1988

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CORPORATIONS BILL 1988

CORPORATIONS (FEES) BILL 1988

SECURITIES EXCHANGES (APPLICATION FOR MEMBERSHIP) FIDELITY FUNDS CONTRIBUTION BILL 1988

SECURITIES EXCHANGES (MEMBERSHIP) FIDELITY FUNDS CONTRIBUTION BILL 1988

SECURITIES EXCHANGES FIDELITY FUNDS BILL 1988

NATIONAL GUARANTEE FUND (REPORTABLE TRANSACTIONS) LEVY BILL 1988

NATIONAL GUARANTEE FUND (PARTICIPATING EXCHANGES) LEVY BILL 1988

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FUTURES ORGANISATIONS (APPLICATION FOR MEMBERSHIP) FIDELITY FUNDS CONTRIBUTION BILL 1988

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EXPLANATORY MEMORANDUM

VOLUME 1

(Circulated by authority of the Honourable Lionel Bowen, MP, Deputy Prime Minister and Attorney-General)

14/12/01

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CONTENTS OF EXPLANATORY MEMORANDUM

CORPORATIONS BILL AND RELATED FEES AND LEVY BILLS

OUTLINE

The Corporations Bill ('the Bill') contains the substantive provisions necessary for the regulation of 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.

2. The Corporations Bill is an omnibus Bill that draws together the present provisions found in the Companies Act 1981, the Securities Industry Act 1980, the Companies (Acquisition of Shares) Act 1980, the Futures Industry Act 1986 and in State and Northern Territory legislation applying those Acts. The scope of the legislative provisions of the Bill is along the lines of the existing law. However, some reforms have been made to remove unnecessary regulation or to overcome specific inefficiencies or burdens in the existing legislation.

3. For example, the rules applying to companies seeking to raise funds from the public have been simplified so as to expedite the process whilst improving the quality of information provided to investors. The Bill also makes reforms to the provisions dealing with shareholder disclosure, company names, transfer of marketable securities, licensing of representatives and public availability of memoranda and articles of association. These are dealt with further in the introduction to the explanatory memorandum.

4. 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.

5. The Bill is being introduced together with the Australian Securities Commission Bill ('ASC Bill') and the Close Corporations Bill. The ASC Bill establishes an Australian Securities Commission (ASC) to regulate companies and the securities and futures industries in Australia. It confers broad investigation, information and hearings powers on the ASC. The Close Corporations Bill provides a new simplified corporate entity for small business. The Corporations (Fees) Bill details the matters in respect of which fees are payable for the purposes of the Corporations Bill. There are nine other Bills - ancillary to the Corporations Bill - dealing with levies payable by members of stock exchanges and futures exchanges to the guarantee funds or fidelity funds established by those exchanges. These matters are dealt with in separate Bills, as they are in the nature of taxing measures, but do not involve departures from the existing co-operative scheme arrangements.

Financial impact statement

6. The Bill is expected to result in a significant reduction of business costs in the light of reforms which it will make to remove unnecessary regulation and to overcome specific inefficiencies or burdens in the existing co-operative companies and securities scheme legislation. For example, the Bill will replace the complex and excessively detailed rules as to the content of prospectuses with much more basic disclosure rules. The Bill will simplify the process of company incorporation by removing the subjective tests as to whether a name is available for reservation. Other amendments are proposed to assist in remedying delays in the transfer and registration of securities.

7. The costs of establishing and maintaining the ASC, which will administer 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

8. The explanatory memorandum proceeds by relating each provision of the Corporations Bill, where appropriate, to the corresponding sections under the existing companies, securities and futures industry codes. The general nature of the provision is explained and, in the case of more complex provisions, where there are significant changes in policy from the existing law, these changes are addressed in greater detail. Where there are relevant differences from the existing legislation, these are identified and explained in the explanatory words accompanying the provision. In the absence of any such qualifying words it may be assumed that the legislative policy of the provision is similar to the existing law. 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;

(d) deals sequentially with each clause of the Bill;

(e) contains a table of major changes to co-operative companies and securities scheme legislation; and

(f) contains a comparative table of the numbering of co-operative companies and securities legislation and of the Corporations Bill and ASC Bill.

BACKGROUND

Co-operative companies and securities scheme

9. 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.

10. 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.

11. 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 Parliament 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.

12. 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

13. 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.

14. 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.

15. 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.

16. 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.

17. 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's 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.

18. Significant improvements have been made. The consolidation of the existing law into the Corporations Bill and the ASC 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.

19. 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.

20. 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. 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

21. 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.

22. 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 <u>all</u> 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 provisions). Complex problems relating to the meaning of 'offers to the public' and 'section of the public' will thereby be removed.

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

Shareholder Disclosure

24. 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.

25. The following approach is proposed:

(a) reduction of the substantial shareholding threshold from 10% to 5%;

(b) the tracing provisions in CA 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

26. 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 overzealous 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.

27. 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).

28. 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

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

Commonwealth legislation. 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.

39. 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

40. 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

41. 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.

ASC Hearings and Investigation Powers

42. 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.

43. 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.

44. 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).

45. 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

46. It is proposed to provide a new simplified corporate entity for small business which obviates the need for much of the inappropriate paraphenalia 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.

47. 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

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

ASC	-	Australian Securities Commission
ASC Bill	-	Australian Securities Commission Bill 1988
C&S Interpretation Act	-	Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980
CA	-	Companies Act 1981
CASA	-	Companies (Acquisition of Shares) Act 1980
CB	-	Corporations Bill 1988
FIA	-	Futures Industry Act 1986
NCSC	-	National Companies and Securities Commission
NCSC Act	-	National Companies and Securities Commission Act 1979
SIA	-	Securities Industry Act 1980
TPA	-	Trade Practices Act 1974
TPC	-	Trade Practices Commission

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49. The Bill is divided into the following Chapters:

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FUTURES ORGANISATIONS (APPLICATION FOR MEMBERSHIP) FIDELITY FUNDS CONTRIBUTION BILL 1988

BILL CHAPTER 1 - INTRODUCTORY

50. Chapter 1 of the Bill (cls.1 to 111) deals with various preliminary matters and contains various definitions and interpretation provisions used throughout the Bill.

PART 1.1 - PRELIMINARY

Cl.1 : Short title

51. When enacted, the Bill may be cited as the Corporations Act 1988.

Cl.2 : Commencement

52. Chapter 1 will commence on the day of which the Bill as enacted recieves Royal Assent. All other provisions will commence when proclaimed. 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 companies and securities scheme at least until well into 1989.

Cl.3 : Application to the Crown

53. Under this new provision the Commonwealth, States, Northern Territory and Norfolk Island will be bound to comply with the provisions of the Bill dealing with external administration (receivership, arrangements and reconstructions, winding up) apart from the offence provisions in Part 5.8.

Cl.4 : Extension to external Territories

54. 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: Commission has general administration of Act

55. The effect of this new provision is that the ASC will be responsible for the general administration of the Bill, subject to the control of the responsible Minister.

56. Under ASC Bill cl.12 the Minister is to have power to give written directions to the ASC about the policies it should pursue or the policies it should follow. However, the Minister is not to have power to give the ASC directions about a particular case.

BILL PART 1.2 - INTERPRETATION

57. Part 1.2 of the Bill (cls.6 to 9) contains various interpretation provisions used throughout the Bill.

Division 1 - General

58. This Division consolidates the definitions used throughout the Bill and states how those definitions apply.

Cl.6 : Effect of this Part

59. The interpretation provisions contained in this Part will apply unless a contrary intention appears in the Bill.

Cl.7: Location of other interpretation provisions

60. This new clause explains the location of the interpretation provisions throughout the Bill. Generally most interpretative provisions are in this Part, although a few particular ones are located near to where they are used.

Cl.8: Interpretation provisions to operate distributively

61. This new clause will ensure that an interpretation provision can have more than one effect without any one effect prejudicing the other (sub-cl.8(1)). Where an interpretation provision does have more than one effect, it will be deemed to be a distinct provision for each of those effects, when determining an effect of that interpretation provision for the purposes of sub-cl.8(1) (sub-cl.8(2)).

Cl.9 : Dictionary

62. This clause contains definitions of terms used in the Bill. Most definitions are substantially the same as those in the co-operative companies and securities scheme legislation.

63. Some of the terms defined in the Bill (with examples of their use) are set out below:

"accounting records"

64. This definition is the same as in CA s.5.

"accounting standard"

65. This is a new definition meaning (except in cls.283 and 288) an instrument in force determining an approved standard of accounting practice.

"accounts"

66. This is the same definition as in CA sub-s.266(1) and applies only to Parts 3.6 and 3.7 which deal with the accounting and auditing obligations of companies.

"acquire"

67. This new definition adds to the various definitions which appeared in the CA, SIA and FIA. This consolidated definition shows how cl.8 ensures each definition has full effect for the relevant purpose, notwithstanding a different meaning for a different purpose.

"adjustment agreement"

68. This definition is substantially the same as in FIA sub-s.4(1).

69. It is defined to mean a standardised agreement the effect of which is that a person will be under an obligation to pay, or will have a right to receive, an amount of money calculated by reference to a state of affairs existing at a particular future time (e.g. currency futures contracts, share price index futures contracts). Contracts or agreements under which the only possible results are that a particular party pays, or does not pay, at a particular time (e.g. an insurance or

superannuation contract) would fall outside the definition. The definition also includes the concept of 'fluctuations' in value or price: this concept is taken from the U.K. Financial Services Bill.

"agency"

70. This is a new definition extending the meaning to an authority, body or person.

"agreement"

71. This new definition consolidates those separate definitions in CASA and FIA. For example, this definition refers to the special meaning for the purposes of Chapter 6 or 7, being a relevant agreement. The definition of "relevant agreement" is substantially the same as in CASA sub-s.39B(4).

"amount"

72. This definition extends beyond the definition in FIA sub-s.4(1) by including "zero".

"ancillary offence"

73. This is a new definition referring to particular applicable offences created by the Crimes Act 1914.

"applicable accounting standard"

74. This is a new definition linking an accounting standard with a particular financial statement.

"approved securities organisation"

75. This definition is based on the one in SIA sub-s.4(1) and refers to an approved corporation maintaining a stock market.

"arbitrage transaction"

76. This definition is the same as in SIA sub-s.4(1).

"arrangement"

77. This definition is substantially the same as in CA sub-s.315(22) and has effect for the purposes of Part 5.1.

"articles"

78. This definition is the same as in CA sub-s.5(1) and SIA sub-s.4(1).

"assets"

79. This definition is the same as in FIA sub-s.69(8) and in SIA sub-s.51(6).

"Australian bank"

80. This definition is based on the definition of "banking corporation" in CA s.5, SIA s.4 and FIA s.4.

"Australian company law"

81. This new definition is used throughout this Bill as a term encompassing company laws in Australia.

"available"

82. This new special definition has effect in relation to names (see Part 4.2).

"banker's books"

83. This definition consolidates those in CA sub-s.5(1), FIA sub-s.4(1) and SIA sub-s.4(1).

"banking corporation"

84. This definition differs from those in CA, FIA and SIA by referring directly to an accepted interpretation of the same expression in the Constitution.

"benefit"

85. This definition is substantially the same as in CASA sub-s.39B(4).

"Board"

86. This new definition has quite distinct meanings in different parts of the Bill, similar to those distinct meanings in CA ss.30A and 266.

"body"

87. This new definition makes a clear distinction from "body corporate" by including unincorporated groups of natural persons.

"body corporate"

88. This new definition is significant for ensuring:

(a) that bodies corporate and foreign companies that are being wound up or which have been dissolved are included; and

(b) that "foreign companies" are included despite the effect of including foreign unincorporated bodies (outside the common understanding of "bodies corporate") which approximate corporations.

"bought position"

89. This definition is substantially the same as in FIA sub-s.4(1), but is expanded by reference to defined obligations and rights relating to futures contracts.

"borrowing corporation"

90. This definition is substantially the same as in CA sub-s.5(1).

"buy-back arrangements"

91. This new definition refers to arrangements made to ensure that a management company can comply with the buy-back convenant contained in a deed relating to prescribed interests.

"carry on"

92. This new definition refers to the extensive interpretation provisions in Division 3. This definition is important in determining which entities are required to register under this Bill.

"cash management trust interest"

93. This is a new definition of a commonly known particular kind of prescribed interest (see definition), the subject of a deed approved under Division 5 of Part 7.12.

"cause"

94. This is a new extended definition which is used in provisions relating to illegal dealings with securities and futures contracts.

"clearing house"

95. This definition is substantially the same as in FIA sub-s.4(1), modified to be constitutionally valid.

"client"

96. This definition is the same as the general definition in FIA sub-s.4(1). In Division 2 of Part 8.3, dealing with agreements with unlicensed persons, "client" is used in a different way.

"close corporation"

97. This new definition refers to a corporation to be registered under the Close Corporations Bill 1988.

"commencement"

98. This is a new definition applying only to the commencement of accounting standards.

"Commission"

99. This is a new definition referring to the Australian Securities Commission to be established by the Australian Securities Commission Bill 1988.

"company"

100. This is an important definition of a term used throughout the Bill.

101. Companies are defined as one kind of corporation (see definition) which in turn is one kind of body corporate. The common factor of "companies", as defined, is incorporation or registration under this Bill or corresponding State and Territory company laws.

102. Companies include only:

(a) (except in relation to a State or Territory in relation to take-overs) a body corporate incorporated or registered under this Bill;

(b) in relation to a State or Territory - a body corporate incorporated under State or Territory company law; and

(c) in relation to takeovers, a body corporate incorporated anywhere in Australia which has a share capital (which includes an unlimited company - see next definition in Bill).

103. Those companies included in category (a) above are:

(i) a company newly incorporated by registration under Division 1 of Part 2.2 of the Bill;

(ii) an existing company carrying on business in Australia that is required by Division 2 of Part 2.2 of the Bill to register as a company; and

(iii) a foreign company that is permitted by Division 3 of Part 2.2 of the Bill to register as a company.

"constitution"

104. This definition is different from that in the C & S Interpretation Act by the additional reference to the memorandum and articles of association of a company.

"contributing member"

105. This definition is based on the one in FIA s.105.

"corporation"

106. This new definition is very different from that for the same term in CA. In CA, "corporation" was defined to mean a wide range of bodies corporate, with a number of exclusions to the State applications of the Companies Act (C'th) made by way

of translator regulations. These exclusions included public authorities and special kinds of entities incorporated under their own general legislation, such as credit unions and building societies.

107. The term "corporation" has a different function in this Bill. Corporations, as defined, form one kind of bodies corporate. A corporation in turn is defined to consist of one of an exhaustive number of different kinds of bodies corporate. What might have come within the meaning of "corporation" under CA, but was also specifically excluded, need not ever come within one of the enumerated meanings of "corporation" in this Bill. Such entities excluded by definition, whilst still bodies corporate, would include registrable Australian corporations (see definition).

108. A corporation will be one of only the following:

(a) a foreign corporation (defined by reference to the Constitution);

(b) a trading corporation (defined by reference to the Constitution and includes a financial corporation - see definition)

(c) a Territory corporation;

(d) a banking corporation (see definition);

(e) an insurance corporation (see definition); or

(f) a company (see definition and comments above).

109. All of those bodies corporate are by definition within the constitutional reach of the Commonwealth.

"deadline"

110. This is a definition of a new term used in relation to financial years and annual returns (see e.g. cl.335).

"deal"

111. This definition is based on the definition of "dealing in securities" in SIA sub-s.4(1) but in addition refers to sub-underwriting securities.

"dealer"

112. This definition is based on the one in SIA sub-s.4(1). A dealer is one person or a group of people who carry on a securities business (defined in cl.93). There are special definitions elsewhere in the Bill not incorporated in this definition (see, e.g. cls.937, 948 and 962).

"debenture"

113. This definition is substantially the same as that in CA sub-s5(1). In CA there were other definitions in ss.147, 148 and 552 which are not repeated in this Bill.

"deed"

114. This definition is based on the one in CA sub-s.5(1) but in addition refers to an amending instrument for the purposes of the prescribed interest provisions.

"document"

115. This new definition includes concepts from various statutes reflecting modern methods of storing and reproducing information.

"eligible broker"

116. This use of this new definition is explained in cl.67.

"eligible commodity agreement"

117. This definition is substantially the same as FIA sub-s.4(1), with modifications reflecting other definitions used in this Bill (see also definition of "commodity agreement").

"eligible exchange-traded option"

118. This definition is based on the definition of "prescribed exchange traded option" in FIA sub-s.4(1).

"eligible communications service"

119. This is a new definition referring to those services within the meaning of the Constitution. The term is used to validly bring within the ambit of this Bill usage of those services sought to be regulated relating to corporations.

"eligible futures adviser"

"eligible futures broker"

120. These new definitions refer to futures brokers and futures advisers (see definitions) within the ambit of the Commonwealth's powers, other than exempt brokers or advisers (see cl.76).

"eligible futures broking business"

121. This new definition refers to futures broking businesses (see definition) within the ambit of the Commonwealth's powers.

"eligible futures contract"

122. This new definition refers to futures contracts within the ambit of the Commonwealth's powers.

"eligible futures market"

123. This new definition refers to futures markets (see definition) within the ambit of the Commonwealth's powers.

"eligible money market dealer"

124. This new definition is of a term for authorised short term money market dealers.

"eligible negotiable instrument"

125. This new definition refers to those instruments within the ambit of the Commonwealth's Constitutional powers. It is used, for example, in relation to the winding up provisions.

"eligible securities"

126. This new definition refers to what are commonly known under the term "securities" (including put and call options) but only those which are clearly within the ambit of the Commonwealth's powers.

"exchange"

127. This is the same definition as in SIA s.4 which was inserted to take account of the establishment of the Australian Stock Exchange Ltd (ASX Ltd).

"exchange member"

128. This definition is based on the one in FIA sub-s.4(1) but in (a) refers to a corporation that is a member.

"Exchange subsidiary"

129. This definition is based on the definition of "Exchange subsidiary" in SIA s.4 and CASA s.6 with only formal changes. The definition was inserted to take account of the changed status of existing capital city stock exchanges as subsidiaries of ASX Ltd.

"executive officer"

130. This definition is based on those in CA sub-s.5(1), FIA sub-s.4(1) as SIA sub-s.4(1) but in addition refers to a member of a close corporation.

"exempt public authority"

131. This new definition is based on the bodies exempted in para. (a) of the definition of "corporation" in CA sub-s.5(1). This term is used to refer to those bodies corporate which are not required to be registered, and do not have an option to register (see definition of "registrable Australian corporation" and cl.340).

"externally-administered body corporate"

132. This new definition is of a general term referring to those bodies corporate which are no longer fully autonomous. This submission to outside control could be by way of:

(a) liquidation;

(b) receivership;

(c) official management; or

(d) a compromise or arrangement.

133. The term is used extensively in provisions relating to the above, and generally throughout this Bill.

"financial year"

134. This definition combines the specific definition in CA sub-s.164(7) and the general definition in CA sub-s.5(1) modified to account for the circumstances in which a body corporate may not have been, or may lose status, as a company under this Bill.

"foreign company"

135. This is an important definition based on the one in CA sub-s.5(1), but differs:

(a) by referring to foreign corporations (within the meaning of the Constitution) instead of merely bodies incorporated outside the State or Territory;

(b) by including bodies incorporated in an excluded Territory; and

(c) by not covering companies which are incorporated in another State or Territory.

136. This last category of companies will be subject to the requirements to register in Division 2 of Part 2.2. Foreign companies are subject to the requirements to register in Part 4.1, Division 2 (see also Part 2.1 Division 3).

"futures advice business"

137. This is a new definition referring to the meaning given in cl.71 which is a considerably modified version of parts of the definition of "futures adviser" in FIA sub-s.4(1). This and other definitions of terms relating to Chapter 8 are substantially based on those in FIA but reflect the modifications necessary under the Commonwealth regime.

"group"

138. This new definition is substantially the same as the definition of "group of companies" in CA sub-s.266(7) but in addition links the definition to the state of affairs as at the end of a financial year.

"have"

139. This new definition avoids doubt in relation to information, by including possession of information in the concept of having information.

"hold"

140. This new definition makes clear that a person holds a document that is a copy of a licence if the person has that document in their possession.

"holding company"

141. This definition is based on CA sub-s.7(4), but modified to refer to bodies corporate in Parts 3.6 or 3.7 (see also cl. 49).

"information service"

142. This is a new definition used in defining, for example, a futures advice business (see cl. 71) for the purposes of licensing.

"insolvent under administration"

143. This definition is the same as those in CA sub-s.5(1) and SIA sub-s.4(1). It means an undischarged bankrupt under Australian law, or under the laws in force in any country which has bankruptcy provisions similar to those in force in Australia. The term "insolvent under administration" will also apply to persons whose financial affairs are subject to

an administration under Part X of the Bankruptcy Act 1966 other than a deed of assignment, or under the corresponding provisions of a law of an external territory or a country other than Australia.

"investment adviser"

144. This definition together with the definition of investment advice business (defined in cl.77) is based on the definition of investment adviser in SIA sub-s.4(1). An investment adviser is one person or a group of people who carry on an investment advice business.

"issue"

145. This definition is substantially the same as that in CA sub-s.5(1) but in addition refers to prescribed interests made available.

"listed corporation"

146. This is based on the definition in CASA s.6 but refers to a "body corporate" (rather than a "company") listed on a stock exchange in Australia or an external Territory.

"management company"

147. This definition is based on that in CA sub-s.164(1) and is relevant to prescribed interests (see Part 7.2, Division 5).

"marketable securities"

148. This definition is the same as that in CA sub-s.5(1) (see also definition of "securities" in SIA sub-s.4(1)). The term is used in Part 7.13 and in the Takeovers Chapter (e.g. cl.750).

"member"

149. This definition is based on that in SIA sub-s.4(1), but in addition refers to a member of a futures organisation.

"member organisation"

150. Para. (a) of the definition of "member organisation" which defines the term in relation to a securities exchange or stock exchange is based on the definition in SIA sub-s.4(1) with only minor changes in wording. This definition was inserted in the SIA to rationalise terminology dealing with members of stock exchanges by referring in one term to members operating alone and in partnerships.

"modifications"

151. This new definition avoids doubt by including additions, omissions and substitutions.

"money"

152. This new definition accounts for the terminology introduced by the Cheques and Payments Orders Act 1986 by including payment orders (which definition see also).

"notice"

153. This definition is based on that in CA sub-s.99(1) but does not automatically exclude a notice permitted under cl.1026.

"officer"

154. This definition is based on that in CA sub-s.5(1) but in addition includes a reference to a member of a close corporation.

"on behalf of"

155. This definition is the same as that in FIA sub-s.4(1).

"open"

156. This new definition avoids doubt as to the importance of requiring the registered office of a company to be open - the public must have access to that office.

"option contract"

157. This is a new definition which covers three commonly accepted meanings:

- para.(a): unlisted put and call options over securities;

- sub-para.(b)(i): foreign exchange contracts (cf. the definition of "foreign currency futures contract" in Schedule 1 of the Futures Markets Act, 1979 (NSW)

- sub-para.(b)(ii): share index contracts, based on para.(b) of the definition of "prescribed exchange-traded option" in FIA sub-s.4(1) (and cf. the definition of "share index options contract" in Schedule 1 of the Futures Market Act, 1979 (NSW).

"Part 5.7 body"

158. This new definition refers to two other new terms which are separately defined. See under "Type A body" and "Type B body" for further comments.

"participation interest"

159. This definition is based on those in CA sub-s.5(1) and SIA sub-s.4(1). There is some minor change of wording. It is defined widely in paras.(a), (b) and (c) subject to the

following exclusions: rights in time-sharing schemes (para.(d)), shares and debentures in corporations (para.(e)), interests in life insurance policies (para.(f)) and certain partnership agreements (para.(g)). There are three new exclusions: cheques, payment orders etc. (para.(h)); normal bank documents evidencing indebtedness (para.(j)) and certain prescribed documents and receipts (para.,(k)).

"power"

160. This definition is the same as that in NCSC Act sub-s.3(1).

"premises"

161. This definition is substantially the same as that in CA s.10 and FIA sub-s.14(8).

"prescribed interest"

162. This definition is based on the definition in CA sub-s.5(1) and SIA sub-s.4(1) but refers specifically to exempt interests for the purposes of Chapter 7.

163. It includes "participation interests" and rights to participate in time-sharing schemes. Regulations may declare certain rights exempt.

"profit or loss"

164. This definition is a simplification of that in CA sub-s.266(1).

"property"

165. This definition is the same as that in s.9 of the C & S Interpretation Act.

"proprietary company"

166. This definition serves the same purposes as that in CA sub-s.5(1) but distinguishes proprietary companies under State or Territory law from others.

"prospectus"

167. This definition is vastly simpler than that in CA sub-s.5(1). This simplification is achieved by using terms which are extensively defined elsewhere (for example, see definition of "notice"). However, the term has substantially the same meaning in its use in Chapter 7 as in CA.

"public corporation"

168. This new definition contains the same meaning as that of "public company" given in CA sub-s.5(1), but in addition includes extensively described Territorial or eligible corporations, in relation to certain prescribed interests. The purpose of this extension is to refer to those bodies corporate which are not public companies, but nevertheless are permitted to, and in fact do, engage in activities relating to prescribed interests.

"public document"

169. This is a new definition referring to the business-related documents of a body corporate which have been released by the body.

"publish"

170. This new definition is, in para.(b), based on those in CA sub-ss.99(1), 100(1) and 100(1). Para.(a) is based on, but far more narrow than, that in FIA sub-s.82(1) (and see sub-cl.1205(1)).

"quotation"

171. This definition is based on the definition of "quotation" in CA sub-s.5(1), CASA s.6 and SIA sub-s.4(1) with only minor changes of wording.

172. The definition includes quotations which are indicative or which are invitations as well as those which are binding offers in the narrow contractual sense.

"registered Australian corporation"

173. This new definition refers to a registrable Australian corporation (see definition) which has registered under Division 1 of Part 4.1.

"registered body"

174. This is a new definition. A foreign company (see definition) need not register until it carries on business in Australia (see cl.343). A registrable Australian corporation need not register until it carries on business interstate (see cl.340). The term "registered body" includes a registered Australian company and a registered foreign company.

"registrable Australian corporation"

175. This new definition refers to those corporations which are not required to be registered until they carry on business interstate (see Division 1 of Part 4.1). The specific, inclusive, definition of "corporation" means a registrable Australian corporation will be one or more of the following:

(a) a trading corporation (see definition);

(b) a banking corporation (see definition) incorporated in a State or Territory;

(c) an insurance corporation (see definition) incorporated in a State or Territory; and

(d) a body corporate incorporated in a Territory,

but will not be any of the following:

(e) a company (see definition) of a State or Territory;

(f) an exempt public authority (see definition); and

(g) a corporation sole.

"relevant agreement"

176. This definition is the same as the definition of "agreement" in CA sub-s.5(1) and FIA sub-s.5(1).

"relevant date"

177. This definition is the same as that in CA s.437.

"relative"

178. This definition is the same as in CA sub-s.5(1) (cf. the definition in SIA sub-s.122AA(1) which omits the reference to "spouse").

"result"

179. This new definition avoids doubt by including a reference to an indirect result.

"retirement village scheme"

180. This definition is substantially the same as that in CA sub-s.215D(3) and SIA sub-s.4(1). This term is not defined in the Qld and WA Companies Codes.

"scrip"

181. This new definition formalises the use of a common term for the documents of title to securities or the securities themselves.

"securities"

182. This new definition is based on those definitions in CA sub-s.5(1), and SIA sub-s4(1) but distinguishes securities in relation to a body corporate (see cl.92) from others.

"securities exchange"

183. This gathers the various meanings of the expression. Para.(a) is based on the definition of "securities exchange" in CA sub-s.5(1); para.(b) is based on the definition in CASA s.6; and para.(c) is based on the definition in SIA sub-s.4(1), and refers to the definition of "stock exchange" in the Securities Chapter.

184. Separate meanings are retained for various chapters.

"securities law"

185. This is a new definition covering provisions in Chapter 6 or 7 or laws corresponding to those provisions.

"securities recommendation"

186. This new definition limits the above term to recommendations about eligible securities.

"serious fraud"

187. This is a new definition of a term used throughout the Bill, particularly in relation to licences.

"share"

188. This definition is the same as that in CA sub-s.5(1) and SIA sub-s.4(1).

"sold position"

189. This definition is based on that in FIA sub-s.4(1) with minor word changes.

190. It is defined as the position of a person who is obliged to make delivery under a commodity agreement or who will have an obligation to pay, or a right to receive, an amount under an adjustment agreement depending on whether the value or worth of the agreement has increased or decreased.

"State"

191. This new definition includes the Northern Territory because for the purposes of company laws it can be considered to be self-governing.

"stock exchange"

192. This definition consolidates several which appear in various Acts.

193. Para.(a) of this definition is based on those in CA sub-s.5(1).

194. Para.(b) is based on that in CASA s.6.

195. Para.(c) of this definition is based on the definition of "stock exchange" in SIA sub-s.4(1) but the one definition now refers to all the exchanges previously referred to in the separate State Acts. The definition was inserted to take account of the establishment of Australian Stock Exchange Limited.

"stock market"

196. This is based on the definition of "stock market" in CA sub-s.5(1) and SIA sub-s.4(1) but now refers to a specific meaning for Chapter 6.

197. The definition aims to include new markets which are in effect stock exchanges with different trading methods.

"subscriber"

198. This new definition introduces a general term in relation to prescribed interests referring to those who accept or make an offer in relation to those prescribed interests.

"suspend"

199. This new definition makes clear that references to "suspend" include what is, in effect, a partial suspension.

"takeover scheme"

200. This definition serves the same purpose as that in CASA s.6 by referring to the detailed explanation in the Bill (see cl.634).

"time-sharing scheme"

201. This definition is substantially the same as that in CA sub-s.5(1) and with only minor word changes.

"trade"

202. This is based on the definition of "trading" in CASA s.6 and SIA sub-s.4(1).

203. The definition is related to that of "quotation" and encompasses the making of offers or invitations that may reasonably be expected to result in the making of an offer to sell securities.

"trading activities"

204. This new definition is related to that of "trading corporation" and includes financial activities, reflecting the inclusion of financial corporations in the definition of "trading corporation".

"trading corporation"

205. This new definition incorporates the meaning of the term as it is used in the Constitution (see also similar definitions in the TPA and the Foreign Takeovers Act 1975). The term includes a foreign corporation, also used in the Constitution.

206. The two expressions appear in paragraph 51(20) of the Constitution which grants powers over those corporations to the Commonwealth.

207. The distinction serves no purpose in this Bill, and so the terms are combined. "Trading corporation" is used extensively throughout the Bill, particularly in relation to determining the registrability of bodies corporate (see for example cls.126 and 364).

"trading floor"

208. This definition is substantially the same as that in SIA sub-s.4(1).

"Type A body"

"Type B body"

209. These two new definitions distinguish between two kinds of bodies for the purposes of Part 5.7 which deals with the winding up of bodies other than companies (cf. Division 6 of Part XII of CA). Provisions relating to Type A bodies rely on the corporations and territories powers of the Commonwealth.

Provisions relating to Type B bodies rely on the insolvency power of the Commonwealth.

"ultimate holding company"

210. This definition is based on that in CA sub-s.7(6), but refers to bodies corporate instead of corporations (see e.g. cls.234 and 304).

"underwrite"

211. This definition is the same as that in SIA sub-s.4(1).

"unit"

212. This definition is the same as that in CA sub-s.5(1).

"unlimited company"

213. This definition is based on that in CA sub-s.5(1) but ensures it applies to both State companies and Commonwealth companies.

"voting share"

214. This definition is based on that in CA sub-s.5(1) and SIA sub-s.4(1) with minor word changes. It is used, for example, in determining a person's relevant interest in shares or in applying the takeover institutions (see cl.615.)

"wholly-owned subsidiary"

215. This definition is based on that in CA sub-s.7(7) with only minor word changes (see eg, cls.235, 292, 304 and 461).

Division 2 - Associates

216. The circumstances in which a person will be deemed to be associated with another person are set out in Division 2. These provisions basically reproduce the "associate"

provisions from each of the substantive co-operative scheme Acts (ie CA, SIA, CASA, and FIA).

217. In brief, a reference to a person associated with another person will include -

(i) a director, executive officer or secretary of a body corporate;

(ii) related bodies corporate;

(iii) a director, executive officer or secretary of a related body corporate;

(iv) a trustee of a trust in relation to which the other person benefits otherwise than by money-lending transactions;

(v) subject to Bill sub-s.16(3), co-directors and partners; and

(vi) persons acting or proposing to act in concert.

Cl.10 : Effect of Division

218. This Division provides the only tests for determining whether a person is associated with another.

Cl.11 : Associates of body corporate

219. This clause is based on CA para.9(1)(a), FIA and SIA paras.6(1)(a) and CASA para.7(4)(a).

220. However, executive officers of the body corporate and related body corporate will now be "associates" of the body corporate. The director and secretary (of the body corporate and the related body corporate) and the related body corporate itself are associates of the body corporate under the current law and will continue to be associates.

Cl.12 : Matters relating to voting shares

221. This clause is based on CA para.9(1)(b), SIA para.6(1)(b) and CASA para.7(4)(b).

222. It is applicable if the associate reference relates to control of the voting power attached to shares and for certain purposes in Chapter 6.

223. An association will arise when there is an agreement (or proposed agreement) relating to the exercise of voting rights attached to shares in a body corporate (para.12(1)(d)), to control or influence the composition of the board or the conduct of affairs of the body (para.12(1)(e)) or to an acquisition including the making of a put or a call option (paras.12(1)(f) and (g)). It is immaterial that the voting power is in any way qualified (para.12(1)(d) and see CA sub-s.9(3) and CASA sub-s.7(7)).

224. If the question of association relates to shares in a body corporate, both the body and a person may be associates of each other (sub-cl.12(2)).

Cl.13 : References in Chapter 7

225. This clause is based on SIA para.6(1)(d).

226. It is applicable where the associate reference occurs in Chapter 7 and relates to a matter to which the preconditions in cl.12 do not refer.

227. This clause extends the term "associate" to a partner or co-director in a securities business (paras.13(a) and (d)), a partner or co-director in another business who knew or ought to have known the material particulars (paras.13(b) and (e) and sub-cl.16(3)) and a trustee, when the primary person is a beneficiary (para.13(c)).

Cl.14: References in Chapter 8

228. This clause is based on FIA sub-s.6(1). It is applicable where the associate reference occurs in Chapter 8 or in cls.29 or 1323. This clause extends the term "associate" to a trustee of a trust in relation to which the other person benefits otherwise than by money-lending transactions (para.14(c), based on FIA para.6(1)(e)) and, subject to sub-cl.16(3), to co-directors and partners (paras.14(a), (b), (d) and (e), based on FIA para.6(1)(c), (d), (f) and (g)).

Cl.15 : General

229. Para.15(1)(a) is based on CA para.9(1)(c), FIA para.6(1)(b) SIA para.6(1)(c) and CASA para.7(5)(c) with only formal changes.

230. Paras.15(1)(a), (b) and (c) and sub-cl.15(2) are based on CA paras.9(1)(c), (d) and (e), FIA paras.6(1), (b), (h), (j) and (k), SIA paras.6(1)(c), (e), (f) and (g) and CASA paras.7(5)(c), (d), (e) and (f) respectively with only minor changes of wording.

231. This clause will include as an associate a person who proposes to act in concert with another (para.15(1)(a)) and a person who is an associate under the regulations (para.15(1)(b)). It also includes a person who proposes to become associated in any other way (para.15(1)(c)) and a person who has taken a step in order to become associated with another (sub-cl.15(2)).

Cl.16 : Exclusions

232. Sub-cl.16(2) is based on corresponding provisions from each of the substantive co-operative scheme Acts (CA sub-cl.9(2), FIA sub-cl.6(4), SIA sub-cl.6(4) and CASA sub-s.7(6)).

233. In effect it excludes legitimate commercial relationships.

234. Sub-cl.16(3) is based on FIA sub-cl.6(2) and SIA sub-cl.6(2).

235. It provides that a partner or co-director in a business other than a securities business is only an associate if that person knew or ought to have known the material particulars.

Cl.17 : Associates of composite persons

236. This clause is based on FIA sub-s.6(3) and SIA sub-s.6(3).

237. Where two or more persons constitute a dealer, investment adviser, futures broker or futures adviser, a person will be associated with the broker or adviser if associated with any of those persons.

Division 3 - Carrying on Business

238. This Division contains mostly new provisions. These provisions are important because many requirements to be imposed by this Bill rely in part upon the carrying on of business.

Cl.18 : Carrying on business : otherwise than for profit

239. This clause is based on CA sub-s.5(1A). It ensures that the concept of carrying on business is not restricted to requiring an element of profit motive.

Cl.19 : Business of a particular kind

240. This new clause ensures that a reference to a business of a particular kind is not taken to mean a business which is only that business of that kind, but can include part of or be in conjunction with another business.

Cl.20 : Carrying on a business: alone or together with others

241. The new clause ensures a reference to a person carrying on a business includes a reference to a person carrying on that business with any other person.

Cl.21 : Carrying on business in Australia or a State or Territory

242. This is a new clause.

243. Having a place of business is taken to mean carrying on business, in the particular jurisdiction (sub-cl.21(1)). Carrying on business includes a reference to:

(a) establishing or using a share transfer office; or

(b) administering, managing or dealing with property, as an agent etc. (sub-cl.21(2)).

244. There are some cases which will not of themselves amount to carrying on business. Some of these are listed in sub-cl.21(3), including:

(a) maintaining a bank account;

(b) creating a charge; and

(c) holding property.

Cl.22 : Carrying on business interstate

245. This new clause provides the only circumstances in which a body corporate can be considered to be carrying on business interstate for the purposes of this Bill (sub-cl.22(3)).

Division 4 - Dealing in futures contracts

246. The meaning of the expression "dealing in futures contracts", which is set out in Part 1.2 Division 4, is based on the interpretation of "dealing in futures contracts" in FIA ss.7 and 8 but differs by deeming in certain circumstances intermediaries to be dealing in futures contracts.

247. A person will be taken to deal in futures contracts if the person acquires or disposes of a futures contract, offers to acquire or dispose of a futures contract or induces or attempts to induce, another person to acquire or dispose of a futures contract (see definition of "deal" in Bill cl.9 and Bill sub-cl.25(1)). The meanings of "acquiring a futures contract" and "disposing of a futures contract" are set out respectively in Bill cls.23 and 24.

248. There are several provisions in the Bill where the concept of dealing is significant. For example, Part 8.7 Division 1 (dealings by insiders), Bill cl.1213 (accounts to be kept) and Bill cl.1266 (sequence of orders).

Cl.23 : Acquiring a futures contract

249. This clause is based on the definition of "acquire" in FIA sub-s.4(1).

250. An acquisition of a futures contract can only come from entering into or being assigned a futures contract.

251. An acquisition of a futures option or an eligible exchange-traded option can occur only if the person takes the option or assignment of the option.

Cl.24 : Disposing of futures contract

252. This clause is based on the definition of "dispose of" in FIA sub-s.4(1).

253. A futures contract is disposed of by closing it out. A futures option or prescribed exchange-traded option is disposed of by granting, assigning, exercising, releasing the option or permitting it to lapse.

Cl.25 : Dealing in futures contracts: general

254. Of central importance to the Futures Chapter is the concept of dealing on behalf of others. A person will be taken to deal in futures contracts on another person's behalf if and only if the first person acquires or disposes of, or offers to acquire or dispose of, a futures contract on behalf of that other person (Bill sub-cl.25(2) - based on FIA sub-s.7(2)).

255. For example, A will deal on behalf of B if A enters into or takes an assignment of a futures contract on the instructions of B. (Note that the expression "on behalf of" includes on the instructions of - see definition of "on behalf of" in Bill cl.9.)

256. Thus an employee of a corporation acting in the proper course of his or her employment, would not be dealing on behalf of the corporation in a case where that employee arranged for the corporation to acquire a futures contract. The futures contract would be acquired by the corporation. A futures broker who took instructions from the employee in such a case would be acting on behalf of the corporation and would require a licence under Bill cl.1142.

257. A specific provision has been included in the Futures Chapter to ensure that an overseas resident who deals through a licenced broker in Australia will not be considered to be a person who deals in futures contracts on behalf of other persons (Bill sub-cl.25(3) - based on FIA sub-s.79(3)). An example is an overseas resident who is a clearing member of ICCH.

Cl.26 : Dealing in futures contracts through intermediaries : first step

258. This is a new clause.

259. A person on whose behalf another person deals with a futures contract is deemed also to deal with that futures contract.

Cl.27 : Dealing in futures contracts through intermediaries : second and later steps

260. This is a new clause.

261. Complementing cl.26, if an intermediary instructed another to deal in a futures contract, and the intermediary gave those instructions on behalf of another (called the "principal"), then the principal will be deemed to have dealt with the futures contract.

Cl.28 : Dealing in futures contracts, through intermediaries, on futures markets

262. This is a new clause.

263. This clause ensures the deeming provisions apply to dealings in futures contracts on a futures market.

Cl.29 : Own account dealings and transactions : futures contracts

264. The interpretation of the expression "own account dealings", which is set out in Bill cl.29, is based on FIA s.8 ("Dealings and transactions on a person's own account").

265. A reference to a person dealing in futures contracts on the person's own account will include dealing on the instructions of an associate and dealing on behalf of a body corporate in which the person has a controlling interest. A broker who is a member of an exchange will not be regarded as dealing on its own account merely because the transaction is with another exchange member.

Division 5 - Relevant Interests in Shares and Securities

265. This Division collects a number of terms and expressions used in CA s.8, CASA s.9 and SIA s.5.

Cl.30 : Terminology used in this Division

267. This clause sets out the meanings of the following terms: power to vote, power to dispose of a share, power or control, controlling interest and prescribed percentage.

Cl.31 : Basic rules

268. This clause is based on CA sub-s.8(1), CASA sub-s.9(1) and SIA sub-s.5(1) with only formal changes.

269. A person has a relevant interest in a share if that person has power to vote in respect of a voting share or power to dispose of a share.

Cl.32 : Control of body corporate having power in relation to a share

270. This clause is based on CA sub-s.8(4), CASA sub-s.9(4) and SIA sub-s.5(4).

271. A person who has a controlling interest in a body corporate or from whom the body corporate is accustomed to taking instructions or directions, has the same power as the body corporate has over shares.

Cl.33 : Control of prescribed percentage of voting power in body corporate having power in relation to a share

272. This clause is based on CA sub-s.8(5), CASA sub-s.9(5) and SIA sub-s.5(5) but has been widened by referring to an associate of the body corporate.

273. If a person (or that person's associates - separately or together) have the power to vote in respect of at least 20% of the voting shares in a body corporate, then that person is deemed to have the same power as the body corporate (or an associate of that body corporate) has in relation to particular shares.

Cl.34 : Deemed relevant interest in advance of performance of agreement whose performance will give rise to a relevant interest

274. This clause is based on CA sub-s.8(6), CASA sub-s.9(6) and SIA sub-s.5(6).

275. If an agreement, right or option would, when exercised, give a person a relevant interest in a share, then this clause deems that person to have that relevant interest.

276. The major change is that para.(c) requires, for the operation of this deeming provision, the person who granted the option to have a relevant interest in the issued share concerned.

Cl.35 : Control of body corporate having a relevant interest by virtue of section 34

This clause is based on CA sub-s.8(7), and CASA sub-s.9(7).

277. A person has a relevant interest in the shares of a body corporate if that person controls another body corporate which is deemed by cl.34 to have a relevant interest in the first body corporate. The scope is extended by cl.44.

Cl.36 : Matters not affecting application of Division

278. This clause is based on CA sub-ss.8(2) and (10), CASA sub-ss.9(2) and (10) and SIA sub-ss.5(2) and (10).

279. The form of, and restrictions on, the power to vote or dispose of a share are immaterial (sub-cl.36(1)). How a relevant interest arose or how remote it is are not relevant (sub-cl.36(2)).

Cl.37 : Body corporate may have a relevant interest in its own shares

280. This clause is based on CA sub-s.8(9A), CASA sub-s.9(9A) and SIA sub-s.5(9A) with only formal changes. A body corporate may be deemed to have a relevant interest in a share in itself.

Cl.38 : Exclusions : money-lenders

281. This clause is based on CA sub-para.8(8)(a)(i), CASA para.9(8)(a) and SIA para.5(8)(a).

282. The relevant interest of a money lender obtained in the ordinary course of business will be disregarded.

Cl.39 : Exclusions : certain trustees

283. This clause is based on CA sub-para.8(8)(a)(iii), CASA para.9(8)(c) and SIA para.5(8)(c).

284. The relevant interest of a trustee will, in certain circumstances, be disregarded.

Cl.40 : Exclusions : instructions to securities dealer to dispose of share

285. This clause is based on CA sub-para.8(8)(a)(iv), CASA para.9(8)(d) and SIA para.5(8)(d).

286. The relevant interest which a dealer has by virtue of instructions to sell securities on behalf of another will be disregarded.

Cl.41 : Exclusions : honorary proxies

287. This clause is based on CA para.8(8)(b), CASA para.9(8)(e) and SIA para.5(8)(e).

288. A relevant interest which a person has because of an appointment at no charge as a proxy to vote for another will be disregarded.

Cl.42 : Exclusions : holders of prescribed offices

289. This clause is based on CA sub-para.8(8)(a)(ii), CASA para.9(8)(b) and SIA para.5(8)(b).

290. If the holder of a prescribed office has a relevant interest, it will be disregarded.

Cl.43 : Prescribed exclusions

291. This clause is based on CA sub-s.8(11) and SIA sub-s.5(11).

292. Regulations may provide that certain relevant interests be disregarded.

Cl.47 : Relevant interests in securities

293. Sub-cl.44(1) is new while sub-cl.44(2) is based on CASA sub-s.9(7) and SIA sub-s.5(7).

294. Sub-cl.44(1) includes certain definitions which widen the scope of some provisions for the purpose of determining whether or not a person has a relevant interest in securities. Thus cl.34 would, by virtue of this clause, refer to securities (instead of just shares) and sub-cl.44(2) (which is parallel to cl.35) deems a person who controls a body corporate which has by virtue of cl.34 (as extended) a relevant interest in securities to also have a relevant interest in those securities.

295. Parallel to cl.37, a person may have a relevant interest in securities issued by the person (sub-cl.44(3)).

Cl.45 : Effect of Division

296. This clause ensures that a relevant interest can only arise by operation of this Division, which is to be interpreted without limitations.

Division 6 - Subsidiaries and related bodies corporate

297. This Division is substantially based on CA s.7. It sets out the nature of subsidiaries, holding companies and related corporations. See also the definitions in cl.4 of "holding

company", "ultimate holding company" and "wholly-owned subsidiary".

Cl.46 : What is a subsidiary

298. This clause is substantially the same as CA sub-s.7(1) with minor word changes. However, this clause ensures that it is only by this clause that a corporation can be a subsidiary - there is no scope for any other notion, as permitted under CA sub-s.7(1).

Cl.47 : Control of a body corporate's board

299. This clause is based on CA sub-s.7(2) with minor word changes.

300. A body corporate will be taken to control another body corporate if it can appoint or remove directors with or without the consent of a third person.

Cl.48 : Matters to be disregarded

301. This clause is based on CA sub-s.7(3) with minor word changes.

302. Certain circumstances are to be disregarded in determining whether a corporation is a subsidiary including:

(a) shares held in a fiduciary capacity (sub-cl.48(2), based on CA para.7(3)(a));

(b) shares held under a trust deed (sub-cl.48(4), based on CA para.7(3)(e)); and

(c) shares held in connection with a normal business of money lending (sub-cl.48(5) based on CA para.7(3)(d)).

Cl.49 : References in this Division to a subsidiary

303. This new clause ensures that a reference to a subsidiary or to being a subsidiary in para.46(b), para.48(3)(b) and

sub-cl.48(5) includes a reference to a subsidiary of a subsidiary by any other application of this Division.

Cl.50 : Related bodies corporate

304. This clause is based on CA sub-s.7(5) with minor word changes.

305. It defines the use of the term, "related company". Holding companies, subsidiaries, and subsidiaries of the same holding company are related companies.

Division 7 : Interpretation of other expressions.

Cl.51 : Acquisition and disposal of shares

306. This provision is based on CASA sub-ss.7(1) and (2) with the modification that the expression of acquiring shares in a body corporate is to apply to the definition of "deal" in Bill cl.9 and Chapters 6 and 7.

307. A person acquires shares in a body corporate:

(a) where a relevant interest is acquired through a transaction in relation to the shares or securities of the body corporate or securities of another body corporate; or,

(b) a person acquires a legal or equitable interest in securities of the body corporate or another body corporate and as a result another person acquires a relevant interest in such shares

(Bill sub-cl.51(1)).

308. For the purposes of Chapter 6, a person disposes of shares in a body corporate where a person ceases to have a relevant interest in those shares (Bill sub-cl.51(2)).

309. The definition of "relevant interest" is dealt with in Part 1.2 Division 5 and the expression "entering into a contract", in relation to shares or securities, is defined in Bill cl.64.

Cl.52 : Doing acts

310. The purpose of this new provision is to avoid the unnecessary repetition of the defined expression in the substantive provisions of the Bill.

311. Doing an act or thing includes a causing or authorising the act or thing to be done.

Cl.53 : Affairs of a body corporate

312. This provision is based on CA s.6 with the modification that the expression no longer applies to the provisions corresponding to CA ss.12, 15 and 16A (relating to powers of inspection) or Part VII (special investigations). These corresponding provisions are now set out in the ASC Bill.

313. For the purposes of Bill cl.260 (oppression), para.461(e) (winding up on ground of actions of directors) cl.487 (arrest of absconding contributory) cl.597 (examination of persons concerned with corporations), sub-cl.1307(1) (falsification of books), cl.1309 (false information) or any other prescribed provision, a reference to affairs of a body corporate includes references to matters such as the formation, control, activities and financial aspects of a body corporate; its internal management; ownership of and dealings with the securities of the body corporate or prescribed interests issued; or any matters arising out of an audit.

Cl.54 : Chapter 8 agreements of the same kind

314. This provision is based on FIA sub-s.5(3).

315. A Chapter 8 agreement is of the same kind as another Chapter 8 agreement where provisions are identical or not materially different, disregarding different parties and amounts payable.

316. "Futures organisation" is defined in Bill cl.9.

Cl.55 : Chapter 8 obligations and rights

317. This provision is based on the definitions of "obligation" and "right" in FIA sub-s.4(1) and the definition of "obligation of a particular kind" in FIA sub-s.4(10).

318. A Chapter 8 obligation or right includes an obligation or right not enforceable at law or in equity (Bill sub-cl.55(1).

319. A Chapter 8 obligation of a particular kind includes alternative Chapter 8 obligations one of which is a Chapter 8 obligation of that kind (Bill sub-cl.55(2)).

Cl.56 : Classes of futures organisation membership

320. This provision is based on FIA sub-cl.4(9).

321. Where a futures organisation (defined in Bill cl.9) has a separate class or classes of membership not related to that organisation's operation as a futures organisation then a reference to a member of a futures organisation is a reference to a person in the person's capacity as a member of a class other than that separate class or classes of membership.

Cl.57 : Classes of shares

322. For the purposes of the Bill shares if not divided into 2 or more classes, constitute a class.

Cl.58 : Corresponding laws

323. For the purposes of the Bill a reference in a provision of an Act to a corresponding law or a law corresponding to a provision is a reference to a provision of a law, or of a previous law, of, or in force in, a State or Territory, being a provision that corresponds to that provision of that Act.

Cl.59 : Debentures as consideration for acquisition of shares

324. This provision is based on CA sub-s.152(8) and 154(4).

325. A reference to a body corporate offering debentures (defined in Bill cl.9) as consideration for acquiring shares in a body corporate include a reference to a body corporate offering cash consideration on a term that the offeree makes a loan to the body corporate of all or part of the cash.

Cl.60 : Directors

326. This provision is based on the definition of "director" in CA sub-s.5(1) and the professional adviser's provision set out in CA sub-s.5(2), with the modification that a member of a close corporation is included within the definition.

327. A reference to directors includes a reference to a person occupying the position of director even when not validly appointed, or a person who directs the board. Similar provisions apply to foreign body corporates. Also, a member of a close corporation is included within the definition (Bill sub-cl.60(1)).

328. A professional or business advisor giving advice to directors is not brought within the definition (Bill sub-cl.60(2)).

Cl.61 : Discretionary accounts

329. The interpretation of the expression "discretionary accounts", which is set out in Bill cl.61, is based on the definition of "discretionary accounts" in FIA s.9.

330. A reference to a futures broker operating on a discretionary account (see e.g. Bill cl.1207) means the broker is authorised by a client to use the client's funds, or by a number of clients to use the client's pooled funds, to deal in futures contracts on the client(s) instructions (not being dealings on instructions limited to time and/or price) without prior approval.

Cl.62 : Dormant bodies corporate

331. This provision is based on CA s.266A with the modifications in relation to the specification of times and periods of dormancy in Bill sub-cls.62(3), (4), (5) and (6). These modifications have been introduced for constitutional reasons.

332. This provision defines dormant bodies corporate for the purposes of the exemption provided by Bill cls.304 and 305 in respect of directors' reports. The definition is also important in determining whether a body corporate is to be regulated under the Bill. For instance see the provisions in respect of activities statements and annual activities statements.

333. In order that a body corporate may be regarded as dormant it is not sufficient that it has not undertaken a transaction which it would be required to enter in the accounting records; it also must not have taken any action which would be likely, in the ordinary course of business, to lead to such a transaction.

334. The provision is mainly intended to apply to "shelf-companies" which have not commenced business and to bodies corporate

referred to in Bill cl.572 which are not carrying on business or are not in operation.

Cl.63 : Eligible circumstances

335. An act or thing is done in "eligible circumstances" in the course of trade or commerce overseas or amongst the States and Territories, or within a Territory. This new provision has been inserted for constitutional reasons.

Cl.64 : Entering into a transaction in relation to shares or securities

336. This provision is based on CA sub-s.8(7), with the modification that the expression defined has been widened to encompass securities.

337. For the purposes of cl.51 and Chapter 6, a reference to entering into a transaction in relation to shares and securities includes a reference to entering into a relevant agreement or exercising an option in relation to the shares and securities.

338. "Relevant agreement" is defined in Bill cl.9.

Cl.65 : Excluded corporations

339. This clause is based on CA sub-ss.97(6), (7), (8) and (9).

340. The corporations referred to in this clause are excluded from the need to comply with the prospectus provisions. The corporations in question are banks, certain pastoral companies, authorised dealers in the short term money market etc. declared by the ASC to be excluded.

341. There is also a regulation making power to enable other corporations to be excluded if this is considered to be desirable at a later stage (para.65(2)(c)).

Cl.66 : Excluded issues, offers and invitations

342. This provision is based on CA sub-s.5(4) but reflects a number of amendments.

343. The terms 'offer to the public', 'section of the public' and 'member of the public' were used in the CA. The interpretation of these terms caused confusion about whether a prospectus was required or not in a particular case. In order to resolve these difficulties the above terms are not used in the Bill , except 'offer to the public' in the context of restrictions on proprietary companies (see definition of 'Offer and invitation to the public' below). Rather, all issues, offers and invitations other than those specifically excluded will be pursuant to a prospectus. However, as is made clear later, the detailed content rules that previously applied to prospectuses have been relaxed in favour of a requirement that prospectuses contain material relevant to an investor making an informed investment decision. The contents of a prospectus may therefore vary as between the persons to whom the prospectus will be directed. Prospectuses directed to a small number of informed institutional investors for example, need not be very detailed. Clause 1084 (based on CA s.215C) is also available as a flexible means of obtaining exemptions from the Prospectus provisions on a case by case basis.

344. Excluded issues will be those specified in sub-cl.66(1), namely issues made:

(a) where the minimum subscription by any one person is at least $500,000.

(b) to persons whose ordinary business it is to buy or sell securities, whether as principal or agent (based on CA para.5(4)(b));

(c) pursuant to the entering into of an underwriting agreement (based on CA para.5(4)(a));

(d) in respect of share issues to existing members of a company in connection with a cl.507 proposal (based on CA para.5(4)(d)) or bonus issues of shares;

(e) in the case of an issue of debentures, where the issue is made to existing debenture holders of a corporation and relates to debentures of that corporation; or it is made by an excluded corporation and relates to debentures of that corporation.

345. It can also be noted that the exclusion relating to retirement village schemes (see CA s.215D) is maintained in the legislation by virtue of the definition of securities and excluded securities.

346. Sub-cl.66(2) parallels sub-cl.66(1) in respect of excluded offers and invitations.

Cl.67 : Exempt brokers and exempt futures advisers

347. This provision is based on the definition of exempt broker in FIA cl.10. This provision also introduces the concept of an exempt futures adviser, which is based on the definition of an exempt broker in FIA. An exempt broker is not required to obtain a futures brokers licence under Bill cl.1142. Similarly, an exempt futures adviser is not required to obtain an futures advisers licence under Bill cl.1143. The format of the provision has been changed because of the need to differentiate between exempt brokers and exempt futures advisers.

348. A prescribed body corporate or an exempt public authority (defined in cl.9) or a declared specified class of exempt public authorities are exempt futures brokers and exempt futures advisers (Bill sub-cls.67(1) and (2)). A person who carries on a futures broking business (defined in Bill cl.9) or a futures advice business (defined in Bill cl.71) in certain specified capacities are exempt futures brokers or exempt futures advisers as the case may be (sub-cl.67(2)).

349. Those specified capacities include persons appointed by a Court to carry on the business concerned (eg a receiver or a liquidator), and persons who fall within specified classes and are approved by the ASC (e.g. certain persons appointed otherwise than by a court such as a receiver, liquidator or official manager and a trustee or other person administering a compromise or arrangement).

Cl.68 : Exempt dealers and exempt investment advisers

350. This clause is based on the definition of exempt dealer in SIA sub-cl.4(1) and on SIA sub-s.4(2). This clause also introduces the concept of an exempt investment adviser, which is based on the definition of an exempt dealer in FIA. An exempt dealer is not required to obtain a dealers licence under cl.780. Similarly, an exempt investment adviser is not required to obtain an investment advisers licence under cl.781. The format of the clause has been changed because of the need to differentiate between exempt dealers and exempt investment advisers.

351. Eligible money market dealers (defined in cl.9) and exempt public authorities are both exempt dealers and exempt investment advisers (sub-cl.68(1)). Persons who only carry on a securities business (defined in cl.93) or an investment advice business (defined in cl.77) in certain specified capacities are exempt dealers or exempt investment advisers as the case may be (sub-cl.68(2)). Those specified capacities include persons appointed by a Court to carry on the business concerned (eg a receiver or a liquidator), a Public Trustee and persons who fall within specified classes and are approved by the ASC (e.g. a personal representative of a dealer or investment adviser, or a person who externally administers a body corporate). A person who is a personal representative of a dealer or an investment adviser will only be an exempt dealer or an exempt investment adviser for a maximum of 6 months (sub-cl.68(6)).

Cl.69 : Exempt proprietary companies

352. This provision is based on the definition of "exempt proprietary company" in CA sub-ss.5(1) and the supporting provisions in CA sub-ss.5(5) and (6).

353. An exempt proprietary company is a proprietary company no member of which is and no share in which is owned by a non-exempt person (Bill sub-cl.69(1)). A similar definition applies to exempt proprietary companies of a State or Territory (Bill sub-cl.69(2)).

354. A non-exempt person is defined in Bill sub-cl.69(3) which should be read together with Bill sub-cls.69(4), (5) and (6). The expression of a person owning a share for the purposes of Bill cl.69 is defined in Bill sub-cl.69(7) which should be read together with Bill sub-cls.69(8) and (9).

Cl.70 : Extension of period for doing an act

355. The purpose of this new provision is to avoid the unnecessary repetition of the defined expression in the substantive provisions of the Bill.

356. An application for the exercise of a power may be made and the power may be exercised even if the period or extended period for doing an act has ended.

Cl.71 : Futures advice business and eligible futures advice business

357. This provision is based on the definition of "futures adviser" in FIA sub-s.4(1) with the following significant modifications:

(a) The references in the FIA definition to 2 or more persons carrying on a business of advising other persons about futures contracts and whether or not such a business is conducted in conjunction with

another business have been omitted. Note Bill cls.19 and 20 in this regard.

(b) The definition has been extended to cover an eligible futures advice business.

(c) Certain acts of various categories of persons are to be disregarded in determining whether or not that person carries on a futures advice business or an eligible futures advice business.

358. A reference to futures advice business in relation to a person is a reference to a business of advising other persons about futures contracts or providing futures reports (Bill sub-cl.71(1)). A similar provision deals with a reference to an eligible futures advice business which includes a reference to advising or giving futures reports to corporations or other persons in eligible circumstances. (Bill sub-cl.71(2)).

359. In determining whether or not a person carries on a futures advice business or an eligible futures advice business the following acts, circumstances or facts shall be disregarded:

(a) The acts of a solicitor or accountant in public practice, being acts merely incidental to the practice (Bill sub-cl.71(4)).

(b) The circumstances of giving advice in:

(i) a publically available newspaper or periodical of a publisher;

(ii) a transmission of a public information service; or

(iii) a publically available sound, video or data recording.

(Bill sub-cl.71(5)).

(c) The fact that the person holds himself herself or itself out as advising other persons or publishing futures reports as mentioned in Bill sub-cl.71(5) (Bill sub-cl.71(7)).

(d) The act of an employee or person acting for another person in connection with a futures advice business carried on by the other person (Bill sub-cl.71(8)).

360. Bill sub-cl.71(5) does not apply in relation to a newspaper periodical, transmission, or sound, video or data recording whose sole or principal purpose is to advise other persons about futures contracts or publish futures reports (Bill sub-cl.71(6)).

Cl.72 : Futures contracts

361. The definition of futures contracts has been dealt with in the introduction to Chapter 8.

Cl.73 : Futures representatives

362. This is a new provision.

363. This provision defines the circumstances in which a person is a futures representative of another person and the circumstances in which a person does an act as futures representative of another person, or a person engages in conduct as a futures representative of another person. A person is a futures representative of another person if:

(a) that person is employed by, or acts for, or by arrangement with the other person in connection with a "futures broking business" (Bill cl.9) a "futures advice business" (Bill cl.71), an "eligible futures broking business" (Bill cl.9) or an "eligible futures advice business" (Bill cl.71) carried on by the other person (Bill sub-cl.73(1)); or

(b) that person holds a proper authority (defined in Bill sub-cl.87(1)) or an invalid futures authority (defined in Bill sub-cl.87(2) from that other person (Bill sub-cl.73(2)).

364. A person does an act or engages in conduct as a futures representative if the act or conduct is done in connection with a futures broking business or futures advice business or an eligible futures broking business or an eligible futures advice business carried on by another person, whilst the person is a representative working on the other person's behalf, being an act or conduct otherwise than in the course of work ordinarily performed by accountants, clerks or cashiers (Bill sub-cl.73(3)). There is also a provision dealing with persons holding themselves out as representatives (Bill sub-cl.73(4)).

Cl.74 : Group holding companies

365. For the purposes of the Bill a company is a group holding company at the end of the financial year where the company is a holding company of a body corporate and there is no company of which the company is a wholly-owned subsidiary.

366. "Holding company" and "wholly-owned subsidiary" are defined in Bill cl.9. Note also Part 1.2 Division 6.

Cl.75 : Inclusion in official list

367. For the purposes of Chapter 6 a reference to a body corporate or person included in an official list of a body corporate is a reference to a body corporate's or person's name included on the list or a former name of same which was included on the list immediately before a change in name.

Cl.76 : Incorporated in Australia

368. For the purposes of the Bill a body corporate that is a company, or is incorporated under the law of the Commonwealth, or a State or a Territory is incorporated in Australia.

Cl.77 : Investment advice business and eligible investment advice business

369. This clause is based on the definition of investment adviser in SIA sub-s.4(1) subject to the modifications identified below.

370. An investment advice business includes a business of advising other people about securities (defined in cl.9) and a business where, as part of that business, a person publishes securities reports (defined in cl.9) (sub-cl.77(1)). Under sub-cl.(2), eligible investment advice business is an investment advice business carried on by a non-corporation that is within the power of Commonwealth to regulate e.g. advice or reports about "eligible securities" (see cl.9), advice to corporations about securities and securities advice or reports given in eligible circumstances (see cl.63).

371. Certain specified acts done by a person will be disregarded for the purpose of determining whether a person is carrying on an investment advice business or an eligible investment advice business or holding himself out as an investment adviser. These specified acts are the same as appear in the SIA definition of investment adviser subject to the following differences. Acts done by bodies corporate which are registered under the Life Insurance Act 1945 or by banks are not exempt (cf. SIA paras.(a) and (c) in definition of "investment adviser"). The exemption in favour of proprietors and publishers of newspapers has been extended to people in the same position in the electronic media (sub-cls.77(6), (7) and (8)). An act done by a person as a representative of another person will also be disregarded (sub-cl.77(9)).

Cl.78 : Invitations, offers and forms of applications

372. This clause is based on CA sub-s.5(3).

373. This provision explains the meaning of invitations, offers and forms of application for the purpose of Chapter 7.

Cl.79 : Involvement in contraventions

374. This provision clarifies who is involved in a contravention of a provision. Persons who:

(a) aid, abet, counsel or procure the contravention;

(b) induce the contravention;

(c) are in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or

(d) conspire with others to effect the contravention

will be involved in a contravention.

Cl.80 : Jervis Bay Territory deemed part of Australian Capital Territory

375. For the purposes of the Bill, Jervis Bay Territory and the ACT will be deemed to constitute a single Territory.

Cl.81 : New companies

376. This new provision is for the purposes of Bill cl.156 which deals with the ASC's obligations in respect of a corporation the ASC is satisfied is not a trading, banking or insurance corporation. The ASC is not obliged to take any action where the company is a new company.

377. A company incorporated under Part 2.2 Division 1 is a new company from its incorporation until the end of:

(a) where an activities statement lodged under Bill cl.153 and states the subscribers intend the company will commence activities, of the kind set out in Bill sub-cls.153(3) and (4) - 3 months beginning on the day:

(i) where it is stated the subscribers intend the company to be dormant for a substantial period after incorporation - when the company ceases to be dormant; or

(ii) otherwise - of the company's incorporation;

(b) where the activities statement states that subscribers intend, within 21 days after incorporation or within the substantial period of dormancy after incorporation, persons other than subscribers will obtain a controlling interest in the company and a further activities statement is lodged under Bill cl.155 and

(i) where the latter statement states whether or not the company intends to commence activities of the kind set out in Bill sub-cls.155(4) and (5) - 3 months beginning on the day specified under Bill para.155(3)(c); or

(ii) otherwise - the day on which the latter statement is lodged;

(c) where the activities statement states that persons other than subscribers will obtain a controlling interest in the periods mentioned in paragraph (b) above and the company contravenes Bill cl.155 - the period within which the company is required to comply with Bill cl.155; or

(d) otherwise - the day of incorporation.

(Bill sub-cl.81(1)).

378. A body corporate registered under Part 2.2 Division 2 or 3 is a new company from the start of the body's registration day until the end of:

(a) where an activities statement lodged under Bill cl.154 and states either that its activities are currently or intended to be those activities specified in and conducted on the day specified in Bill sub-cls.154 (2) and (3), or within 3 months after the registration day or within a substantial period of dormancy after incorporation its activities intend to be those activities specified in Bill sub-cls.154(5) and (6) and;

(i) where the statement also state under Bill sub-cl.154(4) the body will be dormant for a substantial period and it is dormant on the registration day - on the day when the body first ceases to be dormant after that day; or

(ii) otherwise - on the body's registration day.

(b) where an activities statement states directors expect that within 21 days after registration or within a substantial period of dormancy after registration, persons other than current members will obtain a controlling interest, and a further activities statement is lodged under Bill cl.155; and

(i) where the latter statement makes a statement of the kind referred to sub-paragraph (b)(i) in the paragraph above - 3 months beginning on the day specified under Bill paragraph 155(3)(c); or

(ii) otherwise - the day on which the latter statement is lodged; or

(c) where the activities statement states that persons other than current members will obtain a controlling interest in the periods specified in paragraph (b) above and the body contravenes Bill cl.155 - the period within which the body is required to comply with Bill cl.155; or

(d) otherwise - the body's registration day.

(Bill sub-cl.81(2)).

379. "Registration day" is defined in Bill cl.9.

Cl.82 : Offers and invitations to the public

380. This provision is based on CA sub-s.5(4) with the modification that CA para.5(4)(ca) dealing with offers made to holders of prescribed interests has been replaced with bona fide offers is made to existing members of a company in connection with a proposal referred to in Bill cl.507 and relates to shares in a company.

381. The provision is for the purpose of Bill paras.126(1)(c) and (d) which require that before a company can be incorporated as a proprietary company there must be in its constitution, inter alia, a prohibition on the making of offers or invitations to the public.

Cl.83 : Officers and other persons in default

382. This provision is based on CA s.572.

383. It provides that a reference to an officer of a body corporate or other person in relation to a contravention of the Bill who is default of the requirements of a provision of the Bill will be a reference to an officer, including past

officers of a body corporate or any other person, as the case may be, who is involved in the contravention. The circumstances in which a person will be involved in a contravention will be dealt with in Bill cl.79.

384. A secretary of a body corporate will, unless the contrary is proved, be deemed to be knowingly concerned in, and party to, any breach of:

(a) a provision of Bill sub-cl.217 requiring the registered office of a company to be open for certain hours on business days;

(b) any provision of the Bill cl.242 (register of directors, principal executive officers and secretary) or Bill cl.335(annual return) requiring the lodgment of a document with the ASC.

Cl.84 : Own account dealings and transactions: securities

385. This provision is based on SIA sub-s.66(2) and has been included for the purposes of Bill cl.843.

386. A person deals in or enters into a transaction of sale or purchase of securities on the person's own account where the person deals or transacts as principal or on behalf of an associated person or a body corporate in which the person has a controlling interest. If the dealer is in partnership and the dealer's interest and that of the dealer's partners constitutes a controlling interest, the dealer will also be acting on the person's own account for the purposes of the clause.

Cl.85 : Participation interests

387. This provision is based on CA sub-s.5(8) and SIA sub-s.4(7A).

388. Regulations made for the purpose of sub-para.(g)(ii) of the definition of "participation interest" does not apply to

partnerships carrying on a profession or trade whereby a person carrying on that profession or trade is required by an Australian law (defined in Bill cl.9) to be registered, licensed or otherwise authorised in order to do so and the business conducted is the only business conducted by the partnership.

Cl.86 : Possession

389. The purpose of this new provision is to avoid the unnecessary repetition of the defined expression in the substantive provisions of the Bill.

390. A thing in a person's custody or control is in the person's possession.

Cl.87 : Proper authority from futures licensee; invalid futures authority

391. This is a new provision.

392. This provision defines the terms proper authority and invalid futures authority. A proper authority is the document which shows that a person is properly authorised to act as a representative of a particular licensee. The proper authority will consist of a copy of the licence of that particular licensee or principal, on which are endorsed statements by the principal to the effect that the principal states that the holder is a representative of the principal (para.87(1)(a)). The document must also have endorsed on it statements from all other licensees for whom the holder acts as a representative, to the effect that the holder is a representative of that licensee and that the licensee consents to the holder acting as a representative of the principal (para.87(1)(b)).

393. An invalid futures authority is a document which purports to be a proper authority but does not fulfil all of the requirements of a proper authority. A document will be an invalid futures authority from a person if it is, or purports

to be, a copy of a futures licence and has endorsed on it a statement to the effect that the holder is a representative of that person, and the document is not in fact a proper authority from that person (sub-cl.87(2)).

Cl.88 : Proper authority from securities licensee; invalid securities authority

394. This is a new provision. This clause defines the terms proper authority and invalid securities authority. A proper authority is the document which shows that a person is properly authorised to act as a representative of a particular licensee. The proper authority will consist of a copy of the licence of that particular licensee or principal, on which are endorsed statements by the principal to the effect that the principal states that the holder is a representative of the principal (para.88(1)(a)). The document must also have endorsed on it statements from all other licensees for whom the holder acts as a representative, to the effect that the holder is a representative of that licensee and that the licensee consents to the holder acting as a representative of the principal (para.88(1)(b)).

395. An invalid securities authority is a document which purports to be a proper authority but does not fulfil all of the requirements of a proper authority. A document will be an invalid securities authority from a person if it is, or purports to be, a copy of a securities licence and has endorsed on it a statement to the effect that the holder is a representative of that person, and the document is not in fact a proper authority from that person (sub-cl.88(2)).

Cl.89 : Qualified privilege

396. The purpose of this new provision is to consolidate in one provision various provisions under the co-operate scheme legislation dealing with the qualified privilege of various persons eg. CA s.30 (auditor and publisher), s.325A (receiver), and s.419 (liquidator); SIA sub-s.65A(5)

(adviser), and s.81 (auditor and publisher); and FIA s.99 (auditor, clearing house etc. and publisher).

397. Where the Bill provides that a person has qualified privilege in respect of an act, matter or thing the person has qualified privilege in a proceedings for defamation or is not, in the absence of malice, liable to an action for defamation in respect of that act, matter or thing (Bill sub-cl.89(1)). "Malice" includes ill will or any other improper motive (Bill sub-cl.89(2)). Neither provision nor any provision of the Bill limits any other right, privilege or immunity the person otherwise has (Bill sub-cl.89(3)).

Cl.90 : Receivers and managers

398. For the purposes of Chapter 5 a receiver of property of a body corporate is also a manager where the receiver manages or has power to manage the affairs of the body corporate.

Cl.91 : Being or becoming subject to a prohibition, order or notice under Bill cls.229, 230, 599 or 600

399. The purpose of this new provision is to define the circumstances under which a person will be or become under a prohibition, order or notice under Bill cls.229, 230, 599 and 600. The provision extends to persons covered by a prohibition under an order or notice under the various corresponding provisions of laws or a previous laws of a State or Territory.

400. For the purposes of the Bill a person is or becomes subject to:

(a) a Bill cl.229 prohibition - where the person is or becomes prohibited by virtue of Bill cl.229 or a corresponding law of a State or Territory from being a director, promoter of or concerned with the management of a corporation (Bill sub-cl.91(1)).

(b) a Bill cl.230 order - where the person is or becomes prohibited by virtue of Bill cl.230 or a corresponding law of a State or Territory from being a director, promoter of or concerned with the management of a corporation (Bill sub-cl.91(2)).

(c) a Bill cl.599 order - where the person is or becomes prohibited by virtue of Bill cl.599 or a corresponding previous law of the Territory or a corresponding law or previous law of a State or another Territory from acting or being a director, promoter of or concerned with the management of a company or other corporation (Bill sub-cl.599 (3)); and

(d) a Bill cl.600 notice - where the person is or becomes by virtue of Bill cl.600 or a corresponding provision of a law of a participating State or Territory from being a director promoter of or concerned with the management of a corporation.

Cl.92 : Securities of a body corporate

401. This new provision is for the purpose of Chapter 7.

402. The expression "securities of a body corporate" in a context excluding a corporation includes securities of a government other than the government of the Commonwealth, a Territory or a foreign country, an authority of such a government; an unincorporated body or other person not excluded from the above categories (Bill para.92(a)). Securities of a corporation include a reference to securities issued by the governments of the Commonwealth, a Territory or foreign country or an authority of such a government (Bill para.92(b)). The expression securities of a body corporate in a context that includes a corporation includes securities issued by a government, authority, unincorporated body or other person (Bill para.92(c)).

Cl.93 : Securities business and eligible securities business

403. This is a new provision, based on the concept of a business of dealing in securities in SIA s.43.

404. A securities business is a business of dealing in securities (deal in securities is defined in cl.9) (sub-cl.93(1)). An eligible securities business is a securities business carried on by a non-corporation that is within the power of the Commonwealth to regulate (sub-cl.93(2)). Certain specified acts will be disregarded for the purpose of determining whether or not a particular person carries on or holds himself out as carrying on a securities business or an eligible securities business. These specified acts include acts done on behalf of a person by the holder of a dealers licence or an exempt dealer (sub-cl.93(5)), acts done by a person as a representative of a dealer (sub-cl.93(6)), and acts that constitute a dealing in a futures contract (defined in Part 1.2, Division 4) (sub-cl.93(7)).

Cl.94 : Securities representatives

405. This is a new provision.

406. This provision defines the circumstances in which a person is a securities representative of another person and the circumstances in which a person does an act as a securities representative of another person, or a person engages in conduct as a securities representative of another person. A person is a securities representative of another person if:

(a) that person is employed by, or acts for, or by arrangement with, the other person in connection with a securities business, investment advice business (if either person is a corporation), "eligible securities business" (cl.93) or an "eligible investment advice business" (cl.77) (if neither person is a corporation) carried on by the other person (para.94(1)(a) and (b)); or

(b) that person holds a proper authority (defined in sub-cl.88(1)) or an invalid securities authority (defined in sub-cl.88(2)) from that other person (paras.94(2)(a) and (b)).

407. A person does an act or engages in conduct as a securities representative if the act or conduct is done in connection with a securities business or an investment advice business or an eligible securities business or an eligible investment advice business carried on by another person whilst the person is a securities representative working on the other person's behalf, being an act or conduct otherwise than in the course of work ordinarily performed by accountants, clerks and cashiers (sub-cl.94(3)). A person also does an act as a securities representative of another person if that person holds themself out as an securities representative of that other person (sub-cl.94(4)).

408. Whether or not a person does an act or engages in conduct as a representative of another person is particularly important for the purposes of determining the extent of liability of the principals of a representative for the conduct of the representative (see cl.819).

Cl.95 : Signing of certain documents by bodies corporate

409. This provision is based on CA sub-ss.37(4) and 74(4) with the addition that where the seal of a body corporate is affixed to the activities statement lodged under Bill cl.153 the body corporate is deemed to have signed the statement.

410. The affixing of a body corporate's seal in accordance with its constitution to a memorandum, articles or a statement then:

(a) the body corporate is deemed to have signed the memorandum, articles or statement for the purposes of Bill sub-ss.117(1) and (2) and 125(1) and (2); or sub-ss.153(1) and (7); and

(b) a witness is not required for the purposes of sub-ss.117(2) or 125(2) in the case of a memorandum or articles.

411. "Memorandum" and "articles" are defined in Bill cl.9 to mean "memorandum of association" and "articles of association" respectively.

Cl.96 : Statement in a prospectus

412. This provision is based on CA sub-s.107(4).

413. For the purposes of Chapter 7 a statement shall be deemed to be in a prospectus if contained in any report or memorandum issued with the prospectus or incorporated by reference.

Cl.97 : Stock market not to include futures market

414. This provision is based on SIA sub-s.4(5B).

415. The making of a futures contract at a market, exchange, place or facility shall not be taken into account in determining whether the market etc. is a stock market.

416. "Stock market" is defined in Bill cl.9.

Cl.98 : Transfer days for bodies corporate

417. The purpose of this new provision is to allow the Minister or ASC to declare a day after which corporations subject to the Bill cannot carry on business unless registered under the Bill or where applications for registration have been lodged and are to be considered. (See Bill cls.126, 340 and 343).

418. The Minister or ASC may declare as the transfer day for specified bodies corporate a specified day is at least 2 months after the latest of the various days indicated in Bill paras.98(1)(a) to (d). The declaration applies to bodies corporate or particular class thereof even if not in existence

at the time of the declaration (Bill sub-cl.98(3)). The ASC shall cause certain notices to be published after the declaration is made setting out the declaration and explaining the effect of Bill cls.126, 340 and 343.

Cl.99 : Underlying securities

419. Where scrip is constituted by documents that are securities or documents of title to securities, those securities underlie the scrip.

Division 8 - Miscellaneous interpretation rules

Cl.100 : Address of registered office etc

420. This provision is based on CA s.530A. It sets out the information required when the Bill requires a notice to be lodged with the ASC setting out the address of an office of a body corporate or of a person or a change in the situation of an office of a body corporate or person.

Cl.101 : Amount of stock representing a number of shares

421. This provision is based on CASA sub-s.8(4). A reference in the Bill to a "number of shares" will include, where the share capital of a body corporate consists (either in whole or in part) of stock, a reference to the amount of stock that represents that number of shares.

Cl.102 : Applications to be in writing

422. The purpose of this provision is to avoid the unnecessarily repeating in the substantive provisions of the Bill the expression that applications must be in writing.

423. Any application to the ASC to issue a document or do any other act or thing under this Bill is required to be in writing.

Cl.103 : Effect of certain contraventions of this Act

424. The purpose of this new provision is to prevent any act, transaction, agreement, instrument matter or thing from being invalid merely because of the following:

(a) a contravention of

(i) Bill cl.112 - formation of an outsized partnership or association than otherwise allowed under the Bill;

(ii) Bill cl.113 - formation of a trading body corporate under a State or Territory law;

(iii) Bill cl.126 - State or Territorial bodies corporate carrying on business than otherwise allowed under the Bill;

(iv) Bill cl.340 - registrable Australian company (defined in Bill cl.5) carrying on an interstate business while unregistered under the Bill;

(v) Bill cl.343 - foreign company (defined in Bill cl.9) carrying on business while unregistered under Bill;

(vi) Chapter 8; or

(b) a failure to comply with a provision requiring the publishing of a notice or document.

(Bill sub-cl.103(2)).

425. The provision has effect in so far as the Bill otherwise provides (Bill sub-cl.103(1)).

Cl.104 : Effect of provisions empowering a person to require or prohibit contract

426. The purpose of this new provision is to avoid the unnecessary repetition of lengthy expressions in the substantive provisions of the Bill.

427. Where a person requires another to do or prohibits another from doing an act, the provision shall be taken to require that other person to comply with the requirement or prohibition.

Cl.105 : Calculation of time

428. Although substantially redrafted, the effect of this provision is essentially the same as s.26 of the C&S Interpretation Act.

429. Where, for example, the Bill requires the doing of an act within a period of time before a particular day, such period of time is to be calculated without counting that day (Bill sub-cl.105(1) - cf. C&S Interpretation Act sub-s.26(1) which basically reproduces sub-s.36(1) of the Acts Interpretation Act 1901).

430. In calculating the number of days between, for example, 2 events, the day in which one of those events occurs is to be counted but not the day on which the other event occurs (Bill sub-cl.105(2)).

431. For the purposes of this Bill, sub-s.36(1) of the Acts Interpretation Act 1901 (the effect of which is reproduced in sub-cl.105(1)) will not apply (Bill sub-cl.105(3)).

Cl.106 : Performance of functions by Commission delegate

432. This provision is based on sub-s.24(2) of the C&S Interpretation Act.

433. A reference to the ASC in a provision of the Bill dealing with the performance of a function or the exercise of a power will include a reference to a delegate of the ASC (see definition of "Commission delegate" in Bill cl.9).

Cl.107 : Headings to Chapters

434. This provision is new and is intended to ensure that the headings of the Chapters in the Bill form part of the Bill.

435. Sub-section 13(1) of the Acts Interpretation Act 1901 will ensure that the headings of the Parts, Divisions and Sub-divisions of the Bill also form part of the Bill.

Cl.108 : Parts of dollar to be disregarded in determining majority in value of creditors

436. This provision is based on CA s.532.

437. Parts of a dollar will be disregarded in determining a majority in value of creditors.

Cl.109 : Reference to persons, things and matters

438. This provision is based on sub-ss.11A(2) and (3) of the C&S Interpretation Act.

439. Its purpose is to remove any doubts following the decision in Rendoel Pty Limited v Campbell Investment Co. (1985) 3 ACLC 335 which in effect cast on the plaintiff an onus of establishing that respective references to a person and to a company were capable of having the same referent. The effect of Bill sub-cl.109(1) will be that references in a provision are capable of having the same or a common referent unless it is established that a contrary intention appears.

BILL PART 1.3 - APPLICATION

Cl.110 : Application of Act in relation to certain banking and insurance

440. The purpose of this new provision is to extend the operation of the Bill to the doing of acts, or the making of omissions, by banks or insurance companies carrying on interstate business.

Cl.111 : Act not to apply in relation to State banking or insurance within that State

441. Having regard to the Commonwealth's Constitutional powers, the Bill will not apply to State banking or insurance that does not extend beyond the limits of the State concerned.

CHAPTER 2 - CONSTITUTION OF COMPANIES

442. Chapter 2 (cls.112-216) deals with the creation and nature of companies. It provides a system of registration of companies based on that existing under the co-operative scheme of legislation. The differences reflect the need to take into account the Constitutional limits on the powers of the Commonwealth.

443. The Chapter also contains provisions dealing with the legal capacity, powers and status of companies in a similar manner to the co-operative scheme legislation. As well, there are provisions relating to membership in and share capital of companies which are similar to those of the existing scheme.

444. Reforms proposed to the existing legislation are as follows:

(a) certain companies which incorporate under this Bill will not need to register a copy of their memorandum and articles of association (Bill cl.118);

(b) provision is made for a close corporation formed under the Close Corporations Bill to register as a company under this Bill (Bill cls.142-147); and

(c) a company will not be obliged to maintain a branch register of members at the request of a member resident in a particular State or Territory (Bill cl.214).

445. This Chapter consists of the following Parts:

- Part 2.1 - Restrictions on forming certain entities (cls.112 to 113)
- Part 2.2 - Registration of companies (cls.114 to 158)
- Part 2.3 - Legal Capacity, powers and status (cls.159 to 183)
- Part 2.4 - Membership and share capital (cls.184 to 216)

PART 2.1 : RESTRICTIONS ON FORMING CERTAIN ENTITIES

446. This Part complements State and Territory legislation in restricting the size of associations and partnerships. These restrictions will force certain entities to be incorporated under this legislation.

Cl.112 : Outsize partnerships and associations

447. This clause modifies CA sub-ss.33(3) and (4).

448. The size of partnerships and associations that can be formed for profit-making purposes will be restricted to 20 persons, with two exceptions. The first exception permits such entities if they are incorporated or formed under an appropriate law. The second exception permits those of a profession or calling specified by notice in the Gazette to form an unincorporated partnership or association.

Cl.113 : Certain corporations not to be formed under State or Territory company law

449. This is a new clause.

450. It will prevent the incorporation of a body corporate under State or Territory companies legislation if it should be incorporated under this Bill. Those few companies that are not trading corporations will continue to be able to incorporate under State and Territory company law. This provision will not affect the formation of bodies other than companies, such as building societies, co-operative societies etc, that are incorporated under separate non-company legislation, even though those bodies may be trading corporations.

PART 2.2 - REGISTRATION OF COMPANIES

451. Part 2.2 of the Bill provides a complete scheme for all companies which are to be registered under the Bill. (Companies incorporated overseas may be registered as foreign companies under other provisions.) Part 2.2 contains the following provisions:

Division 1	-	Incorporation by registration
Division 2	-	Registering certain State and Territory companies as companies
Division 3	-	Registering foreign companies as companies
Division 4	-	Registering Close Corporations as companies
Division 5	-	Companies registered under Division 2 or 3 or 4
Division 6	-	Activities statements
Division 7	-	Companies ceasing to be trading or banking corporations.

Division 1 - Incorporation by registration

452. This Division contains provisions based on Division 1 of Part III of CA. It provides for the incorporation of new companies.

Cl.114 : Formation of companies

453. This clause is substantially the same as CA sub-s.33(1).

454. Associations of certain numbers of persons for any lawful purpose will be permitted if they incorporate under this Bill. Incorporation requires subscription to a memorandum of association and satisfaction of requirements as to registration.

455. Proprietary companies of two or more persons will be permitted. Public companies of five or more persons will be permitted.

Cl.115 : Classes of companies

456. Substantially the same as CA sub-s.33(2), this clause exhaustively sets out the classes of companies.

Cl.116 : Proprietary companies

457. This clause is substantially the same as CA sub-s.34(1).

458. In certain circumstances a company will be able to be formed as a proprietary company (see also the definition of proprietary company in cl.9(1)). Chief features of a proprietary company are the limits on the transfer of shares, numbers of members, and invitations to the public for fund-raising.

Cl.117 : Requirements as to memorandum

459. This clause is substantially the same as CA s.37(1) with the exception of sub-s.37(4) which is now incorporated in cl.95. The format and the minimum content of the memorandum are prescribed (sub-cl.117(1)). The memorandum may state the objects of the company (sub-cl.117(2)). Each subscriber to the memorandum will be required to state, if the shares of the company are divided into clauses, the class or classes of shares that the subscriber has agreed to take.

Cl.118 : Registration application

460. This is a new clause which serves the same purpose as CA sub-s.35(1). However, it includes a significant amendment which relieves a proprietary company from the obligation of lodging a copy of its memorandum and articles upon incorporation.

461. As under the co-operative scheme, companies to be formed must be preceded by an application (in the prescribed form) for registration of the company.

462. If the company to be registered is a proprietary company limited by shares, the application should state this, be signed by each subscriber but need not be accompanied by a copy of a memorandum and articles (if any) of the proposed company. Otherwise, the application need only be signed by one of the subscribers but must be accompanied by a copy of the memorandum and articles of association.

Cl.119 : Power to require production of unlodged memorandum

463. This new clause will address any difficulty arising from a company not registering its constituent documents under cl.118.

464. The ASC may require the lodgment of the memorandum prior to registration regardless of compliance with cl.118 by the applicant and regardless of the absence of any suspicion of contravention of cl.118.

465. Provision is made for the return of the memorandum to the company where it is not required to be registered.

Cl.120 : Registration

466. This new clause also serves the same purpose as part of CA sub-s.35(1) by providing that the ASC is to register a company by registering the application, and if appropriate, the memorandum and articles of association. A new requirement is that each company will be allotted a unique identifying number upon registration which must be displayed on its business documents.

467. Similar in purpose to CA sub-s.35(9), under Bill sub-cl.120(2) registration will not be permitted unless a name or, as a new provision, a number is reserved under cl.373 in respect of the company.

Cl.121 : Certificate of registration

468. This clause is based in part on CA sub-ss.35(2) and (3). Upon registering the company, the ASC will issue a certificate to the company. This certificate will state a number of things:

- the fact of registration under this Division;
- the fact that this registration constitutes incorporation;
- the day of commencement of registration;
- the class of the company; and
- whether the company is a public or a proprietary company (a new requirement).

Cl.122 : Effect of certificate

469. This clause is based on CA s.549.

470. The certificate given under cl.121 will be conclusive evidence of:

- compliance with all relevant requirements;
- registration under this Division; and
- the date of commencement of registration (a new provision).

Cl.123 : Incorporation

471. This clause is based on CA sub-ss.35(4) and (5).

472. On and from the date of commencement of registration the subscribers and subsequent members will be an incorporated company by the name or number set out in the memorandum (sub-cl.123(1), based on CA sub-s.35(4)). A company will have the traditional powers and attributes of incorporation (sub-cl.123(2), based on CA sub-s.35(5)).

Cl.124 : Members

473. This clause is based on CA sub-ss.35(6) and (7).

474. Upon incorporation, the subscribers to the memorandum will be deemed to have agreed to be members of the company, and will become members (sub-cl.124(1), based on CA sub-s.35(7)) but will be liable to contribute in a winding up (sub-cl.124(2), based on CA sub-s.35(6)).

Cl.125 : Articles of association

475. This clause is substantially the same as CA s.74, with the omission of sub-s.74(4) which now appears in Bill cl.95.

476. Certain classes of companies are required to have articles of association. The required form of articles is set out (sub-cls.125(4) and (5)). The Articles set out in Table A of Schedule 1 to this Bill may be adopted by choice or by default - see cl.175.

Division 2 - Registering certain State and Territory companies as companies

477. Division 2 will provide for the transfer of companies registered under the Companies Act and Codes of the co-operative scheme to registration under this Bill. Many of the provisions in this Division (and in Division 3) have been adopted from Division 4 of Part III of CA, which deals with the transfer of incorporation. Despite the similarity of language, different concepts are involved. Under the CA, a company may transfer its incorporation from one State to another or be registered in an additional State. Under this Division, a company becomes registered only under the Commonwealth scheme, and its original place of incorporation will not have any further importance.

478. Provision is made for the transition of a company which registers under this scheme in respect of things done for the purposes of, or under, the companies law previously applicable to the company.

479. Divisions 2, 3 and 4 provide a simple, single method of recognising a company throughout Australia.

Cl.126 : Certain State and Territory companies not to carry on business unless registered under this Division

480. This new clause is complemented by cl.113 (which will prevent incorporation under a State or Territory law, of companies which are required to be incorporated under this Bill). This clause will prohibit the trading activities of existing, and any future, companies incorporated under State and Territory companies laws which are required to be registered under this Division.

Cl.127 : State or Territory company may apply for registration

481. This clause will serve the same purpose under this Bill as CA sub-s.34(1) and (2) serve under the co-operative scheme. A company formed under a State or Territory law will be required to apply for registration under this Bill (sub-cl.127(1) and compare with CA sub-s.84(1)). The application must be accompanied by relevant documents, unless amongst other things, the ASC already has the document.

Cl.128 : Determination of application

482. This clause is simpler than CA sub-s.86(1) which serves the same purpose. The company will be entitled to be registered if, and only if, its application is proper and the ASC is satisfied that the company is not an externally-administered body corporate (see definition in cl.9) and a name has been reserved in respect of the company.

Cl.129 : Registration of applicant as a company

483. This clause is in part based on CA sub-ss.86(3) and (4). The body corporate granted an application under this Division (being a company incorporated or formed under a State or Territory law) will be registered as a company under this Bill (by having the application registered) and will be given a unique registration number.

484. The body corporate will be registered as a company of one of a number of different specified classes, the class being that which is equivalent to the class under which the body was included in its jurisdiction of incorporation (sub-cl.129(3), based on CA sub-s.86(4)). The body will also be registered as a proprietary company or a public company in accordance with its previous status or constituent documents (sub-cl.129(4), based on CA sub-s.86(3)).

Cl.130 : Constitution of a Division 2 company

485. This new provision will deem the constituent documents (including any provisions deemed by the relevant laws) of a company registered under this Division to be the constituent documents as required by this Bill.

486. These documents will bind the company and its members accordingly.

Cl.131 : Application of Act in relation to Division 2 companies

487. This is a new clause.

488. This Bill will apply to a company registered under this Division in respect of its activities before registration. However, compliance with a provision of the previously applicable law corresponding with a requirement under this Bill is sufficient.

Cl.132 : Acts preparatory to external administration of Division 2 company

489. This new clause will deem a valid act in relation to a company before registration under this Division (made under or for the purposes of a law corresponding to a provision of Chapter 5 (other than Part 5.2)) to be valid for the purposes of this Act.

Division 3 - Registering foreign companies as companies

490. This Division serves a purpose similar to that served by CA s.85 and parts of sections which follow s.85 in permitting foreign companies to transfer their place of incorporation to Australia.

491. Foreign companies which choose to retain their overseas place of incorporation but which wish to operate in Australia will be required to register under Part 4.1. These registered foreign companies and all other foreign companies will be permitted to register as a company under this Division. Division 3 complements Division 2 in providing a comprehensive scheme of registering pre-existing bodies corporate.

Cl.133 : Foreign company may apply for registration

492. This clause, based on CA sub-s.86(2), permits a foreign company to apply to be registered as a company, under this Division. This application will be granted if the application is proper and the company is not disentitled by cls.134 and 135.

Cl.134 : Externally-administered body corporate not to be registered

493. This clause, based on CA sub-s.85(2), will provide one factor disentitling registration. Registration will not be permitted if the body corporate is:

(a) externally-administered (compare with CA paras.85(2)(b) and (c)); or

(b) subject to an undecided application (made anywhere in the world) for winding-up or for approval of a compromise or arrangement (based on CA paras.85(2)(a) and (d)).

Cl.135 : Prerequisites to eligibility

494. This clause is based on CA sub-s.85(3). The second disentitling factor is constituted by failure to satisfy all of a number of certain conditions. These relate to the reservation of its name, and its ability to transfer its incorporation.

Cl.136 : Form and content of application

495. This clause is based on CA sub-ss.85(4) to (6).

496. The application under cl.133 will have to be in the prescribed form, lodged with the ASC and accompanied by specified documents, information and evidence that other conditions have been satisfied.

Cl.137 : Registration of applicant as a company

497. This clause is based on CA sub-ss.86(3) and (4).

498. Where the application under cl.133 is granted, the body will be registered as a company (by having its application registered) and will be given a unique registration number (sub-cl.137(2)). The company will be registered as a company of one of a number of different specified classes, the class being that which most nearly corresponds to the class in which the body was included in its jurisdiction of incorporation (sub-cl.137(3), based on CA sub-s.86(4)). The company will be registered as a proprietary company if it satisfies a number of conditions (sub-cl.137(4), and compare with CA sub-s.86(3)), otherwise it will be registered as a public company (sub-cl.137(5)).

Cl.138 : Registered foreign company

499. This clause simplifies the language of CA sub-s.86(7).

500. If the body to be registered under this clause is at that time registered as a foreign company, the ASC will be able to retain certain documents relating to that proposed registration after the body is removed from that register of foreign companies.

Cl.139 : Constitution of Division 3 company

501. This clause is based on CA sub-ss.87(4) and (5).

502. For the purposes of the requirements in this Bill relating to a company's memorandum and articles, the constituent documents of the company may be deemed to be the memorandum and articles (sub-cls.139(2) and (3), based on CA sub-s.87(4)), even if they are an incorrect English translation (sub-cl.139(4), based on CA sub-s.87(5)).

Cl.140 : Alterations of constitution

503. This clause is substantially the same as CA s.88.

504. There will be certain obligatory alterations of the constituent documents of a company registered under this Division.

Cl.141 : Share warrants

505. This clause is the same as CA s.92 with only minor wording changes.

506. The holder of share warrants issued by a company registering under this Division will become a member of the company without loss to that new member.

Division 4 : Registering Close Corporations as Companies

507. This is a new Division which provides a mechanism for the conversion of close corporations (i.e. registered under the Close Corporations Bill) to companies under this Bill.

Cl.142 : Conversion of a close corporation into a company

508. Subject to the existence of disentitling factors (based on CA sub-s.85(2)) all members of a close corporation may, by subscribing their names to a memorandum and complying with other requirements as to registration, convert a close corporation into a company. Whether or not registration will be as a proprietary company or otherwise will depend upon the number of members and the constitutive documents.

Cl.143 : Requirements as to memorandum

509. This clause is substantially the same as Bill cl.117 except that there is no requirement for subscribers to state the number and class of shares which they have agreed to take. 510. (For further explanation see the paragraph of this explanatory memorandum that relates to that provision.)

Cl.144 : Registration application

511. This clause is based upon Bill cl.118 (see the paragraph of this explanatory memorandum that relates to that provision).

Cl.145 : Power to require production of unlodged memorandum

512. This clause is based upon Bill cl.119 (see the paragraph of this explanatory memorandum that relates to that provision).

Cl.146 : Registration

513. If the ASC is satisfied that all requirements have been met, it will be required to register the close corporation as a company. For proprietary companies limited by shares only the application will be registered. In other cases, the company's memorandum and articles will also be registered. The company's name must be reserved under the appropriate provision of the close corporations Bill before it will be registered by that name under this Bill.

514. Registration under this Bill will have the effect of automatic deregistration under the Close Corporations Bill but will not affect the right of the ASC to retain any documents held in relation to the former close corporations.

Cl.147 : Articles of association

515. This clause is based on Bill cl.125 (see the paragraph of this explanatory memorandum that relates to that provision).

516. In the case of close corporations registered under this Division, a company limited by shares (not being a proprietary company) need not register articles but a company limited by both shares and guarantee or an unlimited company must register articles along with the memorandum.

Division 5 : Companies Registered under Division 2, 3 or 4

517. This Division provides for a number of consequences upon registration under Division 2, 3 or 4.

Cl.148 : Certificate of registration

518. This clause is based on CA sub-ss.86(5) and (6).

519. The ASC will issue a certificate to a company registered under Division 2 or 3. That certificate will state a number of things:

(a) the fact of registration;

(b) the fact of incorporation;

(c) the day of commencement of registration;

(d) the class of the company; and

(e) whether the company is a proprietary or a public company (a new provision).

Cl.149 : Effect of certificate

520. This new clause provides that the certificate will be conclusive evidence of a number of things:

(a) compliance with the requirements of this Bill;

(b) registration under this Bill; and

(c) the day of commencement of the registration of the company (a new provision).

Cl.150 : Effect of registration under Division 2, 3 or 4

521. This clause is based in part on CA s.87.

522. There are several effects of registration under Division 2, 3 or 4. The body will continue as a body corporate (sub-cl.150(2)) and will be a company for the purposes of this Bill (sub-cl.150(3), based on CA para.87(1)(a)). The company will no longer be subject to any law it would have been subject to had it continued its incorporation, registration or domicility without registration under Division 2, 3 or 4.

523. The body will have the same traditional attributes of incorporation as those shared by companies incorporated under Division 1 (sub-cl.150(6), based on CA para.87(1)(c) and see sub-cl.123(2)).

524. The legal personality of the company will continue (sub-cl.150(8), based on CA paras.87(2)(a) and (b)). Acts or things done before registration under an appropriate power will not be affected (sub-cl.150(9), based on CA para.87(2)(d)). Registration will not affect the property of the corporation or, except as provided by this Part, any rights, privileges, powers, authorities, duties etc. of the corporation or of any other person (sub-cl.150(10), based on CA paras.87(2)(c) and (d)). No legal proceedings will be prevented or rendered defective (sub-cl.150(11), based on CA sub-s.87(3)).

Cl.151 : Application of Act to Division 2, 3 or 4 company

525. This clause is substantially the same as CA s.90 and modifies the operation of various provisions of this Bill to take account of the fact that a company registered under Division 2, 3 or 4 pre-existed that registration.

526. As an additional provision, regulations may prescribe further modifications as are necessary.

Cl.152 : Establishment of registers and minute books

527. This clause is the same as CA s.91 in requiring the establishment of registers and minute books but in addition it provides that the requirement can be satisfied by a Division 2 company if it had kept a register or minute book for the purposes of a law corresponding with the provisions of this Bill (sub-cl.152(2)). This means that existing State and Territory companies do not have to establish new books upon registering under the Bill.

Division 6 : Activities statements

528. This new Division requires the establishment of a link between the nature of a company to be registered under this Part and the Constitutional powers of the Commonwealth. That link is established by written evidence of actual or intended activities of the company of a kind that would make the body subject to valid Commonwealth company laws. Safeguards will ensure the evidence remains current.

Cl.153 : Division 1 company

529. In order to be registered under Division 1, a company must lodge a signed statement in the prescribed form which sets out a number of things. The statement must specify:

(a) the date of signing the statement (para.153(1)(c) and (d)); and

(b) one of a number of intentions (sub-cls.153(3), (4) or (5)),

and the statement may in addition state that the intention of the subscribers is that the company will be dormant throughout a substantial period from the time of incorporation (sub-cl.153(2)).

530. The three kinds of intentions (of which one must be stated) are:

(a) that within three months from incorporation trading activities will be the whole or a substantial part of the company's activities (sub-cl.153(3));

(b) that within three months from incorporation the business of banking will be the sole or principal business of the corporation (sub-cl.153(4)); and

(c) that within 21 days after incorporation (or within the period of dormancy, if stated under sub-cl.153(2)), new members will control the company (sub-cl.153(5)). These new members need not be known (sub-cl.153(6)). If this intention is stated, further obligations will be imposed by cl.155.

Cl.154 : Division 2, 3 or 4 company

531. Complementing cl.153, this clause requires for registration under Division 2, 3 or 4 the lodgment of a statement signed by at least two directors in the prescribed form which sets out a number of things. The statement must specify:

(a) the date of signing the statement (paras.154(1)(c) and (d)); and

(b) one of, or a particular combination of, facts, intentions or an expectation (see para.154(1)(e) for the combinations).

532. The necessary evidentiary link could be comprised from one of, or a combination of, a statement specifying:

(a) the fact that existing trading activities form the whole or a substantial part of the activities of the body (para.154(2)(a)), and that it is the intention that this will be so during a period from incorporation ending at least three months later (sub-cl.154(2));

(b) the fact that existing banking business is being carried on by the company as its sole or principal business and that it is the intention that this will be so during a period from incorporation ending at least three months later (sub-cl.154(3));

(c) that it is the intention that the company will be dormant throughout a substantial period (sub-cl.154(4));

(d) that it is the intention that within three months after registration or the period of dormancy (see (c) above - sub-cl.154(4)), trading activities will be the whole or a substantial part of the activities of the company (sub-cl.154(5));

(e) that it is the intention that within three months after registration or the period of dormancy (see (c) above - sub-cl.154(4)), banking will be the sole or principal business of the company (sub-cl.154(6)); and

(f) that it is the expectation that within 21 days after registration or the period of dormancy (see (c) above - sub-cl.154(4)), new members will control the company (sub-cl.154(7)). The directors need not know who the new member will be (sub-cl.154(8)). If this is stated, a further obligation will be imposed by cl.155.

Cl.155 : Further activities statement in certain cases where control of company is to change

533. The intentions referred to in sub-cl.153(5) and sub-cl.154(7) contemplate control of the company changing. As an additional requirement supporting the constitutional link, a further signed statement will be required within certain time limits (see paras.155(1)(c) and (d) and (2)(c) and (d)) as to whether it is intended that within the next three months appropriate activities will be undertaken by the company.

Division 7 : Companies ceasing to be trading or banking corporations

534. This new Division deals with companies registered under this Part which no longer are entitled to be registered because of a lack of characteristics attracting Commonwealth powers.

Cl.156 : Commission to take action

535. Apart from new companies, the ASC will be able to strike off or take steps to wind up a company which it believes is no longer a trading or banking corporation.

Cl.157 : Presumptions about loss of trading or banking corporation status

536. In forming its opinion about the loss of status, the ASC will be assisted by a number of rebuttable presumptions.

Cl.158 : Company to take action

537. This clause will place an obligation on a company to take steps to wind itself up if it ceases to have characteristics attracting Commonwealth powers.

PART 2.3 - LEGAL CAPACITY, POWERS AND STATUS

538. This Part is based on Division 3 of Part III of CA.

539. A company will not be required under the Bill to include a statement of its objects in its memorandum, and will, even if otherwise restricted by its memorandum or articles (its constitution), have the legal capacity of a natural person in addition to those powers peculiar to companies.

Division 1 - Legal capacity and powers

540. Division 1 of Part 2.3 of the Bill (cls.159 to 166) will contain various provisions dealing with the legal capacity and powers of companies.

541. Clauses 159 to 166 of Division 1 are based on CA ss.66B to 68D.

Cl.159 : Interpretation

542. A reference to the doing of an act by a company will include a reference to the making of an agreement by the company and also to a transfer of property by the company; a reference to legal capacity will include a reference to powers.

Cl.160 : Object of clauses 161 and 162

543. The object of Bill cls.161 and 162 is to:

(a) abolish the doctrine of ultra vires in its application to companies; and

(b) without affecting the validity of the dealings of a company with outsiders, to ensure that provisions of a company's constitution relating to objects or powers are given effect by the company's officers and members. These statutory provisions are intended to abolish the doctrine that a company only has the capacity to act in pursuance of its objects. This is done by distinguishing between, on the one hand a legal capacity which the statute declares to be in effect unlimited and, on the other hand, restrictions on its freedom of action imposed by the company itself.

544. Abolition of the doctrine of ultra vires means that a company's capacity to enter into arrangements with outsiders is not affected by limitations imposed by a company's internal rules. Hence, a company has the capacity to act in breach of its objects, but if it does so, it will commit a contravention of the Bill which may have certain consequences. (See Bill cl.162).

545. However, merely because a company has the capacity to enter into arrangements with outsiders which are in breach of its objects or other self-imposed restrictions does not, of itself, mean that the outsiders could not be denied the benefits of the arrangements.

546. To ensure that the provisions of a company's constitution relating to objects or powers of the company are given effect by the company's officers and members, without unduly disrupting arrangements which the company may have entered into with outsiders, a balance is struck in the Bill by providing that, although shareholders would not be able to restrain performance of an agreement once it has been executed, they (or any other person whose interests would be affected) will be able to seek an injunction restraining the company and the outsiders from entering into an agreement.

Cl.161 : Legal capacity

547. This clause is based on CA s.67.

548. A company will, both within and outside Australia, have the legal capacity of a natural person, and will also have the power to do those things peculiar to companies, and also any other act authorised by law, including the law of a foreign country.

549. Bill sub-cls.161(2) and (3) will provide that the unlimited capacity of a company will survive, subject to the Bill, but despite:

(a) any express or implied restriction on, or prohibition of, the exercise by the company of any of its powers;

(b) the fact the company has stated objects;

(c) the fact that a company will contravene the Bill if it acts contrary to an express restriction on, or prohibition of, the exercise of a power of the company;

(d) the fact that an act of the company may not be in the best interests of the company.

550. Bill sub-cl.161(3) specifically excludes the application of the Rolled Steel case [1982] (3 All ER 1057) and is designed to prevent any suggestion that any doctrine of "wider ultra vires" as expounded by the courts remains in existence.

551. These clauses are intended to clarify further the distinction between legal capacity and restrictions imposed by a company as a matter of internal management.

Cl.162 : Restrictions on companies

552. This clause is based on CA s.68.

553. Bill sub-cl.162(1) will specify that the rules of a company's constitution may contain an express restriction on, or an express prohibition of, the exercise by the company of a power of the company. The purpose of this sub-clause is to enable a company to impose restrictions on itself while still retaining the legal capacity conferred by Bill sub-cl.161(1), and also to do away with the notion of implied restrictions.

554. Bill sub-cl.162(2) will specify that where -

(a) a company exercises a power contrary to an express restriction on, or an express prohibition of, the exercise of that power, being a restriction or prohibition contained in the company's constitution; or

(b) the memorandum of a company contains a provision stating the objects of the company and the company does an act otherwise than in pursuance of those objects,

the company will contravene this sub-clause.

555. Bill sub-cl.162(2) is not expressed in terms of the prohibition of ultra vires acts, but rather will provide that such acts as are contrary to express restrictions or prohibitions imposed by the company upon itself, or which are not in accordance with the stated objects of the company, will result in a contravention of this clause by the company.

556. Bill sub-cl.162(3) will specify that where an officer of the company is involved in a contravention by the company of Bill sub-cl.162(2), the officer will be in contravention of Bill sub-cl.162(3).

557. Bill sub-cl.162(4) states that a person who contravenes sub-cl.162(2) or sub-cl.162(3), will not be not guilty of an offence.

558. Bill sub-cl.162(5) states that where a contravention of sub-cl.162(2) has occurred, that is, where a company has exercised a power contrary to an express restriction or prohibition contained in the company's constitution or has done an act otherwise than in pursuance of the company's objects, the exercise of the power, or the act, is not invalid by reason only of the contravention. Implied prohibitions that may be contained in a company's constitution are thus not preserved by this sub-clause.

559. Bill sub-cl.162(6) provides that an act of an officer of a company is likewise not invalid merely because, by doing the act, the officer contravenes Bill sub-cl.162(3).

560. Bill sub-cl.162(7) will provide that where a company or an officer of a company exercises a power or does an act which would contravene sub-clause (2) or (3) of this clause, that fact may be asserted or relied on in any of the proceedings enumerated in sub-cl.162(7).

561. Bill para.162(7)(g) will provide that an application for an injunction under Bill cl.1324 may be sought to restrain a company from entering into an agreement; however, injunctive relief provided by Bill cl.1324 will only available in cases where a contract has not been executed by a company.

562. Bill para.162(7)(g) and sub-cl.162(8) will allow proceedings to be brought by either the company or by a member, such as proceedings to recover damages from present or former officers of the company for losses sustained as a result of any contraventions by those officers of sub-cl.162(2) or sub-cl.162(3).

Cl.163 : Application of certain State and Territory laws

563. A company will be able to carry on business in any State or Territory, despite the foreign companies law of any such State or Territory.

564. Nothing in the Bill, unless expressly provided, will be intended to exclude or limit the application to a company of a law of a State or Territory, in so far as that law is capable of applying concurrently with this Bill.

Cl.164 : Persons having dealings with companies, etc

565. This clause is based on CA s.68A.

566. A person dealing with a company, or with a person who has acquired title, or purports to have acquired title, to property from a company, will be entitled to make certain assumptions which will be binding on the company in any proceedings in relation to those dealings. The specific assumptions that a person will be entitled to make are set out in Bill sub-cl.164(3).

567. The purpose of these provisions is to make clear:

(a) who may make and rely upon the assumptions set out in Bill sub-cl.164(3); and

(b) that a company will not be able to deny the validity of an assumption made under Bill sub-cl.164(3).

568. A person dealing with a company or with a person who has acquired, or purports to have acquired, title to property from a company, will be entitled to assume:

(a) that the constitution of the company has been complied with.

569. The purpose of this provision is to ensure that a person who deals in good faith with persons who can reasonably be supposed to have the authority of the company should be protected against later claims by the company that the persons purporting to act for it lacked authority. This involves clarifying and codifying the so called "indoor management rule" which has developed from the decision in Royal British Bank v Turquand (1856) 119 E.R. 886.

(b) that a person described as a director, principal executive officer or secretary, of a company in a relevant return, has been duly appointed, and has authority to exercise the powers normally exercised by such a person.

570. The purpose of this provision is to:

(i) restate the common law rule that the protection afforded to persons under the "indoor management rule" is not affected merely because the directors etc. have not been properly appointed (Mahoney v East Holyford Mining Co (1875) L.R. 7 H.L. 869). This extends the protection afforded by Bill sub-cl.226(1). In a decision on the equivalent provision in the UK Companies Act 1948, s.180, the House of Lords drew a distinction between defective appointments to which the provision applied and non-existent appointments to which it did not: Morriss v Knassen (1946) AC 459.

(ii) provide that a person dealing with an officer of the company (either actual or assumed) may assume that the officer is able to exercise the customary powers belonging to that type of office. It is believed that this also is in accordance with existing case law and normal

agency principles. What is "customary" will vary with the nature of the particular office and the particular company. Thus, for example, a person will usually not be able to assume, in dealings with a company secretary, that the secretary has the authority to exercise powers normally the responsibility of a managing director.

(c) that a person held by a company to be an officer or agent of the company has been duly appointed with authority to exercise the powers normally exercised by such an officer or agent. Bill para.164(3)(c) refers only to a person "held out by the company to be an officer or agent of the company". (The purpose of this provision is to achieve the same effect in relation to officers and agents as Bill para.164(3)(b) is intended to achieve in relation to directors, principal executive officers and secretaries (see (b) above).

(d) that an officer or agent with authority to issue documents, or certified copies of documents, on behalf of the company, has authority to warrant that the document or copy is genuine. The purpose of this provision is to make it clear that a company will not be able to escape liability for false documents issued by an officer or agent if it has authorised the officer or agent to issue true documents.

(e) that a document has been duly sealed by the company if it bears what appears to be the seal of the company attested by two persons, one of whom may be assumed to be a director, and the other a director or a secretary of the company.

The purpose of this provision is to make it clear that a company will not be able to escape liability for fraudulently sealed documents.

(f) that the directors, principal executive officer, secretaries, employees and agents of the company have properly performed their duties to the company. This statutory presumption of regularity restates the common law rule (e.g. see Richard Brady Franks Ltd v Price (1937) 58 C.L.R. 112 at 142).

571. A person dealing with a company, or with a person who has acquired, or purports to have acquired, title to property from a company, will not be entitled to make assumptions under Bill sub-cl.164(3) where the person knows or ought to know that the assumption is incorrect.

Cl.165 : Lodgment of documents etc. not to constitute constructive notice

572. This clause is based on CA s.68C.

573. The doctrine of constructive notice is a legal fiction which operates to restrict the protection afforded to outsiders under the "indoor management rule".

574. Under the Bill a person will not be held to have constructive notice of documents, including the memorandum or articles of a company, which are lodged with the ASC or which are referred to in documents lodged with the ASC. However, the doctrine of constructive notice will be retained for the purpose of registerable charges lodged with the ASC or with a person under a law corresponding to Division 2 of Part 3.5.

Cl.166 : Effect of fraud

575. This clause is based on CA s.68D.

576. A person will be entitled to make the assumptions referred to under Bill sub-cl.164(3) even where the apparent director etc. or an officer, agent or employee about whom the assumption may be made has acted fraudulently in relation to either:

(i) the dealings, or acquisition or purported acquisition of title to property concerned; or

(ii) the forgery of a document that appears to have the company seal,

unless the person has actual knowledge that the apparent director etc., or the officer, agent or employee has acted or is acting fraudulently or has forged a document.

577. The purpose of this provision is to restate the common law rule that a company will not escape liability for the acts of its directors etc. merely because the director etc. has acted fraudulently, if the company would otherwise be made liable by his act. It also does away with an interpretation that has been placed on Ruben v Great Fingall Consolidated (1906) AC 439 to the effect that the rule in Turquand's Case cannot assist when there has been a forgery.

Division 2 - Changes of Status

578. Division 2 of Part 2.3 deals with changes in the status of a company.

Cl.167 : Change of status

579. This clause is based on CA s.69, except that:

(a) The ASC will issue a certificate of registration, not of incorporation.

(b) The application documents referred to in Bill sub-cl.167(2) will not be prescribed and are enumerated in Bill sub-cl.167(3).

(c) The Bill will require a company applying to change its liability status to make such alterations to its memorandum and articles (if any) as will make the memorandum or articles conform with the requirements set out in Part 2.2 of the Bill relating to the memorandum and articles of a Division 1 company of the status sought.

(d) A Table A proprietary company will be required to lodge a printed copy of its articles even if the articles of the company are not altered, nor any articles adopted, by the special resolution referred to in Bill para.167(3)(a).

580. A change in liability status under this clause will not operate to create a new body corporate.

Cl.168 : Change from public to proprietary company or vice versa

581. This clause is based on CA s.70.

582. It will allow a public company to convert to a proprietary company subject to the provisions of the Bill including the requirement that its constitution be altered to include proprietary company provisions, and will allow a proprietary company to convert to a public company subject to its constitution and to the provisions of the Bill.

583. A company seeking to convert its status will be required to lodge a copy of the relevant special resolution, and in the case of a Table A proprietary company - a copy of its memorandum and articles (if any).

Cl.169 : Registration of Table A proprietary company's constitution after change of status

584. This clause is new and requires the ASC to register the memorandum and articles that had been lodged under Bill cls.167 or 168 by a Table A proprietary company.

Cl.170 : Default in complying with requirements as to proprietary companies

585. This clause is based on CA s.71.

586. It will provide that where a proprietary company defaults in complying with the requirements relating to proprietary companies prohibiting an offer or invitation to the public to subscribe for its shares, or the depositing with or the lending of money to the company, the Court will be able to determine that the company has ceased to be a proprietary company.

587. Likewise the ASC will be able to so determine, where a default or alteration referred to in Bill sub-cl.170(2) has occurred.

588. Bill sub-cl.170(6) will provide that it will be a contravention for certain persons to arrange investments with a proprietary company.

589. A proprietary company will contravene Bill sub-cl.170(7) if a default is made in complying with any of the requirements that are included, or deemed to be included, in its constitution, that relate to proprietary companies.

Division 3 - Memorandum and articles

Cl.171 : General provisions as to alteration of memorandum

590. Cl.171 is based on CA s.72 except for specific references to Table A proprietary companies.

591. It will provide for the lodging with the ASC of a copy of a resolution of a company, a court order or any other document affecting the memorandum of a company.

592. A Table A proprietary company will not be required to lodge a copy of a resolution, document or order unless it relates to the company's name, share capital or status (Bill sub-cl.171(3)).

593. A Table A proprietary company will be required to lodge a copy of its memorandum, if the ASC requires, even if it has not been altered (Bill sub-cl.171(4)).

594. Bill sub-cls.171(5) and (6) will provide for a printed copy of a memorandum with alterations made to it be lodged, if required, with the ASC. Such alterations will include alterations to the memorandum of a Division 2 or a Division 3 company made before the registration day of such a company.

595. Bill sub-cl.171(7) will provide for the ASC to register every resolution, order or other document affecting a company's memorandum.

596. The alteration of a memorandum to which such resolutions, orders or documents relate, will take effect on and from the registration of the resolution, order or document, or otherwise on the day of the resolution or such later day as may be specified in the resolution, order or document Bill sub-cl.171(8)).

597. The ASC will be required by Bill sub-cl.171(9) to certify the registration of a court order, and if so requested by the company, to certify the registration of a resolution or a document, and Bill sub-cl.171(10) will provide for certification of an order to be conclusive evidence of compliance with the requirements of the Bill with respect to the alterations to which the order relates.

598. A Court or the ASC will be able to direct publication of a notice of the registration in accordance with Bill sub-cl.171(11), and Bill sub-cls.171(12) and (13) will provide for a certificate of registration of the company to be issued where appropriate and for the ASC to keep a copy of such a certificate, which copy will be available for inspection under Bill sub-cl.1274(2), and will be admissible in evidence in any proceedings as if it were a Bill sub-cl.1274(5) document.

Cl.172 : Alterations of memorandum

599. Bill cl.172 is based on CA s.73 and provides that a company may, by special resolution, alter the provisions of its memorandum.

600. Bill sub-cl.172(1) will provide, subject to Bill cl.172, that where the memorandum of a company includes the objects of the company, the company will be able to alter the provision of its memorandum with respect to its objects by altering or omitting that provision, and where the memorandum of a company does not include the objects of the company, the company will be able to alter its memorandum by inserting a statement of the company's objects in the memorandum.

601. A company will also be able to alter its memorandum by altering, inserting or omitting any other provision with respect to the objects of the company or any provision with respect to the powers of the company.

602. Bill sub-cl.172(2), subject to Bill cls.172, 180(3) and 260, will enable a company, by special resolution, to alter or omit a provision contained in its memorandum, being a provision that could lawfully have been contained in the articles of the company, provided that the memorandum does not prohibit the alteration or omission of such a provision.

603. Bill sub-cl.172(3) will provide that the memorandum of a company will be able to specify a further requirement which must be complied with before a special resolution altering, inserting or omitting a provision contained in a memorandum will take effect, such provision being one which could lawfully have been contained in the articles. Bill sub-cl.172(4) gives examples of such requirements.

604. Bill sub-cl.172(5) will provide that the power of alteration or omission permitted under sub-cl.172(2) will not be able to be exercised in respect of a provision of the memorandum that relates to rights to which only members included in a particular class of members are entitled.

605. Bill sub-cl.172(6) will provide for notice of a general meeting specifying the intention to propose a resolution for alteration of the memorandum, as a special resolution, to be required to be given not only to members of the company, but also to trustees for debenture holders and if there are none, to all debenture holders. The Court will be able to dispense with such a notice.

606. Bill sub-cl.172(8) will provide that where an application is made to the Court for the cancellation of an alteration of the memorandum of a company by either:

(a) where the alteration relates to a provision relating to the objects or powers of the company - the holders of not less than 10% in nominal value of the company's debentures; or

(b) where the alteration is to any provision of the memorandum - the holders of not less than 10% in nominal value of the company's issued capital or a class of issued capital, or 10% of the members where the company is not limited by shares;

the alteration will have no effect unless it is confirmed by the Court.

607. Bill sub-cl.172(10) will provide that the Court is to have regard to the rights and interests of members, or any class of them, as well as to the rights and interests of creditors. The Court will be able to adjourn proceedings to enable an arrangement to be made for the purchase of the interests of dissentient members and to make orders facilitating such an arrangement, and will be able to cancel or to confirm an alteration in whole or in part and on such terms as the Court thinks fit.

608. Bill sub-cl.172(11) will provide that a reference to a provision of the memorandum of a company that could lawfully have been contained in the articles of the company is, in the case of the memorandum of a Division 2 or 3 company that had registered under an earlier law, a reference to a provision of the memorandum of the company that could lawfully have been contained in the company's articles had the memorandum and articles of the company originally been registered under the Bill.

Cl.173 : Lodging and taking effect of resolutions passed under cl.172

609. This provision is based on CA ss.73(11), (12) and (13).

610. It provides for the taking effect of a resolution passed as provided by Bill sub-cls.172(1) or (2).

Cl.174 : Effect of memorandums of certain Division 2 companies

611. This clause is based on CA sub-s.73(4A).

612. Bill sub-cl.174(2) will provide that where the memorandum of a State or Territory company that has registered under Division 2 of Part 2.2 of the Bill prohibits the alteration of a provision of the memorandum that could lawfully have been contained in the articles of the company (in this sub-clause referred to as an "entrenchable provision"), then while the memorandum of that company continues to do so, the memorandum will be deemed also to prohibit the omission from the memorandum of that entrenchable provision.

613. Where the memorandum of a State or Territory company that has registered under Division 2 of Part 3 of the Bill contains a provision in its memorandum stipulating that a further requirement is to be complied with before the alteration of, or addition to, an entrenchable provision has any effect, then while the memorandum of such a company continues to require that a further requirement be met, Bill sub-cl.174(2) will deem the omission of an entrenchable provision also to be of no effect until the further requirement has been complied with.

614. The deeming provisions of Bill sub-cl.174(2) will have no effect where the memorandum of a State or Territory company expressly provides to the contrary (Bill sub-cl.174(3)).

Cl.175 : Articles adopting Table A or B

615. This clause is based on CA s.75, except where it deals specifically with Division 1 companies and with Table A proprietary companies.

616. It will provide that a company other than a no liability company will be able to adopt all or any of the regulations in Table A; a no liability company will be able to adopt all or any of the regulations in Table B (Bill sub-cl.175(1).

617. If a company limited by shares which is registered under Division 1 of Part 2.2 of this Bill has registered articles, then to the extent that they do not exclude or modify the regulations in Table A, the regulations contained in Table A will be the company's articles so far as they are applicable (Bill sub-cl.175(2)).

618. Unless Table A regulations are excluded or modified by, or are otherwise inconsistent with, provisions that are proved for the purposes of a proceeding in an Australian court to be included (otherwise than by Bill sub-cl.175(2)) at a particular time in the articles of a Table A proprietary company, those regulations will be deemed for the purposes of that proceeding to have been included in the company's articles at that time (Bill sub-cl.175(3)).

619. If a Division 1 company is a no liability company and no articles are registered, Table B regulations will apply as if they were the registered articles of the company, or else the regulations will apply to the extent they are not excluded or modified by articles that are registered by such companies (Bill sub-cl.175(4)).

Cl.176 : Alteration of articles

620. Clause 176 is based on CA s.76.

621. Bill cl.176 will provide that a company will be able to alter or add to its articles by special resolution, which alteration will, if so provided in the memorandum, not take effect until certain other requirements specified in the memorandum are complied with (Bill sub-cls.176(1) and (2)).

622. A company will be able to adopt Table A or Table B regulations, without setting out in full in the special resolution the text of the regulations to be adopted (Bill sub-cl.176(5)).

Cl.177 : Deemed proprietary company provisions

623. A proprietary company's constitution will be deemed to include proprietary company provisions, if it does not already include such provisions.

Cl.178 : Alteration of proprietary company provisions

624. Bill cl.178 is based on CA s.34(4) and will provide that a proprietary company will be permitted to alter any of the proprietary company provisions included, or deemed to be included, in its constitution, but not so that the constitution ceases to contain proprietary company provisions.

Cl.179 : Constitution of companies limited by guarantee

625. Bill cl.179 is based on CA s.77.

626. It will provide that a provision in the constitution of a company limited by guarantee and not having a share capital, that purports to give a right to participate in the divisible profits of the company otherwise than as a member will be void (Bill sub-cl.179(1)).

627. Likewise a provision in the constitution of a company limited by guarantee or in a resolution of such a company purporting to divide the undertaking of the company into shares or interests will be taken to be a provision for share capital (Bill sub-cl.179(2)).

628. The clause will not apply to State or Territory companies incorporated before given dates (Bill sub-cl.179(3)).

Cl.180 : Operation of memorandum and articles

629. Bill cl.180 is based on CA s.78.

630. It will provide that the constitution will bind the company and the members of the company as if it had been signed and sealed by each member, and will constitute a contract between the company and its members and as between the members themselves in their capacity as members, and also as between the company and its officers in their capacity as such, whether they are members or not (Bill sub-cl.180(1)).

631. No member will be bound by an alteration to the constitution made after he becomes a member, that requires him to subscribe to additional shares or increases his liability to the company or restricts his right to transfer shares held at the date of the alteration, unless he agrees in writing to be so bound (Bill sub-cl.180(3)).

632. The limitation on imposing additional liabilities or restrictions on the right to transfer shares does not apply to a public company having a share capital, that converts its status to that of a proprietary company by way of special resolution in accordance with Bill sub-cl.168(1) altering its constitution to include proprietary company provisions.

Cl.181 : Copies of memorandum and articles

633. Bill cl.181 of the Bill is based on CA s.79.

634. It will require a company to supply a copy of the memorandum and articles (if any) of the company to a member within the period provided for by this clause or by the ASC (Bill sub-cl.181(1)). If required by the ASC, a Table A proprietary company will lodge a printed copy of its articles (if any), even if they have not been altered Bill sub-cl.181(2)).

635. Alterations to the memorandum or articles of a company will be required to be included in or annexed to an issued copy of the constitution in the manner specified in Bill sub-cl.181(3).

636. The ASC will be able to require a company to lodge with it a printed copy of the articles of association of the company as altered, including alterations made to the articles of Division 2 and Division 3 companies before they registered under this Bill (Bill sub-cl.181(4)).

637. Where the memorandum or articles of a company is affected by an agreement that is required to be lodged with the ASC under Bill cl.256, the company will not be permitted to issue or lodge a copy of the memorandum or articles unless a copy of the agreement is annexed (Bill sub-cl.181(6)).

Division 4 : Transactions on a company's behalf

Cl.182 : Confirmation of contracts and authentication and execution of documents

638. Bill cl.182 is based on CA s.80.

639. Bill sub-cl.182(1) will provide that a person acting under the authority of a company will be able to make, vary or discharge a contract on behalf of the company in the same manner as if the contract were made, varied or discharged by a natural person.

640. Bill sub-cl.182(2) will provide that such a contract will bind the company and other parties to the contract.

641. Bill sub-cl.182(3) will provide that a contract or document executed under the common seal of the company will not be invalid by reason only that a person attesting the affixing of the common seal was interested in that contract or document or the matter to which it related.

642. Bill cl.182 will not prevent a company from being able to make, vary or discharge a contract under its common seal (Bill sub-cl.182(4)).

643. Bill cl.182 will not apply to the making, variation or discharging of a contract by a Division 2, 3 or 4 company before the company's registration day; however, the clause will otherwise apply from that time regardless of when a company gave its authority (Bill sub-cl.182(5)).

644. Bill sub-cl.182(7) will provide that a document or proceeding requiring authentication by a company will be able to be authenticated by the signature of an officer of the company and will not need to be authenticated under the common seal of the company.

645. Bill sub-cl.182(8) will enable a company to empower a person to execute deeds on its behalf as its agent or attorney, and a deed signed by the agent or attorney on behalf the company under an appropriate official seal of the company will bind the company and have the same effect as if it were under the common seal of the company.

646. Bill sub-cl.182(9) will provide that the authority of an agent or attorney will continue for the period mentioned in the instrument of authority, and if no period is mentioned, until notice of revocation or termination of the agent's or attorney's authority has been given to the person dealing with the agent or attorney.

647. Bill sub-cl.182(10) will provide that a company will, if authorised by its articles, be able to use in place of its common seal outside the State or Territory where the common seal is kept, one or more official seals, which will be required to be facsimiles of the common seal and which will be required to have on their face the names of the places where they are to be used.

648. Bill sub-cls.182(11) and (12) will provide that a person affixing an official seal will be required to certify in writing on the instrument to which the seal is affixed, the

date on which and the place at which the seal is affixed. A document sealed with such an official seal will be deemed to have been sealed with the common seal of the company.

Cl.183 : Ratification of contracts made before formation of company

649. Bill cl.183 is based on CA s.81.

650. Bill sub-cl.183(1) sets out the meaning of a reference throughout the clause to a non-existent company.

651. Bill sub-cls.183(2) and (3) will provide that where a non-existent company (by a person, agent or trustee) purports to contract and the company is then formed within a reasonable time, the company will then, within a reasonable time, be able to ratify the contract and will be entitled to the benefit of the contract as if the company had been formed and had been a party to the contract.

652. Bill sub-cl.183(4) will provide that where a non-existent company purports to contract, and either the company is not formed within a reasonable time thereafter or the contract is not ratified within a reasonable time after formation, any other party to the contract will be able to recover damages from the person who purported to execute the contract on behalf of the non-existent company. Those damages will be equivalent to damages which would have been obtainable if the company had been formed and had ratified the contract and the contract had been discharged by a breach constituted by the refusal or failure of the company to perform any obligations under the contract.

653. Bill sub-cl.183(5) will provide that where proceedings for damages are brought under Bill sub-cl.183(4) and the company has been formed, the Court will be able to order the company to give up property or pay for any benefit received as

a result of the contract and, (or as an alternative) the court will be able to order the company to pay all or some of the damages for which the defendant may be found liable under Bill sub-cl.183(4).

654. Bill sub-cl.183(6) will provide that where proceedings are brought under Bill sub-cl.81(4) and the Court orders the company to give up property or pay for any benefit received, the Court will be able to refuse to award damages or to award lesser damages.

655. Bill sub-cl.183(7) will provide that where the contract is ratified but a breach of contract occurs due to a refusal or failure to perform, and proceedings are brought against the company, the Court will be able, if it thinks it just and equitable,to order the person executing the contract on behalf of the company to pay part or all or the damages.

656. Bill sub-cl.183(8) will provide that a person will be able to be released from liability in relation to a pre-incorporation contract where the other party or parties consent in writing to that person being released.

657. Bill sub-cl.183(9) will provide that Bill sub-cls.183(4) and 183(7) will not apply to allow a party to recover damages from a person in relation to a pre-incorporation contract where that party has consented to the person being released from liability under Bill sub-cl.183(8).

658. Bill sub-cl.183(10) will provide that if the company is formed and it and the other party or parties to the contract substitute another contract for the first contract, the person who executed the first contract on behalf of the company will be discharged from all liabilities in relation to it.

659. Bill sub-cl.183(11) will provide that rights and liabilities under Bill cl.183 in relation to a contract are in substitution for rights and liabilities in relation to the contract accruing apart from that clause.

660. For the purpose of Bill cl.183, a trustee for a proposed company who purports to enter into a contract on its behalf will not have any right of indemnity against the company in respect of the contract, where the company is formed within a reasonable time after the purported entry into the contract, but the company does not ratify the contract within a reasonable time after it is formed. The purpose of Bill sub-cl.183(12) is to prevent the operation of equitable principles by which the trustee might be able to avoid liability for statutory damages under Bill sub-cl.183(4).

661. Bill sub-cl.183(13) will provide that a contract will be able to be ratified by a company under Bill cl.183 in the same manner as a contract will be able to be made by a company under Bill cl.182. The provisions of Bill sub-cl.182(3) relating to non-invalidity of contracts because an interested person attested the affixing of the common seal will also apply.

PART 2.4 - MEMBERSHIP AND SHARE CAPITAL

Division 1 - Membership generally

Cl.184 : Membership of company

662. Bill cl.184 is based on CA s.35(8) and will provide that a person who agrees to become a member of a company and whose name is entered in the company's register of members will become a member of the company.

Cl.185 : Membership of holding company

663. Bill cl.185 is based on CA s.36 and will provide that except in certain circumstances, a body corporate that is a subsidiary of a company will not be able to be a member of the company that is its holding company, nor to hold a beneficial interest in shares of that company.

664. Thus Bill sub-cls.185(3) and (4) will provide that an allotment or transfer to the subsidiary of shares in the holding company will be void, as will a purported acquisition of units of shares in the holding company by the subsidiary company.

665. A unit is defined in the Cl.9 of the Bill as meaning in relation to a share, a right or interest, whether legal or equitable, in the share, and such a unit will include an option to acquire such a right or interest in the share.

666. Bill sub-cls.185(2), (3) and (4) will not apply where the subsidiary is concerned as a personal representative, or as a trustee in the circumstances set out in Bill sub-cl.185(6).

667. Bill sub-cl.185(7) will not prevent a subsidiary referred to in Bill sub-cl.185(7) from continuing to be a member of a holding company referred to in Bill sub-cl.185(7), but subject to sub-cls.185(5) and (6), the subsidiary will not be entitled to vote at meetings of the holding company or of a class of member of the holding company.

668. Where Bill sub-cl.185(7) does not apply but a subsidiary already held shares in a holding company at the time it became a subsidiary of the holding company, the subsidiary will be able to remain a member of the holding company but, subject to sub-cls.(5) and (6), the subsidiary will not be entitled to vote at meetings of the holding company or of a class of members of the holding company, and, within a period of 12

months of becoming a subsidiary of a holding company or within an extension of that period as allowed by a Court, will be required to dispose of all its shares in the holding company (Bill sub-cl.185(8)).

669. Except where a subsidiary is concerned as a personal representative or as a trustee as provided in Bill sub-cls.185(5) and (6), the subsidiary referred to in Bill sub-cls.185(2), (3), (4), (7) and (8) will include its nominee (Bill sub-cl.185(9)).

670. A reference to shares in this clause will include, where the holding company is a company limited by guarantee or is an unlimited company, and whether or not the holding company has a share capital, a reference to the interest of a member of the holding company as a member, whatever the form of that interest (Bill sub-cl.185(10)).

Cl.186 : Prohibition on carrying on business with fewer than statutory minimum number of members

671. Bill cl.186 is based on CA s.82.

672. It will provide that a member of a company (other than a wholly-owned subsidiary of a holding company) that carries on business for more than 6 months with the number of members of the company reduced below 2 in the case of a proprietary company, or below 5 members in the case of any other company, will contravene Bill sub-cl.186(1), if the member is aware that the company is carrying on business with fewer than the statutory minimum of members, and will be generally liable for any debt contracted by the company at that time. Bill sub-cl.186(1) will not apply to a company where the whole of its issued shares are held by a holding company that is a company (Bill sub-cl.186(2)).

Division 2 - Shares generally

673. The provisions of Division 3 of Part 2.4 of the Bill set out the requirements of the legislation with regard to shares generally. In this respect the Bill follows the provisions of CA Part IV, Division 3, except that the provisions equivalent to CA ss.124-128 have been formed into a new Division dealing with class rights (see Bill Part 2.4 - Division 3) and CA ss.116, 117, 129, and 130 have been extracted from this Division and incorporated with other relevant provisions into a new Division dealing with the maintenance of capital (see Bill Part 2.4 - Division 4).

Cl.187 : Return as to allotments

674. This clause is based on CA s.113.

675. Within one month of making an allotment of its shares, a company will have to lodge with the ASC a return setting out particulars of the allotment.

Cl.188 : Differences in calls and payments, reserve liability, &c.

676. This clause is based on CA s.114.

677. If authorised by its articles, a company will be able:

(a) to vary the amounts and times of payment of calls as between shareholders;

(b) to accept from a member the whole or part of the amount unpaid on shares, although no call has been made;

(c) to pay dividends in proportion to the amount paid on each share, except in the case of a no liability company.

678. A limited company will be able by special resolution to determine that any portion of its share capital that has not been called up cannot be called up except in the event of the company being wound up.

Cl.189 : Share warrants

679. This clause is based on CA s.115.

680. Companies will be prohibited from issuing share warrants. Under the Victorian Companies Act of 1928, and comparable legislation in other jurisdictions, companies could issue share warrants, ie, certificates that the bearer was entitled to the shares represented by them. These certificates were negotiable instruments.

Cl.190 : Power to issue shares at a discount

681. This clause is based on CA s.118.

682. A no liability company will be able to issues shares at a discount. Any other company may issue shares at a discount provided that certain conditions are met and that the issue is confirmed by an order of the Court.

Cl.191 : Issue of shares at premium

683. This clause is based on CA s.119.

684. A company that issues shares at a premium will have to transfer a sum equal to the value of the premiums to a "share premium account" which is subject to the provisions of the Bill relating to reduction of capital (except s-cl.195(6) which specifies some of the information to be included in the order) as if the share premium account were paid up capital. The share premium account may be applied only for certain specified purposes.

Cl.192 : Redeemable preference shares

685. This clause is based on CA s.120.

686. If authorised by its articles, a company will be able to issue preference shares that can be redeemed by the company out of profits or out of the proceeds of a fresh issue of shares made for the purposes of the redemption. Where a premium is payable on redemption it will have to be paid out of profits or the share premium account.

687. Where redeemable preference shares are redeemed otherwise than out of the proceeds of a fresh issue of shares, a sum equal to the nominal value of the shares redeemed will have to be transferred from profits otherwise available for dividend to a "capital redemption reserve" which is subject to the provisions relating to the reduction of share capital (except Bill sub-cl.195(6)) as if the reserve were paid up share capital. The capital redemption reserve may be used to pay up unissued shares of the company to be issued to members as bonus shares.

688. Where a company redeems any preference shares it will be able to issue shares to the nominal value of the redeemed shares as if the preference shares had never been issued. Shares will be considered redeemed despite the fact that the redemption payment is by a cheque which has not been presented for payment.

Cl.193 : Power of company to alter its share capital

689. This clause is based on CA s.121.

690. If authorized by its articles, a company will be able to pass an ordinary resolution altering its memorandum by:

(a) increasing share capital by the creation of new shares;

(b) consolidating and dividing its share capital into shares of larger amounts;

(c) converting paid up shares into stock, or stock into shares;

(d) sub-dividing its shares into shares of smaller amounts; or

(e) cancelling shares that have not been taken up and reducing the share capital by that amount. Such a cancellation shall not be a reduction of share capital in accordance with this Act.

Cl.194 : Validation of shares improperly issued

691. This clause is based on CA s.122.

692. Where a company has purported to issue or allot shares in a manner that was invalid or unauthorised, the Court will be able, upon the application of the company, a holder or mortgagee of those shares, or a creditor of the company, to make an order validating the issue or allotment of those shares and confirming the terms of issue or allotment.

Cl.195 : Special resolution for reduction of share capital

693. This clause is based on CA s.123.

694. Subject to confirmation by the Court, a company will be able, if authorised by its articles, to reduce its paid up share capital in any way, including the manners specified. There are procedures to safeguard the interests of creditors who do not consent to the reduction.

Division 3 - Class Rights

Cl.196 : Commission to be informed of special rights carried by, or division or conversion of, shares

695. This clause is based on CA s.124.

696. Where a company allots shares carrying rights that are not contained in the memorandum or articles, the company will have to lodge within one month of the allotment, a statement in the prescribed form relating to those rights. The ASC will also have to be notified of details relating to the division or conversion of shares.

Cl.197 : Rights of holders of classes of shares

697. This clause is based on CA s.125.

698. It deals with the variation of rights attached to classes of shares. There are separate provisions dealing with the variation of the rights

- attached to shares where the share capital is not divided into classes (see Bill cl.198)

- of members of a company which does not have a share capital (see Bill cl.199).

699. Where there is nothing to the contrary in the memorandum or articles of a company, the rights attached to the holders of a class of shares will be able to be varied with the consent of the holders of 75% of those shares or with the sanction of a special resolution passed at a meeting of the holders of those shares.

700. To protect the rights of the holders of a particular class of shares, 10% of the members of that class will be able to apply to the Court to set aside the variation or abrogation of of their rights. In order to avoid problems that may be caused to nominees, a person who has assented to a variation will not be prevented from applying to the Court. This right to apply to the Court also applies where the memorandum or articles are altered by the insertion of a provision authorizing the variation or abrogation of those rights (Bill para.197(4)(b)).

701. The allotment of additional preference shares ranking pari passu with existing preference shares is deemed to be a variation or abrogation of those rights unless the further allotment was authorised by the original allotment or by the memorandum or articles. The operation of this clause is not affected by the provisions relating to alteration of memorandum or alteration of articles.

Cl.198 : Rights of holders of shares

702. This clause is based on CA s.126.

703. It deals with the rights of holders of shares where the share capital is not divided into classes of shares.

704. These provisions are similar to those in Bill cl.197 (rights of holders of classes of shares) and although that part of the clause which deals with planned variation of rights is different in form it still ensures that the rights of existing shareholders are not prejudiced by subsequent action which is not provided for by the memorandum or the articles.

Cl.199 : Rights of classes of members

705. This clause is based on CA s.127.

706. It deals with the variation of the rights of members of a company which does not have a share capital.

707. These provisions are similar to those in Bill cl.197 except that there is no equivalent to Bill sub-cl.197(8) which provides for deemed variation of rights.

Cl.200 : Rights of holders of preference shares to be set out in memorandum or articles

708. This clause is based on CA s.128.

709. A company will not be able to allot preference shares nor convert issued shares into preference shares unless the rights of the holders of those shares are set out in the memorandum or articles of the company.

Division 4 - Maintenance of Capital

Cl.201 : Dividends to be paid from profits only

710. This provision is based on CA s.565.

711. It will impose both criminal and civil liability on a director or an executive officer who wilfully pays or permits to be paid a dividend to shareholders otherwise than out of profits or from the share premium account.

712. Bill sub-cl.201(2) will provide for civil proceedings for recovery of debts owed to creditors of the company to the extent that dividends paid out, exceed profits.

713. Such proceedings will be able to be brought by creditors of the company or by the liquidator suing on their behalf, whether or not a director or executive officer of a company has been convicted of an offence under this provision.

714. The civil standard of proof will apply in precedings for recovery of an amount under Bill sub-cl.201(2).

Cl.202 : Power of company to pay interest out of capital in certain cases

715. This clause is based on CA s.133.

716. Where shares are issued to raise capital for construction work or the provision of plant that cannot be made profitable for a long period, a company will be able to pay interest on the paid up share capital, charging the interest to capital, provided that the payment is authorized by the articles or by a special resolution, is approved by the Court and does not exceed 8% or the prescribed rate.

Cl.203 : Restriction on application of capital of company

717. This clause is based on CA s.116.

718. This provision imposes restrictions on the application of the capital of the company and is intended to strengthen the provisions relating to the making of certain payments (see Bill cl.204).

719. The main provisions are as follows:

(a) Except as provided by Bill cl.204, a company will not be able to apply any shares or capital to make a payment to a person in consideration of his subscribing or procuring subscriptions for shares in the company. (See also Ooregum Gold Mining v Roper [1892] AC 125.)

(b) A company is prohibited from issuing shares at a discount other than in accordance with Bill cl.190.

(c) If a company contravenes this provision, the company will not be guilty of an offence but each officer of the company who is involved in the contravention contravenes this sub-section.

(d) The court may, in addition to imposing a penalty, order that a person guilty of an offence under this provision pay compensation to the company.

(e) Where this provision has been contravened, the company may recover from any person who has knowingly made a profit from the contravention, an amount equal to that profit, or, where it has suffered a loss or damage, the company may recover from any person involved in the contravention, the amount of that loss or damage.

Cl.204 : Power to make certain payments

720. This clause is based on CA s.117.

721. Provided that certain conditions are met, and that the total amount of the proposed payment and any other such payments does not exceed 10% of the amount payable on shares upon their allotment or such lesser amount as authorised by the articles, a company will be able to make a payment by way of brokerage or commission to a person in consideration of his subscribing or procuring subscriptions for shares.

Cl.205 : Company financing dealings in its shares etc.

722. This clause is based on CA s.129.

723. A company is prohibited from giving financial assistance for or in connection with the acquisition by any person of shares in the company or its holding company, or from acquiring or lending money on the security of shares in the company or its holding company.

724. The prohibition extends to acquisitions of "units" of shares which is defined to include beneficial interests (see cl.9) and covers financial assistance given either before or after the acquisition.

725. Included within the provision is a prohibition of direct or indirect acquisition by a company of shares in itself or in a holding company of itself.

726. The meaning of "financial assistance" in Bill sub-cl.205(1) includes the giving a loan, guarantee, or security, releasing an obligation, or forgiving a debt, or any other form of financial assistance. This provision is an inclusory definition and is not intended to be exhaustive of the methods of giving financial assistance which are to be prohibited.

727. The inclusion of the words "the release of an obligation or the forgiving of a debt" make it clear that more than the giving of specie is to be prohibited throughout Bill cl.205 .

728. There is a definition of "relevant purpose" in relation to the giving of financial assistance for the purposes of cl.205. The relevant purpose may be one of a number of purposes for which the company gave the financial assistance, or may be a substantial purpose of the assistance (Bill sub-cl.205(3) - based on TPA s.4F).

729. There is also a definition of "in connection with" for the purposes of Bill cl.205. A company gives financial assistance in connection with an acquisition of shares where it is aware that it will financially assist a person to

acquire shares in the company, or will assist the person who has already acquired shares in the company to pay any unpaid amount for subscriptions or calls.

730. If there is a contravention of Bill sub-cl.205(1), the company will not be guilty of an offence but rather each officer in default will be guilty of an offence. The rationale for the provision is that, if the company is penalised under this section, it is the members and creditors who will suffer.

731. The Court will have power, unless it decides to relieve a convicted officer from liability under Bill sub-cl.205(7), to order that officer to pay compensation to the company or other person suffering loss or damage as a result of the contravention. It is noted that in sub-cl.205(6) the reference in the equivalent CA provision to the C & S Interpretation Act has been replaced by the equivalent Crimes Act 1914 provision (i.e. section 5).

732. Nothing will prohibit a company:

(a) paying a bona fide dividend in the ordinary course of commercial dealing;

(b) making a payment pursuant to a reduction of capital under Bill cl.195;

(c) discharging a liability resulting from a bona fide commercial transaction;

(d) giving a bona fide guarantee or security in the ordinary course of commercial dealing to a borrowing corporation of which it is a subsidiary company;

(e) acquiring its own shares -

(i) where no consideration is provided for the acquisition by the company or a related corporation;

(ii) through a purchase ordered by a court;

(f) creating or acquiring a bona fide lien on its shares in the ordinary course of commercial dealing;

(g) making a bona fide agreement in the ordinary course of commercial dealing with a subscriber for the payment of shares by installment;

733. This is not intended to be construed as an exhaustive list of the activities for which companies may be exempt from in respect of the prohibition contained in Bill sub-cl.205(1). The effect of the common law rules allowing a company in particular circumstances to give financial assistance in relation to its own shares will be preserved.

734. A particular act of a company will also be exempt from the prohibition in Bill sub-cl.205(1) where it consists of -

(a) the lending of money, the giving of guarantees or securities in the ordinary course of the company's ordinary business where its business includes those activities and they are carried out on ordinary commercial terms.

(b) the giving of financial assistance for the acquisition of shares in the company or related corporation to be held by or for the benefit of employees (including salaried directors) of the company or related corporation provided that the scheme for financial assistance has been approved at a general meeting of the company, and, if it is a subsidiary of a listed corporation or corporations, or its ultimate holding company is incorporated in Australia (including the external territories), has been approved at a general meeting of the listed company or ultimate holding company.

735. Bill sub-cl.205(9)(b) requires that, in the case of employee benefits, the scheme for financial assistance in Bill sub-cl.205(9)(b) must have been approved at a general meeting of the company and, where the company is a subsidiary company, the listed corporation or corporations, or its ultimate holding company.

736. A validation procedures exists whereby a company may be exempted from the prohibition in Bill-sub-cl.205 relating to the giving of financial assistance for the acquisition of shares.

737. Major features of this procedure are:

(a) the steps to be taken by a company in relation to the passing of a special resolution to give the financial assistance which are -

(i) The company will have to resolve, by a special resolution, to give the financial assistance;

(ii) where the company is a subsidiary of a listed corporation or where its ultimate holding company is incorporated in Australia (including the external territories), that listed corporation or ultimate holding company will also be required to resolve to give the financial assistance;

(iii) the notice of intention of the company to propose the resolution will have to give particulars of the financial assistance and its effect on the company or, where relevant, the group of corporations, and will have to include a statement of the directors, stating whether, in their opinion, the assistance would be likely to materially prejudice the interests of the creditors or members;

(iv) this notice and the auditor's report or directors' statement will also have to accompany the notice of intention of the listed corporation or ultimate holding company to propose the resolution;

(v) a copy of the notice of intention of the company and of the auditor's report or directors' statement will have to be lodged with the ASC;

(vi) the notice of intention of the company must be given to all members, trustees for debenture holders, and all known debenture holders where there are not trustees;

(vii) a similar provision to the above also exists in relation to the listed corporation and the ultimate holding company;

(viii) within 21 days of the meeting of the company, or of the listed corporation or ultimate holding company, at which the resolution is passed, a notice setting out the terms of the resolution and mentioning the possibility of an application to the Court to oppose the assistance will have to be published in a local daily newspaper;

(ix) there must be no outstanding applications opposing the giving of financial assistance and the financial assistance must not be given either before the period allowed for applications to oppose the assistance expires, or before such applications have been withdrawn or dealt with by a court;

(b) Sub-cl.205(11) provides that the Court on application by a company will be able to consider substantial compliance with Bill sub-cl.205(10) to be sufficient compliance;

(c) Where a special resolution to give financial assistance has been passed by the company, or if appropriate, by the listed corporation or ultimate holding company, an application to the Court opposing the resolution will be able to be made within 21 days by members, trustees for debenture holders or creditors of the company, of a subsidiary company, or of the listed corporation or ultimate holding company (as the case may be), or by the ASC;

(d) Where a resolution to give financial assistance has been opposed, the Court will be required to have regard to the rights and interests of the members and creditors of the company and will not be able to approve the resolution unless it is satisfied that the company has disclosed all material matters and that the financial assistance would not unduly prejudice the interests of creditors or shareholders. The Court will be able to approve or disapprove the resolution and, if it thinks fit, make an order for the purchases by the company of the interests of dissentient members.

Cl.206 : Consequences of a company financing dealings in its own shares

738. This clause is based on CA s.130.

739. Except as provided by this clause, the validity of a contract or transaction will not be affected by reason of a contravention of -

(a) Bill para.205(1)(a);

(b) Bill para.205(1)(b) unless the contract or transaction brings into being the acquisition or loan that constitutes the contravention;

(c) Bill para.205(1)(c) unless the contract or transaction effects the loan that constitutes the contravention.

740. Where a company would, but for Bill sub-cl.206(1), have contravened Bill cl.205, the contract or transaction, or any related contract or transaction will be voidable at the option of the company by a notice in writing to the other party. This option will be subject to the remaining provisions of Bill cl.206.

741. Where the Court is satisfied on the application of the company or of any other person, that the company or that person has suffered, or is likely to suffer, damage as a consequence of the contract or transaction or any related contract or transaction being void by reason of Bill cl.206 or having become void or becoming void under Bill cl.206, the Court will be able to make such orders as it thinks just and equitable (including the orders for return of money or property, compensation or indemnification set out in Bill sub-cl.206(5) against any party to the contract, transaction, or related contract or transaction, or against any person who knowingly aided, was concerned in or party to the contravention. This provision will allow a party to apply to the Court before the company is able to avoid the contract or transaction under Bill sub-cl.206(2).

742. Bill sub-cls.206(6) to (13) deal with the giving to a person of a certificate of directors stating that Bill sub-cl.205(10) has been complied with in relation to an acquisition of shares. If this certificate is given to a person who relies on it, he is protected from an order of the

Court under Bill sub-cl.206(4) and the contract or transaction is not voidable under Bill sub-cl.206(2). However, the person is not protected by the certificate if he was aware prior to the contract or transaction that Bill sub-cl.205(10) had not been complied with. For the purposes of Bill sub-cl.206(7) a person is deemed to be aware of any matter of which his employee or agent having duties in relation to the contract or transaction is aware, unless that person can prove that he did not have personal knowledge of that matter. A person who signs a certificate which falsely states (as at the time the certificate was signed) that Bill sub-cl.205(10) has been complied with has committed an offence.

Division 5 - Register of Members

743. This Division of the Bill deals with the register of members and is based on CA Division 4 of Part V.

Cl.207 : Division not to apply to mutual life assurance companies.

744. This clause is the same as CA s.255.

745. Apart from the right given to members to inspect the register of members (Bill sub-cl.210(5)), the provisions of this Division relating to the register of members will not apply to a mutual life assurance company which complies with the requirements of s.140 of the Life Insurance Act 1945.

Cl.208 : Notices relating to non-beneficial and beneficial ownership of shares.

746. This clause is based on CA s.255A.

747. A shareholder will be required to disclose to the company details of the shares that he holds in a non-beneficial capacity. A non-beneficial capacity will include the situation where a person holds the shares as trustee or

nominee for, or otherwise on account of, another person (Bill sub-cl.208(9)). However, it will not be necessary to provide full details of the particular nature of the non-beneficial capacity in which the shares are held. All that is required in this respect is a statement that at the relevant time the shares where held non-beneficially.

748. The information will be required to be stated in all new transfers lodged for registration (Bill sub-cl.208(1)). Failure to include an appropriate notice in the transfer will constitute a contravention but will not affect the validity of the registration of the transfer (Bill sub-cl.208(2)).

749. Special provision will be made for further notice to be given within 14 days of the registration of the transfer, where a change in the non-beneficial shareholding notified in the transfer occurs after the transfer is lodged but before it is registered. This will occur where any share previously notified as being held in a non-beneficial capacity, becomes beneficially owned (Bill sub-cl.208(3)), or where more of the shares being transferred become held non-beneficially (Bill sub-cl.208(4)).

750. Notice will also have to be given where, at any other time a change occurs in the capacity in which particular shares are held, either from a beneficial to a non-beneficial capacity or vice versa (Bill sub-cl.208(5) and (6)). In such a case the notification of the change will have to be given to the company within 14 days of the change occurring.

751. In proceedings brought under this clause knowledge of an employee or agent acting in relation to the transfer or ownership of the shares will be imputed to the transferee or shareholder (Bill sub-cl.208(7)).

Cl.209 : Register and index of members

752. This clause is based on CA s.256.

753. A company will be required to keep a register of its members containing certain information relating to the shareholdings in the company (Bill sub-cl.209(1)). An unlisted company with a share capital will be required to state which shares are held in a non-beneficial capacity (Bill sub-cl.209(1)(b)).

754. Where an unlisted company notifies the ASC of the conversion of any of its shares into stock, it will be required to state in the register the stock which is held non-beneficially by a member (Bill sub-cl.209(3)(a)).

755. For the purposes of these provisions the joint ownership of shares by 2 or more persons will be deemed to constitute a single membership of the company (Bill sub-cl.209(4)).

756. The question of whether a member of an unlisted company holds shares beneficially or non-beneficially will be determined by having regard only to the information provided in respect of companies by the notification on transfer of shares of change of capacity required under Bill cl.208 or in a statement as to the beneficial ownership of shares furnished to the ASC under Bill Part 6.8 (Bill sub-cl.209(5), (6) and (7)).

757. A company with more than 50 members will be required to keep an index of the names of its members (Bill sub-cl.209(10) and (11)).

Cl.210 : Inspection and closing of register

758. This clause is based on CA s.257.

759. A company will be able to close the whole or part of its register of members for a limited period each year (Bill sub-cl.210(1)). The register will be required to be open for inspection by any member and by any other person on payment of a fee (Bill sub-cl.210(2)).

760. Copies of certain parts of the register will also have to be made available on payment of a fee (Bill sub-cl.210(3)).

Cl.211 : Consequences of default by agent

761. This clause is based on CA s.258.

762. An agent of the company who causes the company to contravene the requirements of the Bill in regard to the register of members will be liable to the same penalties as if he were an officer of the company.

Cl.212 : Power of Court to rectify register

763. This clause is based on CA s.259.

764. If there is an error in the register of members, the Court will be able, on the application of an aggrieved person, any member or the company, to order the rectification of the register of members.

Cl.213 : Trustee, etc, may be registered as owner of shares

765. This clause is based on CA s.260.

766. A trustee, executor or administrator of the estate of a dead or bankrupt person or of a person who is incapable, through physical or mental infirmity, of managing his affairs, will be able to be registered in that capacity as the holder of any legal or equitable interest in a company's shares held by that person (Bill sub-cls.213(1), (3), (4), (5), (6) and (7)). The trustees' etc. will be subjected to the same liabilities as those of the person on whose behalf he holds the shares (Bill sub-cl.213(8)).

767. No notice of any trust will be able to be entered on the register of members except as provided by this clause and cl.209 (Bill sub-cl.213(10)).

768. A person who holds shares in a proprietary company as trustee will be required to notify the company of that fact (Bill sub-cl.213(13)).

Cl.214 : Branch Registers

769. This clause is based on CA s.262 but differs from it in that a company will no longer be obliged to keep a branch register in a particular State or Territory at the request of a member resident in that State or Territory. The requirement to keep branch registers has been omitted because of the absence of any clear benefit to shareholders and the high administrative costs of maintaining branch registers together with the general inconvenience of co-ordinating and up-dating separate registers and the difficulties of developing efficient systems for security transactions and settlements.

770. A company having a share capital however will be able still to keep a branch register in any place outside the State or Territory in which its principal register is kept (Bill sub-cl.214(1)).

771. A branch register will be deemed to be part of the principal register (Bill sub-cl.214(3)).

772. Where a company keeps a branch register it will be required to be kept in the same manner as the Bill requires the company to keep the principal register (Bill sub-cl.214(4)).

773. Shares registered in a branch register are to be distinguished from shares registered in the principal register (Bill sub-cl.214(8)).

774. A company will be able to discontinue a branch register if it transfers all entries in the register to another branch register or to its principal register (Bill sub-cl.214(10)).

Division 6 - Options

Cl.215 : Register of options

775. This clause is based on CA s.131.

776. Bill sub-cl.215(1) provides that a company will be required to keep a register of options to take up unissued shares. (Note that Bill cl.1302 deals with the location of registers). The register will have to contain the particulars set out in Bill sub-cl.215(2). The register will be prima facie evidence of matters inserted in the register and will have to be open for inspection to members without charge and to any other person on the payment of a fee (not exceeding the prescribed amount) if the company requires it. Provision will also be made for copies to be made available.

777. If the options have been granted official quotation by a stock exchange, companies will not be required to keep copies of every instrument by which options to take up unissued shares in the company are granted (Bill sub-cl.215(7)).

Cl.216 : Options over unissued shares

778. This clause is based on CA s.132.

779. Except where holders of debentures of a company have an option to take up shares by way of redemption of the debentures, an option that enables a person to take up unissued shares in a company more than five years after the option is granted will be void.

CHAPTER 3 - INTERNAL ADMINISTRATION

PART 3.1 - REGISTERED OFFICE AND NAME

780. Part 3.1 of the Bill (cls.217 - 220) deals with the registered office, name and number of a company and is based on CA s.216-218 and s.528 except that these provisions have been extended to include the new requirements pertaining to company number names.

Cl.217 : Registered office of a company

781. A company will be required to have a registered office in Australia which must be open and accessible to the public for certain hours each day.

Cl.218 : Notice of address of registered office and office hours

782. When a company or body corporate applies for registration under the Bill, it will be required to notify the ASC of the address of its office and the hours of public access to that office and any change of address or hours of public access (Bill cls.217 and 218).

Cl.219 : Publication of company's name and registration number

783. The name of a company followed by the expression "Australian Company Number" and the registration number of a company will be required to appear legibly on any seal of the company and on its business and its public documents and on every eligible negotiable instrument.

784. Where the company is registered without a verbal name, the registration number of the company will be required to appear on the relevant company documents after the expression "Australian Company Number".

785. A person who signs an eligible negotiable instrument on behalf of a company on which the name or number name of the company does not appear will contravene Bill sub-cl.218(6) and will be liable to the holder of the eligible negotiable instrument for the amount due on it unless the amount is paid by the company.

786. The name of company will be required to be affixed or painted in a conspicuous position at the registered office and other offices or places where the company carries on business and which are open and accessible to the public. However, the registration number of a company will not be required to be so displayed unless it is part of the name of the company (Bill sub-cl.218(8)).

Cl.220 : Service of documents on company

787. Bill cl.220 is based on CA 528.

788. It will provide as follows:

(a) A document will be able to be served on a company by leaving it at, or posting it to the registered office of the company and by serving the document personally on each of the directors of the company resident in Australia.

(b) A document will be able to be served on a liquidator of a company or on a official manager of a company by leaving it at the last address of the liquidator or of the official manager that has been lodged with the ASC.

(c) The situation of the registered office of a company will be deemed to be the address given in the prescribed notice lodged with the ASC.

(d) The situation of the registered office of a company incorporated under a law corresponding to Chapter 2 of this Bill that was deemed to be the situation of the registered office of the company for the purposes of that corresponding legislation will be deemed to be the situation of the registered office of the company for the purposes of the Bill unless or until a notice of change of address of the registered office of the company is lodged with the ASC.

(e) Nothing in this clause is intended to affect the power of a Court to authorise service of a document on a company in a manner not authorised by this clause, nor is it intended to affect the operation of any other Australian law that authorises the service of a document otherwise than is provided in this clause.

PART 3.2 - OFFICERS

789. This Part deals with the duties, obligations and functions etc. of the directors and other officers of the company. The definitions of 'director' and 'officer' are to be found in Bill cls.9 and 60 respectively.

Cl.221 : Directors

790. This clause is based on CA s.219.

791. A public company will be required to have a minimum of 3 directors and a proprietary company a minimum of 2 directors. A body corporate is incapable of being appointed as a director. Any lesser number of directors as referred to in the articles of companies incorporated before 1 July 1982 (ie the commencement of co-operative scheme legislation) will be deemed to provide for the appointment of two directors.

Cl.222 : Restrictions on appointment or advertisement of director

792. A person will not be able to be named as a director in the memorandum or articles, or in a prospectus, unless he has consented in writing to act as a director. Such a person will have to lodge certain undertakings and other documents with the Commission. A certified list of persons who have consented to be directors must be lodged on the lodging of the memorandum of a company for registration. The certifying party will commit an offence if the information is incorrect.

Cl.223 : Qualification of director

793. This clause is based on CA s.221.

794. A director will have to, if required by the articles of the company, obtain his specified share qualification within 2 months of his appointment.

Cl.224 : Vacation of office

795. This clause is based on CA s.222.

796. The office of a director will be vacated if:

(a) he has not obtained his share qualification with the period referred to in sub-cl.223(1);

(b) he ceases to hold his share qualification;

(c) he becomes an insolvent under administration;

(d) he is convicted of an offence referred to in sub-cl.229(2);

(e) he becomes subject to a cl.230 order;

(f) he becomes subject to a cl.599 order; or

(g) he becomes subject to a cl.600 notice.

(Clause 91 interprets the expression 'being or becoming subject to a prohibition, order or notice under cls.229, 230, 599 or 600 and saves the effect of orders, notices and prohibitions made pursuant to previous or existing corresponding State or Territory law.)

797. It is noted that the expression "insolvent under administration" includes a person who has executed a deed of arrangement or whose creditors have accepted a composition (see cl.9).

798. Provision is made for re-appointment of persons who vacate the office of director pursuant to this clause. The pre-conditions to re-appointment depend upon the reason for vacation.

799. The reference to "corresponding law" (defined in Bill cl.58) in sub-cls.224(2), (3), (4), (5) and (6) saves the effect of a vacation of office by force of, a provision of a law, or of a previous law, in force in a State or Territory which corresponds with cl.224.

Cl.225 : Appointment of directors to be voted on individually

800. This clause is based on CA s.223.

801. When directors are appointed by a public company at a general meeting, their appointment will have to be voted upon individually unless the meeting unanimously agrees otherwise.

Cl.226 : Validity of acts of directors and secretaries

802. This clause is based on CA s.224.

803. The acts of a director or secretary will be valid notwithstanding any defect that may afterwards be discovered in their appointment or qualification. This provision covers the case of a director whose office as such is vacated pursuant to sub-cl.224(1).

Cl.227 : Removal of directors

804. This clause is based on CA s.225.

805. A public company will be able to remove a director by resolution before the expiration of his period of office provided that certain conditions, involving special notice of the resolution and the right of the director concerned to have his views made known to members, are met. This provision will not affect any rights which a person may have in respect of compensation or damages payable on termination.

Cl.228 : Age of directors

806. This clause is based on CA s.226.

807. No person of or over the age of 72 years will be able to be appointed or act as a director of a public company or a subsidiary of a public company unless certain conditions are fulfilled, including approval in the form of a special resolution of the company.

808. It is further provided that a person is incapable of being appointed as a director unless he has attained the age of 18 years.

Cl.229 : Certain persons not to manage certain bodies corporate

809. This clause is based on CA s.227.

810. Certain persons will not be able to manage a relevant body corporate which is defined as a company, a foreign corporation or a prescribed corporation.

811. A person who is an insolvent under administration will not be able to be a director or promoter of, or take part in the management of, a relevant body corporate without the leave of the Court.

812. A person who has been convicted of an offence in relation to the promotion, formation or management of a body corporate or of any offence involving fraud or dishonesty or of any offence under this Bill, corresponding existing or previous provisions in any State or Territory, will not be able to be a director or promoter of, or take part in the management of, a relevant body corporate for 5 years from the date of conviction or of the date of release from prison, except with the leave of the Court.

813. A certificate from a prescribed authority stating that a person was released from prison on a certain date will be prima facie evidence that a person was released on that date. This provision is intended to overcome evidentiary problems that have been encountered in establishing such dates.

814. When granting leave under this provision, the Court will be able to impose such conditions or limitations as it thinks fit.

815. A person intending to apply for leave will have to give the ASC 21 days notice of that intention. The ASC has a general right to intervene in any proceeding involving a matter arising under the Bill. The Court will be able at any time, on the application of the ASC, to revoke leave granted under this provision.

816. This provision continues in effect disqualifications occurring under previous law and saves the effect of any leave granted by the Court under a "corresponding law" (see Bill cl.58).

Cl.230 : Court may order persons not to manage corporations

817. This clause is based on CA s.227A. It enables the ASC or certain other persons to seek court orders prohibiting certain persons from taking part in the management of any relevant body corporate (defined as in Bill cl.229). This provision seeks to provide protection to creditors from persons who continually set up businesses which fail.

818. The application to the court can be made by:

(i) the ASC;

(ii) an official manager, liquidator or provisional liquidator of the body corporate;

(iii) a member or creditor of the body corporate or;

(iv) a person authorised by the ASC.

819. The provision applies in respect of 'relevant bodies corporate' which for the purposes of the section means companies, foreign corporations and prescribed corporations. The legislation referred to is this Bill or existing or previous corresponding legislation of a State or Territory.

820. Orders may be made by the Court in respect of directors, secretaries or executive officers of a body corporate who have:

(a) failed to take reasonable steps to prevent the body corporate from repeatedly breaching relevant legislation;

(b) failed to take reasonable steps to prevent two or more bodies corporate of which they are a director from breaching relevant legislation;

(c) themselves repeatedly breached relevant legislation; or

(d) acted dishonestly or failed to exercise a reasonable degree of care and diligence in the performance of their duties as an officer of the body corporate,

821. The reference to a contravention of, or failure to comply with a provision of a 'relevant Act' will include a reference to such a contravention or failure to comply that occurred before the commencement of this Act. A reference to a period in which a person has been a relevant officer of a corporation will include a reference to a period that has elapsed before the commencement of this Bill.

822. An order by the Court made on the application of a person other than the ASC must be lodged with the ASC within 7 days of the making of the order. Orders will include orders made under corresponding State laws co-existing with the Corporations Bill, and corresponding previous laws of a State or internal Territory.

Cl.231 : Disclosure of interests in contracts, property, offices etc.

823. This clause is based on CA. s.228.

824. A director will have to declare at a meeting of directors any interest that he may have in a contract with the company (Bill sub-cl.231(1)) and any conflicts that may arise between his duties or interests as a director and his other duties or interests as a result of any office held or any property he possesses. (Bill sub-cl.231(6)).

Cl.232 : Duty and liability of officers of certain bodies corporate

825. This clause is based on CA s.229.

826. It applies to "officers" as well as directors. Note that the definition of "officer" for sub-cl.232(1) purposes is different from that set out in sub-cl. 9(1) in that it includes all receivers, whether or not managers, any other authorised person who assumes control of the corporation's property for the purpose of enforcing a charge, and all liquidators but it does not include employees.

827. An officer of a corporation will have to act honestly in the exercise of his powers and the discharge of the duties of his office.

828. An officer will have to exercise a reasonable degree of care and diligence in the exercise of his powers and the discharge of his duties.

829. An existing or former officer or employee of a corporation will not be able to make improper use of information acquired by virtue of his position. The fact this provision applies to former officers or employees is in line with insider trading provisions in Chapter 7 of this Bill.

830. CB sub-cl.232(3) includes a prohibition on an officer or employee making improper use of his position as such, ie it is not restricted to information acquired by virtue of that position.

831. The Court, in addition to imposing a criminal penalty, is able to order that a person convicted of an offence under this provision pay compensation to the body corporate. An order for compensation may be made at the same time as the conviction is imposed. Separate proceedings need not be taken.

832. A body corporate will, however, be able to take civil proceedings against a person who has contravened this section for an amount equal to the profit made by that person or the loss suffered by the body corporate. This right will apply irrespective of whether the person involved has been convicted of a offence.

Cl.233 : Liability of directors for debts etc. incurred by body corporate acting as trustee

833. Cl.233 is based on CA s.229A but has been amended in one significant respect. The amendment will ensure that the corporate trustee and not the directors carries the primary liability to meet a debt incurred on behalf of the trust. Directors will be personally liable only where the body corporate is not able to obtain reimbursement from the trust and is not able to pay the debt out of its own assets (Bill para.233(1)(c)). Since the purpose of the provision is to protect creditors, the amendment removes an unnecessary source of liability for the directors where the debt has been paid by the company.

834. Where the debt has not been paid by the company, liability will still be imposed as is the case with CA s.229A, where a debt is incurred in respect of which there is no right of indemnity out of the assets of the trust. The reference to the entitlement to be indemnified relates to the legal right of indemnity rather than the financial capacity of the trust to meet the indemnity obligation. Consequently, directors will not be liable where the company is entitled to be indemnified both there are no or insufficient trust assets to satisfy the indemnity.

835. It should be noted, however, that notwithstanding the operation of proposed cl.233, cl.592 (which corresponds to CA s.556) might still operate to make directors personally liable where the debt has not been paid and the right of indemnity has not been excluded but there are insufficient trust assets to indemnify the trustee.

836. In other respects the liability imposed under proposed cl.233 is stricter than that envisaged in Bill cl.592, in the same way that CA s.229A extends the liability of CA s.556. The defence in Bill cl.592 revolves around the extent to which

an individual director was involved and the reasonableness of his expectations about the company being able to repay the relevant debt at the time that the company incurs the debt. By contrast, if imposition of personal liability is to have the desired effect of discouraging the insertion in trust deeds of provisions relieving the company's right of indemnity from trust assets and to encourage trust deeds to be drafted so as to minimise or even eliminate the possibility that the trustee company may be in breach of trust, then the relevant time to consider the involvement of individual directors in acts which may deny creditors access to trust assets is the time when the trust deed is being prepared. The Bill adopts the rationale of the CA that it is reasonable to encourage all directors of companies acting as trustee to ensure that the company does not enter into trust deeds which are designed to or which by their operation may, deny creditors access to trust assets to meet liabilities incurred by the company. The amendment made by the Bill also offers an incentive for directors to ensure the corporate trustee remains solvent.

837. Moreover, a fundamental corollary of the objective of overcoming the use of a corporate trustee with a nominal share capital to effectively render worthless the right of a creditor to hold the trustee liable for the debts incurred, is the lifting of the "corporate veil" and the treatment of the directors as if in fact they were the trustees. Under the law of trusts the trustee is, in the first event, personally liable to a creditor for the debts of the trust (Muir v City of Glasgow Bank (1987) 4 AC 377 : Octavo Investments Pty Limited v Knight (1979) 54 ALJR 87 at p.89). Where there are a number of co-trustees, each is jointly and severally liable to creditors for the debts of the trust. It is this aspect of the trustees liability to the creditors which proposed Bill cl.233 (as did CA s.229A before it) seeks to impose on the directors of a corporate trustee.

838. However, as under CA s.229A it is not intended that the equitable rights of contribution which may arise as between the co-trustees themselves who are jointly and severally liable for a debt, where some are not responsible for the incurring of the debt in question (which principles have been applied to company directors : Ramskill v Edwards (1885) 31 ChD 100), will be affected by this provision.

839. On the other hand, where a director would, if he were a co-trustee of the trust, be entitled to be fully indemnified in respect of the liability by his co-trustee/directors, then he is completely exonerated from any liability to an outside party (proposed sub-ss.233(1) and (3) definition of "innocent director" which replicate CA sub-ss.229A(1) and (3)).

840. Liability attaches to companies, foreign corporations, and prescribed corporations. In the case of foreign corporations, the liability to which the clause applies would be incurred within Australia. In respect of the other corporations to which the clause applies, the liability may arise within or outside Australia.

Cl.234 : Loans to directors

841. This clause is based on CA s.230.

842. Companies are generally prohibited from making loans to their directors or to directors of related bodies corporate and to persons closely associated with them, such as spouses and relatives. The prohibition extends to payments made to a trustee on behalf of the directors, and to payments made to other body corporate in which the directors, etc have a relevant interest the nominal value of which is not less than 10% of the nominal value of the issued share capital of the body corporate (referred to as a substantial interest). It also expressly covers the situation where another body corporate, in which a director etc has a substantial relevant interest, is interposed between the director etc and the trustee. 'Relevant interests' are defined in Division 5 of Part 1.2.

843. The prohibition does not apply to:

- exempt proprietary companies

- loans, guarantees or security given in certain circumstances. i.e. to a related body corporate if authorised by a resolution of the directors, funds provided to persons to cover expenditure incurred in relation to the company, loans made to full-time employees to assist with the acquisition of a principal place of residence, loans to full-time employees where there has been shareholders approval and in cases where the company is in the business of lending money and does so on normal commercial terms.

844. This clause also deals with defences, the civil liability arising from a contravention, and the relationship of this provision to other laws.

845. Where a contravention occurs, the company itself will not be liable to be prosecuted in respect of that contravention but this does not affect the liability of the director and any officers to be prosecuted in respect of a contravention. They may also be jointly and severally liable to make good any loss suffered by the company as a result of the contravention.

846. Where a lender has made a loan which has been guaranteed or secured by a company in contravention of this provision that guarantee or security may be enforced if, before the security or guarantee is provided, the lender has been furnished with a certificate to the effect that the company is not prohibited.

Cl.235 : Register of directors' shareholdings etc.

847. This clause is based on CA s.231.

848. A company shall keep a register of directors' shareholdings, debentures and other interests in the company

or related corporations. (For the location of the register see Bill cl.1302).

849. Bill cl.235 does not contain a provision allowing the ASC to inspect the register. See however ASC Bill cl.29 which provides that a person authorised by the ASC may inspect without charge any book required to be kept by the Bill.

Cl.236 : General duty to make disclosure

850. This clause is based on CA s.232.

851. A director shall give notice to the company of such matters relating to himself as may be necessary for the purposes of Bill cls.235, 242 and any of the provisions of Chapter 6, and the date and place of the director's birth.

852. This provision also deals with the periods within which such information must be provided and with other related matters.

853. It requires notice of a change in the particulars referred to in Bill para.236(1)(a) to be given to the company, irrespective of whether that provision has itself been complied with.

854. There is a provision which specifies the period within which notice under Bill sub-cl.236(1). is required to be given. A double duty of disclosure is not imposed upon directors if there has been compliance with a corresponding provision of a previous law of a State or an internal Territory (Bill sub-cl.236(8)).

855. Principal executive officers and secretaries are also required to give notice of certain matters.

Cl.237 : Benefits for loss of, or retirement from, office

856. This clause is substantially the same as CA s.233, but a number of minor changes have been made.

857. Restrictions are imposed upon the giving of benefits (including those of a non-financial nature) to a person in connection with their retirement from an office held with the company. The phrase 'in connection with retirement' encompasses loss of office by resignation, retrenchment or death.

858. In order that shareholders' rights are not prejudiced by the giving of the benefit, particulars of the proposal must be disclosed to the members and be approved by the company in general meeting. There is a new requirement in relation to disclosure to the company which mirrors existing CA para.129(9)(b) and requires disclosure to holding companies as well if the company is a subsidiary company. There is also provision for estimates to be given if the value of the benefit cannot be ascertained at the time when disclosure is required.

859. The restrictions apply to benefits given by a company, an associate of a company (other than a related body corporate), and a superannuation fund.

860. Approval will not be required in relation to the giving of:

(a) an exempt benefit;

(b) a prescribed benefit in prescribed circumstances e.g. contributions made by the company to the trustees of a superannuation fund during the course of employment of a director or principal executive officer; or

(c) a genuine pension or lump sum payment provided it does not exceed the specified amount.

861. In order to ensure that the sale of a company's property or undertaking is not improperly influenced by the making of payments to directors, such payments are prohibited (para.237(1)(b)). The prohibition extends to payment of benefits to office holders and former office holders, their relatives, associates and spouses of all of them (see definition of 'prescribed person' in sub-cl.237(19)).

862. The approval of a payment by shareholders does not relieve an officer of any duty owed to the company under Bill cl.239.

Cl.238 : Assignment of office

863. This clause is based on CA s.234.

864. A director of a public company will not be able to assign his office without the approval of a special resolution of the company although he will be able to, if authorised by the articles, appoint alternate or substitute directors.

Cl.239 : Powers to require disclosure of directors' emoluments

865. This clause is based on CA s.235.

866. If served with a notice by 10% of members or by holders of 5% in nominal value of the issued share capital, a company will be required:

(a) as soon as practicable, to prepare a statement and cause it to be audited, setting out details of emoluments paid to directors of the company and of each subsidiary.

(b) to send a copy of the statement to all persons entitled to receive notice of general meetings of the company as soon as it has been audited; and

(c) to lay a copy of the statement before the next general meeting held after the statement is audited.

Cl.240 : Secretary

867. This clause is based on CA s.236.

868. A company will have to have at least one secretary. A secretary will be appointed by the directors and must be a natural person. At least one secretary will have to reside ordinarily within Australia and be present at the registered office of the company in person or by an agent when the office is required to be open.

Cl.241 : Provisions indemnifying officers or auditors

869. This clause is based on CA s.237.

870. Any provision, whether in the articles or in a contract, exempting an officer or auditor from, or indemnifying him against, liability for negligence, default, breach of duty or breach of trust, will be void. This will not apply to payment of legal costs incurred in successfully defending civil or criminal proceedings, nor to any insurance contract where the company or a related body corporate does not pay the premiums.

Cl.242 : Register of directors, principal executive officers and secretaries

871. This clause is based on CA s.238. A company will be required to keep a register of its directors, principal executive officers and secretaries.

872. In order to assist in accurate identification of company officers personal details of company officers are to be included in the register including the date and place of birth of each such officer.

873. In relation to directors, particulars of other directorships in other bodies corporate that under this Act or the law of any State or Territory, of public companies or subsidiaries of public companies are required to be kept on the register.

874. The register kept by the company is to be open for inspection by any member of the company without charge or any member of the public subject to the wishes of the company regarding charges. Any charge made shall not exceed the prescribed amount.

875. The ASC shall be notified by the company of particulars required to be specified in the register, and of changes of those particulars in relation to company officers.

Cl.243 : Register of disqualified company directors and other officers

876. This clause is based on CA s.238A.

877. The ASC is required to keep a register of disqualified company directors and other officers for the purposes of the Act. The register must contain a copy of the Court order made under sub-cl.230(1) or sub-cl.599(2) or the notice made under sub-cl.600(3) prohibiting the person from being a director, promoter of, or from taking part in any way in the management of any corporation.

878. There is also provision for any person to inspect and take extracts from the register of disqualified company directors and other officers.

879. This register may include copies of each order and notice made or served under corresponding provisions of co-existing State and Territory legislation and previous co-operative scheme legislation or other law.

PART 3.3 - MEETINGS AND PROCEEDINGS

880. This Part which deals with meetings and proceedings is based on CA Division 3 of Part V and does not contain any changes to the substantive law.

Cl.244 : Statutory meeting and statutory report

881. This clause is based on CA s.239.

882. Where a public company that is a limited company with a share capital or a no-liability company issues a prospectus for the first time, the company will be required to hold a general meeting of members of the company between 1 and 3 months after the date on which the company allots shares pursuant to the prospectus. Such a meeting will be called the "statutory meeting" (Bill sub-cl.244(1)).

883. At least 7 days before the meeting the directors will be required to send a report containing certain particulars (Bill sub-cl.244(3)) to every member of the company (Bill sub-cl.244(2)) and to the ASC (Bill sub-cl.244(5)). This report is the "statutory report" which will have to be examined and reported on by auditors if there are any (Bill sub-cl.244(4)).

884. There are also provisions which set out the rights of members to:

(a) be told of other members' shareholdings at the statutory meeting;

(b) discuss certain matters at the meeting;

(c) adjourn the meeting; and

(d) appoint committee/s of enquiry

(Bill sub-cls.244(6)-(9)).

Cl.245 : Annual general meeting

885. This clause is based on CA s.240.

886. A company will be required to hold an annual general meeting at least once in each calendar year and within 5 months (or 6 months in the case of an exempt proprietary company) after the end of each financial year (Bill sub-cl.245(1)).

887. A company will be able to hold its first annual general meeting at any time within 18 months of incorporation. However, if the first financial year of the company ends after the commencement of this Bill, the company will be required to hold the meeting within 5 months (6 months in the case of an exempt proprietary company) after the end of its first financial year (Bill sub-cl.245(2)).

888. A general meeting of a company will be deemed to be its annual general meeting if resolutions are passed at that meeting dealing with all matters that are required to be dealt with at the annual general meeting (Bill sub-cl.245(3)).

889. An exempt proprietary company will be deemed to have held an annual general meeting if it is deemed pursuant to Bill cl.255 to have held a general meeting and a resolution deemed to have been passed at that general meeting deals with all matters required to be dealt with at an annual general meeting (Bill sub-cl.245(4)).

890. On the application of a company the ASC will be able to extend the time for holding an annual general meeting (Bill sub-cls.245(5), (6), (7) and (8)).

891. Provided proper notice is given to everyone entitled to receive notice a company will be able to hold a general meeting at any time (Bill sub-cl.240(9)).

Cl.246 : Convening of general meeting on requisition

892. A general meeting will have to be convened by the directors of a company on the requisition of at least 100 members holding shares in the company on which there has been paid an average sum, per member of at least $200 or on the requisition of at least 200 members of a company not having a share capital. Alternatively, in either case, a general meeting will be able to be requisitioned by a member who is entitled or by members who are together entitled to not less than 5% of the total voting rights of all the members having at the date of the deposit of the requisition a right to vote at general meetings (Bill sub-cl.246(1)).

893. The requisition will be required to state the objects of the meeting (Bill sub-cl.246(2)). Provision will also be made for the requisitioning member or members to proceed to convene the meeting if the directors do not convene a meeting following a requisition (Bill sub-cl.246(3)). Such a meeting must be held within 3 months of the date of deposit of the requisition (Bill sub-cl.246(5)).

Cl.247 : Convening of meetings

894. This clause is based on CA s.242.

895. Two or more members holding at least 5% of the issued share capital, or not less than 5% in number of members of a company not having share capital, will be able to call a meeting as long as the articles do not provide otherwise (Bill sub-cl.247(1)).

896. Notice of at least 14 days will be required for a meeting of a company other than a meeting to pass a special resolution (Bill sub-cl.247(2)).

897. A meeting will be deemed duly called, even if convened by shorter notice, if it is so agreed by all members entitled to attend and vote at the meeting for an annual general meeting and for any other meeting by a majority of the members, entitled to attend and vote, holding, at least 95% in nominal value of the voting shares, or 95% of the voting rights in a company not having a share capital (Bill sub-cl.242(3)).

Cl.248 : Articles as to right to demand a poll

898. This clause is based on CA s.243.

899. Provisions in the articles which would exclude or restrict the right to demand a poll at a general meeting on any matter other than the election of the chairman of the meeting or the adjournment of the meeting or requiring a proxy to be lodged more than 48 hours before a meeting will be void.

Cl.249 : Quorum, chairman, voting etc. at meetings

900. This clause is based on CA s.244.

901. This clause sets out general procedural requirements for the conduct of meetings so far as the articles do not otherwise provide.

Cl.250 : Proxies

902. This clause is based on CA s.245.

903. Subject to certain restrictions, a member of a company entitled to attend and vote at a meeting will be entitled to appoint proxies, whether or not members, to attend meetings and vote instead of the member.

Cl.251 : Power of Court to order meeting

904. This clause is based on CA s.246.

905. The Court will be able, either of its own motion or on the application of a director or member, to order a meeting where for any reason it is impracticable to call a meeting in the manner prescribed by the articles or this Bill.

Cl.252 : Circulation of members' resolutions, etc

906. This clause is based on CA s.247.

907. On the requisition of a specified proportion of its members, a company will be obliged

(a) to give notice of any resolution intended to be moved at an annual general meeting of the company; and

(b) to circulate any statements relating to the matter referred to in any proposed resolution or the business to be dealt with at any general meeting

(Bill sub-cl.252(1)).

Cl.253 : Special Resolutions

908. A resolution will be a special resolution if it is passed by at least 75% of the members or shareholders entitled to vote at a meeting of which no less than 21 days notice is given specifying the intention to propose the resolution (Bill sub-cl.253(1)).

909. The requirement for at least 21 days written notice will not apply if members holding at least 95% of the issued share capital or not less than 95% in number of members of a company not having a share capital agree that it is not necessary (Bill sub-cl.253(4)).

Cl.254 : Resolution requiring special notice

910. This clause is based on CA s.249.

911. Where the legislation requires special notice of a resolution, notice of intention to move the resolution will be required to be given to the company 28 days before the meeting at which it is to be moved.

Cl.255 : Resolutions of exempt proprietary companies

912. This clause is based on CA s.250.

913. Subject to certain qualifications, if all the members of an exempt proprietary company sign a document stating that they are in favour of a resolution set out in that document, then the resolution will be deemed to have been passed at a general meeting of that company held on the day and at the time, at which the document was last signed by a member (Bill sub-cl.255(1)). There will be some qualification on the operation of this deeming provision (Bill sub-cl.255(2)).

Cl.256 : Lodgement etc. of copies of certain resolutions and agreements

914. This clause is based on CA s.251.

915. Copies of certain resolutions will have to be lodged with the ASC by the company. Where articles have not been registered, members may obtain copies of every resolution, document or agreement to which this section applies.

Cl.257 : Resolutions at adjourned meetings

916. This clause is based on CA s.252.

917. A resolution passed at an adjourned meeting will be treated as having been passed on the date on which it was passed and not on any earlier date.

Cl.258 : Minutes of proceedings

918. This clause is based on CA s.253.

919. Minutes of general meetings and of meetings of directors will have to be entered in minute books within one month of the meeting. The minutes will have to be signed by the chairman of the relevant meeting or by the chairman of the next succeeding meeting (Bill sub-cl.258(1)).

920. A signed minute will be prima facie evidence of the proceedings to which they relate (Bill sub-cl.258(2)).

Cl.259 : Inspection of minute books

921. A company will be required to keep minute books at its registered office or its principal place of business in Australia or at such other place in Australia as is approved by the ASC. The minute books of general meetings will have to be open for inspection by any member without charge (Bill sub-cl.259(1)). A member will be able to obtain a copy of any minutes of a general meeting on payment of a fee. (Bill sub-cl.259(2)).

PART 3.4 : OPPRESSIVE CONDUCT OF AFFAIRS

922. This Part is based on CA Part IX and does not contain any changes to the substantive law.

Cl.260 : Remedy in cases of oppression or injustice

923. This clause is based on CA s.320.

924. An application will be able to be made to the Court for an order under this clause by a member of the company or the ASC. The grounds for an application by a member will be:

(a) that affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members, or in a manner that is contrary to the interests of members as a whole; or

(b) that an act or omission, or a proposed act or omission, by or on behalf of the company, or a resolution, or a proposed resolution, of a class of members, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was or would be contrary to the interests of the members as a whole.

925. The ASC will be able to apply to the Court for an order under cl.260 where it has investigated matters under Division 1 of Part 3 of the ASC Act.

(Bill sub-cl.260(1)).

926. If the Court is of the opinion that the relevant grounds for have been established, then the Court can make such orders as it thinks fit including:

(a) an order that the company be wound up;

(b) an order directing the company to institute, prosecute, defend or discontinue specified proceedings, or authorising a member or members of the company to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company.

(c) an order appointing a receiver or a receiver and manager of property of the company.

(d) an order restraining a person from engaging in specified conduct or from doing a specified act or thing.

(e) an order requiring a person to do a specified act or thing

(Bill sub-cl.260(2)).

927. The Court will not be able, however, to make an order under sub-cl.260(2) for the winding up of a company, if it is of the opinion that the winding up of the company would unfairly prejudice the oppressed member or members (Bill sub-cl.260(4)).

928. The expression "affairs of a body corporate" is defined in Bill cl.53 and does not incorporate any changes to the existing definition of "affairs of a corporation" in CA s.6.

PART 3.5 - CHARGES

INTRODUCTION

929. This Part is substantially the same as CA Part IV Division 9.

930. Part 3.5 of the Bill will require the registration of certain charges over the property of companies and will determine the priorities to be accorded to these registrable charges as against each other.

931. The requirement for registration will also apply to the charges of registrable Australian corporations (see Division 1 of Part 4.1). This requirement is extended to registrable Australian corporations as a consistent application of protective provisions relating to those who take advantage of the benefits of operating under this regulatory regime.

932. A system of priorities will make registrable charges invalid if not registered within 45 days after creation. This system is the same as that used in the co-operative scheme. The basic rationale for a priority system was outlined in paras. 47 and 48 of the Seventh Interim Report of the Eggleston Committee delivered before the co-operative scheme was enacted:

> "47. As stated above, we have come to the conclusion that the best solution for the problems created by the form of the present legislation is to substitute a system of priorities for the present system of partial invalidity. The present system, although stated in terms of validity, is itself really a system of priorities, since the invalidity is stated to operate only as against the liquidator and any creditor of the company. The consequence of failure to register, therefore, is not to destroy the security absolutely but to destroy the

preferential rights of the holder of the charge as against creditors and liquidators, but not (as pointed out by Professor Gower) as against persons who purchase the property from the company. The effect of non-registration therefore is to alter the priorities attaching to a charge. But it is apparent that the method of alteration of priorities set out in section 100 is unsatisfactory for several reasons.

48. In the first place, as we have already pointed out, the protection of a person registering a charge is imperfect in that such a person may register the charge at a time when the register is clear, only to find that an earlier charge which was not registered at the time of search or at the time of registration is registered within thirty days of its creation, and takes priority over the second charge. In the second place, charges which have not been perfected by registration ought to be postponed, not only to the claims of creditors, but also to the claims of persons who, having searched and found no relevant charges on the register, have purchased the property subject to the charge from the company. Thirdly, under the present system, if the charge is not registered in time it becomes void as a security to the extent stated in section 100, and the situation can only be cured by an application to the court under section 106. If a suitable system of priorities were laid down, there would be no need to impose a time limit on registration except insofar as failure to register might involve penalties for non-compliance with the Act. Late registration might result in the postponement of the charge as against interests created after the charge was registered. It would follow that sub-section (10) of section 100, and section 106, could be omitted from the Act. The power to extend the time for filing (section 109) would only affect the question of penalties, and could be made to apply generally, and not merely in the case of out-of-State documents."

Division 1 - Preliminary

Cl.261 : Interpretation and application

933. This Division consists only of this interpretation clause, which is substantially the same as CA s.199.

934. The terms "document of title", registrable charge" and "Register" have been defined for the purposes of this Part. The definitions of "present liability" and "prospective liability" are relevant to cl.268 and cl.282.

935. The term "document of title" is used in this Bill paras.262(1)(g), and (2)(c), and sub-cl.262(5).

936. Charges over property held by a company as trustee will be required to be registered (sub-cl.261(2)) except charges on property held by a trustee company as a legal personal representative or as a trustee under a will (sub-cl.262(9)).

937. A charge existing when property is acquired will be treated as if it were not registrable until the charge is registered. The rationale is that the new chargee cannot control what happens to the property of the company. Similarly, charges over property of a corporation which are not required to be registered when created but are subsequently required to be registered when the corporation transfers its incorporation or registers as a foreign company will be treated as if they were not registrable until the charges are registered. When any of these charges are registered they have the priority accorded to a registered charge as from the time of registration. However, if they have an earlier priority at general law this priority remains, so that the new chargee is not prejudiced (sub-cls.261(3) and (4)).

938. The time when a document will be deemed to be lodged is defined in sub-cl.261(5).

The provisions of the Bill relating to the registration of charges will apply to charges on all property of companies (and registrable Australian corporations) (sub-cl.261(7)) but only to property within Australia of registered foreign companies formed overseas (sub-cl.261(9)).

Division 2 - Registration

939. This Division is substantially based on CA ss.200 to 215A. It deals with the registration of charges and the effect of registration.

Cl.262 : Charges required to be registered

940. The types of charges that are required to be registered under this Part are set out in cl.262.

941. Some of these charges are:

(a) Charge created in equity: It will be clear that the provisions relating to the registration of charges apply to charges created in equity as well as at law (see introductory words to sub-cl.262(1)). A charge on property held by a trustee company as a legal personal representative or a a trustee under a will will not require registration (see sub-cl.262(9)).

(b) In the light of the distinction drawn in Re South Australian Barytes (1977) 3 ACLR 52 between uncalled share capital and uncalled share premiums, reference is made in the Bill to uncalled share premiums (see paras.262(1)(b) and (c), same as CA paras.262(1)(b) and (c)).

(c) Charge on personal chattels: A charge on personal chattels (defined in sub-cl.262(3)) will be required to be registered, whether or not it was "created" by an instrument in writing.

(d) Charge on ship: Charges on ships registered in an official register kept under a law relating to title to ships will be excluded from the charges requiring registration (para.262(1)(d))

Questions as to whether or not ship fittings such as tackle etc. are comprehended in the exemption will depend on the laws relating to title to ships.

(e) Charge on service marks: It will be made clear that the provisions relating to registration of trade marks extend also to service marks and other registered designs (para.262(1)(e)). See also sub-cl.279(5) which will ensure that the provision does not override Commonwealth legislation relating to trade marks etc. which have their own provisions as to title validity and priority for charges.

(f) Charge on a book debt: The registration requirements will apply to charges on book debts (including future book debts and particular book debts) owed to a company. As a book debt will frequently be a marketable security and vice versa, and charges on marketable securities are required to be registered (see para.262(1)(g), the provision is the same as CA para.262(1)(g)) to ensure that the exemptions applicable to one category of charge are also applicable to the other. Accordingly, a charge on a book debt which is also a marketable security, will not be required to be registered if the charge is created by the deposit of a document of title to the marketable security (see also sub-cl.262(4)).

(g) Charge on a marketable security: Para. 262(1)(g) will require the registration of certain charges on marketable securities. The term 'marketable securities' is defined in sub-cl.9(1).

(h) A charge on a negotiable instrument other than a marketable security: Charges created over negotiable instruments will be required to be registered para.262(1)(j) unless the charge is created by way of deposit etc. (para.262(2)(c)).

942. Certain dealings will be specifically exempted from the registration requirements (sub-cl.262(2)). The following points are of importance:

(a) Para. 262(2)(a) will exclude a charge or a lien over property arising by operation of law. This provision may only be a statement of the existing law (and reflect the law under the CA - see para.262(2)(a)) but stating it explicitly will serve to warn that such liens and charges are not covered.

(b) Para. 262(2)(b) will exempt pledges from the registration requirements, consistent with Bills of Sale legislation, as the pledgee would have actual or constructive possession of the property.

(c) Para. 262(2)(d) deals with transfers in the ordinary course of business - cf s.32 of the Instruments Act (Vic.): "'Bill of sale' ... does not include ... transfers of goods in the ordinary course of business of any trade or calling ..."

(d) Para. 262(2)(e) covers dealings outside Australia-cf. s.32 of Instruments Act (Vic.): "'Bill of sale' ... does not include ... bills of sale of goods in foreign parts or at sea ..."

943. Attention is also directed to the following provisions of cl.262:

(a) The purpose of sub-cl.262(5) is to clarify what securities come within the phrase "a lien or charge

on a crop, a lien or charge on wool or a stock mortgage".

The effect of the provision will be that a lien or charge on a crop, a lien or charge on wool, or a stock mortgage over property of a company is registrable under this legislation if it is registrable under legislation (prescribed in the regulations) relating to crop liens, wool liens and stock mortgages in the State or Territory where the property the subject of the security is situated.

(b) The definition of book debt in s-cl.262(4) will exclude marketable securities and negotiable instruments to avoid overlap with paras.262(1)(f) and (j). The definition of book debt will exclude charges on debts owing in respect of mortgages of land to avoid dual registration of sub-mortgages of land which would generally be registered in land title registers. A mortgage of the reversion of a lease will also be excluded.

(c) There is provision for those cases where documents evidencing or representing a thing in action (documents of title) are in the hands of a third party when the transaction is consummated or where the documents have not yet been issued, but the lender is nevertheless entitled to be protected (sub-cl.262(6)).

(d) The registration of charges provisions will apply to an instrument of charge that charges both property falling within sub-cl.262(1) and other property of the company (sub-cl.262(7) - based on CA sub-s.262(6)).

(e) The provisions will not apply to charges on land sub-cl.262(8)) - see also sub-cl.279(2) which ensures that the provisions of Division 3 do not apply so as

to affect the priority of a charge on land or other unregistrable property if a charge exists which applies to that property as well as to registrable property.

(f) Sub-cl.262(1) will not apply to a charge on fixtures given by a charge on the land to which they are affixed (sub-cl.262(9) - cf. sub-s.109A(1) of the Conveyancing Act 1919 (NSW)).

(g) Charges by a trustee corporation will be dealt with in sub-cl.262(10).

(h) A charge on property of a company will not be invalid by reason only of the failure to lodge with the the Commission or to give to the company or some other person a notice or other document that is required to be lodged or given under this Division (sub-cl.262(11)). However, the general penalty will apply in these cases (sub-cls. 270(2) and (3)).

Cl.263 : Lodgment of notice of charge and copy of instrument

944. This clause is substantially the same as CA s.201, with modifications reflecting the Commonwealth origins of the scheme. A company will have to lodge a notice of a charge with the ASC within 45 days after the creation of the charge together with a copy of the instrument (if any) creating or evidencing the charge, or where a series of debentures have been issued and the charge is evidenced only by the resolution or resolutions and the debentures, a copy of the resolution or each of the resolutions and a copy of the first debenture issued in the series.

945. As a consequence of the requirement that a copy of any instrument creating or evidencing a charge must be lodged it is necessary to include provisions para.263(1)(a) and sub-cl.263(2) to cover cases where a company by resolution

creates a series of debentures each containing its own charge clause and not supported by a separate trust deed.

946. Provision has been made for registrable bodies which transfer their incorporation under Division 3 of Part 2.2 or register under Part 4.1 Division 2 to lodge with the ASC a notice and a copy of charges in respect of property (see cl.261) which was charged prior to it becoming registered (sub-cls.263(3)and (4)).

Cl.264 : Acquisition of property subject to charge

947. This provision is substantially the same as CA s.202.

948. A company that acquires property subject to an existing charge will be required to lodge a notice of that charge with the ASC and, if the charge was created or evidenced as mentioned in para.263(1)(b) or (c), the instruments or copies of such instruments etc. will be required to be lodged under those provisions (cl.264).

949. The 45 day period will also be adopted in this provision.

Cl.265 : Registration of documents relating to charges

950. This clause is substantially the same as CA s.203.

951. The ASC will have to keep a register to be known as the Register of Company Charges and enter in the register certain particulars in relation to charges. Persons wishing to lodge documents promptly to gain the benefits of the priority system will not be prejudiced by the existence of provisions in various Stamp Duties Acts preventing the ASC from accepting documents on which stamp duty is payable before the stamp duty has been paid (sub-cls.265(4) and (5)). The provisions are similar to those relating to defective notices (sub-cls.265(6)-(9)).

952. The procedures involved where a purported notice of charge is defective will be as follows:

(a) Where a notice is lodged that is defective, provided the notice contains the name of the company concerned and the particulars referred to in sub-para.263(1)(a)(iv) or (v), the ASC will be required to enter the charge in the register and include the word 'provisional' alongside the entry (para.265(6)(a)). The ASC will then have to direct the person who lodged the document to ensure that on or before a specified date the requirements in relation to the notice will be complied with (para.265(6)(b)).

(b) Where a company complies with a direction by ASC (under sub-cl.265(6)) on or before the date specified in the notice, the ASC will have to delete the word 'provisional' from the entry in the Register and enter any required particulars that had not previously been entered (para.265(7)(a)). However, if a company fails to comply with a direction before the date specified the ASC will be obliged to delete all of the particulars that were entered in relation to the charge (para.265(7)(b)). Where a company complies with a direction after the date specified in the notice, the ASC will have to then make an entry in the Register in relation to the charge of the time and date on which the direction was complied with together with the other required particulars (para.265(3)(c)).

(c) If the word 'provisional' is entered in the Register specifying a time and a date in relation to a charge, the charge will not be deemed to have been registered, (sub-cl.265(3)), but if the company complies with the direction within the required time and the word 'provisional' is deleted and the entry specifying that time and date remains, the charge

will be deemed to be registered and to have been registered from and including the time originally specified in the register. If the direction is only complied with after the required time, the charge will be deemed to be registered from the time of compliance. (sub-cl.265(9)).

953. If there is more than one charge on the property of a registrable body at the time when the charge is created but the body subsequently applies to be registered as a company then the ASC is required to insert details of those charges in its register in such a manner that as against other registrable charges they are all accorded the same priority by Division 3 (sub-cls.265(10)-(13)).

954. If a corporation fails to comply with its obligation to lodge particulars of all relevant charges at the same time, and instead lodges details of some pre-existing charges at a later time, the corporation will be liable to penalties but the charges will not be disadvantaged: these pre-existing charges will still be given the same priority time for the purposes of Division 3. However, as between themselves, these charges will retain their priorities under the general law.

955. There are 4 categories of pre-existing charges to which these provisions apply:

(a) charges over property of a foreign company which only become registrable under the Act when the foreign company becomes registered under Part 2.2 Division 3 (sub-cls.265(10) and (11), and see also sub-cl.263(3));

(b) charges over property of a foreign company which only become registrable when the foreign company commences to carry on business in Australia and is thereby required to register as a foreign company in Australia (sub-cls.265(10) and (11) and see also sub-cl.263(4));

(c) charges over property of a registrable Australian corporation which only becomes registrable when the corporation becomes registrable under Part 4.1 Division 2; and

(d) charges over property of an individual or unregistered foreign company which only become registrable under the Act when the property is acquired by a local corporation or a registered foreign company (sub-cls.265(12) and (13), and see also cl.264).

Cl.266 : Certain charged void against liquidator or official manager

956. The provision is substantially the same as CA s.205.

957. If the company becomes externally-administered because liquidation of official management occurs, then a registrable charge will be void as a security on the property of the company as against the liquidator or official manager unless notice is lodged with the ASC within the specified time (see sub-cls.266(1) and (2)) or at least six months before the commencement of the winding-up or official management. However, the charge will not be void as a security if the 45 day or other period has not elapsed when the winding up or official management commences sub-cl.266(1)).

958. Subject to any extensions of time which may have been granted sub-cl.266(3)), the period of time within which the notice in respect of the charge must have been lodged will be:

(a) 45 days from creation of the charge, in the case of a charge created by a company or registered foreign company (para.266(2)(a));

(b) 45 days after the chargee becomes aware that:

(i) the registrable body which has given the charge has become registered as a company under Division 3 of Part 2.2 or registered as a foreign company under Part 4.1 (para.266(2)(b)); or

(ii) that the relevant property has been acquired by a company or registered foreign company (para.266(2)(c)) - this period will operate rather than the time within which the corporation is required to ensure that details of the charge are lodged with the ASC, on the basis that it would be inequitable for the charge to become void as a security without the chargee being aware that it had become registrable; and

(c) 45 days after the variation occurs, in the terms of a registrable charge on property of a company which has the effect of increasing the amount of the debt increasing the liabilities or restricting the creation of subsequent charges on the property (para.266(3)(d)).

959. The Eggleston Committee explained the reasons for this provision in para.53 of its report which was in the following terms:

"53. So far as liquidators are concerned, we think that an unregistered charge should not confer any priority in a liquidation. This accords with the present position. But in the case of a registered charge, we think there should be a provision that the person entitled to a registered charge shall not be entitled to the benefit of the charge unless it is registered within thirty days of its creation, or at least six months prior to the liquidation. Otherwise a person might avoid disclosure of the existence of the charge until just before the company was about to

go into liquidation, and then by a last-minute registration obtain the benefit of the charge."

960. A comparable provision has been inserted in Division 2 (sub-cl.266(1)) rather than in Division 3 on the basis that this is more appropriate for resolution as a question of validity rather than as a question of priority and postponement of charges. The effect of this provision is a question of how an unregistered charge will rank alongside non-preferential unsecured creditors, whereas the effect of the Eggleston Priorities Schedule (see para.5(e)) would have been to rank the holder of an unregistered charge behind all unsecured creditors. (See also cls.561, 565 and 566 as to the priorities and validity of charges in a liquidation.)

961. Failure to lodge a notice of variation of the terms of a registered charge within the required period will not result in the entire charge being void against a liquidator or official manager but only to the extent that it secures the amount of the increase in the liability (sub-cl.266(3)).

962. Interested parties will be able to apply to the Court for an extension of time within which to lodge notices of charges and the Court will grant the extension if the failure to lodge the notice within the required time is accidental, or if it does not prejudice the position of creditors or shareholders or if the granting of an extension on any other grounds would be just and equitable (sub-cl.266(4)). Rectification of omissions or mis-statement in the register of charges is covered in cl.274.

963. As this Division retains some aspects of partial a invalidity system it has been considered appropriate to ensure that companies creating charges do not avoid the consequences of failure to register charges within the required time by creating new charges as security for the same debt just prior to expiry of the time limits, thereby achieving a contrived extension of time (sub-cl.266(5)).

964. The rights of a purchaser for value from a chargee or a receiver appointed by the chargee of company property will be protected where the purchaser acts in good faith and without notice of the commencement of official management or winding up (sub-cl.266(6)).

965. A person purchasing property subject to an unregistered charge may only avoid the consequences of the charge being void against a liquidator if that person establishes that the property was purchased in good faith and without notice of the commencement of winding up proceedings (sub-cl.266(7)).

Cl.267 : Charges in favour of certain persons void in certain cases

966. This clause is substantially the same as CA s.205A inserted in that Act in 1985.

967. In the winding up of an insolvent company the provisions of the Bankruptcy Act 1966 relating to fraudulent dispositions (s.121) and avoidance of preferences (s.122) will be applicable (sub-cl.553(2)).

968. However, those provisions alone may not be adequate in coping with the practice which was sought to be remedied by CA s.205A whereby insolvent companies, shortly before going into liquidation, would grant a debenture or charge to principals associated with the company (usually directors) to secure loans or other indebtedness with the consequence that receivers appointed under those charges obtained control of the company's books. In many cases, the charge would be invalid under these Bankruptcy Act provisions. However, the liquidator might have insufficient funds to apply to a court to set aside the invalid charge and require the return of the books.

969. This practice will be prevented by:

(a) providing liquidators with a statutory right to inspect company books in the possession of a receiver (see sub-cl.477(3)); and

(b) by reversing the onus of proving that a charge involves a fraudulent disposition or preference, where it has been given in favour of company officers and an attempt is made to enforce it within 6 months of its creation.

970. The second of these measures will be achieved by cl.267.

971. The main features of this provision are as follows:

(a) Where a company creates a charge on its property in favour of a person who is a relevant person (see proposed sub-cl.267(7) for a definition of this term) and the chargee (see sub-cl.267(7) for a definition of this term) purports to take a steps in the enforcement of the charge within six months of its creation, the charge is void unless the leave of the Court is obtained to enforce it (sub-cl.267(1)).

(b) Either entry into possession or the appointment of a receiver shall be a step taken in the enforcement of the charge (sub-cl.267(2)).

(c) Leave of the Court may be granted to enforce the charge if the company was solvent immediately after the creation of the charge and if it is just and equitable in the circumstances to do so (sub-cl.267(3)).

(d) Even if the charge is void, liability as an unsecured debt is retained (sub-cl.267(4)).

(e) Even if the charge is void, a <u>bona fide</u> purchaser for value who has no notice that the charge was created in favour of a relevant person, is entitled to good

title to property. However the third party has the onus of proving that that party's title is not affected. (sub-cl.267(5) and (6)).

972. The definition of "relevant person" in sub-cl.267(7) makes it clear for the purposes of this Bill that the matter to which the references to an associated person under proposed s.267 relates, is the creation of the charge (para.267(7)(b)).

Cl.268 : Assignment and variation of charges

973. This clause is substantially the same as CA s.206.

974. Where registrable charges are assigned, the new chargee will have to notify the ASC and the company within 45 days (sub-cl.268(1)).

975. Where certain variations of registered charges are effected, particulars will have to be lodged with the ASC accompanied by the instrument effecting the variation or a certified copy of it (sub-cl.268(2)). See the definition of "priority time" in cl.278 as to the priority to be accorded to such variations.

976. Where a charge secures a debt of an unspecified amount or a debt of a specified amount and further advances, a payment or advance made by the chargee to the company in accordance with the terms of the charge will not be required to be notified to the Commission (sub-cl.268(3)). This does not mean, however, in the case of a charge which provides for the possibility of further advances being made but the lender is not obliged to make those advances, that the priority accorded to the charge will necessarily extend to those further advances - see cl.282 and definitions of "priority time", "present liability" and "prospective liability" (sub-cl.261(1)). If the charge is varied by including additional items within the property charged then this would be treated as the creation of a new charge requiring fresh particulars to be lodged under cl.263.

Cl.269 : Satisfaction of, and release of property from, charges

977. clause is substantially the same as CA s.207.

978. The satisfaction of, and release of property from, charges is dealt with in this clause.

Cl.270 : Lodgment of notices, offences, etc

979. The provision is substantially the same as CA s.208.

980. Particulars of a charge will be able to be lodged by the company creating it or by any other person.

Cl.271 : Company to keep documents relating to charges and register of charges

981. This provision is substantially the same as CA s.209.

982. A company will be required to keep a copy of documents relating to registrable charges over its property and a register in which particulars of all charges (whether registrable or not) are entered.

983. As to where the register is to be kept, see cl.1302.

Cl.272: Certificates

984. A certificate issued by the ASC setting out particulars of a registered charge which are entered in the register of company charges will be prima facie evidence of the matters stated in the certificate (sub-cl.273(1) and (2)).

985. A certificate issued by the ASC merely stating that particulars of the charge have been entered in the register will be conclusive evidence that the registration requirements have been complied with.

Cl.273 : Registration under other legislation relating to charges

986. This provision provides the same purpose as CA s.211.

987. Registration under this regime will interact with other regimes in the same was as the CA regime interacts with other State regimes of registration.

988. Some types of charges that fall within the scope of sub-cl.262(1), and hence will be required to be registered under this Bill may also be required to be registered under separate State or Territory legislation. Cl.273 will overcome the need for dual registration in relation to securities over personal chattels.

989. This clause avoids doubts as to whether or not this section interacts as intended with legislation concerning securities over personal chattels, including wool, crops and stock.

990. Where a notice in relation to charge is required to be lodged with the ASC then -

(i) the charge need not be registered under prescribed State or Territory legislation;

(ii) the priorities provisions of those laws do not apply to the charge; and

(iii) if the charge is not registered under those laws the validity or effect of the charge is not affected (sub-cl.273(1)).

991. Failure to register in accordance with the prescribed provisions will not affect the validity or limit the effect of the transfer, assignment, or giving of security nor result in any loss of priority which would otherwise be avoided under other legislation - sub-cl.273(3)).

992. The same protections will be given to crop liens and stock mortgages required to be registered under prescribed laws (sub-cl.273(3)).

993. It is anticipated that the relevant ACT provisions (Parts IV and V of the Instruments Ordinance 1933) will be identified in the regulations. The corresponding provisions in State laws will also be identified in the regulations (being the relevant parts of the Instruments Act 1958 (Vic); the Bills of Sale Act 1898 and Liens on Crops and wool and Stock Mortgages Act 1898 (NSW); the Bills of Sale and Other Instruments Act of 1955 and the Liens on Crops of Sugar Cane Act of 1931 (Qld); Liens on Fruit Act, 1923 and the Stock Mortgages and Wool Liens Act 1924 (SA); Bills of Sale Act 1899 (WA); and the Stock, Wool, and Crop Mortgages Act 1930 (Tas)).

994. The regulations may specify particular provisions of a law of a State or Territory apply, rather than all of the law (para.273(4)(a)).

995. The regulations may also modify the operation of those other laws (para.273(4)(b)).

996. These provisions will not apply to a charge given by a company jointly with others, where one of the others is not a company (sub-cl.273(5)). This involves no departure from the existing law.

Cl.274 : Power of Court to rectify Register etc

997. This clause is substantially the same as CA s.212.

998. The Court will have the power to rectify omissions or mis-statements in the Register of Charges if it is satisfied of certain matters (cl.274 - see also sub-cl.266(3) in relation to the power of the Court, if satisfied of those same matters, to extend the time of lodging notice of charges).

Cl.275 : Charges of Division 2 company

999. This clause is based on CA s.214.

1000. There will be provision for the entry, in the ASC register, of details of charges (which are not already registered under this Division) on property of State and Territory companies which become registered as companies under this Bill.

1001. This regime will then apply to the charges of the body as if it had always been a company as defined in cl.9.

Cl.276 : Charges of Division 3 company

1002. This clause is based on CA s.213.

1003. There will be provision for entry in the ASC register, of details of charges (which are not already registered under this Division) on property of foreign companies registering under Part 2.2 Division 3.

Cl.277 : Power to exempt from compliance with certain requirements of Division

1004. This clause is substantially the same as CA s.215.

1005. The ASC will be able to exempt a person from certain of the requirements in cls. 263, 264 and 268 subject to such conditions as it thinks fit.

Division 3 - Order of Priority

1006. The priorities as between registrable charges are set out in this Division which is substantially the same as CA s.204 Schedule 5.

1007. The policy issues involved as to which charges should take priority over other charges have been generally resolved

along the lines of the Eggleston Committee's draft schedule of priorities as incorporated in Schedule 5 of CA. This Bill does not purport to determine priorities as between registrable charges and other unregistrable interests in the property of a company.

Cl.278 : Interpretation

1008. These are interpretation provisions relating to the categories of charges, substantially the same as CA Schedule 5 cls.5 and 6 (sub-cl.278(1)).

Notice and knowledge

1009. Sub-clause 278(2) is substantially the same as CA Schedule 5 cl.4.

1010. A reference in this Division to a person having "notice" of a charge will include a person having constructive notice. The meaning of "constructive notice" will be left to be determined under the general law.

1011. Sub-clause 278(3) is substantially the same as CA Schedule 5 cl.3A.

1012. This clause will provide that, where, due to the definition of "priority time" in sub-cl.278(1) a registered charge has 2 or more priority times each relating to a particular liability secured by the charge, each of those liabilities shall, for the purposes of Part 2.2 Division 3, be deemed to be secured by a separate registered charge, the priority time of which is the priority time of the first-mentioned registered charge that relates to the liability concerned.

1013. This ensures that a charge, to the extent that it secures each extra amount, has a priority time related to the date of lodgment of the notice of variation. The purpose of this is to make it clear that the provisions of Part 2.2

Division 3 that allocate priorities apply to such a charge separately in respect of each extra amount secured by the charge.

1014. Chargees will be able to consent to a waiver or variation of the priority to which their charges would otherwise be entitled (see sub-cl.279(2)).

1015. A chargee of a floating charge will be deemed to have consented to a subsequent registered fixed charge created before the floating charge crystallises taking priority unless the chargee of the floating charge takes certain action (see sub-cl.279(3)).

Cl.279 : Priorities of charges

1016. This clause is substantially the same as CA s.204.

1017. This clause provides that the priorities of registrable charges in relation to each other are as set out in Division 3.

1018. As under the CA:

(a) The statutory scheme of priorities will not purport to determine the priorities between registrable charges and other unregistrable interests - this matter is left to the general law.

(b) The provision for chargees to be able to consent to a waiver or variation of the priority to which their registrable charges would otherwise be entitled, is contained in sub-cl.279(2) rather than in Division 3.

(c) A chargee of a floating charge will be deemed to have consented to a subsequently registered fixed charge created before the floating charge crystallizes taking priority unless the company, under the terms of the floating charge, had limited its power to create subsequent fixed charges and this fact had

been notified to the ASC by the holder of the floating charge.

Cl.280 : General priority rules in relation to registered charges

1019. This clause is based on CA Schedule 5 cl.1.

1020. Registered charges will take precedence inter se according to the times of registration unless the later registered charge was created earlier and the holder of the prior registered charge is proved to have had notice of it when the charge was taken (paras. 280(1)(a), (2)(a) and (1)(c). In certain circumstances, registered charges will also not take precedence inter se according to the times of registration where the earlier charge is a floating charge and the later registered charge is a fixed charge - see sub-cl.279(3).

1021. A registered charge takes precedence over an earlier created unregistered charge unless the holder of the registered charge is proved to have had notice of the earlier unregistered charge when the charge was taken (paras.280(1)(b) and (2)(b)).

1022. Priorities as between registered charges and other unregistrable interests in the property (such as interests acquired by a retail buyer and stockbrokers' liens over shares) will be left to be determined under general law. In line with this policy, this Division does not contain any reference to competition between holders of registered charges and execution creditors although this omission would not have any effect on the general law: a registered charge will not take precedence over the claim of an execution creditor under a prior levied execution.

1023. This Division does not contain any reference to competition between registered charges and claims in liquidation. This issue is covered in cl.266. If liquidation

or official management occurs then a registrable charge will be void as a security on the property of the company as against the liquidator or official manager unless notice is lodged with the ASC within the specified time (see sub-cls.266(1) and (2)) or at least six months before the commencement of the winding-up or official management. However, the charge will not be void as a security if the 45 day or other period has not elapsed when the winding up or official management commences (sub-cl.266(1)).

Cl.281 : General priority rules in relation to unregistered charges

1024. This clause is substantially the same as CA Schedule 5 cl.2.

1025. An unregistered charge will take precedence over a subsequently created registered charge if the holder of the registered charge is proved to have had notice of the earlier unregistered charge when the charge was taken (para.281(a)).

1026. Unregistered (but registrable) charges will take precedence inter se according to the times of their creation, regardless of notice (para.281(b)).

1027. Priorities as between unregistered (but registrable) charges and other unregistrable interests will be left to be determined under general law. As to competition between unregistered charges and claims in a liquidation see cl.266.

Cl.282 : Special Priority rules

1028. This clause is substantially the same as CA Schedule 5 cl.3.

1029. If a registrable charge over company property secures any liability that is not fixed or capable of being ascertained at the time when the charge is registered, then whether or not any priority (accorded by Part 2.2 Division 3

to the charge over another charge) will extend to that liability may depend on one or more of the following factors:

(a) whether or not the liability is of an unspecified amount;

(b) whether or not the chargee has actual knowledge of the other charge;

(c) if the liability is only a liability up to a specified maximum amount, whether or not the ASC has been notified of the nature of the liability and the amount so specified;

(d) whether or not the liability becomes fixed or capable or being ascertained before the chargee first learns of the other charge; and

(e) whether or not the charge can be required, in certain circumstances, to make further advances.

1030. If, for example, a company gives security for an overdraft which provides for the possibility of the lender making further advances of an unspecified amount and, whether before or after the charge is registered, the lender makes further advances, even though under no obligation to do so then the lender will be entitled to repayment of those further advances in priority to the claims of, say, the holder of a subsequently registered charge only if the advances had been made prior to the first lender learning of the existence of the other charge (sub-cl.282(2) and para. 282(4)(c)).

1031. If, however, the terms of the charge providing for further advances actually require the chargee to make those subsequent advances, then the lender will be entitled to repayment of those further advances in priority to the claims of the holder of the subsequently registered charge even if the advances are made after the person making them knew of the

existence of the subsequently registered charge (para.282(4)(d)).

1032. Similar principles will apply if the charge secures a liability which is not capable of being ascertained at the time that the charge is registered, although the maximum possible amount of the liability is fixed, but that that maximum amount is not notified to the ASC (para.282(4)(d)).

1033. If the nature of that liability and the maximum amount are notified to the Commission then the priority accorded by this Division 3 to the charge over another charge extends to that liability even if it becomes a fixed liability only after registration and even if, when it becomes a fixed liability, the chargee knows of the existence of the other charge sub-cl.282(3)).

1034. Whereas priorities as between registered charges will generally be affected by constructive notice on the part of chargees of the existence of prior created charges (see cls.278 and 280), actual knowledge is the factor which will determine whether or not the priority accorded to a charge by cl.280 extends to a liability that is not fixed or capable of being ascertained at the time that the charge is registered. This is to avoid the need, for example, for lenders making further advances under the terms of a registered charge to be constantly searching the register of charges (given that they would be fixed with constructive notice of details on the register).

PART 3.6 : ACCOUNTS

1035. Part 3.6 of the Bill (cls.283 to 323) contains the following provisions dealing with the accounts and reports of companies:

Division 1	-	Accounting standards
Division 2	-	Accounting records
Division 3	-	Financial years of holding companies and subsidiaries
Division 4	-	Financial statements
Division 5	-	Directors' statements
Division 6	-	Directors' reports
Division 7	-	Financial statements and directors' reports
Division 8	-	Inspection of records
Division 9	-	Transitional.

1036. These provisions are substantially based on CA Divisions 1 and 2 of Part VI.

Division 1 : Accounting Standards

Cl.283 : Accounting standards

1037. This clause is the equivalent of CA s.266B, although its method of operation is significantly different to the CA section.

1038. The Accounting Standards Review Board ("ASRB") may make accounting standards for the purposes of the accounts (Part 3.6) and audit (Part 3.7) provisions. Such a standard must be in writing and must not contain requirements that conflict with other requirements of the Act or Regulations (such as prescribed disclosure requirements for accounts and group accounts) (Bill sub-cl.283(1)).

1039. An accounting standard made by the ASRB is to be treated as a disallowable instrument under s.46A of the Acts

Interpretation Act 1901 ("AIA") (Bill sub-cl.283(2)). That section provides that AIA ss.48-50, with appropriate modifications, apply to standards.

1040. The effect of AIA ss.48-50 on accounting standards includes the following:

(a) making of standard to be modified in Gazette (AIA para.48(1)(a));

(b) standards operate from date notified or other specified date (which is not normally to be before date of notification) (AIA para.48(1)(b) and sub-s.48(2)); and

(c) standards are to be laid before each House of the Parliament within 15 sitting days of that House after the standard is made (AIA para.48(1)(c)).

1041. The effect of either House of the Parliament disallowing the revocation, replacement or amendment of a standard will be to restore the standard to the form in which it existed prior to the ASRB notifying the revocation, replacement or amendment (AIA sub-s.48(7)).

Cl.284 : Application of accounting standards : general

1042. This is a new clause the purpose of which is to make clear that the ASRB has the power to make standards that apply only to certain types of company or in certain circumstances.

1043. The ASRB will be able to express a standard as applying to all companies or to a specified class of company (e.g. listed companies or borrowing corporations) (Bill sub-cl.284(1)). An approved accounting standard may differ according to difference in time, locality, place or circumstance. (Bill sub-cl.284(2)).

Cl.285 : Application of accounting standards : financial years

1044. This clause is the equivalent of CA s.266C. However, the provision has been recast to allow companies greater flexibility in situations where a standard has been amended.

1045. An accounting standard will normally apply in respect of the first financial year of a body corporate that ends after the date on which the standard commences and each subsequent financial year. However, it is possible for the ASRB to make a standard that will apply in respect of the first financial year of a body corporate commencing after the date on which the standard commences and each subsequent financial year (Bill sub-cl.285(1)).

1046. An accounting standard cannot be expressed to apply to a financial year of a body corporate ending before the commencement of the standard (Bill sub-c.285(2)).

1047. Nevertheless, it is possible for directors to elect to apply to a financial year a standard that would not otherwise apply to that financial year (Bill sub-cl.285(3)). This provision is intended to enable directors to immediately use a standard (which could be either entirely new or an amendment to an existing standard) made after the end of a company's financial year but prior to the completion of the company's accounts for that financial year.

Cl.286 : Interpretation etc of accounting standards

1048. This clause is based on CA s.266E.

1049. Expressions used in approved accounting standards have the same meaning as in the Bill (Bill sub-cl.286(1)).

1050. A document that purports to be issued or published by the ASRB and sets out an accounting standard as in force as at a specified time, or a copy of such a document, is prima facie evidence that the standard is in force at that time and that

the text is that of the standard made by the ASRB (Bill sub-cl.286(2)).

Cl.287 : Power of Board to require copy of accounts or group accounts

1051. This provision is based on CA sub-s.266F(1).

1052. Where, pursuant to Bill sub-cl.332(11), an auditor of a company has sent to the ASRB a copy of his report on the accounts or group accounts, the ASRB will be entitled to require, by notice in writing, the company to supply it with a copy of its accounts or group accounts (Bill cl.287).

Cl.288 : Application of accounting standards approved under Companies Act 1981

1053. This is a transitional provision, the intention of which is:

(a) to preserve accounting standards approved by the "old" ASRB (that is, the Board established by the Ministerial Council for Companies and Securities); and

(b) to set out the circumstances in which those standards apply to a financial year of a company.

1054. An accounting standard that, at the commencement of Part 3.6 of the Bill, was an approved standard for the purposes of CA Part VI continues in force as if it were a standard made in accordance with Bill cl.283 (Bill sub-cl.288(1)).

1055. An accounting standard to which this clause relates, applies to the financial year of a body corporate where:

(a) the body would have been a company for the purposes of the CA; and

(b) the standard would have applied to that financial year pursuant to CA s.266C (Bill sub-cl.288(2)).

Division 2: Accounting Records

Cl.289 : Accounting records

1056. This provision is based on CA s.267 with modifications to reflect the Australia-wide operation of the new legislation.

1057. Under this provision a company will be required to keep at such location or locations decided upon by the directors accounting records that correctly record and explain the transactions and financial position of the company so as to enable the preparation of accounts and the audit of those accounts (Bill sub-cls.289(1) and (3)).

1058. This provision also provides:

(a) that a company's accounting records have to be retained for 7 years (Bill sub-cl.289(2));

(b) that where the accounting records are kept outside Australia, sufficient statements and records must be kept in Australia to enable the preparation of true and fair accounts and the other documents to be attached to the accounts, and where those statements and records are not kept at the registered office, the Commission must be notified of their location (Bill sub-cls.289(5) and (6));

(c) that the Commission can require specified accounting records kept outside Australia to be produced at a place within Australia (Bill sub-cl.289(4)); and

(d) that the accounting records either be kept in writing in the English language or be readily convertable into writing and that language (Bill sub-cl.289(7)).

1059. A company is also required to make its accounting records available for inspection by a director, a registered company auditor acting on behalf of a director or any other person authorised to inspect the records (for example, an officer of the Commission) (Bill sub-cls.289(8) and (9)).

Division 3 : Financial years of holding company and subsidiaries

Cl.290 : Synchronisation

1060. This provision closely follows CA s.268.

1061. Directors of a company that is a group holding company will be required to ensure that the financial year of each subsidiary coincides with the financial year of the company. If there is good reason for the financial years not to coincide, an application is able to be made to the ASC. There will be a right of appeal to the Court against the ASC's decision (Bill cl.290).

Cl.291 : Orders under corresponding laws

1062. This is a transitional provision which has no equivalent in the CA.

1063. This provision provides that where a company had an order under a law corresponding to cl.290 immediately prior to its registration day, the order will continue to have effect as if it had been made under cl.290 (Bill cl.291).

Division 4 : Financial statements

1064. This Division deals with the obligations of company directors in respect of the profit and loss account, the balance sheet and, for a holding company, the group accounts.

Cl.292 : Profit and loss account

1065. This provision is based on CA sub-s.269(1) except that the requirement to have the profit and loss account made out not less than 14 days before the annual general meeting has been modified to reflect the fact that under certain circumstances the shareholders can agree to dispense with the requirement to give 14 days notice for the calling of an annual general meeting.

1066. Company directors will be required, before the deadline after the end of a company's financial year, to cause to be made out a profit and loss account for that financial year. The profit and loss account must give a true and fair view of the profit or loss of the company for that financial year (Bill cl.292).

Cl.293 : Balance-sheet

1067. This provision is based on CA sub-s.269(2) except that the requirement to have the balance-sheet made out not less than 14 days before the annual general meeting has been modified to reflect the fact that under certain circumstances the shareholders can agree to dispense with the requirement to give 14 days notice for the calling of an annual general meeting.

1068. Company directors will be required, before the deadline after the end of a company's financial year, to cause to be made out a balance-sheet as at the end of that financial year. The balance-sheet must give a true and fair view of the state of affairs of the company as at the end of that financial year (Bill cl.293).

Cl.294 : Steps to be taken before accounts made out

1069. This provision is based on CA sub-s.269(7).

1070. Before the accounts referred to in Bill cls.292 and 293 are made out, the directors of a company are required to take reasonable steps:

(a) to find out what has been done about writing off bad debts and making provision for doubtful debts and, where necessary, to cause such debts to be written off and such provision to be made (Bill sub-cl.294(2));

(b) to find out whether any other current assets are unlikely to realise their value as shown in the company's accounting records and, where they are unlikely to realise that value, to cause them either to be written down to their realisable value or for provision to be made for the difference between their book value and their realisable value (Bill sub-cl.294(3));

(c) to find out whether the value of any non-current asset is shown in the company's accounting records at an amount that exceeds the cost of acquiring the asset at the end of the financial year and, unless provision has been for writing down the value of the asset, to provide such explanations as will prevent the accounts from being misleading because of the overstatement (Bill sub-cl.294(4)).

Cl.295 : Group accounts

1071. This provision is based on CA sub-s.269(3) except that the requirement to have the group accounts made out not less than 14 days before the annual general meeting has been modified to reflect the fact that under certain circumstances the shareholders can agree to dispense with the requirement to give 14 days notice for the calling of an annual general meeting.

1072. Where at the end of a financial year a company is a holding company, the company's directors will be required, before the deadline after the end of a company's financial year, to cause to be made out group accounts dealing with the profit or loss and state of affairs of the company and its subsidiaries for their respective last financial years. The group accounts must give a true and fair view of the profit or loss and state of affairs of the group so far as they concern members of the company (Bill cl.295).

Cl.296 : Audit of financial statements

1073. These requirements are based on CA sub-s.269(4) and (5) except for the modification to time limits to reflect the fact that under certain circumstances the shareholders can agree to dispense with the requirement to give 14 days notice for the calling of an annual general meeting.

1074. Directors of companies (other than exempt proprietary companies which did not appoint an auditor pursuant to Bill cls.325 and 326) will be required to have the accounts audited before the deadline after the end of the company's financial year and to attach the auditor's report to the accounts (Bill cl.296).

Cl.297 : Financial statements to comply with regulations

1075. This provision is based on CA sub-s.269(8).

1076. Company directors will be required to ensure that the accounts comply with the relevant prescribed requirements, but if that will not result in a true and fair view being given of the matters required, additional information and explanations will be required (Bill cl.297).

Cl.298 : Financial statement to comply with applicable accounting standards.

1077. This provision is based on CA sub-ss.269(8A) and (8B).

1078. Company directors will be required to ensure that accounts are prepared in accordance with applicable accounting standards (Bill sub-cl.298(1)).

1079. Company directors will not be required to ensure accounts are prepared in accordance with a particular applicable accounting standard where compliance with that standard would result in the accounts not giving a true and fair view (Bill sub-cl.298(2)).

Cl.299 : Effect of sections 297 and 298

1080. This is a new provision.

1081. This intention of this clause is to ensure that the action to be taken by directors, where compliance with the principal requirements of cls.297 and 298 would result in accounts not giving a true and fair view, applies only in respect of the requirements in those clauses and not to other clauses that contain requirements for accounts to give a true and fair view (Bill cl.299).

Cl.300 : Inclusion of comparative amounts for items required by accounting standards

1082. This is new clause, the intention of which is to set out the requirements in respect of comparative amounts for items that have to be disclosed in accordance with accounting standards.

1083. Where a company's financial statements for a financial year have to include a particular item and its amount in accordance with cl.298, the corresponding amount of that item for the previous financial year must be disclosed if cl.298 or

a corresponding law applied in respect of that financial year. In addition, the accounts must include a note of explanation if the amounts have been calculated on a different basis in each year (Bill cl.300).

Division 5 : Directors' Statements

Cl.301 : Statement to be attached to accounts

1084. This provision is based on CA sub-ss.269(9) and (11).

1085. Directors of a company are required to state whether in their opinion:

(a) the profit and loss account is drawn up so as to give a true and fair view of the profit or loss of the company for the financial year and the balance sheet is drawn up as to give a true and fair view of the state of affairs of the company at the end of the financial year (Bill sub-cl.301(2)); and

(b) there are reasonable grounds to believe that the company will be able to pay its debts as and when they fall due (Bill sub-cl.301(5)).

1086. The directors' statement is required to indicate whether the accounts of the company have been prepared in accordance with all applicable accounting standards (Bill sub-cl.301(6)). Where the accounts have not been prepared in accordance with a particular applicable accounting standard, the directors will be required to include in their directors' statement:

(a) the reasons for their opinion that compliance with that accounting standard would have resulted in the accounts not giving a true and fair view; and

(b) particulars of the quantified financial effect on the accounts of non compliance with that accounting

standard (Bill sub-cl.301(8)). Where the accounts have been prepared in accordance with any accounting standards the directors have elected should apply in relation to the financial year, the statement should specify those standards (Bill sub-cl.301(7)).

1087. Where a company, in accordance with Bill cl.326, did not appoint an auditor, the statement should indicate whether the company has:

(a) kept accounting records that correctly record and explain the transactions and financial position if the company;

(b) kept its accounting records in such a manner as will enable true and fair accounts to be prepared; and

(c) kept its accounting records in a manner that will enable them to be audited (Bill sub-cl.301(9)). It should also indicate whether the accounts have been properly prepared by a competent person (Bill sub-cl.301(10)).

1088. Where a company has been dormant from the commencement of the financial year to the date of he directors' statement, the statement should say that the company has been dormant. In the absence of such a statement, a reader of the accounts would not be aware of the reason why there was no directors' report (Bill sub-cl.301(11)).

1089. In forming their opinion in relation to the matters required by Bill sub-cl.301(2), directors will be required to have regard to circumstances that have arisen and information that has become available since the end of the financial year and that would, if those accounts had been made out when the statement is made, have affected the determination of an amount or particulars in those accounts (Bill sub-cl.301(3)). Where directors have not made adjustments in those accounts to reflect the circumstance or information, they will be required

to include in their statement such information and explanations as will prevent those accounts from being misleading (Bill sub-cl.301(3)).

Cl.302 : Statement to be attached to group accounts

1090. This clause is based on CA sub-ss.269(10) and (12). The directors of a company that is a group holding company are required to prepare a directors' statement containing similar information to that required from directors of a company under cl.301 (Bill cl.302).

Cl.303 : Statements under this Division

1091. This is a new clause which brings together in one place the timing and administrative requirements for statements contained in CA sub-ss.269(9), (9A), (10) and (10A).

1092. The directors are required to comply with there requirements of cl.301 (or cls.301 and 302 in the case of a group holding company) either before the auditor reports on the financial statements or, where there is no auditor, before the deadline after the end of the financial year (Bill sub-cl.303(1)).

1093. A statement made by directors in accordance with cls.301 and 302 must be made in accordance with a resolution of directors, be made not more than 42 days before the deadline after the end of the financial year, be signed by at least 2 directors and bear the date on which it was made (Bill sub-cl.303(2)).

Division 6 : Directors' reports

Cl.304 : Report on company other than group holding company

1094. This provision is based on CA subs.270(1), although some requirements contained in other parts of CA s.270 have also been included in this clause.

1095. Company directors will be required to prepare a report that complies with all of the provisions of Division 6 of Part 3.6 except cl.305 (Bill para.304(1)(a)). However, where the company is either an exempt proprietary company or a wholly-owned subsidiary of another company, it is also relieved of the requirement to comply with sub-cls.304(7) to (10) (Bill para.304(1)(b)) whilst a company is relieved of all reporting requirements if it is dormant from the start of a financial year until the deadline after that financial year (Bill sub-cl.304(2)).

1096. The report is required to:

(a) state the names of the directors as at the date of the report (Bill sub-cl.304(3));

(b) state the company's principal activities and any significant change in the nature of those activities (Bill sub-cl.304(4));

(c) give the profit or loss after provision for income tax (Bill sub-cl.304(5));

(d) state the amount that it is recommended should be paid as dividend (Bill sub-cl.304(6);

(e) state other dividends paid or declared since the start of the financial year (Bill sub-cl.304(7));

(f) contain a review of the company's activities (Bill sub-cl.304(8));

(g) give details of any significant change in the company's state of affairs (Bill sub-cl.304(9));

(h) give details of any matter that has arisen since the end of the financial year and which may significantly affect the company's operations (Bill sub-cl.304(10)); and

(i) refer to likely developments in the company's operations (Bill sub-cl.304(11)).

Cl.305 : Report on group holding company

1097. This clause is based on CA sub-s.270(2), although, like cl.304, it also brings together some requirements from other parts of CA s.270.

1098. The directors of a company that is a group holding company are required to prepare a directors' report containing similar information to that required from directors of a company under cl.304 (Bill cl.305).

Cl.306 : Report may omit prejudicial information

1099. This clause is essentially the same as CA sub-s.270(3).

1100. Where information required pursuant to sub-cls.304(1) and 305(11) in respect of likely developments in the operations and expected results of those operations would, in the opinion of directors, prejudice the interests of the company or group then that information need not be included, provided that the report states that some or all of the required information has not been included in the report (Bill cl.306).

Cl.307 : Public companies

1101. This clause is essentially the same as CA sub-s.270(3A).

1102. Where at the end of a financial year a company is a public company and is not a wholly-owned subsidiary of another company, the directors' report is to provide:

(a) particulars of directors' qualifications, experience and any special responsibilities;

(b) particulars of shares in the company or in a related body corporate; and

(c) particulars of any interest of a director in a contract or proposed contract wit the Company (Bill cl.307).

Cl.308 : Options

1103. This clause is based on CA sub-ss.270(4) to (6).

1104. The directors' report will be required to set out the following details in respect of each option the company has granted in its shares:

(a) the name of the person to whom the option was granted or whether an option was granted to generally to shareholders or debenture holders or a class of shareholders or debenture holders;

(b) the number and class of shares of which the option was granted;

(c) the expiration date of the option;

(d) the basis on which the option is to be exercised; and

(e) whether the option holder has a right to participate in any share issue of any other body corporate (Bill sub-cl.308(3)).

1105. In addition, the report shall give:

(a) particulars of shares issued by virtue of the exercise of an option;

(b) the number of classes of unissued shares under option; the prices, or method of determining price, of issue of such shares;

(c) the expiration dates of the options; and

(d) particulars of the option holders' rights (if any) to participate in the issue of shares of any other corporation (Bill sub-cl.308(4)).

1106. Where a company is a group holding company, the information required by sub-cls.308(3) and (4) has to be provided in respect of each body corporate in the group that has granted options (Bill sub-cl.308(2)).

1107. If any of the information required by cl.308 to be included in the directors' report has already been provided in a previous directors' report, cl.308 can be complied with by referring to that earlier report (Bill sub-cl.308(5)).

Cl.309 : Benefits under contracts with directors

1108. This clause is based on CA sub-s.270(7).

1109. Where a company director receives or will receive benefits (other than emoluments or salary as a full-time employee) being a benefit resulting by reason of contract between the company or related body corporate and the director or a firm of which the director is a member or with a company in which the director has a substantial financial interest, the directors' report will have to set out details of each such benefit. (Bill cl.309).

Cl.310 : Reports generally

1110. This is a new clause which brings together the timing and administrative requirements contained in CA sub-ss.270(1) and (2).

1111. The directors' report is to be prepared no later than the deadline after the end of a company's financial year (Bill sub-cl.310(1)).

1112. The report is to be prepared in accordance with a resolution of directors, made not more than 42 days before the deadline, is to be signed by at least 2 directors and is to bear the date on which it was signed (Bill sub-cl.310(2)).

Division 7 : Financial Statements and Directors' Reports

Cl.311 : Rounding off amounts

1113. This provision is based on CA s.271.

1114. The regulations will be able to make provision permitting specified companies to round-off amounts in accounts and reports to the nearest one-thousand dollars (Bill cl.311).

Cl.312 : Directors of holding company to obtain all necessary information

1115. This provision is based on CA s.272.

1116. Directors of a company that is a group holding company are not to prepare the group accounts unless they have available to them sufficient information in respect of each subsidiary to ensure that the group accounts will present a true and fair view so far as the members of the company are concerned and that the directors' report and statement will not be false or misleading in a material particular (Bill sub-cl.312(1)).

1117. The directors of each subsidiary are required to supply whatever information is required for the preparation of the group accounts and directors' report and statement (Bill sub-cl.312(2)).

1118. Where the directors of a company are unable to obtain sufficient information from the directors subsidiary, they are still required to prepare the group accounts and directors' statement and report. In addition, they have to provide

details of the information not obtained and add such qualifications and explanations to the group accounts and directors' statement and report as will prevent them from being misleading (Bill para.312(3)(a)). When the information in question is received, a summary of it together with its affect on the group accounts and directors' statement and report is to be lodged with the ASC and circulated to each shareholder (Bill para.312(3)(b)).

Cl.313 : Relief from requirements as to accounts and reports

1119. This provision is based on CA s.273.

1120. The directors of a company can apply to the ASC for an order relieving them, the company or the auditor (if any) from compliance with any specified requirements of the Act relating to, or to the audit of, accounts or group accounts or to the directors' report required by Bill Division 6 of Part 3.6 (Bill sub-cl.313(1)).

1121. Provision also exists for the ASC to grant such relief to a class or classes of companies (Bill sub-cl.313(6)).

1122. Before making an order relating to the form or content of the accounts, group accounts or directors' report, the ASC must be satisfied

(a) that compliance with the requirements from which relief is sought

(i) would render the accounts, group accounts or directors' report misleading;

(ii) would be inappropriate in the circumstances of the company or companies included in a class; or

(iii) would impose unreasonable burdens on the company, or an officer or the auditor of the

company, or the companies, or officers a or auditors of companies included in a class; or

(b) the company is not carried on for profit to individual members, prohibited by its memorandum or articles from making distributions to its members and is required by any law of the Commonwealth a State or a Territory to prepare annually a statement of income and expenditure or a statement of its financial position or both, or a class of companies have such characteristics. (Bill sub-cl.313(11)).

1123. This provision will enable the ASC to grant relief in respect of accounting, auditing and reporting requirements other than the requirement to keep proper books of account (Bill sub-cl.313(9)). Furthermore, the ASC may grant relief from the specified accounting requirements

(a) to attach accounts, etc, to the annual return of a company; and

(b) to include items of financial information (commonly known as key financial data) in the "short-form" annual return (Bill sub-cl.313(10)).

1124. The ASC will be given the power to revoke or suspend the application of the order upon appropriate notice (Bill sub-cls.313(13) and (14)). A person aggrieved by an order, or the revocation or suspension of an order o a refusal of an application for the suspension or revocation of an order will be given a right to appeal to the Court (Bill sub-cl.313(15)).

Cl.314 : Orders under corresponding laws

1125. This is a transitional provision for the purposes of the Commonwealth legislation.

1126. Where an order under a law corresponding to cl.313 applied to a Division 2 company immediately before its

registration, the order will continue to apply as if it had been made under cl.313 and the relief granted was in respect of the requirements of the Bill corresponding to those referred to in the order (Bill cl.314).

1127. The practical effect of this provision is to continue orders made by the NCSC under CA s.273 as if they were made by the ASC under cl.313.

Cl.315 : Members entitled to financial statements and reports

1128. This provision is based on CA s.274.

1129. Companies will be required to send copies of all documents to be laid before the annual general meeting to all persons entitled to receive notice of general meetings at or before the time the notice of the annual general meeting is sent out. However, where the notice of the annual general meeting is sent out more than 14 days before the meeting, the documents to be laid before the meeting must also be sent out at least 14 days before the meeting (Bill sub-cl.315(2)).

1130. Members, whether or not entitled to copies of accounts, who have not been sent copies of accounts and debenture holders can request copies of all accounts and associated statements and reports (Bill sub-cl.315(3)).

Cl.316 : Financial statements and reports to be laid before annual general meeting

1131. This provision is based on CA s.275.

1132. Company directors will be required to lay before each annual general meeting held in respect of a financial year:

(a) a copy of the financial statements for that year;

(b) a copy of each directors' statement required by Bill Division 5 of Part 3.6;

(c) a copy of the directors' report in accordance with Bill Division 6 of Part 3.6; and

(d) a copy of the auditor's report required by Bill sub-cl.316(5)

Cl.317 : Commission may require company to lodge accounts etc.

1133. This provision is based on CA s.275A.

1134. The ASC will be given the power to require companies, the accounts of which were not required to be audited under Bill Part 3.7, to lodge with the ASC copies of accounts and other documents for a specified financial year or for specified financial years.

1135. This is to enable the ASC to obtain from a company a copy of its accounts, etc., either to ensure compliance with the accounting and reporting requirements of the Bill or to facilitate inquiries into the affairs of the company (Bill cl.317).

Cl.318 : Contravention of Part

1136. This provision is based on CA s.276.

1137. There will be penalties for failure to comply with the provisions relating to the preparation and laying of financial statements and directors' reports. (Failure to supply the ASC with copies of accounts etc. requested in accordance with Bill cl.317 is not an offence for the purpose of this clause. However, such failure is to be an offence for the purposes of the general penalty provision.) (Bill sub-cl.318(1)).

1138. Where action is taken against a person for failing to comply with the requirements on form and content of accounts or group accounts, it is a defence if it can be shown that the information omitted was immaterial and did not affect the giving of a true and fair view (Bill sub-cl.318(2)).

1139. The onus of proving that accounts or group accounts would not, if made out in accordance with an applicable accounting standard, give a true and fair view, lies on the directors of the company (Bill sub-cl.318(3)).

1140. Where, at the end of the period in which accounts and directors' reports must be prepared, the ASC by written notice requires the directors of a company to produce accounts or directors' reports, failure to produce those accounts or directors' reports may be used as prima facie evidence that the accounts and reports had not been made out within that period (Bill sub-cl.318(4)).

Division 8 : Inspection of records

Cl.319 : Inspection of records

1141. This clause is based on CA s.265B.

1142. A member of a company will be able to apply to the Court for an order authorising a registered company auditor or a legal practitioner to inspect the books of the company on the member's behalf (Bill para.319(a)). The Court, if it is satisfied that the application is made in good faith and for a proper purpose, will be able to make an order authorising a registered company auditor or a legal practitioner to inspect and make copies of such of the company's books as are specified in the order (Bill paras.319(b) and (c)). The Court will also be able to make such other orders as it considers necessary (Bill para.319(d)).

1143. The member's right to apply for an order under this Division will not limit any rights that the member may have under any other law. (Bill sub-cl.319(2)).

Cl.320 : Disclosure of information

1144. This clause is based on CA s.265C.

1145. Where a registered company auditor or legal practitioner is authorised by court order to inspect the books of a company, he will be prohibited from disclosing any information acquired in the course of the inspection to any person other than the member on whose behalf he was authorised to make the inspection or to staff member or a member or acting member of the ASC. (Bill cl.320).

Division 9 - Transitional

Cl.321 : Application of this Part and Part 3.7 to Division 2 company

1146. This is a transitional provision which has no equivalent in the CA.

1147. A person does not have to comply with a requirement of Parts 3.6 and 3.7 in respect of a financial year of a Division 2 company that ended before the company's registration date (Bill cl.321).

Cl.322 : Continued application to Division x2 company of requirements of corresponding law

1148. This is a transitional provision which has no equivalent in the CA.

1149. Where a company of a State or Territory is registered as a company under Division 2 of Part 2.2, and a person had not complied with the requirements of a law that corresponds with Parts 3.6 and 3.7 in relation to the last financial year of the company prior to the registration day, the person shall comply with those requirements as if they were imposed by a law of the Commonwealth and a reference to the NCSC was a reference to the ASC (Bill cl.322).

Cl.323 : Division 3 or 4 companies

1150. This is a transitional provision which has no equivalent in the CA.

1151. Parts 3.6 and 3.7 apply in relation to the financial year of a Division 3 or 4 company that ended before its registration day to the extent, and with such modifications, as may be prescribed (Bill cl.323).

PART 3.7 : AUDIT

1152. This Part, which sets out the requirements for the audit of a company's accounts and, where required, group accounts, is substantially similar to the provisions in CA Part VI Division 3.

Cl.324 : Qualifications of auditors

1153. This provision is based on CA s.277.

1154. A person cannot consent to be appointed as auditor, act as auditor or prepare a report required of an auditor if the person is not a registered company auditor, the person (either directly or through a body corporate in which he or she is a substantial shareholder) owes more than $5,000 to the company or a related body corporate or (except in the case of an exempt proprietary company) is an officer of the company or an employee or partner of such an officer (Bill sub-cl.324(1)). Similar requirements apply in respect of the appointment of a firm as auditor (Bill sub-cl.324(2)).

1155. The appointment of a firm as auditor is taken as the appointment of all members of the firm who are registered company auditors (Bill sub-cl.324(7)) and a newly constituted firm (due to death or retirement etc.) is deemed to be appointed as auditor if not is not disqualified (Bill sub-cl.324(8)). Except as provided by Bill sub-cl.324(8), the

appointment of members of a firm as auditors is not affected by dissolution of the firm (Bill sub-cl.324(9)).

1156. A report or notice purporting to be made by a firm shall not be duly made unless signed by a member who is a registered company auditor (Bill sub-cl.324(10)).

1157. Each member of a firm that consents to be appointed as the auditor or acts as an auditor or prepares a report required of an auditor will be guilty of an offence if this appointment is in breach of this clause (Bill sub-cl.324(11)).

1158. The ASC can approve a suitably qualified or experienced person as auditor where it is impractical for an exempt proprietary company to obtain the services of a registered company auditor (Bill sub-cl.277(12)). Further provisions in respect of such an approval are set out in Bill sub-cls.324(13), (14) and (15).

1159. A person will be prohibit from knowingly disqualifying himself or a firm if he is a member from acting as auditor (Bill sub-cl.324(16)).

Cl.325 : When unlimited exempt proprietary company need not appoint auditor

1160. This provision is based on CA s.278.

1161. An unlimited exempt proprietary company need not appoint an auditor at any annual general meeting where, as at the day of the meeting, no member is other than a natural person, an unlimited exempt proprietary company or a State or Territorial unlimited exempt proprietary company (Bill sub-cl.325(1)). An auditor need not be appointed at the next annual general meeting of the company if these conditions continue to be satisfied (Bill sub-cl.325(4)).

1162. Directors of an unlimited exempt proprietary company need not comply with Bill sub-cl.327(1) where all members have

agreed within 14 days after incorporation not to appoint an auditor and within that 14 day period no member of the company is a person other than a natural person, an unlimited exempt proprietary company or a State or Territorial unlimited exempt proprietary company (Bill sub-cl.325(2)).

1163. Where the company ceases to be an unlimited company or the membership changes such that a body corporate other than an unlimited exempt proprietary company or a State or Territorial unlimited exempt proprietary company becomes a member, the directors must appoint an auditor within 1 month unless the company has already appointed an auditor (Bill sub-cl.325(5)).

Cl.326 : When exempt proprietary company need not appoint auditor

1164. This provision is based on CA s.279.

1165. An exempt proprietary company need not appoint an auditor at an annual general meeting if not more than 1 month before the meeting all members agree the company need not appoint an auditor (Bill sub-cl.326(1)). If these conditions continue to exist, the company need not appoint an auditor at the next annual general meeting (Bill sub-cl.326(4)).

1166. Directors of an exempt proprietary company need not comply with Bill sub-cl.327(1) where all members have agreed within 14 days after incorporation that the company need not appoint an auditor (Bill sub-cl.326(2)).

1167. There will be deemed vacancy in the office of auditor and Bill sub-cl.327(5) will apply where the directors' statement indicates that the company did keep proper accounting records, did not have the accounts properly prepared by a competent person or a director has been convicted of an offence in relation to a matter contained in a directors' statement (Bill cl.326(5)).

1168. Members can at any time agree to appoint an auditor (Bill sub-cl.326(7)). Where a company ceases to be an exempt proprietary company they must appoint an auditor within 1 month unless the company has already appointed an auditor (Bill sub-cl.326(8)).

1169. An auditor appointed under Bill sub-cls.326(5) and (8) holds office until the next annual general meeting (Bill sub-cl.326(10)).

Cl.327 : Appointment of auditors

1170. This provision is based on CA s.280.

1171. This provision deals with the procedures to be adopted for filling the office of auditor following the incorporation of the company and after a vacancy occurs in that office.

1172. Directors of a company shall appoint an auditor within 1 month after incorporation unless the company at a general meeting has appointed an auditor (Bill sub-cl.327(1)). An auditor so appointed holds office until the first annual general meeting (Bill sub-cl.327(2)).

1173. A company shall, at its first annual general meeting or at any subsequent annual general meeting where the office of auditor is vacant, appoint an auditor (Bill sub-cl.327(3)). An auditor so appointed holds office until death, removal, resignation or disqualification (Bill sub-cl.327(4)).

1174. Where a vacancy in the office of auditor occurs (other than through a removal of auditor), directors shall appoint an auditor unless the company at general meeting appoints an auditor or, where the company is an exempt proprietary company, all members agree within 1 month it is not necessary to appoint an auditor (Bill sub-cl.327(5)). Where a company fails to appoint a new auditor, the ASC may, on a written application of a member appoint a new auditor (Bill sub-cl.327(12)).

1175. A person or firm is not to be appointed as auditor unless the person or firm has consented by notice in writing to the appointment and has not withdrawn such consent before the appointment (Bill sub-cl.327(7)). Such a notice from a firm must be signed in the firm name and in the name of a member who is a registered company auditor (Bill sub-cl.327(8)). If Bill sub-cl.327(7) is contravened the appointment is ineffective and the company and defaulting officer are guilty of an offence (Bill sub-cl.327(9)).

1176. Where an auditor is removed from office at a general meeting in accordance with Bill cl.329 the meeting may forthwith appoint a replacement auditor to whom a notice of nomination in accordance with Bill sub-cl.328(3) has been sent. The appointment requires a resolution passed by a majority of not less than three quarters of members. Special provision exists for failure to appoint the new auditor forthwith (Bill sub-cl.327(10)). Upon failure by the company to appoint a new auditor after removal of an auditor, there is power for the ASC to appoint a new auditor (Bill sub-cl.327(11)).

1177. An auditor appointed under Bill sub-cls.327(5), (10), (11) or (13) holds office until the next annual general meeting (Bill sub-cl.327(14)).

1178. A director who fails to take reasonable steps to comply with Bill sub-cls.327(1) or (5) is guilty of an offence (Bill sub-cl.327(16)).

Cl.328 : Nomination of auditors

1179. This provision is based on CA s.281.

1180. A company cannot appoint an auditor at its annual general meetings unless the nomination of the auditor was given to the company by a member either before the meeting was convened or not less than 21 days before the meeting (Bill sub-cl.328(1)). If Bill sub-cl.328(1) is contravened the

purported appointment is ineffective and the company and defaulting officer are guilty of an offence (Bill sub-cl.328(2)). Where notice of nomination of appointment as auditor is received by the company it shall send a copy of the notice to the proposed auditor, the existing auditor and members entitled to vote at the annual general meeting (Bill sub-cl.328(3)).

Cl.329 : Removal and resignation of auditors

1181. This provision is based on CA s.282.

1182. An auditor of a company will be able to be removed from office by resolution of the company at a general meeting of which special notice has been given (Bill sub-cl.329(1)). Where a company receives special notice of a resolution to remove an auditor it shall send copies to the auditor and the ASC (Bill sub-cl.329(2)). An auditor may make representation (of reasonable length) and request copies be sent to every member to whom notice of meeting was sent (Bill sub-cl.329(3)). The company shall send a copy of representations, unless the ASC otherwise orders, and the auditor, without prejudice to the right to be heard orally, can require the representations to be read out at the meeting (Bill sub-cl.329(4)).

1183. An auditor may resign subject to having received the consent of the ASC in the case of a company other than an exempt proprietary company. The resignation takes effect

(a) in the case of an exempt proprietary company - the latter of the day specified in the notice of resignation or the day on which the notice of resignation is received by the company; and

(b) in all other cases - on the later of the day specified in the notice of resignation, the day on which the ASC gives its consent, or the day fixed by the ASC. (Bill sub-cls.329(5), (9) and (10)).

1184. A statement made by an auditor in an application for the ASC's consent to the auditor's resignation or an answer to any ASC enquiry thereto is not admissable in proceedings against the auditor nor may provide a ground of prosecution, action or suit against the auditor (Bill sub-cl.329(7)).

1185. A person aggrieved by the ASC's refusal to consent to a resignation may appeal to the Court (Bill sub-cl.329(8)).

1186. Where a firm is disqualified from being an auditor under Bill para.324(2)(d) on the retirement or withdrawal of a member, that member shall be deemed to be auditor of the company until the ASC's consent to the retirement or withdrawal is obtained (Bill sub-cl.329(11)).

1187. Notice of the removal or resignation of auditor must be lodged with the ASC and (if any) the trustee of debenture holders within 14 days (Bill sub-cl.329(12)).

Cl.330 : Effect of winding up on office of auditor

1188. This provision is based on CA s.283.

1189. An auditor will cease to hold office upon:

(a) the passing of a special resolution for the voluntary winding up of a company (Bill para.330(a)); or

(b) the making of a court order for the winding up of the company (Bill para.330(b)).

Cl.331 : Fees and expenses of auditors

1190. This provision is based on CA s.284.

1191. The reasonable fees and expenses of a company's auditor are to be paid by the company (Bill cl.331).

Cl.332 : Powers and duties of auditors as to reports on accounts

1192. This provision is based on CA s.285.

1193. It will be the duty of an auditor to report on the accounts or group accounts required to be laid before the company at the annual general meeting and on the company's accounting records and other records relating to those accounts (Bill sub-cl.332(1)). The auditor shall furnish his report in sufficient time to enable the company to comply with the requirements of Bill sub-cl.315(1) (Bill sub-cl.332(2)). To facilitate the performance of this duty, provision is also made for the auditor to have a right of access to the accounting and other records of the company and, in the case of a holding company, the accounting and other records of any subsidiaries (Bill sub-cls.332(5) and (6)). The contents of the auditor's report are also dealt with under Bill sub-cl.332(3). The matters an auditor has a duty to form an opinion or is set out is Bill sub-cl.332(4). An auditor is entitled to attend any general meeting of a company, to receive notices etc. in respect of same, and to be heard at the meeting (Bill sub-cl.332(8)).

1194.Where an auditor became aware of a default in complying with Bill sub-cl.245 or the provisions of Bill sub-cl.316 relating to laying of accounts before the annual general meeting of a company, or in the course of performing duties as auditor is satisfied there has been a contravention of the Bill or a matter has not or will not be adequately dealt with in the auditor's report, the auditor is required to report to the ASC (Bill sub-cls.332(9) and (10)).

1195. Where an auditor is not satisfied or that accounts have been drawn up in accordance with an applicable accounting standard or is of the opinion that accounts have not been so drawn up, the auditor will be required to send to the ASRB a copy of his report (Bill sub-cl.332(11)).

Cl.333 : Obstruction of auditor

1196. This provision is based on CA s.286.

1197. Officers or auditors of corporations who obstruct an auditor in the course of his duty will be guilty of an offence (Bill cl.333).

Cl.334 : Special provisions relating to borrowing corporations and guarantor bodies

1198. This provision is based on CA s.287.

1199. An auditor of a borrowing corporation will be required to furnish his report to the trustee for debenture holders as well as to the members of the corporation. The auditor will also be required to report any matters that is considered prejudicial to the interests of debenture holders to the corporation (whether a borrowing or guarantor corporation) and to the trustee (Bill cl.334).

PART 3.8 : ANNUAL RETURN

1200. Part 3.8 of the Bill (cls.335 to 339) deals with the annual return.

Cl.335 : Annual return

1201. This provision is based on CA.s.263.

1202. A company will be required to lodge with the ASC an annual return in the prescribed form and containing certain particulars. Such a return will have to be lodged at any time between the end of the financial year and the end of the period of one month commencing on:

(a) the day on which the annual general meeting is held; or

(b) if no annual general meeting is held within the period specified in Bill cl.245, the last day of the period in which a meeting should have been held in accordance with Bill cl.245 (Bill sub-cl.335(1)).

1203. The ASC may prepare and serve on a company a partly completed annual return using information previously supplied. The company will be required to correct (if necessary) the information and after completing any other information which has to be inserted, lodge the annual return with the ASC (Bill sub-cls.335(2) and (3)).

Cl.336 : Annual activities statement

1204. A company, other than a dormant company, will be required to include an activities statement in its annual return (Bill sub-cl.336(2)). The following statements will be required:

(a) Whether or not all or a substantial part of the company's activities at the specified day were trading activities (within the meaning of the Bill) (Bill sub-cl.336(4)).

(b) Whether or not all or a substantial part of the company's futures activities are intended to be trading activities. The statement is to cover future activities within the whole or a specified part of the period commencing on the day the statement is signed (being a day not more than 28 days before the lodgement of the annual return) and the corresponding day to be specified in the next annual return (Bill sub-cl.336(5), and Bill sub-cl.336(1) and para.336(3)(b)).

1205. Where banking (other than intra-state banking) or insurance (other than intra-state insurance) is the sole or principal business of a company, there will be a requirement to include a certificate in its annual return to that effect.

The certificate will also be required to state whether or not it is intended to carry on such a business in the future for the same period referred to in the paragraph immediately above (Bill sub-cl.336(6) and (7)).

1206. Where a company is a dormant company as at the specified day the annual return will be required to set out the following:

(a) A statement to the effect that the company is dormant and specify the day on which the company last became dormant (i.e. the "dormancy day")

(b) If the dormancy day is

(i) more than 3 months after incorporation - state whether or not trading activities were all or a substantial part of the activities during the 3 months ending on the dormancy day; or

(ii) less than three months before the day of the signing of the activities statement - state whether or not the company intends that with 3 months after the dormancy day to cease to be dormant and trading activities will be all or a substantial part of the company's activities (Bill sub-cl.336(8)).

1207. The activities statement shall be signed by at least 2 directors of the company (Bill para.336(3)(a)).

Cl.337 : Exemption of certain companies

1208. This provision is based on CA.s.265, but with the modification that a public company is required to keep its principal register within 25 kilometres of an ASC office.

1209. A public company that has more than 500 members, keeps its principal register at a place within 25 kilometres of an

ASC office and provides reasonable access to its share register is not required to include a list of members with its annual return. The annual return will require such a company to indicate whether Bill cl.337 applies. (Bill sub-cl.337(1)).

1210. A public company limited by guarantee which is prohibited by its memorandum or articles from paying dividends will be exempt from complying with the requirement to include a list of members in the annual return. (Bill sub-cl.337(2)).

1211. The ASC may, by order published in the Gazette, require a company to which sub-cls.337(1) and (2) apply to comply with all or any of the provisions of this Part or regulations made thereunder (Bill sub-cl.337(3)).

Cl.338 : Information in annual return deemed to satisfy certain other lodgment requirements.

1212. This provision is based on CA.s.265A.

1213. Where a company should have lodged a document with the ASC giving details of changes in company officers, registered office, number of share issued and the like, those documents will be deemed to have been lodged with the ASC if all of the particulars required to have been included in them are included in the company's annual return (Bill cl.338).

Cl.339 : Division 2 company

1214. This is a transitional provision which has no equivalent in the CA.

1215. A Division 2 company need not comply with this Part in relation to a financial year that ended before its registration day (Bill sub-cl.339(1)).

1216. Where a company of a State or a Territory registered under Division 2 of Part 2.2, as at its registration day, has not lodged with the NCSC an annual return pursuant to CA or

the corresponding Codes, the company will be required to lodge with the ASC the annual return made out in accordance with CA or the corresponding Codes. The company will be required to lodge the annual return within the period specified by the CA or the corresponding Codes if it has not expired, otherwise, within 14 days after the registration date (Bill sub-cl.339(2)).