if some other person has a prior and greater right to the name e.g. because it has been registered as a trade or service mark. The registration of a company name confers no property in that name.

26. The practical effect of this proposal will be to allow all company names except:

- (a) identical names; and
- (b) names of a type that are prescribed in Regulations under the Corporations Bill (for example, names suggesting connexion with the Government).

27. The business community will benefit from the proposal because the ASC will be able to process names applications more quickly than at present. In addition, the ASC will benefit because a smaller number of staff will be required on names matters. This, in turn, could benefit the business community through fees for names applications being reduced in real terms (i.e. by either a reduction in money terms or not increasing in line with inflation).

#### Takeovers Legislation

28. The basic framework of the existing takeovers legislation will be maintained for the purposes of the initial Commonwealth legislation.

29. Any comprehensive review of the takeovers legislation would involve the question whether the basic Eggleston principles underlying the code are still appropriate (in particular the concept that each voting share in a company has attached to it an equal proportion of the value of any premium for control). Given the timing considerations, it is not practicable to give the subject the rigorous analysis it warrants or to engage in adequate public consultation before introduction of the initial legislation. A comprehensive review of the basic approach of the takeovers legislation could follow the commencement of the Commonwealth scheme.

30. The only matter thought feasible for implementation in the initial legislation is the abandonment of pre-vetting of Part A statements, profit forecasts and asset valuations during takeover bids. This is consistent with the similar proposals for abandonment of pre-vetting of prospectuses. Pre-vetting is a resource intensive exercise and in contested takeover bids provides too much scope for litigation against the NCSC. The existing provisions imposing criminal and civil liability for omissions or false or misleading statements in Part A statements and offer documents should ensure that such documents are accurate. So far as profit forecasts or statements on asset valuations are concerned, the ASC should not have to expend resources in order to make a decision best left to the market

(which will devalue any forecast or statement which is overly optimistic).

Transfer of marketable securities

31. A number of amendments are designed to assist in remedying delays in the transfer and registration of securities.

32. The major proposal involves deletion of the requirement that a transferor sign a transfer form. (A broker authorised by the transferor will be able to validate it on the transferor's behalf and will indemnify the transferor and the company in all circumstances where a transfer has been made without authority.) Full compensation will be available from the National Guarantee Fund for any losses arising from unauthorised transfers.

33. It is proposed that transferee acceptance forms also be deleted. These are unnecessary and increase the amount of paper within the system.

Exemption and modification power for ASC in respect of transfer of securities provisions

34. It is proposed that the ASC be given an exemption and modification power in respect of the provisions dealing with transfer of securities. This power will be similar to that proposed in respect of the prospectus, debenture and prescribed interest provisions (based on a widened s.215C of the Companies Act).

35. This extension of Commission powers is designed to enable some flexibility to be introduced into the transfer of securities provisions. This will facilitate testing, perhaps by way of pilot schemes, of new procedures forming part of any longer term system developed to make the transfer and settlement system more efficient. In addition, such powers may also enable preparation for, and phased implementation of, any new system which is

successfully developed without the need for specific legislative amendment at each stage of the system's introduction.

36. The ASC in exercising any such powers will need to be satisfied that the interests of shareholders are adequately protected and that exercise of the power will be likely to enhance the efficiency of the existing transfer and settlement system.

37. Another proposal involves the abolition of the requirement that companies maintain branch registers at the request of a shareholder. This will produce substantial efficiency gains and cost savings to the several parties involved in processing certificates and transfers. It will also significantly simplify the operation of the proposed new transfer and settlement system currently being developed by the Australian Stock Exchange.

38. There has been significant pressure from companies, share registrars, stockbrokers, and the Australian Stock Exchange for the abolition of branch registers to be considered for inclusion in the national scheme legislation. Branch registers are costly and inconvenient to maintain and to co-ordinate, particularly where one shareholder may in fact have shares registered on different registers. Registrars' experience has shown that the majority of requests for share registry information are directed to the principal share office. For this reason and given the abolition of death duties, it is argued that branch registers are no longer of any benefit to shareholders.

#### Licensing of Representatives - Securities and Futures Industry

39. It is proposed, in accordance with the earlier NCSC proposals, to discontinue licensing of representatives of securities dealers and advisers and of futures brokers and advisers. This will be replaced with a system where brokers and advisers are made fully liable for the conduct of their respective representatives (in addition to being responsible for their training, education and supervision). This liability will extend to actions which are outside the scope of their authority (as is the case with insurance agents under the Insurance (Agents and Brokers) Act).



Memorandum and Articles of Association

40. It is proposed that proprietary companies be relieved of the obligation to lodge a copy of their memorandum and articles of association with the ASC. It is considered the requirement is no longer necessary for private companies given that third parties are sufficiently protected in their dealing with such companies by the abolition of ultra vires and reduction of the rules of constructive notice of company documents. The reform will also facilitate a substantial reduction in administrative costs for the ASC.

Hearings and Investigation Powers

41. It is proposed that the ASC Bill will contain provisions strengthening the existing inspection powers and clarifying the scope of the existing hearings powers. The Bill will also provide for an adjudicative panel, independent from the ASC, to conduct hearings into certain designated matters.

42. The present inspection and special investigation powers are to be amalgamated so that the existing inspection powers will be more effective. In addition, the Minister will be able to direct the ASC to carry out an investigation where this is in the public interest.

43. The ASC's investigative powers (including its powers to conduct an investigative hearing in private along the lines of the powers now contained in the special investigations provisions) are distinct from its general powers to conduct hearings for the purposes of the performance or exercise of its functions or powers. The ASC will be able to use its general hearings powers, for example, to afford natural justice to a person whose licence or registration it proposes to revoke. In addition, the ASC will be able to hold public hearings to ascertain views on the exercise by the ASC of its administrative responsibilities (e.g. a proposed policy statement or guideline).

44. To overcome criticisms that have been levelled against the NCSC for acting as prosecutor, judge and jury, the ASC Bill will provide for the establishment of a separate Panel to conduct hearings into such class of matters as the Minister approves. Initially, the Panel will be empowered to hear cases involving unacceptable conduct during a takeover. These are very controversial matters and amount to about five per year. The ASC will hear all remaining matters. It is proposed that the Minister will progressively confer further functions on the Panel as it develops its expertise and if the panel proves to be an effective means of hearing a large number of adjudicative hearings. If the Panel operated satisfactorily, the work of the Companies Auditors and Liquidators Disciplinary Boards could be transferred to it.

#### Close Corporations

45. It is proposed to provide a new simplified corporate entity for small business which obviates the need for much of the inappropriate paraphernalia of regulation that is more appropriate for larger companies. This proposal will be implemented in the Close Corporations Bill which is being introduced in conjunction with the ASC Bill and the Corporations Bill.

46. The new form of company will be based on the Companies and Securities Law Review Committee's proposals for a 'close corporation'. The broad purpose behind the Close Corporation legislation to simplify the corporate rules for small business will be achieved by reducing financial and other reporting requirements and replacing the usual concept of management with partnership rules. Memorandum and articles of association will be abolished and replaced with a non-registrable written association agreement. Basic information about the company will be filed in the form of a Founding Statement which will be updated each time there is a change to the material particulars. A Certificate of Compliance will be an annual document witnessing that the Company has stated that accounts have been prepared according to a formula prescribed by the legislation.

**ABBREVIATIONS**

47. The following abbreviations are used in this explanatory memorandum:

AIA	-	<u>Acts Interpretation Act 1901</u>
AIDC Act	-	<u>Australian Industry Development Corporation Act 1970</u>
ASC	-	Australian Securities Commission
Bill	-	Australian Securities Commission Bill 1988
CA	-	<u>Companies Act 1981</u>
CAC	-	Corporate Affairs Commission
CASA	-	<u>Companies (Acquisition of Shares) Act 1980</u>
CSIB	-	Corporations and Securities Industry Bill 1976
DPP Act	-	<u>Director of Public Prosecutions Act 1983</u>
FIA	-	<u>Futures Industry Act 1986</u>
NCSC	-	National Companies and Securities Commission
NCSC Act	-	<u>National Companies and Securities Commission Act 1979</u>
NCA Act	-	<u>National Crime Authority Act 1984</u>
PSA	-	<u>Public Service Act 1922</u>

- SIA - Securities Industry Act 1980
- TPA - Trade Practices Act 1974
- TPC - Trade Practices Commission

CONTENTS OF THE BILL

48. The Bill is divided into the following Parts:

- Part 1 - Preliminary
- Part 2 - The Commission and its Functions and Powers
- Part 3 - Investigations and Information-Gathering
- Part 4 - The Commission's Business
- Part 5 - The Commission's Members
- Part 6 - The Commission's Staff
- Part 7 - Preventing conflicts of interest and misuse of information
- Part 8 - Finance
- Part 9 - The Advisory Committee
- Part 10 - The Corporations and Securities Panel
- Part 11 - Companies Auditors and Liquidators Disciplinary Board
- Part 12 - Accounting Standards Review Board
- Part 13 - Miscellaneous

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BILL PART 1 - PRELIMINARY

49. Part 1 of the Bill (cls. 1 to 6) deals with various preliminary matters.

Cl. 1 : Short title

50. When enacted, the Bill will be cited as the Australian Securities Commission Act 1988.

Cl. 2 : Commencement

51. Part I of the Bill will commence upon Royal Assent. The rest of the Bill will commence upon proclamation.

52. In the event that any State or Territory Government has, by the time of passage of this and related Bills, indicated a firm intention to challenge their constitutional validity, the Bills as enacted will not be proclaimed until the High Court has had the opportunity to consider their constitutional validity. Adoption of this course of action is likely to involve continuation of the co-operative scheme at least until well into 1989.

Cl.3 : Objects

53. Clause 3 has no counterpart in the NCSC Act, but is based in part on the preamble to the Formal Agreement with the States and Northern Territory on companies and securities regulation. Its purpose is to assist in the interpretation of the Bill and, in particular, to guide the operation of the ASC. The Bill establishes an Australian Securities Commission to administer the laws of the Commonwealth concerning companies, securities and futures industry. The Bill also establishes a Companies and Securities Advisory Committee to provide informed and expert advice to the Minister about the content, operation and administration of those laws and about the securities and futures markets, and an independent

Corporations and Securities Panel to conduct hearings into certain designated matters. The Bill also creates a single Companies Auditors and Liquidators Disciplinary Board to replace the existing 8 and reconstitutes the Accounting Standards Review Board.

54. In performing its functions the ASC will have among its objectives:

- . the maintenance and improvement of capital markets
- . maintenance of investor confidence
- . achievement of uniformity
- . enforcement of national scheme laws.

Cl.4 : Extension to external Territories

55. The Bill may be extended to external Territories prescribed by regulations (cl.4 - based on NCSC Act s.4). The Bill will not extend to any external Territories at this stage.

Cl.5 : Interpretation

56. Sub-clause 5(1) contains definitions used throughout the Bill. Many of these are found in the NCSC Act and the CA, SIA and FIA. Some of the more important definitions are as follows:

- Advisory Committee: This is the Companies and Securities Advisory Committee established by Bill cl.145. This Committee will be made up of people with prominence in the fields of business, the financial markets, law, economics and accounting. Its function will be to assist the responsible Minister in the ongoing review of the legislation and its administration.



- appropriate officer - This term is used in cl.220 of the Bill which enables the Attorney-General to make arrangements with State and Territory Ministers or Administrators about matters such as State and Territory corporate affairs records, offices and resources.
- Commission - This is the new independent Australian Securities Commission (ASC) established by cl.7 of the Bill. The ASC will be responsible for administering new national companies and securities laws. It will be based on the existing NCSC but will have the capacity to manage effectively all resources available for the administration of the scheme.
- Commission delegate - The ASC will be able to delegate any of its functions or powers (see cl.102) to certain persons or bodies (viz a State or Territory CAC, its own members, staff members - dealt with below - or others approved by the Attorney-General). These persons or bodies are referred to in the Bill as "Commission delegates".
- "eligible person" - This term is used in Bill Part 3 dealing with the ASC's investigative and information gathering powers.
- national scheme law - The ASC will have, under the control of the responsible Minister, the general administration of national scheme legislation. This legislation will comprise this Bill, the proposed Corporations Bill and the Close Corporations Bill. One of the ASC's objects will be to take whatever action it can take, and is necessary, to enforce and give effect to this legislation (see cls. 3 and 11).

- staff member - This term covers public servants working for the ASC (cl. 120), including consultants (cl. 121) and staff seconded to the ASC from other Government agencies (cl. 122).

57. Subject to the Bill, an expression used in this Bill will have the same meaning as in the Corporations Bill (sub-cl.5(2)). The Interpretation Chapter of the Corporations Bill will also apply except so far as the contrary intention appears (sub-cl.5(3)).

Cl.6 : Giving information

58. Clause 6 is new and defines what is meant by 'giving information' for the purposes of the provisions setting out the ASC's investigative or information gathering powers.

BILL PART 2 - THE COMMISSION AND ITS FUNCTIONS  
AND POWERS

59. Part 2 of the Bill (cls. 7 to 12) deals with the establishment and membership of the ASC and its objects, functions and powers.

Cl.7 : Establishment

60. Clause 7 is similar to NCSC Act sub-s.5(1). It establishes the ASC. The ASC will be responsible for administering the proposed new Commonwealth companies and securities scheme legislation.

Cl.8 : Commission is a body corporate

61. Clause 8 is based on NCSC Act sub-s.10(1). The ASC will be a body corporate with the usual attributes (perpetual succession, a common seal, capacity to acquire and dispose of property and capacity to sue and be sued in its corporate name).

Cl.9 : Membership

62. Clause 9 is the same as NCSC Act sub-ss.11(1), (3) and (4). The ASC will consist of not fewer than three and not more than eight members appointed by the Governor-General on the nomination of the Minister, at least three of whom will be full-time members. A person will not be nominated for appointment as an ASC member unless he or she is qualified for appointment by virtue of his or her knowledge of, or experience in, one or more of the fields of business, the administration of companies, the financial markets, law, economics and accounting.

63. Clause 9 enables part-time members to be appointed. Negotiations are continuing with the State and Northern Territory Governments regarding the administration of national scheme laws. One element of the Commonwealth proposals being negotiated is that State and Northern Territory Governments

will be able collectively to nominate two part-time ASC members.

64. The ASC will be able to perform or exercise its functions and powers even if the number of its members falls below the statutory minimum for a period of less than three months.

Cl.10 : Chairperson and Deputy Chairperson

65. Sub-clause 10(1) is based on NCSC Act sub-ss.13(1) and (2). Sub-clause 10(2) is new. One of the full-time ASC members will be a Chairperson (to be referred to as the Chairman or Chairwoman, as appropriate). Another full-time member will be the Deputy Chairperson (to be referred to as the Deputy Chairman or Deputy Chairwoman, as appropriate).

Cl.11 : Functions and powers

66. Clause 11 is new but may be compared with NCSC Act s.6. The ASC is to have such functions and powers as are conferred on it by any Commonwealth Act where the ASC is responsible for the general administration (Bill sub-cl. 11(1) and (4)). The Bill confers broad investigation, information-gathering and hearings powers on the ASC. The other functions and powers of the ASC are set out in the Corporations Bill, which covers the regulation of companies, and the securities and futures industries, and in the Close Corporations Bill which provides a new simplified corporate entity for small business. These Bills are being introduced together.

67. The ASC will be required to provide such staff and support facilities as are necessary to the Corporations and Securities Panel (established by the Bill to conduct hearings into designated matters), the Companies Auditors and Liquidators Disciplinary Board and the Accounting Standards Review Board (Bill para.11(2)(a) - new provision).

68. The ASC will also be empowered to advise the Minister about any changes to a national scheme law that it sees as necessary (Bill para.11(2)(b) - new provision).

69. The ASC will also be empowered to do whatever is necessary for the performance of its functions or reasonably incidental thereto (Bill sub-cl. 11(3)).

70. The ASC will be responsible for the general administration of the Bill, subject to the control of the responsible Minister (Bill sub-cl. 11(5)).

#### Cl. 12 : Directions by Minister

71. Clause 12 may be compared with NCSC Act s.7 and TPA s.29. The Minister is to have power to give written directions to the ASC about the policies it should pursue or the priorities it should follow (Bill sub-cl. 12(1) - cf TPA sub-ss. 29(1) and (2)). The Minister may not give a direction unless prior written notice has been given to the ASC and the ASC Chairperson has had an opportunity to discuss the need for the direction with the Minister. However the Minister is not to have power to give the ASC directions about a particular case (Bill sub-cl. 12(3)).

72. Under this provision the Minister would be able to direct the ASC, for example, to have regard to any relevant policies of the Commonwealth Government, including those applicable to the managing and resourcing of the public sector (see para.13, Policy Guidelines for Commonwealth Statutory Authorities and Government Business Enterprises, October 1987).

73. Clause 12 ensures that the ASC will be more independent of political interference than the NCSC. The Ministerial Council has the capacity to give a direction in respect of particular cases. The ASC will not be subject to any such influence from Government.

BILL PART 3 - INVESTIGATIONS AND INFORMATION-GATHERING

74. Part 3 of the Bill (cls.13 to 93) deals with the investigative and hearings powers of the ASC.

Division 1 : Investigations

75. This Division deals with the powers of the ASC to conduct investigations.

Cl.13 : General Powers of Investigation

76. This clause is based upon CA s.16A, SIA s.13 and FIA s.19.

77. The ASC will be given a general power to investigate where:

- (a) it thinks an investigation is expedient for the due administration of a national scheme law; and
- (b) it has reason to suspect that there may have been a contravention of a national scheme law, or of another law where the contravention involves a body corporate or fraud or dishonesty.

Cl.14 : Minister may direct investigations

78. This clause is based upon CA s.291, SIA s.16 and FIA s.22 but also reflects the constitutional basis for an investigation. Where the Minister considers that an investigation is in the public interest, the Minister will be able to direct the ASC to investigate the matter. The range of matters over which the Minister may direct an investigation is set out in sub-cl.14(2).

79. The ASC must comply with such a direction (sub-cl.14(3)), but it may still delegate a function or power if appropriate (sub-cl.14(4)).

Cl.15 : Investigation after report of receiver or liquidator

80. This is a new provision.

81. Where the ASC receives a report of a receiver or liquidator it will be able to investigate a matter to which the report relates for the purpose of determining whether a person ought to be prosecuted.

Cl.16 : Interim report on investigation

82. This clause is based on the similar provisions, CA s.305, SIA s.29 and FIA s.35.

83. The ASC is required to prepare an interim report about an investigation if the Minister so directs (sub-cl.16(2)), where it forms an opinion (sub-cl.16(1)) that there has been a contravention of a law and that an interim report would assist in the protection of property, or if it forms an opinion that there is an urgent need for an amendment to a national scheme law. The ASC may also prepare an interim report in any other event (sub-cl.16(2)).

Cl.17 : Final report on investigation

84. This clause is also based on the CA s.305, SIA s.29 and FIA s.35.

85. If the Minister has directed that an investigation be carried out (sub-cl.17(2) and see cl.14), and in any other case, if the Minister so directs (sub-cl.17(1)), the ASC will be required to prepare a final report. In any other case, the ASC may prepare a final report (cl.17(1)).

86. The final report is required to set out a number of matters (sub-cl.17(3)), including the findings of the ASC.

Cl.18 : Distribution of report

87. This clause differs from the corresponding provisions, CA ss.305 and 306, SIA s.29 and FIA s.35.

88. A copy of any report (final or interim) must be given to the Minister (sub-cl.18(1)) and may be given to a person to whom the report materially relates (sub-cl.18(2)) in contrast with the more stringent conditions given in CA sub-ss.306(1) and (2), SIA sub-ss.30(1) and (2) and FIA sub-ss.36(1) and (2)). In all cases, the Minister may publish all or part of a report (sub-cl.18(3)). The Minister is not specifically restricted by provisions corresponding with CA sub-s.306(7), SIA sub-s.30(5) and FIA sub-s.36(5) which dealt with restricting publication certified to be prejudicial to the administration of justice.

Division 2 : Examination of Persons

89. This Division deals with the examination of persons relevant to an investigation held under Division 1. These provisions are similar to corresponding provisions in CA Part VII, SIA Part II and FIA Part II .

Cl.19 : Notice requiring appearance for examination

90. This provision is based on CA s.295, but reflects SIA sub-s.12(3D) and FIA sub-s.18(7) in sub-cl.19(3).

91. Where the ASC suspects or believes, on reasonable grounds, that a person can give information relevant to a matter it is investigating, it may give written notice requiring that person to give all reasonable assistance and to answer questions on oath.



92. Sub-clause 19(3) requires that the notice to the examinee set out the examinee's right to be represented by a lawyer (see cl.23) and the applicable law of self-incrimination (see cl.68).

Cl.20 : Proceedings at examination

93. This new provision provides that upon attending an examination required by a notice issued under cl.19, that person is called the "examinee", and the examiner is called the "inspector". The inspector, if not the ASC, is someone to whom this power has been delegated (see para.19(2)(b)).

Cl.21 : Requirements made of examinee

94. This clause is based on CA sub-s.295(1).

95. The inspector may require the examinee to answer questions or make statements on oath or under an affirmation as to their truth (sub-cl.21(1) and (2)). These questions must be relevant to the investigation conducted under Division 1 (sub-cl.21(3)).

Cl.22 : Examination to take place in private

96. This new provision requires examinations held under this Division to be held in private, with only the inspector, a member of the ASC, any other staff member or person approved by the ASC, the examinee and the examinee's lawyer present.

Cl.23 : Examinee's lawyer may attend

97. This clause is based on CA sub-ss.296(6) and (12).

98. The examinee's lawyer may always attend with the examinee. The lawyer will be able to address the inspector and cross-examine the examinee (sub-cl.23(1)), provided that in doing so the examination is not obstructed (sub-cl.23(2)).

Cl.24 : Record of Examination

99. This clause is based on CA sub-ss.298(1) and (2).

100. A record may be made of the examination (sub-cl.24(1)) and must be made if the examinee so requests. The inspector may require the examinee to read and sign the record (para.24(2)(a)). If requested, the inspector must give a copy of the record to the examinee (para.24(2)(b)).

Cl.25 : Giving to other persons copies of record

Cl.26 : Copies given subject to conditions

101. These clauses are based on CA sub-ss.298(6) to (9). Copies of the record, or related books, or both, may be given to the examinee's lawyer if the lawyer is carrying on or contemplating legal proceedings in respect of matters to which the examination related (sub-cl.25(1)) or to any other person (sub-cl.25(3)). If so given, use of the copy of the record is restricted (sub-cl.25(2)) and may be subject to further conditions (sub-cl.25(3)), which must be complied with (cl.26).

Cl.27 : Record to accompany report

102. Although sub-cl.27(1) is based on CA sub-s.298(10), sub-cl.27(2) is a new provision. A final report of an investigation is to be accompanied by a copy of any record of examination which had been given to any person in respect of that investigation (sub-cl.27(1)). A copy of that record may also accompany the report of another investigation if relevant (sub-cl.27(2)).

Division 3 : Inspection of Books

103. This Division deals with the power of the ASC to inspect books required to be kept by a national scheme law (see definition of "books" in cl.5). This Division is chiefly

based on Division 1 of CA Part II, but there are corresponding provisions in Division 1 of SIA Part II and Division 1 of FIA Part II.

Cl.28 : When certain powers may be exercised

104. This clause is based on CA sub-s.12(1), with variations to provide constitutional validity for this Division.

105. The ASC will be able to require the production of various books relating to the affairs of a corporation if:

- (a) for the purposes of the performance or exercise of any of the functions or powers of the ASC;
- (b) for the purposes of ensuring compliance with a national scheme law;
- (c) in relation to an alleged or suspected contravention of a national scheme law or that involves fraud or dishonesty (see cl.14); or
- (d) for the purposes of an investigation under Division 1.

Cl.29 : Commission may inspect books without charge

106. This clause is based on CA s.11.

107. A person authorised by the ASC may inspect without charge any book required to be kept open for inspection by a national scheme law.

Cl.30 : Notice to produce books about affairs of body corporate

108. This clause is based on CA para.12(2)(a).

109. Apart from inspection of generally available books (cl.29) the ASC may, by written direction, require the

production of specific books relating to the affairs of a body corporate. The written direction may be given to any body corporate that is not an exempt public authority, or to any eligible person (see definition in cl.5).

Cl.31 : Notice to produce books about securities

110. Sub-cl.31(1) is substantially the same as SIA para.8(1)(a), whilst sub-cl.31(2) is substantially the same as SIA sub-s.8(3). The ASC will be able to require by written direction the production of specified books relating to securities in a wide variety of circumstances (see paras.31(1)(g) to (m) and sub-cl.31(2)). The request may be made of a variety of persons, including a dealer in securities and any party to a dealing in securities (see paras.31(1)(a) to (f)).

Cl.32 : Notice to produce books about futures contracts

111. Sub-cl.32(1) is substantially the same as FIA para.13(3)(a), and sub-cl.32(2) is based on FIA sub-s.13(5). The ASC will be able to require by written direction the production of specified books relating to futures contracts in a wide variety of circumstances (see paras.32(1)(j) to (p) and sub-cl.32(2)). The request may be made of a variety of persons, including a past or present futures broker (see paras.32(1)(a) to (h)).

Cl.33 : Notice to produce documents in person's possession

112. This clause is based on CA para.12(2)(b), SIA para.8(1)(b) and FIA para.13(3)(b). The ASC will be able to require by written direction the production of specified books, relating to the affairs of a body corporate, securities or futures contracts, if those books are in the possession of the person receiving the direction.

Cl.34 : Commission may authorise persons to require production of books

113. This clause simplifies and consolidates CA sub-ss.12(3) and (4) SIA sub-ss.8(2) and (4) and FIA sub-ss.13(4). The ASC will be able to authorise a member or staff member to make a requirement of the kinds permitted by this Division. This authorisation may be general or limited to particular books or persons liable to produce to the books (sub-cl.34(2)).

Cl.35 : Application for warrant to seize books not produced

114. This clause is based on CA sub-s.13(2), SIA sub-s.9(1) and FIA sub-s.14(2)). If appropriate, the magistrate can require further information in connection with the application (sub-cl.35(2)). Only when there are reasonable grounds to suspect that there are, or will soon be, on particular premises, books which have not been produced as required, may an application be made to search those premises for the books (sub-cl.35(1)).

Cl.36 : Grant of warrant

115. This clause is based on corresponding provisions in CA, SIA and FIA.

116. A magistrate will be empowered to issue a warrant if satisfied of the matters required under cl.35.

117. The warrant will authorise a member of the Australian Federal Police, and any other named person, to use such necessary and appropriate force and assistance,

(a) to enter premises;

(b) to search the premises;

(c) to break open and search anything on the premises; and

(d) to take possession of the books.

118. Sub-cl.36(1) and (2) are based on CA sub-s.13(1), SIA sub-s.9(1) and FIA sub-s.14(1).

119. The information to be laid before the magistrate will also state which of the grounds set out in the information, and particulars of any other grounds, that are relied upon to justify the issue of the warrant (sub-cl.36(3), based on CA sub-s.13(3), SIA sub-s.9(2A) and FIA sub-s.14(3)).

120. The warrant will specify the premises and books referred to in sub-cl.36(4) which is based on CA sub-s.13(4), SIA sub-s.9(2B) and FIA sub-s.14(4).

121. These features are designed to provide safeguards in the issue of warrants.

Cl.37 : Powers where books produced or seized

122. This clause is substantially similar to corresponding provisions in CA, SIA and FIA. Where books are produced or seized (sub-cl.37(1)), those books may be:

(a) inspected, copied or have extracts taken from them (sub-cl.37(3));

(b) used for the purposes of a proceeding (sub-cl.37(4));  
and

(c) if produced, retained (sub-cl.37(2)), and, in any case, retained for as long as is necessary, if retained for one of the purposes set out in sub-cl.37(5).

123. Sub-cl.37(1) to (5) are based on CA sub-ss.12(6) and 13(6), SIA sub-ss.8(6) and 9(4) and FIA sub-ss.13(8) and 14(6).

124. Liens cannot be claimed against a person retaining books, but liens are not otherwise prejudiced (sub-cl.37(6), based on CA sub-ss.12(5) and 13(5), SIA sub-ss.8(5) and 9(3) and FIA sub-ss.13(7) and 14(5)).

125. Inspections of books retained will be permitted (sub-cl.37(7) reflecting CA sub-para.12(6)(a)(iv) and para.13(6)(d), SIA sub-para.8(6)(a)(iv) and para.9(4)(d) and FIA sub-para.13(5)(a)(iv) and para.14(6)(d)).

126. If appropriate, retained books may be delivered to the ASC (sub-cl.37(8)).

127. If appropriate, a person who takes possession of a book will be able to require a person who produced the books or took part in their compilation to make such further explanation as can be made (sub-cl.37(9), based on CA sub-para.12(6)(a)(ii) and para.13(6)(b), SIA sub-para.8(6)(a)(ii) and para.9(4)(b) and FIA sub-para.13(8)(a)(ii) and para.14(4)(b)).

Cl.38 : Powers where books not produced

128. This clause is based on CA para.12(6)(b), SIA para.8(6)(b) and FIA para.13(8)(b).

129. If books are not produced, a person may be required to give an opinion as to both the location of the books and their custodian.

Cl.39 : Power to require person to identify property of body corporate

130. This clause is based on CA sub-s.12(7).

131. If books are not produced, a person may be required to identify property of a body corporate and to explain how that property has been accounted for by the body corporate.

Division 4 : Requirements to Disclose Information about Securities or Futures Contracts

132. This Division deals with the powers of the ASC to require disclosure of information about securities and futures contracts. These powers will enable the ASC summarily to ascertain underlying facts with considerable speed if the more formal process of conducting a hearing is inappropriate.

Cl.40 : When certain powers may be exercised

133. Clause 40 is a new clause restricting the powers of the ASC to require disclosure of information about securities and futures contracts. These powers may only be exercised in a number of circumstances, namely:

- (a) for the purposes of the performance or exercise of any of the other functions powers of the ASC;
- (b) for the purposes of ensuring compliance with a national scheme law;
- (c) in relation to a suspected contravention of an appropriate law; or
- (d) for the purposes of an investigation under Division 1.

134. Other circumstances in which these powers may be exercised are set out in cl.42.

Cl.41 : Acquisitions and disposals of securities

135. This clause is based on SIA sub-ss.12(1) to (3).



136. This clause of general application permits the ASC to require:

- (a) of a dealer, the disclosure of identities of parties to an acquisition or disposal of securities, and any instructions given in relation to that acquisition or disposal (sub-cl.41(1));
- (b) of a person, the disclosure of identities of parties and their instructions, in relation to an acquisition or disclosure by that person; or
- (c) of a stock market operator, the disclosure of identities of a party to a transaction.

Cl.42 : Additional operation of section 41

137. The powers given to the ASC under cl.41 may be exercised in circumstances beyond those set out in cl.40. This new clause provides that these powers may also be exercised:

- (a) in relation to eligible securities (sub-cl.42(3) and see definition of that term in cl.4);
- (b) in relation to securities involving a corporation (para.42(4)(a) and sub-cl.42(5)), in eligible circumstances (para.42(4)(b) and see definition of that term in cl.5) or on a stock market (para.42(4)(c)); and
- (c) in relation to a dealer which is a corporation (sub-cl.42(6)).

Cl.43 : Exercise of certain powers of the Commission in relation to securities

138. Sub-cl.43(1) expands upon SIA paras.12(3A)(a) to (e). Sub-cl.43(2) is based upon SIA para.12(3A)(f). Sub-cl.43(3) is based upon SIA para.12(3A)(g).

139. The ASC will also be empowered:

- (a) to obtain from a director, secretary or executive officer of a body corporate, information that might have affected any dealing that has taken place, or might affect a dealing that may take place, in securities of, or made available by, the body corporate (sub-cl.43(2)); and
- (b) to require information from a person whom the ASC believes on reasonable grounds is capable of giving information about:
  - (i) certain dealings in securities;
  - (ii) certain advices given in relation to securities;
  - (iii) the financial position of a person giving such advice; or
  - (iv) a relevant audit or auditor's report (sub-cl.43(3))

in a number of circumstances, being where the ASC considers that:

- (c) it may be necessary to exercise its power to prohibit trading in particular securities (para.43(1)(a)), and it is necessary to exercise one of the powers

described in (a) and (b) above to determine whether it is necessary to exercise this power under the national scheme law (para.43(4)(a));

- (d) a contravention of securities offence provisions contained in CB cl.845 or in CB Division 2 of Part 7.11 may have been committed (para.43(1)(b)), and it is necessary to exercise one of the powers described in (a) and (b) above for the purpose of investigating the possible contravention (para.43(4)(b));
- (e) a contravention of the substantial shareholder and disclosure of beneficial interests provisions in CB Parts 6.7 or 6.8 may have been committed (para.43(1)(e)), and it is necessary to exercise one of the powers described in (a) and (b) above for the purpose of investigating the possible contravention (para.43(4)(b));
- (f) a contravention of a law of the Commonwealth involving fraudulent securities market activities may have been committed (para.43(1)(d)), and it is necessary to exercise one of the powers described in (a) and (b) above for the purpose of investigating the possible contravention (para.43(4)(b)); or
- (g) that unacceptable conduct may have occurred during the course of a takeover (paras.43(1)(e) and (f)), and it is necessary to exercise one of the powers described in (a) and (b) above for the purpose of determining whether or not to exercise its powers under CB cls.732 or 734 (para.43(4)(c)).

Cl.44 : Dealings in futures contracts

140. This clause is based on FIA sub-ss.18(1) to (3).

141. This clause of general application permits the ASC to require:

- (a) of a futures broker, the disclosure of identities of parties to a dealing in a futures contract, and any instructions given in relation to that dealing;
- (b) of a person, the disclosure of identities of parties and their instructions, in relation to a dealing with a futures contract; or
- (c) of a futures exchange or clearing house, the disclosure of parties concerned in a dealing with a futures contract.

Cl.45 : Additional operation of s.44

142. Powers given to the ASC under cl.44 may be exercised in circumstances beyond those set out in cl.40. This new clause provides that these powers may also be exercised:

- (a) in relation to a dealing in a futures contract by a corporation (para.45(3)(a)), in eligible circumstances (para.45(3)(b) and see definition of that term in cl.5) or on a futures market conducted by a corporation or in eligible circumstances (para.45(3)(c)); and
- (b) in relation to a futures broker, a futures exchange or a clearing house which is a corporation (sub-cl.45(4)).

Cl.46 : Exercise of certain powers of Commission in relation to futures contracts

143. This clause is based on FIA sub-s.18(4).

144. The ASC will also be empowered to require the disclosure of information it believes that person can give, relating to:

- (a) dealings in futures contracts;
- (b) certain advices in relation to futures contracts;
- (c) the financial position of a person given such advices; and
- (d) a relevant audit or auditor's report,

where the ASC considers -

- (e) that it may be necessary to give a direction under CB cl.1138 (aimed at ensuring orderly futures markets) for the purpose of determining whether or not to give such a direction (para.46(1)(a)); or
- (f) that there may have been committed:
  - (i) a contravention of the futures offence provisions in CB Part 8.7 (other than CB cls.1258 and 1267); or
  - (ii) a contravention of a law of the Commonwealth involving fraud or dishonesty,

for the purpose of investigating the possible contravention (para.46(1)(b)).

Cl.47 : Disclosures to take place in private

145. This new provision requires disclosures to the ASC in the course of an investigation to take place in private. The ASC may give directions about who may be present when a disclosure is being made. Other persons entitled to be present are an

ASC member or approved staff member or the lawyer of the person making a disclosure.

Cl.48 : Lawyer of person making disclosure may attend

146. This new provision entitles the lawyer of a person making a disclosure to the ASC to be present during the disclosure and entitles the lawyer to address ASC representatives present about the disclosure. If the presiding ASC representative believes the lawyer is trying to obstruct the disclosure, the representative will be able to require the lawyer to stop his or her address.

Division 5 : Proceedings After an Investigation

147. This Division deals with the powers and obligations of the ASC in relation to proceedings.

Cl.49 : Commission to cause prosecution to be begun

148. This clause is substantially the same as CA sub-ss.306(8) and (9), SIA sub-ss.30(6) and (7) and FIA sub-ss.36(6) and (7).

149. The ASC will be obliged to prosecute a person where it appears as a result of an investigation or from a record of an examination that a person ought to be prosecuted for an offence against the Commonwealth law (sub-cl.49(1) and (2)).

150. The ASC will be able to require the assistance of any person other than the prosecuted person for the purposes of such a prosecution (sub-cl.49(3) and (4)).

Cl.50 : Commission may cause civil proceedings to be begun

151. This clause is based on CA sub-s.306(11), SIA sub-s.30(9) and FIA sub-s.36(9).

152. The ASC will be permitted to commence civil proceedings for the recovery of property or damages where it appears as a result of an investigation or from a record of an examination that it would be in the public interest to have such civil proceedings.

Division 6 : Hearings

153. This Division deals with hearings before the ASC. This Division is largely based on NCSC Act Part VI, with some important differences.

Cl.51 : Power to hold hearings

154. This clause is based on NCSC Act sub-s.36(1) but with an important difference. It empowers the ASC to hold hearings under Division 5 for the purposes of the performance or exercise of any of its functions and powers, other than an investigative function or power conferred by Division 1. Division 2 contains a separate procedure for the examination of persons under investigation.

155. The ASC will be required to use its hearings powers under Division 5 where a national scheme law requires a hearing to be held (e.g. where the ASC proposes to revoke or suspend a person's licence). The ASC will also be able to hold public hearings under Division 5 to ascertain views on the ASC's exercise of its administrative responsibilities (e.g. a proposed policy statement or guideline).

Cl.52 : General discretion to hold hearing in public or private

156. This clause, based on NCSC Act sub-s.36(2), gives the ASC a general discretion to decide whether a hearing should be held in public or private (sub-cl.56(1)), but differs from the NCSC Act by requiring the ASC to have regard to a number of

considerations, such as the public interest (sub-cl.56(2)) when exercising this discretion. The ASC's discretion is subject to cls.53 and 54, explained below.

Cl.53 : Request by a person appearing at hearing that it take place in public

157. This clause, based on NCSC Act sub-s.36(3) and para.36(6)(a), qualifies the general discretion described in cl.52.

158. A person entitled to appear at a hearing may request that it take place in public, and the ASC will be required to direct that the hearing take place in public unless, having regard to the matters referred to in sub-cl.52(2) (such as public interest considerations), it is desirable that the hearing take place in private.

Cl.54 : Certain hearings to take place in private

159. In this provision, based on NCSC Act sub-s.36(4), the ASC's general discretion is qualified so that the hearing must take place in private if required by a national scheme law.

Cl.55 : Commission may restrict publication of certain material

160. This clause, based in part on NCSC Act para.36(6)(b), permits the ASC to restrict the publication of evidence given, or matters contained, in documents lodged with the ASC in the course of a hearing. However, the ASC must have regard to a number of considerations, such as the public interest, when deciding whether or not to restrict publication.

Cl.56 : Who may be present when hearing takes place in private

161. This clause is based on NCSC Act sub-ss.36(5), (7) and (8).



162. Where a hearing takes place in private, the ASC will decide who may be present (sub-cl.56(1)). However, the following persons cannot be prevented from being present at a hearing:

- (a) a person entitled under a national scheme law to appear at that hearing;
- (b) a person representing such a person; and
- (c) a person representing a person entitled to be present at a private hearing by reason of an ASC direction.

163. It will be an offence for a person to be present at a private hearing if that person is not entitled to be there (sub-cl.56(3)).

Cl.57 : Involvement of person entitled to appear at hearing

164. This clause is based on NCSC Act sub-ss.36(9) and (10).

165. The ASC will have to notify details of a hearing to persons entitled to be afforded an opportunity to appear. Written submissions may be lodged with the ASC if such persons do not wish to appear (sub-cl.57(3)).

Cl.58 : Power to summon witnesses and take evidence

166. This clause is based on NCSC Act s.37 and sub-s.38(4).

167. A member of the ASC will be able to summon persons to attend at a hearing to give evidence or produce any documents referred to in the summons (sub-cl.58(1)). A member of the ASC will also be able to require and administer an oath or affirmation that the answers given to the questions asked will be true (sub-cl.58(2) and (3)). However, the ASC may permit evidence to be given by way of tendering a written statement (sub-cl.58(5), based on NCSC Act sub-s.38(4)).

Cl.59 : Proceedings at hearings

168. This clause is based on NCSC Act sub-ss.38(1) and (2).

169. Proceedings at hearings before the ASC will be conducted with a minimum of formality and technicality, and maximum expedition. The ASC:

- (a) will not be bound by the rules of evidence;
- (b) may permit a person to intervene in the proceedings on such conditions as it thinks fit; and
- (c) will be required to observe the rules of natural justice (sub-cl.59(2)).

170. The provisions of the Bill relating to meetings (cls.103 to 107) will apply as far as practicable (sub-cl.59(3) - Division 4 of Part 3).

171. At hearings before the ASC:

- (a) a natural person may be represented by an employee approved by the ASC;
- (b) a body corporate may be represented by an officer of the body corporate approved by the ASC;
- (c) an unincorporated association or one of its members may be represented by a member or officer approved by the ASC; and
- (d) any person may be represented by a lawyer (sub-cl.59(5) to (8)).

Cl.60 : Commission to take account of evidence and submissions

172. This clause, based on NCSC Act sub-s.36(11), requires the ASC to take account of evidence and submissions in making decisions.

Cl.61 : Reference to Court of questions of law arising at hearing

173. This new clause provides that, if a question of law arises at a hearing, the ASC will be able to, of its own motion or at the request of another, refer that question to the Court. The Court is conferred with jurisdiction to hear and determine such a question provided the Court consists of at least 3 judges. Until a decision is delivered by the Court, the ASC will not be permitted to make any decision relevant to that question (para.61(2)(a)). When the Court delivers its opinion on that question of law, the ASC will be required to act in accordance with that opinion (para.61(2)(b)).

Cl.62 : Protection of members etc.

174. This clause, based on NCSC Act sub-ss.41(1) to (3), provides that a member of the ASC has the same protection and immunity in relation to hearings as a Justice of the High Court. Protection and immunity is given to lawyers and other representatives and witnesses as if they were appearing in a proceeding in the High Court.

Division 7 : Offences

175. This Division consolidates offences constituted by contraventions of provisions of this Part. It is based on the corresponding provisions, CA ss.14 and 296, FIA s.15, NCSC Act s.39 and SIA s.19.

Cl.63 : Non-compliance with requirements made under this Part

176. This clause, based in particular on CA sub-s.14(1) and sub-ss.296(2) to (5), makes it an offence to contravene specific provisions of this Part.

Cl.64 : False information

177. This clause is based on a number of corresponding provisions: CA sub-ss.14(2) and (3) and sub-s.296(3), FIA sub-ss.15(2) and (3) and sub-ss.25(6) and (7), NCSC Act sub-s.39(3) and SIA sub-ss.12(5) and (6) and sub-s.19(5).

178. It will be an offence to give false or misleading evidence before a hearing, in the course of an examination or in compliance with any other requirement made under this Part. However, it will be a defence if the person believes on reasonable grounds that the evidence was true and not misleading. This defence is available in CA sub-s.14(3) and SIA sub-s.12(6), but not in CA s.296.

Cl.65 : Obstructing person acting under this Part

179. This clause is based on CA sub-ss.14(4) and (5) and FIA sub-ss.15(4) and (5).

180. It will be an offence to hinder the ASC or a person who is executing a warrant issued under cl.36 (sub-cl.65(1)).

181. The occupier of premises entered under a warrant issued under cl.36 must provide reasonable assistance (sub-cl.65(2)).

Cl.66 : Contempt of Commission

182. This clause is different from NCSC Act s.40, but is consistent with other Commonwealth provisions used since 1984. It will be an offence to obstruct the ASC (or a member)

in the performance or exercise of any of the functions and powers of the ASC, or to disrupt a hearing, or to publish evidence given to the ASC in contravention of an ASC direction (see cl.55).

Cl.67 : Concealing books relevant to investigation

183. This clause is based on CA s.310, FIA s.40 and SIA s.34.

184. Where the ASC is investigating or is about to investigate a matter, it will be an offence to conceal, destroy or alter a book that is the subject of the investigation, or to send the book out of the particular State or Territory or out of Australia (sub-cl.67(1)) unless it was not intended to defeat the purposes of the national scheme law or to delay or obstruct an investigation (sub-cl.67(2)).

Cl.68 : Self-incrimination

185. This clause is substantially based on a number of corresponding provisions, CA sub-ss.14(6) and (7) and sub-ss.296(7) and (8), FIA sub-ss.15(6) and (7) and sub-s.25(10) and SIA sub-ss.12(3C), (3CA) and (3CD) and sub-s.19(9), but extends the privilege against self-incrimination.

186. If before making a statement, signing a record or producing a book a person claims that the statement, record or book might tend to incriminate him or her or make him or her liable to a penalty, neither the statement, record or book, nor anything obtained as a result of the person making the statement, signing the record or producing the book, is admissible in evidence against the person in a criminal proceeding or proceeding for the imposition of a penalty, other than a proceeding in respect of the falsity of a statement made or contained in a record (sub-cl.68(2) and (3)). If a claim of self-incrimination is not made, it is not

a reasonable excuse for a person to refuse or fail to give information, sign a record or produce a book if required to do so.

Cl.69 : Legal professional privilege

187. This clause is a consolidation of corresponding provisions, CA ss.16 and 308, FIA sub-s.17(1) and s.38, NCSC Act sub-s.39(4) and SIA s.32.

188. A lawyer will be permitted to withhold a privileged communication made to that lawyer in that capacity unless the person involved agrees to the furnishing of that information. Where a privileged communication is withheld, the lawyer will be required to provide details of the identity of the document or book containing the communication, or the person to whom or from whom the communication was made.

Cl.70 : Powers of court where non-compliance with Part

189. This clause is based on CA sub-ss.297(1) and (2), NCSC Act sub-s.39(7) and SIA sub-ss.19(13) and (14).

190. Where the ASC is satisfied that a person has unreasonably failed to comply with a requirement made under this Part (other than Division 7), it may certify to the Court that such a failure has taken place. The Court will then be able to order that person to comply with the requirement or to punish that person as if in contempt of court, or both.

Division 8 : Commission's Powers Where Non-Compliance with Part

191. This Division deals with the powers of the ASC where there has been non-compliance with a requirement made under this Part. It is based on corresponding provisions, CA s.311, FIA s.41 and SIA s.35.

Cl.71 : Orders by Commission

192. This clause, based on the provisions mentioned above, provides the foundation for exercising the powers of the ASC described in this Division. Those powers may be exercised if the ASC requires relevant information, but that information cannot be found out because of a failure to comply with a requirement made under this Part.

Cl.72 : Orders in relation to securities of a body corporate

193. This clause is based on CA sub-s.311(1).

194. Where the information about the affairs of a body corporate needs to be found out for the purposes of an investigation under Division 1 but cannot be found out because a person has failed to comply with a requirement made under this Part, then the ASC may make one or more of the following orders:

- (a) an order restraining a specified person from disposing of any interest in specified securities of the body corporate;
- (b) an order restraining a specified person from acquiring any interest in specified securities of the body corporate;
- (c) an order restraining the exercise of voting or other rights attached to specified securities of the body corporate;
- (d) an order directing the holder of securities to give written notice of the order to any person whom the holder knows to be entitled to exercise a voting right attached to those securities;

- (f) an order directing the body corporate not to make a payment in respect of those securities (except in a winding up);
- (g) an order directing a body corporate not to register a transfer or transmission of specified securities;
- (h) an order directing a corporation not to issue shares to an existing shareholder.

Cl.73 : Orders in relation to securities generally

195. This clause is based on SIA sub-s.35(1).

196. The ASC will be permitted to make a range of orders similar to those set out in cl.72 if, in the Commission's opinion, information about securities needs to be found out for the purposes of an investigation under Division 1 but cannot be found out because a person has failed to comply with a requirement made under this Part.

Cl.74 : Orders in relation to futures contracts

197. This clause is based on FIA sub-s.41(1).

198. Where the ASC forms the opinion that information about futures contracts needs to be found out for the purposes of an investigation under Division 1 but cannot be found out because a person has failed to comply with a requirement made under this Part, the ASC will be able to make one or more of the following orders, namely:

- (a) an order restraining a specified person from disposing of or acquiring specified futures contracts;



- (b) an order restraining a specified person from exercising rights under specified futures contracts; and
- (c) an order requiring a specified person to dispose of specified futures contracts.

199. Restrictions are placed on the effect of such an order in sub-cl.74(2).

Cl.75 : Orders under this Division

200. This clause is based on CA sub-ss.311(1A) to (4), FIA sub-ss.41(3) to (6) and SIA sub-ss.35(2) to (5).

201. The ASC will be able to vary or revoke an order made under this Division (sub-cl.75(1)). A person aggrieved by such an order will be able to apply to the Court to vary or revoke the order (sub-cl.75(5) and (6)). Failure to comply with an order will constitute an offence (sub-cl.75(7)).

202. A copy of the order (or revoking or varying order) is to be given to the subject of the order and, if appropriate, the issuer of the relevant securities or options (sub-cl.75(3) and (4)).

Division 9 : Evidentiary Use of Certain Material

203. This Division allows for and describes the use of evidence gained from examinations in proceedings against the person examined or other persons.

Cl.76 : Statements made at an examination: proceedings against examinee

204. This clause is based CA ss.298 and 299, FIA ss.27 and 29 and SIA ss.21 and 23.

205. The record of examination is generally admissible as evidence against the person examined in any proceedings. There are four exceptions (based on CA s.299(1), FIA s.29 and SIA s.23) relating to:

- (a) self-incrimination in criminal proceedings or proceedings for the imposition of a penalty (other than proceedings in respect of a false or misleading statement) if a claim is made before providing any self-incriminating answer;
- (b) relevance (if claimed);
- (c) the record being misleading by virtue of associated evidence not having been tendered in the proceedings (if claimed); and
- (d) the answer discloses matters that could be the basis for a claim of legal professional privilege (if claimed).

206. If a record of an examination is reduced to writing and is signed by the examinee in accordance with sub-cl.24(2) or authenticated in any other prescribed manner, the record is prima facie evidence of the questions asked and answers given at the examination (based on CA sub-s.298(3), FIA sub-ss.27(3) and (5) and SIA sub-ss.21(3) and (5)).

Cl.77 : Statements made at an examination; other proceedings

207. This clause is based on CA s.300, and reflects modifications in FIA s.30 and SIA s.24.

208. Questions and answers at an examination will be admissible in any federal proceedings against other persons. However, such evidence will not be admissible if the party seeking to admit the evidence fails to call the person

examined as a witness when asked to do so by the opposing party, or it is unreasonable, impractical or impossible to call the person as a witness.

Cl.78 : Weight of evidence admitted under s.77

209. This clause is narrower than the corresponding provisions, CA ss.301 and 302, FIA ss.31 and 32 and SIA ss.25 and 26.

210. The weight of any evidence admitted under cl.77 in any proceedings will be judged having regard to:

- (a) the passage of time between a matter occurring and it being dealt with at the examination;
- (b) the presence or absence of an incentive for the person examined to conceal or to misrepresent relevant facts; and
- (c) any other circumstances from which it is reasonable to draw an inference about how accurate the statement is (and not "or otherwise", as provided for in CA s.301, FIA s.31 and SIA s.25).

211. Where evidence given by a person during an examination is admitted against another person and the first person is not called as a witness, evidence relevant to the credibility of that first person will be admissible. However, there will be a limitation on the admissibility of such evidence if it could be refuted by cross-examination.

Cl.79 : Objection to admission of statements made at examination

212. This clause is an expansion on the corresponding provisions, CA s.303, FIA s.33 and SIA s.27.

213. A party may give another party to a proceeding at least 14 days' notice of intention to tender as evidence all or part of the record of an examination. As a new requirement, this notice will set out the statements (sub-cl.79(2)). The other party will have a further 14 days (unless extended) in which to object, giving reasons, to the admission of such evidence. The Court may determine the question of admissibility before or during actual proceedings. If a party raises no objections under these provisions, there may be no further objection to the admission of the record at the hearing. Existing law that would allow evidence to be admitted will be preserved (see cl.83).

Cl.80 : Copies of, or extracts from, certain books

214. This clause is based on CA s.15, FIA s.16 and SIA s.10A.

215. A copy of any book relating to the affairs of a corporation or to any of the circumstances listed in paras.31(1)(g) to (m) and paras.32(1)(j) to (p) will be admissible in evidence in any proceedings as if it were the original (sub-cl.80(1)), provided that the copy is proved to be a true copy (sub-cl.80(2)). Evidence that the copy is a true copy will be able to be given by a person who has compared the copy with the original. This evidence may be stated orally, or by affidavit or statutory declaration (sub-cl.80(3)).

Cl.81 : Report under Division 1

216. This clause is based on CA sub-ss.306(12) and (13).

217. If the ASC certifies a copy to be a true copy of a report made under Division 1, that copy is admissible in proceedings as prima facie evidence of both the opinion of the ASC and any facts or matters found by the ASC to exist.

Cl.82 : Exceptions to admissibility of report

218. This new provision provides safeguards on the use of reports as evidence. Before such a report can be admissible, the other party against whom the evidence is to be tendered must have had a reasonable opportunity to examine the copy of the report (sub-cl.82(1) and (2)). That other party must also have an opportunity to cross-examine in relation to that report (sub-cl.82(3) and (4)).

Cl.83 : Material otherwise admissible

219. This clause consolidates CA sub-s.303(7), FIA sub-s.33(7) and SIA sub-s.27(7).

220. Nothing in this Division renders inadmissible evidence which would otherwise have been admissible under other laws.

Division 10 : Miscellaneous

221. This Division deals with a number of miscellaneous matters.

Cl.84 : Requirement made of a body corporate

222. This clause is based on CA sub-s.12(9), FIA sub-s.13(10) and SIA sub-s.8(7).

223. Provisions applicable to a body corporate will also be applicable to a person who is or who has been an officer of the body corporate (and see definition of "officer" in cl.5).

Cl.85 : Evidence of authority

224. This clause differs from CA sub-s.295(5) by providing for more particularity.

225. A person to whom has been delegated a power to make a requirement of another person will be required to produce sufficient identification and authorisation if requested by that other person.

Cl.86 : Giving documents to natural persons

226. This new clause extends the operation of AIA s.28A so as to permit service on a natural person by leaving a document at an address with a person whom it is believed on reasonable grounds lives or works at that address and is over 16 years of age.

Cl.87 : Place and time for production of books

227. This new clause provides that where a provision of this Part empowers a person to require the production of books at a specified place and time, that requirement shall be reasonable in all the circumstances.

Cl.88 : Application of Crimes Act and Evidence Act

228. This clause reflects the similar operation of CA sub-s.289(7), FIA s.26, NCSC Act s.42 and SIA s.20.

229. The effect of this clause is to import Part IIIA of the Evidence Act 1905 relating to the admissibility of business records in civil proceedings and certain offence provisions contained in Part III of the Crimes Act 1914 (such as giving false testimony, fabricating evidence, destroying evidence or intimidating, corrupting or deceiving witnesses).

Cl.89 : Allowances and expenses

230. This clause is based on CA sub-ss.296(10) and (11), FIA sub-ss.25(12) and (13), NCSC Act sub-s.38(3) and SIA sub-ss.19(11) and (12).

231. A person answering a summons to appear at an examination or hearing is entitled to the prescribed allowances and expenses (if any) and any other amount the ASC thinks reasonable.

Cl.90 : Expenses of investigation under Division 1

232. This clause is based on CA sub-ss.309(1) and (8), FIA sub-s.39(1) and SIA sub-s.33(1).

233. Subject to cl.91 below, the ASC is required to pay the expenses of an investigation.

Cl.91 : Recovery of expenses of investigation

234. This clause is based on CA sub-ss.309(3) to (6), FIA sub-ss.39(3) to (6) and SIA sub-s.33(3) to (6), but reflects a more reasonable policy in not enabling the ASC to recover costs of an investigation where the investigation has not resulted in a person being convicted or having judgment awarded against him or her.

235. Where a person is convicted of an offence, or has judgment awarded against him or her in federal proceedings, as a result of an ASC investigation, the ASC may order the person to pay the costs of the investigation and may recover the costs in Court proceedings if the order is not fully complied with.

Cl.92 : Compliance with Part

236. Based upon CA sub-s.12(8), FIA sub-s.13(9), sub-s.18(2) and sub-s.25(11) and SIA sub-s.18(6A), sub-s.12(8) and sub-s.19(10), this clause provides that no liability shall result merely from compliance with a requirement made under this Part.

Cl.93 : Effect of Part

237. Following language similar to CA sub-s.13(7), FIA sub-s.14(7) and SIA sub-s.9(5), sub-cl.12VJ(2) ensures that all other functions or powers conferred by law remain unaffected by the conferral of functions in this Part. Further, the generality of anything in this Part is not to be limited by anything else in this Part unless expressly provided (sub-cl.93(1), a new provision).



BILL PART 4 - THE COMMISSION'S BUSINESS

238. Part 4 of the Bill (cls. 94 to 107) deals with the way the ASC may arrange its business. The ASC may establish Divisions, may delegate any of its functions and powers in certain circumstances, and may hold meetings.

Division 1 - General

Cl.94 : Arrangement of Commission's business

239. Clause 94 is new. Subject to any directions that the responsible Minister may give the ASC (see cl. 12) the ASC Chairman or Chairwoman may give directions about the arrangement of the ASC's business (Bill cl. 94 - based on TPA s.16).

Cl.95 : Commission to establish offices

240. This new provision gives the ASC the flexibility it needs to establish its own offices. Such offices may be situated throughout Australia so as to best service the needs of local business communities.

Cl.96 : Regional Commissioners

241. This new provision enables the appointment of a Regional Commissioner for a State or Territory only if the Commonwealth has failed to reach agreement with the State or Territory with respect to the vesting of administration of national scheme laws in that State or Territory's CAC. If a Regional Commissioner is appointed for a State or Territory, he or she will manage the office or offices established in that State or Territory by the ASC.

Division 2 - Divisions of the Commission

Cl.97 : Chairperson may establish Division of Commission

242. This clause is based on NCSC Act sub-s.21(1). The ASC Chairman or Chairwoman may, if he or she wishes, direct that certain of the ASC's functions or powers may be performed or exercised by a Division of the ASC consisting of at least 2 specified members. A Division may be established to perform or exercise specified functions or powers either generally or in relation to a specified matter or class of matters (Bill sub-cl. 97(1) - cf sub-s. 21(1) of the NCSC Act).

243. Where the Chairperson is not to be a member of a Division, he or she must specify the member who is to be Chairperson of the Division (Bill sub-cl. 97(2) - based on NCSC Act Act sub-s. 21(1A)).

Cl.98 : Effect of direction establishing Division

244. Where a Division has been established, it will be able to perform functions, exercise powers or hold meetings as if it were the ASC. Two ASC members will form a quorum at a Division meeting. (Bill cl. 98 - cf. sub-ss. 21(4) and (5) of the NCSC Act).

Cl.99 : Chairperson may reconstitute Division

245. A direction in relation to Divisions will be able to be revoked or amended at any time (Bill cl. 99 - cf sub-cl. 21(2) of the NCSC Act Act).

Cl.100 : Effect of reconstituting Division

246. Where there is a change in the membership of a Division and the former members of the Division have begun, but have not completed, the determination of a matter, the new members may do so (Bill cl. 100 - cf sub-cl. 21(2) of the NCSC Act).

Cl.101 : Multiple Divisions

247. One Division will be able to perform functions or exercise powers of the ASC even though another Division is performing the same functions or powers at the same time (Bill cl. 101). This provision addresses the possibility that although Divisions may be considering different matters, these matters may call for the performance or exercise of similar functions or powers.

Division 3 - Delegation by the Commission

Cl.102 : Delegation

248. This clause is based on NCSC Act ss.45 and 46 with some modifications. It enables the ASC to delegate all or any of its functions or powers to:

- an ASC member
- a staff member (a term covering public servants working for the ASC, persons employed under contract, including consultants and staff seconded to the ASC from other Government agencies)
- any person or class of persons prescribed by the Regulations
- any other person or body approved by the responsible Minister (such as a State or Territory CAC)

(Bill sub-cl.102(1) and (2)).

249. ASC delegates will be subject to directions from the ASC (Bill sub-cl. 102(5)). In delegating its powers the ASC is to have regard to the need for the ASC to be accessible and responsive to the local business community and where the ASC has delegated its powers or functions under national scheme

laws to a State or Territory authority it will be required to ensure that those laws are, to the greatest extent practicable, administered by that authority (Bill sub-cl.102(4)). Delegated functions or powers that are performed or exercised by an ASC delegate will be taken to have been performed or exercised by the ASC. (Bill sub-cl. 102(6)).

250. The ASC's power of delegation will not be limited to the power to delegate to a specified person. It will include a power to delegate to any person from time to time performing the duties of a specified office or position (AIA s.34A).

251. Where the exercise of an ASC power or function is dependent on a person's opinion, belief or state of mind and that power or function has been delegated, it may be exercised upon the delegate's opinion, belief or state of mind (AIA s.34A). This provision will also apply where the delegate is a body rather than a natural person (Bill sub-cl.102(7)).

252. There are several other effects of an ASC delegation:

- (a) It may be made either generally or as otherwise provided by the instrument of delegation.
- (b) The power to delegate may not itself be delegated.
- (c) An ASC delegation does not prevent the ASC performing or exercising the delegated function or power itself.

(AIA s.34AB).

#### Division 4 - Meetings of the Commission

##### Cl.103 : Convening of meetings

253. This clause is based on NCSC Act sub-ss.20(1)-(3) except that 2 ASC members may now request a meeting to be convened.

If the ASC Chairperson wishes to convene a meeting, he or she may do so at a place and time he or she determines. The Chairperson is also to convene such meetings as he or she thinks necessary or as are requested by two ASC members.

Cl.104 : Approved methods of communication

254. This clause is based on NCSC Act sub-s.20(3A) and (3B) and sub-ss21(4A) and (4B). If all ASC members who are not absent from office so agree, meetings may be held by an approved method of communication.

255. Members participating in a meeting held by one of these methods are deemed to be present at the meeting even though not physically present. Because a meeting of a Division is deemed to be a meeting of the ASC (see sub-cl.98(4)), there is no need to specifically provide for a similar method of holding meetings of Divisions (cf NCSC Act sub-ss.21(4A) and (4B)).

Cl.105 : Quorum

256. A quorum for a meeting will be 2 ASC members if the ASC consists of 3 or 4 members but will be 3 ASC members in any other case. (Bill cl. 105 - cf NCSC Act Act sub-s. 20(4)).

Cl.106 : Who is to preside at meetings

257. The ASC Chairman or Chairwoman is to preside at all ASC meetings at which he or she is present. Otherwise, the Deputy Chairman is to preside or, in his or her absence, another elected member will preside (Bill cl. 106 - based on NCSC Act Act sub-ss. 20(5) and (6)).

Cl.107 : Procedure at meetings

258. Questions arising at a meeting will be determined by a majority of members. The presiding member will have a

deliberative but not a casting vote (Bill cl.107 - based on NCSC Act sub-ss. 20(7) and (8)).

BILL PART 5 - THE COMMISSION'S MEMBERS

259. Part 5 of the Bill (cls. 108 to 119) deals with the terms and conditions of ASC members and with acting appointments.

Division 1 - Terms and Conditions

Cl.108 : Term of office as member

260. ASC members will hold office for a period specified upon appointment not exceeding 5 years (subject to cls. 110 and 111 dealing with resignation and termination of a member's appointment). ASC members will be eligible for re-appointment (Bill sub-cl. 108(1) - based on NCSC Act sub-s 12(1)).

261. Persons aged 65 are not to be appointed as members and a term of appointment is not to extend beyond a person's 65th birthday (Bill sub-cl. 108(2) and (3) - based on NCSC Act sub-s 12(2) and TPA sub-s. 8(2)).

Cl.109 : Term of office of Chairperson or Deputy Chairperson

262. A Chairperson or Deputy Chairperson of the ASC will hold office until:

- the end of his or her term of membership
- his or her resignation
- the termination of his or her appointment
- his or her death
- in the case of a Deputy Chairperson, he or she is appointed Chairperson.

(Bill sub-cl. 109(1) - cf NCSC Act sub-s. 13(4)).

263. A person who is appointed as Chairperson or Deputy Chairperson (see cl. 9) is eligible for re-appointment as such (Bill sub-cl.109(2) - cf NCSC Act sub-s. 13(6)).

Cl.110 : Resignation

264. A person may resign as an ASC member, Chairperson or Deputy Chairperson in writing signed and delivered to the Governor-General (Bill cl.110 - based on NCSC Act sub-s. 13(5) and s.16).

Cl.111 : Termination of appointment

265. The Governor-General will be able to terminate the appointment of an ASC member because of misbehaviour or physical or mental incapacity and will be obliged to terminate a member's appointment if he or she:

- becomes bankrupt, etc.
- is a full-time member and engages in other paid employment without the Attorney-General's consent
- is a full-time member and is absent without leave for 14 consecutive days, or for 28 days in any 12 month period
- is a part-time member and is absent without leave from 3 consecutive meetings
- fails to comply with his or her obligations to disclose pecuniary interests and conflicts of interest (cls.123, 124 and 125) or to refrain from dealing in securities or futures contracts where he or she has price sensitive information (cl.128)

(Bill sub-cl.111(1) and (2) - based on NCSC Act s.18).



266. If a full-time member who is a participant in the Commonwealth Occupational Superannuation Scheme consents, the Governor-General may retire the member from office on the ground of incapacity (Bill sub-cl.111(3) and cl.5, definition of "eligible employee") and that member may then be entitled to invalidity benefits under that Scheme.

Cl.112 : Remuneration and allowances etc.

267. This clause is based on TPA s.9 and AIDC Act s.33. It enables an ASC member is to be paid:

- such remuneration as is determined by the Remuneration Tribunal (which is the usual requirement for members of non-commercial statutory authorities - see Policy Guidelines for Commonwealth Statutory Authorities and Government Business Enterprises, October 1987) or, if no Tribunal determination is operative, such remuneration as the Minister determines;
- such allowances as the Minister determines.

268. These allowances will include benefits by way of financial or other assistance in connection with housing, transport, insurance, long service leave and superannuation that in the opinion of the Minister are necessary or desirable to assist the member or place the member in a position that may facilitate the performance of his or her functions. In addition the ASC member will be able to be reimbursed for any loss of expenditure incurred by reason of, or in the course of, the performance of his or her functions.

269. This provision is to have effect subject to the Remuneration Tribunals Act 1973. For example, under sub-s. 7(8) of that Act, either House of Parliament can in effect disallow a determination by the Tribunal.

Cl.113 : Leave of absence

270. The Minister may grant a full-time member leave of absence from duty on such terms and conditions as to remuneration or otherwise as the Minister specifies. The Minister may grant a part-time member leave of absence from an ASC meeting (Bill cl.113 - cf TPA s.12, NCSC Act s.15).

Cl.114 : Superannuation arrangements

271. The responsible Minister will be able to approve, vary or revoke special superannuation arrangements for full-time ASC members who are not participants in the Commonwealth Occupational Superannuation Scheme provided these arrangements have been approved by the Minister for Finance.

Cl.115 : Other terms and conditions

272. The Governor-General may determine additional terms and conditions to apply to an ASC member.

Division 2 - Acting Appointments

Cl.116 : Acting Members

273. When there is a vacancy in the office of a member, or a member is absent from office, the Minister may appoint another person to act either as a full-time or part-time member. The Minister has similar powers where there is a vacancy in the office of an acting member.

274. There are a number of other consequences arising from AIA s.33A:

- The appointment may be expressed to have effect only in the circumstances specified in the instrument of appointment.

- The Minister may determine the terms and conditions of the appointment, including remuneration and allowances and may terminate the appointment at any time.
  
- Where an appointee is acting as an ASC member during the absence of a member whose office becomes vacant while the appointee is acting then, unless the appointee's appointment provides to the contrary, the appointee may continue so to act until the Minister otherwise directs, the vacancy is filled or for 12 months, whichever happens first.
  
- The appointment ceases if the appointee resigns in writing delivered to the Minister.
  
- The appointee may exercise all the powers and perform all the functions and duties of the ASC member in whose office he or she is acting.
  
- The ASC Bill applies in relation to the appointee as if the appointee were the holder of the ASC's member's office.

Cl.117 : Acting Chairperson

275. The Minister will be able to appoint a member to act as Chairperson when the Chairperson's office is vacant or the Chairperson is absent from office (Bill cl.117 - cf NCSC Act sub-s. 17(1)).

Cl.118 : Acting Deputy Chairperson

276. The Minister will be able to appoint a member to act as Deputy Chairperson when the Deputy Chairperson's office is vacant or the Deputy Chairperson is absent from office or is acting as Chairperson (Bill cl.118 - cf NCSC Act sub-s. 17(2)).

Cl.119 : Limitation on appointments to act during vacancy

277. This clause is based on NCSC Act sub-s.17(4). The appointment of a person acting as member, Chairperson or Deputy Chairperson during a vacancy of office will not be able to continue for more than 12 months.

BILL PART 6 - THE COMMISSION'S STAFF

278. Part 6 of the Bill (cls.120 to 122) deals with those staff and consultants that the ASC may employ.

Cl.120 : Staff

279. Unless the ASC has made other arrangements (see cls.120(3), 121 and 122), its staff will be Commonwealth public servants or Commonwealth public office holders appointed or employed under the PSA. (Bill sub-cl.120(1) - based on NCA Act sub-s. 47(1)).

280. The ASC Chairperson will be able to exercise the same powers over its PSA staff as a Secretary of a Commonwealth Department can (Bill sub-cl.120(2) - based on NCA Act sub-s. 47(2)). These powers include the power to create or abolish an office (PSA s.27) and to reclassify an office (PSA s.29A).

281. The ASC will also be able to employ persons on contract. The terms and conditions of employment of these persons are such as the ASC determines with the Minister's approval (Bill sub-cl.120(3) and (4) - based on DPP Act sub-s. 27(3)).

Cl.121 : Consultants etc

282. This clause is based on NCSC Act s.25. The ASC will also be able to engage special consultants to assist the ASC. The ASC will be able to determine the terms and conditions of engagement of these consultants (Bill cl.121 - cf NCA Act s.48).

Cl.122 : Staff seconded to the Commission

283. The ASC will be able to make arrangements with other Commonwealth, State and Territory Departments and authorities to have their staff seconded to the ASC to assist the ASC (Bill cl.122 - based on NCA Act s.49 and DPP Act s.29).

BILL PART 7 - PREVENTING CONFLICTS OF INTEREST  
AND MISUSE OF INFORMATION

284. Part 7 of the Bill (cls.123 to 132) contains provisions requiring ASC and Advisory Committee members to disclose potential conflicts of interest and restricting them from privately dealing with information which is price sensitive or which they have acquired in the course of their duties.

Division 1 - Disclosure of Interests

Cl.123 : Chairperson to disclose certain interests to Minister

285. In contrast to NCSC Act s.19, the ASC Chairperson is required to notify the Minister of all pecuniary interests that the Chairperson has or acquires in an Australian business (Bill cl.123 - based on TPA sub-s. 17(3)). This requirement is consistent with the disclosure requirements imposed on senior Commonwealth public servants by Public Service Guidelines on Official Conduct.

Cl.124 : Member to disclose certain interests to Chairperson

286. This is a substantially new provision. Where an ASC member apart from the Chairperson has a pecuniary or other interest that could conflict with his or her public duty, the member is to disclose the interest to the Chairperson before determining any matter before the ASC. The Chairperson may decide either that:

- the member should not take part, or not continue to take part in the matter (in which case the member must withdraw from determining the matter); or
- the member's interest should be disclosed to everyone concerned in the matter (in which case the member must withdraw unless all concerned consent to the member taking part).

287. The ASC Chairperson is to disclose to all concerned any interests that could conflict with his or her public duty.

(Bill cl.124 - cf TPA s.17).

Cl.125 : Notification of interests to Commission

288. This is a substantially new provision. Clause 125 requires non-PSA staff of the ASC (i.e. persons employed under contract, consultants and staff seconded to the ASC), ASC delegates or person assisting ASC delegates to notify the ASC of their pecuniary or other interests that could conflict with their public duty and to take whatever action is necessary to avoid the conflict (cf NCSC Act s.49). PSA staff of the ASC will be required to make disclosure by virtue of Public Service Regulation 8B.

Cl.126 : Defence

289. A defence of ignorance of a particular fact or matter is provided to a person who is prosecuted for failure to notify pecuniary interests under cl.125 (Bill cl.126 - based on NCSC Act sub-s. 49(3)).

Division 2 - Confidentiality

Cl.127 : Confidentiality

290. Clause 127 is more comprehensive than NCSC Act s.47 in imposing a positive duty on the ASC to take all reasonable measures to protect the unauthorised disclosure of information given to it in confidence. In addition to being directly accountable to one responsible Minister, officers of the ASC will also be subject to the secrecy requirements of s.70 of the Crimes Act 1914 and staff will be subject to any administrative arrangements dealing with their contracts of employment.

However, the disclosure of information is deemed to be an authorised disclosure for the purposes of:

- compliance with a requirement of a law of the Commonwealth or a prescribed law of a State or Territory: or
- to assist an authority or person to perform functions or powers analogous to those of the ASC.

Division 3 - Restrictions on Dealing in Securities  
and Futures Contracts

Cl.128 : Certain persons not to deal on the basis of certain information

291. Persons who are, or have been, associated with the ASC, will be prohibited from dealing in price sensitive information relating to securities or futures contracts (Bill cl.128 - based on NCSC Act sub-s. 48(1)).

Cl.129 : Compensation to other parties where section 128 contravened

292. A person in breach of the prohibition in cl.128 will be liable to pay compensation to any person who sustains loss as a result of the breach and may be liable under some other law (Bill cl.129 - based on NCSC Act sub-ss.48(2) and (7)).

Cl.130 : Amount of compensation

293. The Bill also makes provision for the amount of compensation to be paid as a result of a person's insider dealing. The onus of proof will be on the person liable to pay the amount arising from a transaction (Bill cl.130 - based on NCSC Act sub-ss. 48(3) and (4)).



Cl.131 : Limitation of actions

294. No action for recovery can be taken after 2 years from the completion of the transaction (Bill cl.131 - based on NCSC Act sub-s. 48(5)).

Cl.132 : Commission may sue

295. If it considers it to be in the public interest, the ASC will be able to take action in the name, or for the benefit, of a person for recovery of compensation (Bill cl.132 - based on NCSC Act sub-s. 48(6)).

BILL PART 8 - FINANCE

296. Part 8 of the Bill (cls.133 to 144) deals with money payable to, or trust property received by, the ASC and how that money or property is to be applied or dealt with. These provisions are the standard provisions currently being used for non-trading statutory authorities.

Division 1 - General

Cl.133 : Payments to Commission by Commonwealth

297. This new clause may be compared with NCSC Act s.26. The ASC will be paid such money as the Parliament appropriates for the ASC's purposes. The Minister for Finance will be able to give directions about the amounts in which, and the times at which, appropriated funds are to be paid to the ASC.

Cl.134 : The Commission's money

298. This new clause may be compared with NCSC Act s.28.

299. The ASC's money (as opposed to money that must be paid into the Consolidated Revenue Fund) will consist of money appropriated by an Act of Parliament (see cl.133) and any other money paid to the ASC (enabling the ASC to be self-funded).

Cl.135 : How Commission's money to be applied

300. The ASC's money is to be applied to pay:

- its expenses and liabilities and those of the Corporations and Securities Panel, the Companies Auditors and Liquidators Disciplinary Board or the Accounting Standards Review Board
- remuneration, allowances or benefits (except those of the Advisory Committee - see Bill cl.161)

- superannuation benefits, or contributions under a superannuation scheme, for members who are not contributors to the Commonwealth Occupational Superannuation Scheme.

301. Money which the ASC does not immediately require may be invested with an approved bank, in Commonwealth securities or in any other manner which the Treasurer approves.

302. The Minister may require the ASC to pay to the Commonwealth a specified amount of its money that is not immediately required for its purposes. Moneys so paid will form part of the Consolidated Revenue Fund.

(Bill cl.135 - based on NCSC Act s.29).

Cl.136 : Estimates

303. This clause is based on NCSC Act s.31. The ASC will be required to prepare estimates of its receipts and expenditure (apart from estimates of receipts or expenditure of trust money) each fiscal year or as requested by the Minister. ASC expenditure must be in accordance with estimates approved by the Minister.

Cl.137 : Limitation on contracts and leases

304. The ASC will not be able to:

- enter into a contract (other than an employment contract under sub-cl.120(3) or 121(1)) involving payments exceeding \$250,000; or
- enter into a lease of land for more than 10 years

without the approval of the Minister or as permitted by the regulations (Bill cl.137 - cf NCSC Act s.33).

Cl.138 : Application of Division 3 of Part XI of Audit Act

305. By virtue of this new provision, the ASC will be a public authority to which Division 3 of Part XI of the Audit Act 1901 applies. That Division requires an authority to:

- open bank accounts with approved banks
- keep proper accounts and records of its transactions and affairs
- have those accounts audited by the Auditor-General
- submit an annual report and financial statement to the responsible Minister.

Cl.139 : Liability to taxation

306. The ASC will be exempt from liability to pay taxation under any law (apart from Commonwealth debits tax and fringe benefits tax legislation) not specified in the regulations (Bill cl.139 - based on NCSC Act s.35 and see Debits Tax Administration Act 1982, sub-s. 8(4) and Fringe Benefits Tax Assessment Act 1986, sub-s. 66(3)).

Division 2 - Trust Property

Cl.140 : Commission may accept property on trust

307. The ASC will be able to accept gifts, bequests and devises on trust and will be able to act as trustee of money or other property vested in it on trust (Bill cl.140 - based on NCSC Act sub-s. 43(1)).

Cl.141 : Trust money to be paid into bank account

308. Trust money of the ASC must be paid into an approved bank trust account (Bill cl.141 - cf NCSC Act sub-s. 43(2)).

Cl.142 : How trust property to be applied

309. Trust money or trust property is to be applied and may be invested in accordance with the usual powers of a trustee (Bill cl. 142- based on NCSC Act sub-s. 43(3)).

Cl.143 : Accounts relating to trust property

310. This clause has an effect similar to NCSC Act sub-s.43(4).

311. The ASC will be required to keep proper accounts and records of its transactions and affairs relating to trust money and trust property and to ensure that all payments out of its trust money are correctly made.

Cl.144 : Audit in relation to trust property

312. This clause has an effect similar to NCSC Act sub-s.43(5).

313. The Auditor-General will be required to inspect and audit the accounts and records of the ASC's transactions with trust money. The Auditor-General or his or her delegate will be entitled to reasonable access to the ASC's trust accounts and records.

BILL PART 9 - THE ADVISORY COMMITTEE

314. Part 9 of the Bill (cls.145 to 170) establishes a Companies and Securities Advisory Committee to advise the Minister about the administration and reform of the national companies and securities scheme and deals with its staff and finances.

Division 1 - General

Cl.145 : Establishment

315. New cl.145 establishes the Companies and Securities Advisory Committee.

Cl.146: Advisory Committee is a body corporate

316. As the Advisory Committee will have its own Parliamentary appropriation (see cl.159) it will, like the ASC, be a body corporate with the usual attributes (perpetual succession, a common seal, capacity to acquire and dispose of property and capacity to sue and be sued in its corporate name) (Bill cl.146 - based on NCSC Act sub-s.10(1)).

Cl.147 : Membership

317. The Advisory Committee will consist of a part-time Convenor and such other part-time members as the Minister thinks fit. Committee members will be required to have substantial experience and prominence in one or more of the fields of business, the administration of bodies corporate, the financial markets, law, economics and accounting. The Minister is required to try to ensure that there is a proper 'geographic spread' of membership so that the business and financial communities of the States and Territories are adequately represented.

Cl.148 : Functions

318. The purpose of the Advisory Committee will be to advise the Minister on its own initiative or as requested by the Minister and, if it thinks fit, to make recommendations to the Minister on:

- the development or reform of national scheme legislation and regulations
- the operation or administration of national scheme legislation and regulations
- the performance or exercise of the ASC's functions and powers
- developments in the securities or futures markets (such as new financial instruments or undesirable markets practices) that might require regulatory action
- improving the efficiency of the capital markets
- such other matters relating to companies and close corporations and the securities and futures industries as may be referred to it by the Minister.

319. It is envisaged that the Advisory Committee will consult with the ASC, where appropriate, before providing advice to the Minister.

Cl.149 : Term of office as member

320. A person appointed to the Advisory Committee will hold office for between one and three years but will be eligible for re-appointment.

Cl.150 : Resignation

321. A person appointed to the Advisory Committee may resign by notice in writing to the Minister.

Cl.151 : Termination of appointment

322. An Advisory Committee member will hold office during the pleasure of the Minister who may terminate the member's appointment at any time. The Minister may terminate a Committee member's appointment if the member:

- becomes bankrupt etc.; or
- is physically or mentally incapacitated.

Cl.152 : Remuneration and allowances etc.

323. The Remuneration Tribunal will determine the remuneration of an Advisory Committee member, but if no determination is made by the Tribunal, the Minister will be able to determine the remuneration. Allowances paid to Committee will be determined by the Minister.

Cl.153 : Meetings

324. The procedure of the Advisory Committee will be able to be determined by the members present. If the Convenor is absent from a meeting, a member of the Committee may be nominated as an acting Convenor.

Cl.154 : Advisory Committee may inform itself in any manner

325. This clause is similar to s.28 of the Law Reform Commission Act 1973.



326. For the purpose of the performance by the Advisory Committee of any of its functions, the Advisory Committee may inform itself in such manner as it sees fit. This clause would enable the Advisory Committee to hold public hearings on law reform issues should it wish to do so.

Cl.155 : Publication of advice or recommendations

327. The Minister may, after consultation with the Committee, publish the advice or recommendations of the Committee. The Advisory Committee is also able to publish, of its own volition, any advice or recommendations that it has given to the Minister.

Division 2 - Staff and Finance

Cl.156 : Staff

328. Unless the Advisory Committee has made other arrangements (see cls.156(3), 157 and 158), its staff will be Commonwealth public servants or Commonwealth public office holders appointed or employed under the PSA (Bill sub-cl.156(1) - based on NCA Act sub-s.47(1) and see Bill cl.39).

329. The Convenor of the Advisory Committee will have the same powers over its PSA staff as a Secretary of a Commonwealth Department has (Bill sub-cl.156(2) - based on NCA Act sub-s.47(2)). These powers include the power to create or abolish an office (PSA s.27) and to reclassify an office (PSA s.29A).

330. The Advisory Committee will also be able to employ persons on contract. The terms and conditions of employment of these persons are such as the Advisory Committee determines with the Minister's approval (Bill sub-cl.156(3) and (4) - based on DPP Act sub-s.27(3)).

Cl.157 : Consultants

331. This clause is based on NCSC Act s.25 and NCA Act s.48 (and see Bill cl.121).

332. The Advisory Committee will also be able to engage special consultants to assist it. The Advisory Committee will be able to determine the terms and conditions of engagement of these consultants.

Cl.158 : Staff seconded to Advisory Committee

333. The Advisory Committee will be able to make arrangements with other Commonwealth, State and Territory Departments and authorities to have their staff seconded to the Committee to assist it (Bill cl.158 - based on NCA Act s.49 and DPP Act s.29).

Cl.159 : Payments to Advisory Committee by Commonwealth

334. This clause may be compared with NCSC Act s.26 (and see Bill cl.133).

335. The Advisory Committee will be paid such money as the Parliament appropriates for the Committee's purposes. The Minister for Finance will be able to give directions about the amounts in which, and the times at which, appropriated funds are to be paid to the ASC.

Cl.160: The Advisory Committee's money

336. This clause may be compared with NCSC Act s.28. The Advisory Committee's money (as opposed to money that must be paid into the Consolidated Revenue Fund) will consist of money appropriated by an Act of Parliament (see cl.159) and any other money paid to the Advisory Committee.

Cl.161 : How Advisory Committee's money to be applied

337. This provision is based on NCSC Act s.29 (and see Bill cl.135).

338. The Advisory Committee's money is to be applied to pay its expenses and liabilities and any remuneration or allowances payable to members of the Advisory Committee.

339. Money which the Advisory Committee does not immediately require may be invested with an approved bank, in Commonwealth securities or in any other manner which the Treasurer approves.

340. The Minister may require the Advisory Committee to pay to the Commonwealth a specified amount of its money that is not immediately required for its purposes. Moneys so paid will form part of the Consolidated Revenue Fund.

Cl.162 : Estimates

341. This clause is based on NCSC Act s.31 (and see Bill cl.136).

342. The Advisory Committee will be required to prepare estimates of its receipts and expenditure (apart from estimates of receipts or expenditure of trust money) each fiscal year or as requested by the Minister. Expenditure of the Advisory Committee's money must be in accordance with estimates approved by the Minister.

Cl.163 : Limitation on contracts and leases

343. This clause is based on NCSC Act s.33 (and cf. Bill cl.137).

344. The Advisory Committee will not be able to:

- enter into a contract (other than a contract of employment) involving payments exceeding \$50,000; or

- enter into a lease of land for more than 10 years, without the approval of the Minister or as permitted by the regulations.

Cl.164 : Application of Division 3 of Part XI of Audit Act

345. Like the ASC (see Bill cl.138), the Advisory Committee will be a public authority to which Division 3 of Part XI of the Audit Act 1901 applies. That Division requires an authority to:

- open bank accounts with approved banks;
- keep proper accounts and records of its transactions and affairs;
- have those accounts audited by the Auditor-General; and
- submit an annual report and financial statement to the responsible Minister.

Cl.165 : Liability to taxation

346. The Advisory Committee will be exempt from liability to pay taxation under any law (apart from Commonwealth debits tax and fringe benefits tax legislation not specified in the regulations (Bill cl.165 - based on NCSC Act s.35 and see Debits Tax Administration Act 1982, sub-s.8(4) and Fringe Benefits Tax Assessment Act 1986, sub-s.66(3)).

Cl.166 : Advisory Committee may accept property on trust

347. This clause is based on NCSC Act sub-s.43(1).

348. The Advisory Committee will be able to accept gifts, bequests and devises on trust and will be able to act as trustee of money or other property vested in it on trust.

Cl.167 : Trust money to be paid into bank account

349. Trust money of the Advisory Committee must be paid into an approved bank trust account (Bill cl.167 - based on NCSC Act sub-s.43(2)).

Cl.168 : How trust property to be applied

350. Trust money or trust property of the Advisory Committee is to be applied and may be invested in accordance with the usual powers of a trustee (Bill cl.168 - based on NCSC Act sub-s.43(3)).

Cl.169 : Accounts relating to trust property

351. This clause has an effect similar to NCSC Act sub-s.43(4).

352. The Advisory Committee will be required to keep proper accounts and records of its transactions and affairs relating to trust money and trust property and ensure that all payments out of its trust money are correctly made.

Cl.170 : Audit in relation to trust property

353. This clause has an effect similar to NCSC Act sub-s.43(5).

354. The Auditor-General will be required to inspect and audit the accounts and records of the Advisory Committee's transactions with trust money. The Auditor-General or his or her delegate will be entitled to reasonable access to the Advisory Committee's trust accounts and records.

BILL PART 10 - THE CORPORATIONS AND SECURITIES PANEL

355. Part 10 of the Bill (cls.171 to 184) establishes a new Corporations and Securities Panel, independent from the ASC, to conduct private hearings with respect to such class or classes of matters as are designated by the Minister.

Division 1 - General

Cl.171 : Establishment of Panel

Cl.172 : Membership

Cl.173 : President

356. These clauses establish the Panel and provide for its members to be appointed by the Governor-General on a part-time basis on the nomination of the Minister. A person will not be nominated for appointment unless he or she has knowledge of, or experience in, one or more of the fields of business, the administration of bodies corporate, the financial markets, law, economics and accounting. One of the persons appointed will be appointed as President.

Cl.174 : Functions and powers of the Panel

Cl.175 : Certain functions and powers may be vested in Panel

357. The Panel will have such functions and powers as are conferred on it by or under a national scheme law. The Minister will be able to direct that the Panel shall exclusively perform or exercise specified functions or powers of the ASC or Companies Auditors and Liquidators Disciplinary Board. It is envisaged that initially the Minister will direct that the Panel should perform the ASC's function of declaring conduct unacceptable during a takeover. All other functions would initially be performed by the ASC. If the

Panel proved to be effective, it is envisaged that the Minister would direct that further functions be performed by the Panel instead of the ASC. Such functions might include those now performed by the Companies Auditors and Liquidators Disciplinary Board.

Cl.176 : Term of office as member

Cl.177 : Term of office as President

358. Members of the Panel will be appointed for up to 5 years and will be eligible for re-appointment. The President will hold office until the end of his or her term or until he or she ceases to be a member but may be re-appointed.

Cl.178 : Resignation

Cl.179 : Termination of appointment

359. The President or other Panel member will be able to resign by writing to the Governor-General. The Governor-General will be able to terminate a member's appointment in the event of the member's:

- misbehaviour
- physical or mental incapacity
- bankruptcy etc.
- contravention, without reasonable excuse, of cl.128 dealing in price sensitive information.

Cl.180 : Remuneration and allowances

360. A Panel member will be paid such remuneration and allowances as are determined by the Remuneration Tribunal.

Cl.181 : Acting President

361. The Minister will be able to appoint a Panel member to act as President when the President's office is vacant or the President is absent from office. The appointment of a person acting as President during a vacancy will not be able to continue for more than 12 months.

Division 2 - Conduct of Panel's Business

Cl.182 : Constitution of Panel in relation to particular matters

362. The Panel will comprise the President and 2 other members. The President will be able to convene the Panel as required. The President will be able to organise the composition of the Panel on a case by case basis by selecting a Deputy President and one other member from a pool of Panel members appointed by the Governor-General. The President will have the flexibility of selecting other members before or during the hearing of a matter, or if before it is determined, if a particular member ceases to be available.

Cl.183 : Disclosure of interests by members

363. Where a Panel member has a pecuniary or other interest that could conflict with the proper performance of the member's functions with respect to a particular matter that is to be heard by the Panel, the member will be required to disclose the interest to the parties involved in the matter and will not be able to take part in the matter without the parties' consent.

364. Where the President becomes aware that a Panel member has a conflict of interest with respect to a particular matter that is to be, or is being, heard by the Panel, the President



will be able to choose another member to replace the member with the conflict of interest. If the President still wishes the member to take part in the hearing of a matter notwithstanding the conflict of interest, the President will be required to disclose the member's interest to all the parties involved in the matter.

Cl.184 : Restrictions on Panel members dealing in securities and futures contracts

365. Panel members will, like persons who are or have been associated with the ASC, be prohibited from dealing in price sensitive information relating to securities or futures contracts and will be liable to pay compensation to any person who sustains loss as a result of a breach of the prohibition.

BILL PART 11 - COMPANIES AUDITORS AND LIQUIDATORS  
DISCIPLINARY BOARD

366. This Part is substantially the same as the provisions contained in the ACT Companies Auditors and Liquidators Disciplinary Board Ordinance 1982 (CALDBO).

Division 1 : Constitution of Disciplinary Board

367. Division 1 of Part 11 of the ASC Bill (cls.185 to 196) provides for the formation and constitution of a Board which would attend to disciplinary matters in relation to auditors and liquidators registered and performing their functions under the CB.

368. Auditors and liquidators presently registered are subject to the disciplinary terms contained in the CA and Codes and the disciplinary measures taken by the various State and Territory Companies Auditors and Liquidators Disciplinary Boards.

Cl.185 : Establishment of Disciplinary Board

369. Cl.185 establishes a Companies Auditors and Liquidators Disciplinary Board.

Cl.186 : Membership of the Disciplinary Board

370. This clause is based on CALDBO s.6.

371. The Board Chairperson, appointed by the Minister, will be a legal practitioner who has been enrolled to practise in a Supreme Court of a State or Territory, or a Court of higher jurisdiction, for not less than 5 years.

372. The Bill provides for the appointment of 2 other members, by the Minister, from panels of names supplied by the National Councils of both the Institute of Chartered Accountants in Australia and the Australian Society of Accountants (1 member from each panel of 5 names).

373. All appointments, to the Board, are on a part-time basis (Bill cl.186).

Cl.187 : Functions and Powers of the Disciplinary Board

374. This clause is based on CALDBO s.5.

375. The Board has the functions and powers conferred by Division 3 of Part 9.2 of the Corporations Bill (Bill cl.187).

Cl.188 : Term of office

376. This clause is based on CALDBO paras. 6(3)(b) and (c).

377. All appointments to the Board are to be for maximum terms of 3 years. Appointees are eligible for re-appointment for further terms (Bill cl.188).

Cl.189 : Resignation from office

378. This clause is based on CALDBO s.11. The Chairperson, other member or deputy of a member may tender a written resignation signed and delivered to the Minister (Bill cl.189).

Cl.190 : Termination of appointment

379. This clause is essentially the same as CALDBO s.12.

380. The Minister has the discretion to terminate the appointment of the Chairperson, a member or deputy of a member because of his or her misbehaviour or physical incapacity (Bill sub-cl.190(1)).

381. The Minister shall terminate the appointment of a Chairperson, member or deputy if he or she:

- . is absent without leave of the Board for 3 consecutive Board meetings,
- . is an insolvent under administration,
- . is convicted of an offence punishable by imprisonment for 12 months or more,
- . becomes of unsound mind; or
- . fails to disclose an interest in a matter in accordance with cl.194 (Bill sub-cl.190(2)).

Cl.191 : Acting Chairperson

382. This clause is essentially the same as CALDB s.7.

383. The Minister may appoint an acting Chairperson (who must be qualified for appointment as Chairperson) during the absence of the Chairperson or during a vacancy in the office of Chairperson (Bill cl.191).

Cl.192 : Appointment of deputies

384. This clause is essentially the same as CALDBO s.8.

385. The Minister may appoint deputies to perform the duties of a member appointed from the panel submitted by one of the accounting bodies during that member's absence (Bill cl.192).

Cl.193 : Meetings

386. This clause is essentially the same as CALDBO s.9.

387. The Chairperson shall convene meetings of the Board at which he or she shall preside, and at which he or she and 1 member shall constitute a quorum.

388. Questions considered at a meeting are determined by majority vote and the Chairperson presiding at a meeting of the Board has a casting as well as a deliberative vote.

389. Other meeting procedures are as determined by the Board (Bill cl.193).

Cl.194 : Disclosure of interest

390. This clause is essentially the same as CALDBO s.10.

391. Members (including the Chairperson) shall disclose any direct or indirect pecuniary interest in a matter being or about to be considered by the Board.

392. The disclosure shall be recorded in the minutes and the member may not normally be present during deliberation of, or take part in any decision, by the Board on the matter. However, the Minister or the Board may allow a member to be involved in consideration of a matter in which he or she has declared a pecuniary interest (Bill cl.194).

Cl.195 : Remuneration and Allowances

393. This clause is based on CALDBO s.13.

394. The Remuneration Tribunal determines the remuneration of members of the Board, although if no such determination has been made, the Minister may determine the remuneration. The Minister will determine allowances (Bill cl.195).

Cl.196 : Confidentiality

395. The Board has to protect from unauthorised use or disclosure information given to it in confidence.

396. Authorised disclosure of information is:

- (a) where it is released in accordance with another law (eg the Freedom of Information Act); or
- (b) where it is given to a body or person in a State or Territory or another country to help that body or person perform or exercise a function or power that corresponds with any of the Board's functions or powers.

(Bill cl.196).

Division 2 - Hearings by Disciplinary Board

397. This Division deals with the hearing of complaints against registered auditors and liquidators by the Disciplinary Board and are drawn from CA ss.30A to 30R inclusive. Those disciplinary sections not dealt with in the Bill are contained in the CB.

Cl.197 : Hearings

398. This clause is based on CA s.30E.

399. The Board will be given power to conduct hearings for the purpose of exercising its functions or powers with respect to the cancellation or suspension of registration.

400. Where the Board is required to allow a respondent the opportunity of attending a hearing to present his case, the Board will be required to afford the ASC a similar opportunity.

401. A hearing must be conducted in private. The Board will be entitled to give directions as to the persons who will be entitled to be present at a hearing that is conducted in private.

402. A respondent who is entitled to present his or her case at a hearing will be entitled to request that the hearing be conducted in public.

403. Where such a hearing is conducted in public and where the Board is satisfied that the evidence is of a confidential nature or may affect the interests of any other person, the Board will be entitled to:

- (a) direct that part of the hearing take place in private; or
- (b) prevent or restrict the publication of evidence or documents produced to the Board.

404. A person who must be afforded the opportunity of being present at a hearing (i.e. the ASC and the respondent) must be given proper notice of the hearing.

405. A person who is entitled to appear at a hearing and who does not wish to appear in person or provide a representative, will be able to lodge written submissions with the Board. The Board will be required to take such submissions into account in relation to the matter (Bill cl.197).

Cl.198 : Power to summon witnesses and take evidence

406. This clause is essentially the same as CA s.30F.

407. A person may be summoned to appear at a hearing to give evidence and produce documents referred to in the summons. For the purposes of giving evidence a person may be required to take an oath or make an affirmation at the instance of the Chairperson (Bill cl.198).

Cl.199 : Proceedings at hearings

408. This clause is essentially the same as CA s.30G.

409. At a hearing, the Board will not be bound by the rules of evidence but will be required to observe the rules of natural justice.

410. Any party who appears at a hearing may have legal representation.

411. A person who attends a hearing pursuant to a summons is entitled to be paid such allowances and expenses as are provided for by the regulations.

412. The Board will be entitled to permit a person appearing at a hearing as a witness to give evidence by a written statement. If the Board thinks fit, that person will be required to verify the statement by oath or affirmation (Bill cl.199).

Cl.200 : Failure of witnesses to attend and answer questions

413. This clause is essentially the same as CA s.30H.

414. A person summoned to appear as a witness at a hearing shall not fail to attend unless excused or released from further attendance. A witness shall not refuse to answer a question, produce a document, take an oath or make an affirmation when directed to do so.

415. Contravention of the requirements in sub-cl.200(1) to 200(4) will be punishable by a fine of \$1,000 or imprisonment for 3 months.



416. Where the Board is satisfied that a person summoned to appear has failed to attend and give evidence, has attended and refused to take an oath or make an affirmation, or has failed to answer a question or produce a document, the Chairperson may certify such non-compliance to the Court. The Court may then inquire into the case and may either order the person to comply with the requirement and/or punish the person as if he or she had been guilty of contempt of court (Bill cl.200).

Cl.201 : Contempt of Disciplinary Board

417. This clause is essentially the same as CA s.30J.

418. It is an offence punishable by fine or imprisonment to, inter alia, do any act that would constitute contempt of court if the Board were a court of record (Bill cl.201).

Cl.202 : Protection of Members etc.

419. This clause is based on CALDBO s.14 and CA s.30K.

420. The Chairperson or a member of the Board will have, in the performance of his or her duties, the same protections and immunities as are possessed by a High Court Judge.

421. Legal practitioners and witnesses will also be afforded the same immunities, protection and privileges as they would be afforded in proceedings conducted in the High Court of Australia (Bill cl.201).

Cl.203 : Hearings deemed to be judicial proceedings

422. A hearing before the Board shall, for the purposes of Part III of the Commonwealth Crimes Act 1914, be deemed to be a "judicial proceeding".

423. Under s.31 of the Crimes Act 1914 "judicial proceeding" means a proceeding in or before a Federal Court or Court exercising Federal jurisdiction, or Court of a Territory, and includes a proceeding before a body or person acting under the law of the Commonwealth, or of a Territory, in which evidence may be taken an oath (Bill cl.203).

Cl.204 : Costs

424. This clause is essentially the same as CA s.30Q.

425. This clause deals with the recovery of costs (including the costs of and incidental to the hearing) by the respondent and by the ASC (Bill cl.204).

PART 12 - ACCOUNTING STANDARDS REVIEW BOARD

426. Part 12 of the Bill (cls.205 to 215) establishes an Accounting Standards Review Board ('ASRB') which will take over the functions of the body, also known as "Accounting Standards Review Board", established by the Ministerial Council for Companies and Securities. With the exception of Bill cl.215 (Annual Report), these provisions do not have any equivalent in the co-operative scheme legislation. However, they generally follow Ministerial Council resolutions about the establishment, functions and powers of the body established by that Council.

Cl.205 : Establishment of Review Board

427. Clause 205 establishes the ASRB.

Cl.206 : Membership of the Review Board

428. The ASRB will have a Director and such other members as are appointed by the Minister. There is no maximum limit on the number of members who can be appointed. The ASRB Director and members, all of whom will be appointed on a part-time basis, will be required to have substantial knowledge of, or experience in, one or more of the fields of accounting, law or business (Bill cl.206).

Cl.207 : Functions and powers

429. The functions of the ASRB will be to:

- (a) develop a conceptual framework, not having the force of an accounting standard, against which it will evaluate proposed accounting standards submitted to it;

- (b) review proposed accounting standards referred to it;
- (c) sponsor or undertake the development of possible accounting standards;
- (d) engage in such public consultation as may be necessary to decide whether a accounting standard should be approved;
- (e) change the form and content of any proposed accounting standard submitted to it where such a change is considered necessary.

430. In addition, the ASRB will have such functions as are conferred upon it by other national scheme laws. The most important of these will be to make accounting standards in accordance with cl.283 of the Corporations Bill.

431. The above functions and powers generally follow those conferred on the existing body by either resolution of the Ministerial Council or the Companies Act 1981 (Bill cl.207).

Cl.208 : Term of office

432. A person appointed to the ASRB as the Director or as a member will hold office for a maximum term of 3 years. The Director or a member whose term has expired or is about to expire is eligible for re-appointment (Bill cl.208).

Cl.209 : Resignation from office

433. A person appointed to the ASRB may resign by notice in writing delivered to the Minister (Bill cl.209).

Cl.210 : Termination of appointment

434. The Minister may terminate the appointment of the Director or a member if the person is physically or mentally incapacitated; or becomes bankrupt etc. (Bill cl.210).

Cl.211 : Acting Director

435. During the absence of the Director, or during a vacancy in the office of Director, the Minister is empowered to appoint an acting Director from amongst the members of the ASRB (Bill cl.211).

Cl.212 : Meetings

436. The Director is to convene such meetings of the ASRB as occasion requires. The Director is to preside at a meeting of the ASRB. The procedures for calling and conducting meetings of the ASRB are to be as decided by the Board, except to the extent that:

- (a) a quorum will comprise the Director and one other member;
- (b) matters considered at meetings will be decided by a majority of votes; and
- (c) the Director has a casting vote.

(Bill cl.212).

Cl.213 : Remuneration and allowances

437. The remuneration of the Director and other members of the ASRB will be as determined by the Remuneration Tribunal. However, where the Tribunal has not made such a determination, the remuneration will be as determined by the Minister. Allowances will be as determined by the Minister (Bill cl.213).

Cl.214 : Confidentiality

438. The ASRB has to protect from unauthorised use or disclosure information given to it in confidence.

439. Authorised disclosure of information is:

- (a) where it is released in accordance with another law (eg the Freedom of Information Act); or
- (b) where it is given to a body or person in a State or Territory or another country to help that body or person perform or exercise a function or power that corresponds with any of the ASRB's functions or powers.

(Bill cl.214).

Cl.215 : Annual report

440. This clause is based on CA s.266G and is generally similar to that section except for the omission of the reference to the Ministerial Council in para.266G(1)(b).

441. The ASRB is, by 31 October in each year, to prepare and furnish to the Minister, a report on its operations for the 12 months ending on 30 June in that year. The Minister is required to table the ASRB's report in each House of the Parliament within 15 sitting days after it is received from the Board (Bill cl.215).

BILL PART 13 - MISCELLANEOUS

442. Part 13 of the Bill (cls.216 to 223) deals with various miscellaneous matters including arrangements which the Commonwealth Minister may make with other State and Territory Ministers for the use of their resources.

Cl.216 : Validity of certain actions

443. Acts by a person appointed to, or appointed to act in, an office under the Bill will not be invalidated even though:

- the person has not been appointed;
- his or her appointment is irregular or defective;
- the appointment has ceased;
- the acting appointment has not been made or has ceased.

(Bill cl.216 - cf NCSC Act sub-ss. 11(6), 11(7) and 17(8)).

Cl.217 : Liability for damages

444. This clause is based on NCSC Act sub-s.41(4) but has been extended in its operation.

445. The ASC; Advisory Committee; their members, officers, employees; ASC delegates; and other persons appointed under the Bill or under any prescribed Act, will not be liable to an action for damages for an act performed in good faith in pursuance of any function conferred under an Act.

Cl.218 : Duplicate seals

446. The ASC is to have a common seal and such duplicate of the seal as it directs. A document to which a duplicate seal

is affixed is taken to have had the ASC's common seal affixed to it (Bill cl.218 - based on NCSC Act sub-s. 10(2)).

**Cl.219 : Judicial notice of Commission's seal and members' signatures**

447. This clause is based on NCSC Act sub-ss.10(3) to (5). Courts, judges and other persons authorised to receive evidence are to take judicial notice of:

- the ASC's common seal
- the official signature of the person who holds or has held, or is acting or has acted in, the office of Chairperson, Deputy Chairperson or other member of the ASC if that signature appears on any official document.

**Cl.220 : Arrangements with the States and Territories**

448. This new provision permits the responsible Commonwealth Minister to make arrangements with a State or Territory Minister or with the Administrator of an external Territory about any matter connected with the administration of national scheme legislation or the performance or exercise of a function or power of the ASC or Advisory Committee.

449. These arrangements may include arrangements as to:

- the transfer of State or Territory Corporate Affairs Commission records
- the use of State or Territory offices or facilities
- delegation of ASC powers or functions to a State or Territory authority or officer
- the secondment of State or Territory officers.



450. The arrangements may include provision for the States or Territories to be reimbursed in respect of matters to which the arrangements relate.

(Bill cl.220 - cf Aboriginal Affairs (Arrangements with the States) Act 1973, s.5).

Cl.221 : Acquisition of State or Territory books

451. This clause is new. It will enable certain records held by State or Territory authorities (and in particular, records held by CACs) to vest in the ASC in certain circumstances. The powers contained in the clause will be exercised only as a last resort in the event that a State or Territory refused to hand over its corporate affairs records to the Commonwealth. In the first instance it is envisaged that the ASC would request State or Territory authorities to make their records available for inspection and copying. If this request were refused, the powers conferred by cl.221 would then be invoked so as to avoid the need for companies and others to have to reodge documents with the ASC.

452. The Minister, or the ASC with the Minister's written approval, will be able to declare that specified "State or Territory books" relating to corporations, foreign companies and others regulated by a national companies and securities scheme law are vested in the ASC (Bill sub-cl.221(1)). The term "State or Territory books" is defined in sub-cl.221(12) to mean books in the possession of, or of an authority of, a State or Territory (including the Northern Territory). The term "books" is defined in cl.5 to include registers, accounts or accounting records, banker's books and any other document or record of information.

453. Where the Minister or the ASC is satisfied that:

- (a) access to particular State or Territory records would assist it to perform or exercise any of its functions or powers or assist in ensuring compliance with a national companies and securities scheme law; or
- (b) particular State or Territory records may relate to an alleged or suspected contravention of a national scheme law, or of some other Commonwealth or Territory law concerning the management or affairs of a body corporate or involving fraud or dishonesty in connection with a body corporate, securities or futures contracts -

the Minister, or the ASC with the Minister's approval, will be able to declare their satisfaction as to these matters and that the State or Territory records are vested in the ASC (Bill sub-cl.221(2)).

454. It will be irrelevant that the ASC is able to obtain the State or Territory records from some other source (Bill sub-cl.221(3)).

455. Declarations made under cl.221 will have to be published in the Gazette and provided to the State, Territory or authority which has the records (Bill sub-cl.221(4)). On publication of a declaration, the relevant records will vest in the ASC (Bill sub-cl.221(5)) and will have to be delivered to the ASC within a reasonable time and at a reasonable place (Bill sub-cl.221(6)).

456. Once the records have been delivered to the ASC, the ASC will be required to permit the State, Territory or authority concerned to inspect the records free of charge at all reasonable times and to make copies of, or take extracts from, any of the records to enable it to administer its own laws (Bill sub-cl.221(7)).

457. If the operation of cl.221 results in State records being acquired otherwise than on just terms, the Commonwealth will be liable to pay reasonable compensation (Bill sub-cl.221(8) and (9) - cf. Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987 sub-ss.19(3) and (4)). The ASC will also be liable to reimburse the State, Territory or authority whose records it has acquired for all reasonable costs incurred by it in delivering the books to the ASC (Bill sub-cl.221(10)).

458. The Commonwealth, States, Northern Territory and Norfolk Island will be bound to comply with cl.221 (Bill sub-cl.221(11)).

#### Cl.222 : Jurisdiction of Courts

459. This new clause provides that the Federal Court and State and Territory Supreme Courts will have concurrent jurisdiction to hear matters arising from the Bill. This is not intended to affect the operation of s.68 of the Judiciary Act 1903 dealing with the jurisdiction of State and Territory Courts in criminal matters.

#### Cl.223 : Regulations

460. The Governor-General will be able to make any necessary regulations (Bill cl.223 - cf NCSC Act s.53).

ASC Bill : Explanatory Memorandum - Corrigendum to Para.357 -  
Conferral of Powers on the Corporations and Securities Panel

Paragraph 357 of the explanatory memorandum indicates that the Minister will be able to direct that the Corporations and Securities Panel (established under Part 10 of the Bill - see cl.171) exclusively perform specified functions and powers of the ASC or the Companies Auditors and Liquidators Disciplinary Board. It was envisaged that the initial area of power referred to the Panel would be the proposed power of the ASC to declare certain acquisitions or takeover conduct unacceptable and to make consequential freezing orders.

This approach has been modified. Conferral of powers on the Panel will now be achieved by specific legislative amendment when considered appropriate. This will ensure that conferral of powers on the Panel will be subject to full Parliamentary scrutiny and exposure.

However, because of the importance of ensuring that the unacceptable acquisition or conduct declaration powers under Part 6.9 of the Corporations Bill are exercised by a body that is independent of the investigating authority (the ASC), that Bill now confers immediate exclusive power on the Panel to make such declarations (see corrigendum to that Bill's explanatory memorandum for further details). This achieves in a more immediate and direct manner the result which, as foreshadowed in paragraph 357 of the explanatory memorandum, was planned to have been achieved by Ministerial direction.

Conferral of a hearings power in respect of this declaration power and in respect of any other power legislatively conferred on the Panel will also be achieved in a more explicit way in Part 10 of the ASC Bill (see Division 3 (cls.184-198)). Whereas it was previously envisaged that any conferral of power on the Panel would pick up by reference the ASC's general hearings powers, this method provides for a specific hearings power for the Panel. Although these provisions are generally based on the ASC's hearings powers, a major distinguishing feature is that all Panel hearings must be held in private (sub-cl.185(3)).

As a result of these changes, the numbering of clauses of the Bill has also changed.

The explanatory memorandum should be read as if:

- references to cl.175 were omitted;
- references to cls.176-184 were references to cls.175-183;
- references to cls.185-196 were references to cls.199-210; and
- references to cls.197-223 were references to cls.212-238.