

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

NATIONAL GUARANTEE FUND (MEMBERS OF PARTICIPATING
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FUTURES ORGANISATIONS (APPLICATION FOR MEMBERSHIP)
FIDELITY FUNDS CONTRIBUTION BILL 1988

FUTURES ORGANISATIONS (MEMBERSHIP) FIDELITY FUNDS
CONTRIBUTION BILL 1988

FUTURES ORGANISATIONS FIDELITY FUNDS LEVY BILL 1988

EXPLANATORY MEMORANDUM

VOLUME 2

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

14/12/01

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CHAPTER 4 - VARIOUS CORPORATIONS

1217. Chapter 4 (Bill cls.340 - 409) provides for the registration under the Bill of particular kinds of entities. The provisions are based substantially on CA Part XIII but have been modified to take account of their different constitutional basis.

1218. The Chapter also includes the provisions dealing with the names of corporations which, with certain exceptions, (see Part 4.2) are also based on existing provisions.

1219. This Chapter consists of the following Parts :

1. Part 4.1 - Registration of Certain Bodies (cls.340 to 365)
2. Part 4.2 - Names of Corporations (cls.366 to 383)
3. Part 4.3 - No liability Companies (cls.384 to 398)
4. Part 4.4 - Investment Companies (cls.399 to 408)
5. Part 4.5 - Financial Statements of Australian Banks and Life Insurance Corporation (cl.409).

Part 4.1 - Registration of Certain Bodies

1220. Part 4.1 provides a system of registration for certain bodies which is equivalent to the system provided under the existing scheme for the registration in a State or Territory of foreign companies and the recognition of foreign companies registered in another State or Territory that carry on business in that State. It retains and enhances the concept of one place of registration for Australian bodies wishing to carry on business interstate and foreign bodies carrying on business in Australia.

1221. It should be noted that the present co-operative scheme foreign company registration provisions require the registration of not only overseas incorporated foreign companies, but also bodies not being companies (e.g. building societies, co-operative societies, incorporated associations etc.) incorporated or formed within an Australian State or Territory which carry on business outside their State or Territory of incorporation.

1222. This Part is based substantially on CA Divisions 3, 4 and 5 of Part XIII with certain changes to take account of their different constitutional basis.

1223. Part 4.1 is a redrafting of the relevant parts of Divisions of CA Part XIII and deals separately with bodies which have their place of origin within Australia and bodies which have their place of origin overseas.

1224. Division 1 provides a system of registration for Australian corporations (called registrable Australian corporations) which are trading, financial and banking corporations that are incorporated under State or Territory legislation other than companies legislation and which are not exempt public authorities or corporations sole. As with the existing scheme these corporations will be required to register once in order to carry on business interstate. They will, however, no longer have to register or reserve their name, or comply with other company law formalities, in each State or Territory in which they wish to carry on business.

1225. Division 2 provides a system of registration for a foreign company that wishes to carry on business in Australia. It is based on CA Division 5 of Part XIII.

1226. Division 3 is a new Division. Although it contains provisions which are based on CA provisions, it does not correspond to a specific division of CA Part XIII. The

Division brings together the various provisions which will have general application to the bodies registered under this Part.

Division 1 - Registrable Australian Corporations

Clause 340 : Registrable Australian corporation not to carry on business interstate unless registered

1227. This provision is new and requires a registrable Australian corporation, if it carries on business interstate, to register under this Division.

1228. A "registrable Australian corporation" is defined in Bill sub-cl.9(1) as a corporation incorporated in a State or Territory other than a company of that State or Territory, an exempt public authority or a corporation sole. The definition therefore includes the more economically significant of those bodies which fall within the CA definition of "foreign company".

1229. A registrable Australian corporation that has a place of business in a State or Territory, other than its place of origin, is considered to carry on business interstate (see cl.22).

Cl.341 : Application for registration

1230. This is a new provision.

1231. The Commission will be required to register a registrable Australian corporation under the Division if it lodges certain documents with the Commission including, inter alia:

- . the certificate of incorporation
- . constitution

- . directors
- . charges.

The requirements are similar to CA s.512(2).

Cl.342 : Cessation of business etc.

1232. This clause is based on CA s.518.

1233. If a registered Australian corporation (i.e. one registered under this Division) ceases to carry on business interstate it will be required to notify the Commission within 7 days of so ceasing (Bill sub-cl.342(1)).

1234. Where the Commission has reasonable cause to believe that a registered Australian corporation no longer carries on business interstate, the Commission will be able to initiate a procedure which can lead to a company's name being struck off the register (Bill sub-cl.342(2), (3), (4) and (6)). This procedure is similar to the procedure set out in CA for striking a registered foreign company off the register (CA sub-ss.518(3), (4), (5) and (6)).

1235. The power of the Court to wind up a corporation whose name has been struck off the register will not be affected by these procedures (sub-cl.342(5)).

1236. Provision will also be made for restoring the company's name to the register if struck off by administrative error or if a person is aggrieved by the striking off (Bill sub-cl.342(7), (8), (9), (10) and (11)).

1237. Notwithstanding that a corporation ceases to be registered under this Division prior obligations to lodge a document under the Bill will continue to apply (Bill sub-cl.342(12)).

1238. If a registered Australian corporation goes into liquidation or is dissolved in its place of origin, the liquidator in the place of origin or the Commission will be able to apply to the Court to appoint a liquidator of the corporation (Bill sub-cl.342(13)).

1239. The liquidator will have powers to pay out creditors, recover and realise the property of the corporation in Australia outside its place of origin and to pay the net amount recovered and realised to the liquidator of the corporation in its place of origin (Bill sub-cl.342(14)). Where there is no liquidator in the corporation's place of origin, the liquidator can seek directions from the Court (Bill sub-cl.342(15)).

Division 2 - Foreign Companies

1240. This Division applies to those bodies incorporated or formed outside Australia or in an external Territory to which the Bill will not apply (excluded Territory).

Cl.343 : Foreign company not to carry on business in Australia unless registered

1241. This clause is based on CA s.512(1).

1242. A foreign company will not be able to carry on business in Australia unless it is registered or has applied to be registered under this Division.

1243. A "foreign company" is defined in Bill cl.9(1) and means

- (a) a foreign corporation; or
- (b) a body corporate incorporated in an excluded Territory; or

(c) an unincorporated body that:

- (i) is formed outside Australia or in an excluded Territory;
- (ii) under the law of its place of formation, may sue or be sued, or may hold property in the name of its secretary or of an officer of the body duly appointed for that purpose; and
- (iii) does not have its head office or principal place of business in Australia.

1244. A foreign company that has a place of business in Australia carries on business in Australia (cl.21). The definition of "carrying on business in Australia" also includes establishing or using a share transfer office or share registration office in Australia or administering, managing or otherwise dealing with property situated in Australia as an agent, legal personal representative or trustee (sub-cl.21(2) same as CA s.510(2)). There are also several factors, set out in cl.21, which will not amount to carrying on business in Australia (same as CA s.510(3)).

Cl.344 : Application for registration

1245. This clause is based on CA sub-s.512(2).

1246. The Commission will be required to register a foreign company under the Division if it lodges certain documents with the Commission, including, inter alia,

- . a certified copy of a current certificate of incorporation or similar document;
- . a certified copy of its constituent documents; and
- . a list of directors.

Cl.345 : Appointment of local agent

1247. This clause is based on CA s.514.

1248. A foreign company will be able to appoint a person as a local agent. The Commission is prohibited, however, from registering a foreign company under this Division unless the foreign company has at least one local agent appointed under sub-cl.346(1).

Cl.346 : Local agent : how appointed

1249. This clause is based on CA s.514.

1250. This clause sets out the procedures for the appointment of a local agent. It requires various documents to be lodged with the Commission (sub-cl.346(1), (2) and (4)). A person appointed as local agent continues to be a local agent of the foreign company until that person dies or ceases to be a local agent under cl.347.

Cl.347 : Local agent : how removed

1251. This clause is based on CA ss.514(3) and (4).

1252. This clause provides for the termination of the appointment of a person as local agent. A foreign company will be able to lodge with the Commission a written notice stating that the person's appointment as local agent has terminated or will terminate on a specified day (sub-cl.347(1)). The person ceases to be a local agent of the company either on the day set out in the notice or at the end of 21 days after lodgment of the notice with the Commission (sub-cl.347(2)).

Cl.348 : Liability of local agent

1253. This clause is based on CA s.514(2).

1254. A local agent will be liable for all things or acts that the Bill requires a foreign company to do. In addition, unless the local agent can satisfy the court or tribunal that he should not be liable the local agent will be personally liable for any penalty imposed on the foreign company for a contravention of the Act.

Cl.349 : Balance sheets and other documents

1255. This clause is based on CA s.516.

1256. A registered foreign company will be required at least once in every calendar year and at intervals of not more than 15 months to lodge with the ASC a copy of its balance sheet and of its profit and loss account made up to the end of its last financial year in the form the company is required to prepare by law for the time being applicable to that company in its place of origin (Bill sub-cl.349(1)). The ASC will have certain powers to -

- (a) grant extensions of time for the lodgment of balance sheets, profit and loss accounts and other documents (Bill sub-cl.349(2));
- (b) require a registered foreign company to provide additional information or documents but not information or documents that it would not be required to furnish if the company were a public company under the Bill (Bill sub-cl.349(3)); and
- (c) declare that this clause does not apply to specified foreign companies (Bill sub-cl.349(7)).

1257. Where a registered foreign company is not required by the law of its place of origin to do so it will be required to prepare a balance sheet or profit and loss account or if the ASC requires it an audited balance sheet or audited profit and

loss account in the same form and containing the same information as the company would have been required to prepare if it were a public company incorporated under the Bill (Bill sub-cl.349(5) and (6)).

Cl.350 : Cessation of business

1258. This clause is based on CA s.518.

1259. If a registered foreign company ceases to carry on business in Australia it will be required to notify the ASC within 7 days of so ceasing (Bill sub-cl.350(1)).

1260. If the ASC receives notice from an agent of a registered foreign company that the company has been dissolved, the ASC will be required to remove the name of the company from the register (Bill sub-cl.350(2)).

1261. Where the ASC has reasonable cause to believe that a registered foreign company no longer carries on business in Australia the ASC will be able to initiate a procedure which can lead to a company's name being struck off the register (Bill sub-cl.350(3), (4), (5) and (7)).

1262. However the power of the Court to wind up a foreign company whose name has been struck off the register will not be affected (Bill sub-cl.350(6)).

1263. Provision is also made for restoring the company's name to the register if struck off by administrative error or if a person is aggrieved by the striking off (Bill sub-cl.350(8), (9), (10), (11) and (12)).

1264. Notwithstanding that a foreign company ceases to be registered under this Division its prior obligations to lodge a document under this Bill will continue (Bill sub-cl.350(13)).

1265. If a registered foreign company goes into liquidation or is dissolved in its place of origin:

- (a) the company's local agent will be required to notify the ASC of the commencement of the liquidation and of the dissolution and the appointment of a liquidator if applicable; and
- (b) the liquidator in the place of its origin or the ASC will be able to apply to the Court for the appointment of a liquidator to realise the property of the company in Australia

(Bill sub-cl.350(14))

1266. The duties of a liquidator appointed by the Court are set out in Bill sub-cl.350(15). Where there is no liquidator for the place of origin of a registered foreign company, the Australian appointed liquidator will be able to apply to the Court for directions about the disposal of the net amount recovered under sub-cl.(15).

Cl.351 : Principal Australian register of foreign company

1267. This clause is based on CA s.521(1) and (3).

1268. A registered foreign company with a share capital will be required to keep a branch register of members in Australia if a shareholder resident in Australia requests the foreign company to register the member's share in an Australian branch register (Bill sub-cl.351(1) and (2)).

1269. A registered foreign company that does not seek funds from the public will be excluded from the operation of cl.351 (Bill sub-cl.351(3)).

1270. A registered foreign company will not be permitted to discontinue its principal Australian branch register without the consent of the member whose shares are registered in that register.

Cl.352 : Branch registers in Australia

1271. This clause is based on CA s.521 but contains a significant change set out below.

1272. A registered foreign company will be permitted to keep more than one branch register in Australia. A registered foreign company will no longer be obliged to keep a branch register in a State or Territory simply at the request of any individual member resident in that State or Territory if there is a principal Australian register located elsewhere in Australia. This represents a change to the provisions under CA s.521 and is consistent with changes to provisions elsewhere in the Bill dealing with branch registers (see the paragraphs of this explanatory memorandum on Bill cl.214 for further explanation).

1273. Where a registered foreign company elects to keep more than one branch register in Australia, then a duplicate of each register must be kept at the location of its principal Australian register (Bill sub-cl.352(3)). Shares registered in a branch register are to be distinguished from shares registered in the principal Australian register (Bill sub-cl.352(6)).

1274. A registered foreign company will be able to discontinue a branch register if it transfers all entries in the register to another branch register or to the principal Australian register (Bill sub-cl.352(7)).

Cl.353 : Register kept under cls.351 and 352

1275. This clause is based on CA sub-ss.521(7), (8) and (9), and ss.523 and 525 and sets out the provisions relating to the manner of keeping a branch register under cls.351 and 352 in Australia (Bill sub-cl.353(2), (3), (4) and (5)). The register will be deemed part of the foreign company's register of members (Bill sub-cl.353(6)).

1276. On the application of a member, a registered foreign company will be required to remove shares from a branch register and to register them in such other register as is specified in the application (Bill sub-cl.353(7)).

1277. A branch register will be prima facie evidence of any matters required or authorised by the Bill to be inserted in it (Bill sub-cl.353(8)).

1278. The location of registers is dealt with in Bill cl.1302.

Cl.354 : Notifying Commission about register kept under cls.351 or 352

1279. This clause is based on CA sub-s.521(10) and (11).

1280. A registered foreign company will be required to notify the ASC within 14 days after opening, changing the location of or discontinuing a branch register.

Cl.355 : Effect of right to acquire shares compulsorily

1281. This clause is based on CA sub-s.521(12).

1282. Where a law of a foreign company's place of origin corresponding to cl.414 (compulsory acquisition of shares under an arrangement or reconstruction) or cl.701 (shares subject to acquisition under a takeover) entitles a person to

give notice to another person of wishing to acquire shares held by that other person in the foreign company and the shares are held in a register kept under cl.351 or 352 then cls.351, 352 353 and 354 will cease to apply until either the shares are acquired or the person who gives notice is no longer entitled to acquire the registered shares.

Cl.356 : Index of members and inspection and closing of registers

1283. This clause is based on CA s.524.

1284. The requirements imposed on locally incorporated companies as to the keeping of indexes of names of members and the requirements as to inspection and closing of registers of members will apply (with such adaptations as are necessary) to branch registers maintained by registered foreign companies.

Cl.357 : Certificate as to shareholding

1285. This clause is based on CA s.526.

1286. A certificate under the seal of a foreign company specifying any shares held by any shareholder and registered in the branch register will be prima facie evidence of the title of the shareholder to the shares and of the fact that the shares are registered in the branch register.

Division 3 : Bodies Registered under this Part

Cl.358 : Names

1287. The ASC will not be able to register a body corporate under Division 1 or 2 unless the body's name is reserved under Part 4.2 of the Bill (Bill sub-cl.358(1) which follows CA s.508). The registered body will not be allowed to use a name in a State or Territory unless the body is registered under that name in Division 1 or 2 or the name is registered under the respective State or Territory law relating to business names (Bill sub-cl.358(2)).

1288. A registered body will be able to register a change of name if it lodges a notice under Bill cl.361. The ASC will not be able to register a change of name unless the new name is reserved for that body under Part 4.2 of the Bill (Bill sub-cl.358(3) and (4)).

Cl.359 : Registered Office

1289. This clause is based on CA s.507.

1290. A registered body i.e. a registered Australian corporation or a registered foreign company will be required to have a registered office in Australia to which all communications may be addressed, which is open to the public for certain hours on business days and at which a representative of the company is present at all times when the office is open to the public (Bill sub-cl.359(1) and (2)). Changes in the location of a registered office or in the hours it is open to the public will have to be notified to the ASC within 7 days (Bill sub-cl.359(3) and (4)).

Cl.360 : Certificate of Registration

1291. This clause is based on CA sub-s.514(6).

1292. On registering a body under Division 1 or 2 or registering a change in a registered body's name the ASC will be required to issue a certificate, under its seal, of the body's registration under that Division (Bill sub-cl.360(1)). The certificate will be prima facie evidence of the matters stated in it (Bill sub-cl.360(2)).

Cl.361 : Notice of certain changes

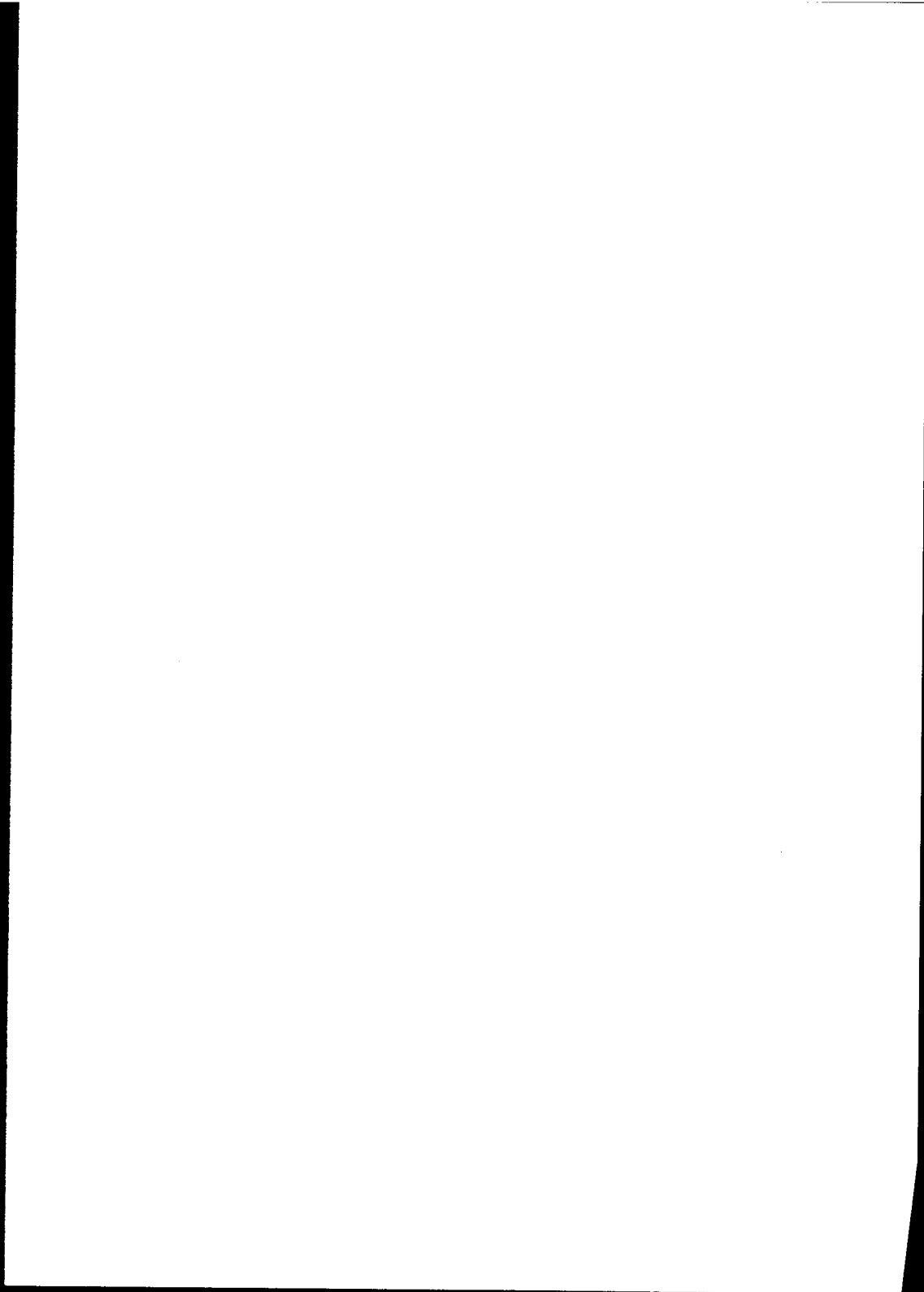
1293. This clause is based on CA s.515.

Corporations Bill : Explanatory Memorandum : Corrigendum to
Paragraphs 2248-2262 - Declarations of Unacceptable
Acquisition or Conduct in Takeovers and Related Matters

Paragraphs 2248-2262 of this explanatory memorandum indicate that the ASC would, as did the NCSC under CASA, have power to declare certain acquisitions or related conduct unacceptable and to make certain temporary freezing orders where such declarations were made. However, it was envisaged, as indicated in paragraph 357 of the explanatory memorandum to the ASC Bill, that the Minister would direct that the above ASC powers be conferred exclusively on the Corporations and Securities Panel established under that Bill.

As indicated in the corrigendum to the ASC Bill, the Panel jurisdiction will be conferred directly by specific provision in the Corporations Bill itself. The main elements of this approach are as follows:

- . the Panel will have the same power to make declarations as the NCSC had under CASA (see cl.733);
- . before making a declaration, the Panel must be satisfied that unacceptable circumstances have occurred (see cl.732 - based on CASA sub-ss.60(1) and (3)) and that a declaration is in the public interest having regard to any relevant matters including those set out in cl.731, e.g. the desirability of an efficient, competitive and informed market for the acquisition of shares (see para.733(3)(b));
- . where the Panel makes such a declaration, it will be able, on the application of the ASC, to make any orders it considers necessary to, among other things, protect the rights of persons affected by the acquisition or conduct, including remedial orders of the type which were available to the Court under CASA sub-s.60(4) (sub-cl.734(2)). The Panel will also be able to make interim orders pending determination of an application for an order under sub-cl.734(2) (sub-cl.735(2));
- . it will be an offence for a person to contravene an order made by the Panel (sub-cl.734(5));
- . Panel decisions will be reviewable by the Court under the Administrative Decisions (Judicial Review) Act, but not otherwise;
- . the declaration powers of the Panel will be exercisable on the application of the ASC which must apply within 60 days of the acquisition or conduct or within (up to) an extra 30 days if the Panel allows. The Panel, unless the Court extends the period, must decide within 90 days of the acquisition or conduct or within 30 days of the application, whichever is the later period (sub-cl.733(2)); and
- . hearings in relation to acquisitions and conduct must be held in private (see sub-cl.185(3) of the ASC Bill),



1294. A registered body will be required to notify the ASC within one month of any changes in certain specified matters (Bill sub-cl.361(1)). The Commission will have power to extend the time for lodging the notice or document (Bill sub-cl.361(2)).

Cl.362 : Publication of name

1295. This clause is based on CA s.517.

1296. A registered body or a registrable Australian corporation which carries on business interstate will be required to place on all public documents:

- (a) its name;
- (b) its place of origin unless it is an Australian bank;
- (c) a statement to the effect that its liability is limited if that is the case.

(Bill sub-cl.362(1) and (2)).

1297. It will also be required to set out its name on every eligible negotiable instrument (Bill sub-cl.362(3)).

1298. In a change from existing law to facilitate identification, the body will also be required to set out on all public documents and eligible negotiable instruments after the body's name, where it first appears, either in full or abbreviated, the expression "Australian Registered Body Number" and the body's registration number given by the ASC (Bill sub-cl.362(4) and (5)). This new requirement is consistent with other provisions of the Bill relating to publication of company registration numbers.

1299. Unless it is an Australian bank, the body will be required to exhibit conspicuously outside every place of business established by it that is open and accessible to the public its name, place of origin, the fact that its liability is limited if it is and in the case of its registered office the words "Registered Office" (Bill sub-cl.362(9)). An Australian bank will be required to exhibit its name conspicuously outside every place of business it establishes that is open or accessible to the public (Bill sub-cl.362(10)).

Cl.363 : Service of documents on registered body

1300. This provision is based on CA s.530.

1301. It provides that a document will be able to be served on a registered foreign company or its liquidator in the same manner as it can be served on a local company or its liquidator.

Cl.364 : Power to hold land

1302. This clause is based on CA s.511.

1303. A registered Australian corporation that is a

- (a) trading corporation; or
- (b) banking corporation; or
- (c) insurance corporation;

and a registered foreign company will have power to hold land in any State or Territory (Bill sub-cl.364(1) and (3)).

1304. A registered Australian corporation that is incorporated in a Territory will have power to hold land in any Territory (Bill sub-cl.364(2)).

Cl.365 : Application of certain State and Territory laws

1305. This clause is new and provides that a registered Australian corporation and a registered body will be able to carry on business interstate and in Australia respectively despite the law in force in a State or Territory which relates to foreign companies (Bill sub-cl.365(1)).

1306. Unless it expressly provides so, the Bill will not exclude or limit the application of a State or Territory law to a registrable Australian corporation or a body in so far as that law can apply concurrently with this Bill (Bill sub-cl.365(4)).

PART 4.2 : NAMES

1307. Part 4.2 sets out the provisions of the Bill governing the names of corporations.

1308. These provisions are based on CA Part III, Division 2 but differ from the existing scheme of company name registration as follows:-

- (a) Names will be available for reservation and registration on an Australia-wide basis rather than in individual States and Territories.
- (b) The existing names of those bodies to which the Bill will apply may be retained notwithstanding that they may be similar to, or identical to names on the various State and Territory registers, or the names of bodies registered (or proposed to be registered) under this Bill (see Bill sub-cl.374(3) and (4), 376(4) and (5)). However, each body will be given a unique registration number which it must publish on its business documents (see Bill cl.219). Where bodies have identical or similar names, this registration number should distinguish them.

(c) It will be possible for a company to incorporate without a verbal name and be known by the registration number allocated to it by the ASC (see Bill cl.372).

(d) All names are to be available provided that there are no identical names already reserved or registered and that no names declared by the Regulations to be unacceptable are used (see Bill cl.367).

1309. The content of Bill cls.366 to 383 is outlined below.

Cl.366 : Interpretation

1310. This provision is new.

1311. For the purposes of Part 4.2 of Chapter 4, references to "body corporate", "company" and "registrable body" will include respectively an intended body corporate, an intended company and an intended registrable body. The terms "body corporate", "company" and "registrable body" are defined in Bill cl.9.

Cl.367 : Available names

1312. This provision is based on CA s.38. In CA s.38, however, a name would not be available if, in the opinion of the NCSC, such a name was undesirable or so closely resembled another name as to be likely to be mistaken for it. These subjective tests have not been included in Bill cl.367.

1313. A name will be available to a body corporate unless the name:

- (a) is a name that is already reserved or registered by another body corporate; or

(b) is a name, or a name of a kind that has been declared in the Regulations to be unacceptable for registration.

(Bill sub-cl.367(1) - based on CA paras.38(1)(a) and (c)).

1314. For the purpose of determining whether a proposed name is the same as a name already reserved or registered, certain words, abbreviations, symbols and marks are to be disregarded (eg "the", "Limited", "and", punctuation marks, etc) (Bill sub-cl.367(2)). This sub-clause is based on sub-s.26(3) of the U.K. Companies Act 1985.

1315. The Minister will be able to consent to a name being available to a body corporate (Bill sub-cl.367(4) - cf. CA para.38(2)(c)).

Cl.368 : Names of particular classes of companies

1316. This provision is based on CA sub-ss.39(1), (2) and (3).

1317. The names and abbreviated forms of particular classes of companies (eg limited companies, no liability companies, proprietary companies) are dealt with in Bill cl.368.

Cl.369 : Use of words "Limited" and "No liability"

1318. This provision is based on CA s.566.

1319. A corporation is prohibited from carrying on business under a name using "Limited" or "No liability" or any abbreviation of these words as part of its name, unless the corporation is incorporated with limited liability or no liability as the case may be under an Australian company law or the law of a country outside Australia.

Cl.370 : Use of word "Proprietary"

1320. This provision is based on CA s.567.

1321. A company is prohibited from using the word "Proprietary" or any abbreviation of that word unless the company fulfils the requirements of the Bill relating to proprietary companies (Bill sub-cl.370(1) - based on CA s.567).

1322. This provision will not apply to a company incorporated before 24 December 1896 under Victorian company law (Bill sub-cl.370(2)).

Cl.371 : Abbreviations of words included in a company's name

1323. This provision is based on CA sub-s.39(4).

1324. The description of a company will not be incorrect simply because various abbreviations have been used in the company's name (eg "Ltd" for "Limited", "Pty" for "Proprietary", etc). Bill paras.371(d), (e) and (f) are new.

Cl.372 : Company with registration number as name

1325. This provision is new and is intended to allow a new company to incorporate with and be known by a number name allocated to it by the ASC upon registration.

1326. Bill cl.372 will be applicable where the memorandum or registration application of a company proposing to incorporate under Division 1 of Part 2.2 of the Bill states that the company's name upon registration is to be its registration number (Bill sub-cl.372(1)).

1327. Where the ASC registers such a company under Bill cl.120 it will be required to register it by a name consisting of the words "Australian Company Number" followed by the company's

registration number and any words or expressions required to be included in the name by Bill cl.368 (eg Limited, Proprietary, etc) (Bill sub-cl.372(3)).

1328. Where a company elects to be registered with a number name instead of a verbal name, the requirement in Bill sub-cl.120(2) that the proposed name be reserved will not apply (Bill sub-cl.372(2)).

Cl.373 : Name of intended Division 1 company

1329. This provision is based on CA s.40.

1330. An application for the reservation of the name of an intended Division 1 company may be made to the ASC (Bill sub-cl.373(1) - based on CA sub-s.40(1)). A "Division 1 company" is defined in Bill cl.9 as a company incorporated under Division 1 of Part 2.2 of the Bill.

1331. Where the name is available to the company, the ASC will reserve the name for a period of 2 months (Bill sub-cl.373(2) - based on CA sub-s.40(2)).

1332. Where the ASC registers a company under Division 1 of Part 2.2 (the company being required by Bill sub-cl.120(2) to first reserve a name under this clause) the ASC will register the reserved name which thereupon ceases to be reserved (Bill sub-cl.373(3) - based on CA sub-s.40(4)). The registration of the name remains in force until cancelled by the ASC (see Bill cl.381).

1333. If the name of an intended company is reserved and the applicant notifies the ASC in writing that it no longer wishes that name to be reserved, the ASC will be required to cancel the reservation (Bill sub-cl.373(4) - based on CA sub-s.40(5)).

1334. Reservation of a name does not of itself entitle an intended company to be registered by that name (Bill sub-cl.373(5) - based on CA sub-s.40(6)).

Cl.374 : Name by which body corporate proposes to be registered as a company

1335. This provision is new and deals with the reservation and registration of the name of a body corporate proposing to be registered as a company under Division 2 of Part 2.2 (ie companies previously registered under co-operative scheme legislation) or Division 3 of Part 2.2 (ie foreign companies proposing to register as a company).

1336. It is intended that the existing names of these bodies may be retained notwithstanding that they may be similar to or identical to names on the various State and Territory registers, or the names of other bodies registered or to be registered under the Bill. Accordingly, as from the commencement of Division 2 of Part 2.2 the name of a company registered under the company law of a State or Territory will be deemed to be reserved under Bill cl.374 provided that that company does not subsequently change its name (Bill sub-cl.374(3)). Similarly, as from the commencement of Division 3 of Part 2.2, the name of a foreign company registered or incorporated under the law of its place of origin will be deemed to be reserved under Bill cl.374 provided that that foreign company does not subsequently change its name (Bill sub-cl.374(4)).

1337. Apart from these deeming provisions, the procedure set out in Bill cl.374 for reserving and registering the names of such bodies is essentially the same as the procedure for reserving and registering the names of intended companies proposing to register under Division 1 of Part 2.2 (Bill sub-cl.374(2), (5), (6) and (7) - see ex. memo on Bill cl.373).

Cl.375 : Proposed new name of company

1338. This provision is based on CA s.43.

1339. A company which proposes to change its name may lodge an application with the ASC to reserve a new name (Bill sub-cl.375(1) - based on CA sub-s.43(1)).

1340. Where the name is available to the company the ASC will be required to reserve that name for a period of 2 months (Bill sub-cl.375(2) - based on CA sub-s.43(2)).

1341. Where the company changes its name to the reserved name under Bill cl.382 the ASC will be required to register the new name (which thereupon ceases to be reserved) and cancel the registration of the company's old name (Bill sub-cl.375(3) - based on CA sub-s.43(4)).

1342. Where a name is reserved under this provision and the company notifies the ASC in writing that it no longer wishes that name to be reserved, the ASC will be required to cancel the reservation of the name (Bill sub-cl.375(4) - based on CA sub-s.43(5)).

1343. The reservation of a name under this provision does not of itself entitle the company to change its name to the reserved name (Bill sub-cl.375(5) - based on CA sub-s.43(6)).

Cl.376 : Name by which registrable body proposes to be registered

1344. This provision is based on CA s.46 and deals with the reservation and registration of the name of a registrable body that proposes to register under Part 4.1 of the Bill. A "registrable body" is defined in Bill cl.9 as a registrable Australian corporation or a foreign company.

1345. As in Bill cl.374, the existing names of these registrable bodies will be deemed to be reserved under this clause provided that such names have not been changed since the commencement of Division 1 or Division 2 (as the case may be) of Part 4.1. (Bill sub-cl.376(4) and (5) - see ex. memo on Bill cl.374.)

1346. Apart from these deeming provisions, the procedure set out in Bill cl.376 for reserving and registering the names of such registrable bodies is essentially the same as the procedure for reserving and registering the names of intended companies proposing to register under Division 1 of Part 2.2 (Bill sub-cl.376(3), (6), (7) and (8) - see ex. memo on Bill cl.373).

Cl.377 : New name or proposed new name of registered body

1347. This provision is based on CA s.377 and deals with the reservation and registration of a name as the new name or proposed new name of a registered body (i.e. a registrable Australian corporation that is registered under Division 1 of Part 4.1, or a foreign company that is registered under Division 2 of Part 4.1).

1348. The procedure set out in Bill cl.377 for reserving and registering the new name of a registered body is essentially the same as the procedure for reserving and registering the new name of a company (see ex. memo on Bill cl.375).

Cl.378 : Applications under sections 373 to 382

1349. This provision is new.

1350. An application to reserve a name made under any of Bill cls.373 to 382 must be in the prescribed form and accompanied by the prescribed documents.

1351. The requirement that such applications be in the prescribed form was included in the CA within each of the substantive provisions (eg see CA sub-ss.40(1), 43(1), 46(1), and 49(1)).

Cl.379 : Extension of reservation

1352. This provision is based on CA s.58.

1353. Where an application is made during the currency of a reservation of a name the ASC may extend the period of reservation of the name for up to two months.

Cl.380 : Cancellation of registration where body corporate dissolved or de-registered

1354. This provision is based on CA s.63.

1355. The ASC will be required to cancel the registration of the name of a body corporate where that body corporate is dissolved (Bill sub-cl.380(1) - based on CA sub-ss.63(1) and (2)).

1356. The ASC will also be required to cancel the registration of the name of a body corporate where that body corporate ceases to be registered under Part 4.1 (Bill sub-cl.380(2) - based on CA sub-s.63(3)).

Cl.381 : Registration remains in force until cancelled

1357. This provision replaces a number of sub-sections in the reservation and registration provisions of the CA (eg CA sub-ss.40(7), 43(7), 46(8) and 49(6)).

1358. The registration of a name under Part 4.2 remains in force until the ASC cancels it.

Cl.382 : Change of name

1359. This provision is based on CA s.65.

1360. A company may, by special resolution and with the approval of the ASC, change its name to a name reserved under Bill cl.375 (Bill sub-cl.382(1) and (2) - based on CA sub-ss.65(1) and (2)).

1361. The ASC will be able to direct a company to change its name if the name of the company, for whatever reason, is a name that was not available to the company (Bill sub-cl.382(3) - based on CA sub-s.65(3)).

1362. A change of name by a company will not create a new legal entity (Bill sub-cl.382(4) - based on CA sub-s.65(4)).

Cl.383 : Omission of "Limited" in names of charitable and other companies

1363. This provisions is based on CA s.66.

1364. The ASC will be able to license a limited company to be registered without the word "Limited" as part of its name if the ASC is satisfied that the company is being formed for charitable or certain other purposes (Bill sub-cl.383(1) and (2) - based on CA sub-ss.66(1) and (2)).

1365. This clause differs from CA s.66 in that it will no longer be possible for companies licensed under Bill cl.383 to be exempted from lodging annual returns and returns of directors, principal executive officers and secretaries (cf. CA s-sec.66(5)).

1366. The licence granted to a State or Territory company under CA s.66 (or corresponding State provisions) will continue in force after such company has registered under

Division 2 of Part 2.2 as if the licence had been granted to that company by the ASC under Bill cl.383 (Bill sub-cl.383(11)).

PART 4.3 : NO LIABILITY COMPANIES

1367. This Part is based on CA Division 1 of Part XIII (ss.475-489) and contains special provisions dealing with no liability companies.

1368. There is no change to the substantive law relating to no liability companies.

Cl.384 : Application of Act to no liability companies

1369. This clause is based on CA s.475.

1370. The provisions of the Bill relating to public companies, other than those relating to the liability of members, will apply to no liability companies (Bill cl.384).

1371. A no liability company will not be able to be formed as a proprietary company (see Bill sub-cl.116). Only mining companies will be able to be formed as no liability companies (see Bill sub-cl.115(2)).

Cl.385 : Shareholder not liable to calls or contributions

1372. This clause is based on CA s.476.

1373. Shareholders will not be required to pay calls in respect of shares they hold in a no liability company or to contribute to its liabilities. If, however, calls are unpaid, then the shareholder will not be entitled to any dividend due on the shares, in respect of which the calls are due. These are the essential features of no liability companies.

Cl.386 : Dividends payable on shares held irrespective of amount paid up on shares

1374. This clause is based on CA s.477.

1375. Subject to the articles, a dividend will be payable to a no liability company shareholder in proportion to the number of shares held, irrespective of the amount paid up or credited as paid up.

Cl.387 : Calls : when due

1376. This clause is based on CA s.478.

1377. It will provide for a no liability company to notify shareholders of the amount of a call, the day when it is payable and the place for payment (Bill sub-cl.387(2)). Shareholders will be given sufficient time to meet the call (Bill sub-cl.387(1)).

Cl.388 : Forfeiture of shares

1378. This clause is based on CA s.479.

1379. Any share in a no liability company upon which a call remains unpaid 14 days after the day payment is due, will be forfeited and will be offered for sale by public auction.

Cl.389 : Provisions as to sale of forfeited shares

1380. This clause is based on CA s.480.

1381. If forfeited shares which are advertised for sale at public auction are not sold, they will have to be offered to shareholders for a limited period (unless the shareholders resolve otherwise) and, if still unsold, must be held by the directors in trust for the company. They must then be disposed of in such manner as the company determines.

Cl.390 : As to shares held by or in trust for company

1382. This clause is based on CA s.481.

1383. A call will not have any effect on a forfeited share that is held by or in trust for the company but if it is re-issued or sold by the company it may be credited as paid up to an amount which the company determines.

Cl.391 : Sale of shares on non-payment of calls valid although specific numbers not advertised

1384. This clause is based on CA s.482.

1385. A sale of forfeited shares will be valid although the specific numbers of the shares are not advertised.

Cl.392 : Postponement of sale

1386. This clause is based on CA s.483.

1387. An intended sale of forfeited shares will be able to be postponed for a limited period (Bill sub-cl.392(1)). The date to which the sale is postponed will be required to be advertised in a daily newspaper (Bill sub-cl.392(2)).

Cl.393 : Redemption of forfeited shares

1388. This clause is based on CA s.484.

1389. Subject to certain conditions, a person will be able to redeem a forfeited share prior to the intended sale of such share.

Cl.394 : Office to be open on the day before sale

1390. This clause is based on CA s.485.

1391. The company's office will have to be open on the day immediately preceding the day of the intended sale of a forfeited share.

Cl.395 : Distribution of surplus where cessation of business upon winding up

1392. This clause is based on CA s.486.

1393. Any surplus in a winding up will be distributed amongst the parties entitled to it in proportion to the shares held by them irrespective of the paid up value of the shares although the holder of shares on which a call is due will not be so entitled.

Cl.396 : Distribution of surplus on cessation of business within 12 months after incorporation

1394. This clause is based on CA s.487.

1395. If a no liability company ceases to carry on business within 12 months of its incorporation, shares issued for cash will rank on a winding up in priority to shares issued to vendors or promoters for consideration other than cash.

Cl.397 : Rights attaching to preference shares issued to promoters

1396. This clause is based on CA s.488.

1397. The holders of any shares issued to vendors or promoters will not be entitled to any preference on the winding up of the company.

Cl.398 : Restrictions on tribute arrangements

1398. This clause is based on CA s.489.

1399. A no liability company will be required to do its own working of any mines rather than contract the work out, unless authorised by a special resolution of the company to contract out or, if the contract or lease arrangement is for a period of less than 3 months, a similar arrangement has been made in the preceding 2 years.

PART 4.4 : INVESTMENT COMPANIES

1400. This part is based on CA Division 2 of Part XIII and contains special provisions dealing with investment companies.

Cl.399 : Interpretation

1401. This clause is based on CA s.490.

1402. Bill sub-clause 399(1) contains special definition and interpretation provisions for this Part.

1403. The ASC will be able to declare a body corporate - a company or a foreign company that is registered or required to be registered under Division 2 of Part 4.1 of the Bill - to be an investment company (Bill sub-cl.399(3)).

1404. The ASC will be able to specify, when declaring a body corporate to be an investment company, that only certain provisions of the Part apply to it (Bill sub-cl.399(4)).

Cl.400 : Restriction on borrowing by investment companies

1405. This clause is based on CA s.491.

1406. An investment company will be prohibited from borrowing amounts equivalent to more than 50% of its net tangible assets (Bill sub-cl.400(1)). Borrowing otherwise than by the issue of debenture stock will be limited to 25% of the net tangible assets (Bill sub-cl.400(2)).

Cl.401 : Restriction on investments of investment companies

1407. This clause is based on CA s.492.

1408. An investment company will be prohibited from:-

- (a) investing amounts equivalent to more than 10% of its net tangible assets in a body corporate (Bill sub-cl.401(1)); and
- (b) holding more than 5% of the ordinary share capital of a body corporate (Bill sub-cl.401(2)).

Cl.402 : Restriction on underwriting by investment companies

1409. This clause is based on CA s.493.

1410. An investment company will be prohibited from underwriting issues of authorised securities (authorised trustee investments) to an amount exceeding the equivalent of 40% of its net tangible assets (Bill sub-cl.402(1)). The amount will be restricted to the equivalent of 20% of its net tangible assets in the case of underwriting other securities (Bill sub-cl.402(2)).

Cl.403 : Special requirements as to articles and prospectus

1411. This clause is based on CA s.494.

1412. An investment company will be prohibited from issuing a prospectus without specifying:

- (a) the type of security in which, if its memorandum contains a provision stating its objects, its objects allow it to invest; and

- (b) whether the objects allow it to invest within or outside Australia or both; or
- (c) that its memorandum does not contain a provision stating the objects of the company.

(Bill sub-cl.403(1)).

1413. In addition, within 3 months of the company being declared an investment company, its articles will have to specify the matters mentioned in paras.(a) and (b) above if the company wishes to invest, borrow, underwrite or sub-underwriter (Bill sub-cl.403(2)).

Cl.404 : Investment company not to hold shares in other investment companies

1414. This clause is based on CA s.495.

1415. Investment companies will be prohibited from holding any shares or debentures in any other investment company or a body corporate engaged primarily in the business of investment that has been declared by an order of the ASC for the purpose of these provisions (Bill sub-cl.404(1)).

Cl.405 : Investment company not to speculate in commodities

1416. This clause is based on CA s.496.

1417. An investment company will be prohibited from buying, selling or dealing directly in any raw materials or manufactured goods for the purposes of profit other than for such investments entered into before the investment company was declared to be an investment company (Bill sub-cl.405(1) and (2)).

Cl.406 : Balance-sheets and accounts

1418. This clause is based on CA s.497.

1419. Investment companies will be required to state in their accounts in greater detail than other companies their purchases and sales of securities, investments, underwriting income and brokerage and to indicate the manner in which their investments have been valued (Bill sub-cl.497(1) to (4)).

Cl.407 : Investment fluctuation reserve

1420. This clause is based on CA s.498.

1421. Investment companies will be required to credit profits from the sale of securities to a reserve account which is available for the payment of income tax but not for the payment of dividends.

Cl.408 : Contraventions

1422. This clause is based on CA s.499.

1423. There will be a specific general penalty for all breaches of the provisions of this Part.

PART 4.5 - FINANCIAL STATEMENTS OF AUSTRALIAN BANKS AND LIFE INSURANCE CORPORATIONS

Cl.409 : Australian banks and life insurance corporations

1424. This provision is based on CA s.288.

1425. Australian banks and life insurance corporations will be deemed to have satisfied certain requirements of the Bill relating to the preparation of financial statements if they satisfy the requirements of a law of the Commonwealth relating to banking or to life insurance.

CHAPTER 5 - EXTERNAL ADMINISTRATIONPART 5.1 - ARRANGEMENTS AND RECONSTRUCTIONS

1426. Part 5.1 (cls.410-415) deals with arrangements and reconstructions that are outside the takeover code contained in the Acquisition of Shares Chapter of the Bill. A "Part 5.1 body" is defined in Bill cl.9 as a company, a registered Australian corporation, or a foreign corporation that is a registered foreign company.

1427. In substance, the provisions reflect the existing law contained in CA Part VIII. The Court will be able on the application of a Part 5.1 body, a creditor, a member or the liquidator (if the body is being wound up), to order a meeting of the creditors or members. If the compromise or arrangement is approved at the meeting by a majority in number representing 75% in value of the creditors or members present and voting in person or by proxy, and sanctioned by the Court, the compromise or arrangement will become binding on the creditors or members and on the company.

1428. The Bill, like the CA, does not define either "compromise" or "arrangement", though Bill cl.9 (based on CA s.315(22)) provides that "arrangement" includes the re-organisation of the share capital of a body corporate by the consolidation and/or division of shares.

1429. The provisions of this Part will enable a body, subject to the approval of the requisite percentage of creditors or members and to the agreement of the Court, to:

- (a) enter into a compromise with its creditors as an alternative to liquidation;

- (b) vary the share structure of the company, including variations to the rights of members, to an extent that could not be achieved through an alteration to the memorandum or articles;
- (c) be reconstructed through the transfer of its assets to a new company in consideration of the issue of the new company's shares to the first company's members; or
- (d) amalgamate with one or more companies through the transfer of their assets to one of them or to a new company formed for the purpose.

Cl.410 : Interpretation

1430. This clause is based on CA s.315(23).

1431. This clause provides that any reference in this Part to directors of a Part 5.1 Body will be a reference to the directors of Part 5.1 body or any one or more of them.

Cl.411 : Power to compromise with creditors and members

1432. This clause is based on CA s.315.

1433. Where a compromise or arrangement is proposed between a Part 5.1 body and its creditors or members, the Court will be able on application by the body, or any creditor, member or liquidator of the body, to order a meeting of creditors or members in such places as it directs (Bill sub-cl.411(1)).

1434. However, the Court will not be able to make an order unless:

- (a) 14 days (or such lesser period as the Court or ASC permits) notice of the hearing of the application has been given to the ASC (Bill sub-cl.411(2)(a)); and

- (b) the Court is satisfied that the ASC has had a reasonable opportunity to examine and make submissions to the Court on the proposed compromise or arrangement and the draft explanatory statement relating to it (Bill sub-cl.411(2)(b)).

1435. The draft explanatory statement will be required to:

- (a) explain the effect of the proposed compromise or arrangement, stating, in particular, any material interests of the directors of the company and the effect that the proposed compromise or arrangement will have on those interests in so far as that effect is different from the effect on the like interest of others; and
- (b) set out prescribed information and any other information material to the making of a decision by a creditor or member as to whether or not he should agree to the proposed compromise or arrangement, being information that is within the knowledge of one or all of the directors of the company and which has not been previously disclosed to the creditors or members.

(Bill sub-cl.411(3)).

1436. A compromise or arrangement will be binding on the creditors or members of a company only if:

- (a) it is approved by a majority in number present and voting, such majority representing 75% in value of all creditors or members present and voting in person or by proxy; and

(b) it is approved by the Court.

(Bill sub-cl.411(4)).

1437. If the Court orders 2 or more meetings of creditors or of a class of creditors or 2 or more meetings of members or a class of members the meetings will be deemed to be one single meeting with the votes cast at each meeting aggregated accordingly (Bill sub-cl.411(5)).

1438. The Court will be able to grant its approval to a compromise or arrangement subject to such alterations or conditions as it thinks just (Bill sub-cl.411(6)).

1439. A person will not be able without the leave of the Court, to administer or to be appointed to administer a compromise or arrangement if that person:

- (a) is a mortgagee of any property of the body;
- (b) is an auditor or an officer of the body;
- (c) is an officer of a body corporate that is a mortgagee of property of the body;
- (d) is not a registered liquidator;
- (e) is an officer of a body corporate related to the body; or
- (f) has been, in the previous 12 months, an officer or promoter of the body or a related body corporate, unless the ASC directs that this paragraph does not apply.

(Bill sub-cl.411(7)).

1440. A person appointed to administer a compromise or arrangement will have to observe the requirements that are imposed on receivers and liquidators in relation to:

- . the power of the Court to fix remuneration of receivers (Bill cl.425),
- . the duty of a receiver to notify the ASC that he has been appointed or has ceased to act (Bill cl.427(2) and (4)),
- . the duty to state on documents that a receiver has been appointed (Bill cl.428),
- . the lodging of accounts of receivers (Bill cl.432),
- . the enforcement of the duty to make returns (Bill cl.434),
- . the supervision of liquidators (Bill cl.536).

(Bill sub-cl.411(9)).

1441. Bill sub-cl.411(10), (11) and (12) set out procedural requirements in relation to orders made under Bill sub-cl.411(4)(b).

1442. The directors of a company will be required to report on a compromise or arrangement that has been proposed, if the members of the company so direct (Bill para.411(13)(a)). This report will have to be available at the registered office of the company for inspection by the shareholders and creditors of the company at least 7 days before the date of any meeting ordered by the Court to be convened as provided in Bill sub-cl.411(1) (Bill para.411(13)(b)).

1443. The Court has power to restrain further proceedings in any action or other civil proceedings against the body (Bill sub-cl.411(16)).

1444. The Court will not be able to approve a compromise or arrangement if it considers that the compromise or arrangement

has been proposed as a means of avoiding the takeovers provisions (Bill Chapter 6) unless the ASC advises the Court in writing that it has no objection to the scheme. However, even if the ASC has no objection to the scheme, the Court is still able to reject the scheme (Bill sub-cl.411(17)).

Cl.412 : Information as to compromise with creditors or members

1445. This provision is based on CA s.316.

1446. Where a meeting is convened under Bill cl.411, the company will be required to supply certain information to creditors or members in relation to the compromise or arrangement including information, within the knowledge of the directors, that is material to the making of a decision to approve the scheme (Bill sub-cl.412(1)).

1447. The explanatory statement will not need to be sent to creditors whose debts are less than \$200 provided they are given an opportunity to obtain a copy on request (Bill sub-cl.412(2)).

1448. In a scheme of arrangement which merely involves a corporate reconstruction and does not involve creditors, the explanatory statement will have to be registered with the ASC before it is sent out (Bill sub-cl.412(6)). In schemes of arrangement involving insolvency (where time may be more critical), the explanatory statement will not have to be registered by the ASC before it is sent out but the ASC will have to be given an opportunity to examine it before the Court approves the arrangement (Bill sub-cl.412(7)).

Cl.413 : Provisions for facilitating reconstruction and amalgamation of Part 5.1 bodies

1449. This provision is based on s.317.

1450. Where there is an application to the Court for the approval of a compromise or arrangement, and the compromise or arrangement is connected with a scheme for the reconstruction or amalgamation of a Part 5.1 body, the Court will be able to make certain orders, including orders for the transfer of property and liabilities, the allotment of shares or the appropriation of other interests, the dissolution (without winding up) of the transferor body (i.e. the body whose property has been transferred), and for provision to be made for any person who dissents from the compromise or arrangement (Bill sub-cl.413(1)).

Cl.414 : Acquisition of shares of shareholders dissenting from scheme or contract approved by a majority

1451. Where a scheme or contract (other than a takeover scheme) involving a transfer of shares to a person (the transferee) has been approved by holders of 90% in nominal value of the shares involved, the transferee will be able, within 2 months, to give notice to a dissenting shareholder that he desires to acquire the shares of that shareholder, and will be bound and entitled to acquire those shares unless the Court otherwise orders (Bill sub-cl.414(1)).

1452. A company will be required to transfer unclaimed sums and property resulting from a reconstruction or arrangement to the Minister to be dealt with under Part 9.7 of the Bill (Bill sub-cl.414(12)).

Cl.415 : Notification of appointment of scheme manager and power of Court to require report

1453. This provision is based on CA s.319.

1454. A person appointed to administer a compromise or arrangement will be required to notify his appointment (Bill sub-cl.415(1)).

1455. Where an application is made to the Court in relation to a proposed compromise or arrangement, the Court will be able to require a report on the terms of the scheme, the conduct of the officers of the company and other matters to be prepared. The person appointed as administrator must also notify the ASC of his appointment (Bill cl.415(2)).

PART 5.2 : RECEIVERS AND MANAGERS

1456. This Part (cls.416-434) contains provisions relating to the appointment and regulation of receivers and receivers and managers of property of a corporation. Interpretations for words used in this Part, including corporation, financial corporation, floating charge, the court, registered and registrable Australian corporations, and trading corporation are in Chapter I. The term "corporation" is also specifically defined in cl.416. The provisions of this Part essentially follow those of the Part X of CA. The Crown is bound by these provisions (see cl.3, (CA s.322)).

Cl.416 : Interpretation

1457. This clause is based on CA s.321.

1458. It is drafted in a manner that reflects the constitutional powers of the Commonwealth.

1459. The Part applies to corporations but does not apply to:

- (a) registrable Australian corporations other than a registered Australian corporation;
- (b) a company of a State or Territory;
- (c) an exempt public authority; or
- (d) a corporation sole.

1460. Consequently companies incorporated under the Bill and existing companies registered under the Bill (company) and foreign corporations within the meaning of para.51(20) of the Constitution will be subject to this Part. A reference to the property of a registered foreign corporation that was formed or incorporated outside Australia, will, unless the contrary intention appears, be a reference to property within Australia of the foreign corporation. Property of a company shall be read as property of the company within or outside Australia and property of a corporation incorporated in an excluded Territory will be read as property within a State or Territory.

1461. Receiver in relation to property of a corporation includes a receiver and manager.

Cl.417 : Application of Part

1462. This Part will apply to all receivers appointed, over the property of corporations, after the commencement of this Part whether or not the instrument conferring was made before or after the commencement.

Cl.418 : Persons not to act as Receivers

1463. This clause is based on CA s.323.

1464. Certain persons will be prohibited from being appointed and acting as receivers of property of a corporation.

1465. As the Corporations Bill disentitles companies over which a receiver has been appointed from being able to register under the Bill there is no provision like CA s.323(5).

Cl.419 : Liability of Receiver

1466. This clause is based on CA s.324.

1467. The liabilities of a receiver and manager are set out in the Bill cl.419. A receiver or any other authorized person who assumes control of any property of a corporation in order to enforce any charge, will be liable for the debts that are incurred in the course of the receivership, possession or control etc. This liability will not, however, prejudice the receiver's rights against the corporation or any other person. A person who assumes control of any property of a corporation will be able to apply to the Court for relief if he or she incurs civil liability which would not have been incurred had he or she been properly appointed as receiver of that property.

Cl.420 : Powers of Receiver

1468. This clause is based on CA s.324A.

1469. A receiver will, subject to this clause, any Court order or instrument appointing him or her, have power to do, in Australia and elsewhere, all things necessary or convenient to be done to attain the objectives of the receivership.

Cl.421 : Duties of Receiver with respect to bank accounts and Accounting Records

1470. This clause is based on CA s.324B.

1471. This provision sets out the duties of a receiver of property of a corporation with respect to bank accounts and accounting records. Unless the Court orders otherwise, a director, creditor or member of a corporation will be entitled to inspect these records kept by the receiver.

Cl.422 : Reports by Receiver

1472. This clause is based on CA s.324C.

1473. If it appears to the receiver that an officer or member may be guilty of an offence or that a person connected with the corporation has misappropriated money or property or may be guilty of negligence, breach of duty or trust, then the receiver will be required to report this to the ASC. The receiver will be required to give the ASC any information it requires.

1474. The receiver will also be able to lodge with the ASC further reports specifying any other matter which, in the opinion of the receiver, should be brought to the notice of the ASC.

1475. Where a receiver has not made a report to the ASC, and it appears to the Court that a report should have been made by the receiver pursuant to this clause, then the Court may direct the receiver to make such a report.

Cl.423 : Supervision of Receiver

1476. This clause is based on CA s.324E.

1477. If it appears to the Court, or the ASC, that a receiver of property of a corporation has not faithfully performed his or her duties, or if a complaint is made to the Court or to the ASC with respect to the performance of the receiver's duties, the Court or the ASC will be able to enquire into the matter. The Court may then take such action as it thinks fit.

Cl.424 : Receiver may apply to Court

1478. This clause is based on CA s.324F.

1479. The receiver of property of a corporation can apply to the Court for directions in relation to any matter arising in connection with the performance of the receiver's functions.

Cl.425 : Power of Court to Fix Remuneration of Receivers

1480. This clause is based on CA s.325.

1481. The Court on the application of the liquidator, official manager or ASC will be able to make orders in relation to the remuneration to be paid to a receiver of, part or all, the property of a corporation.

Cl.426 : Receiver to Enjoy Qualified Privilege in Certain Circumstances

1482. This clause is based on CA s.325A.

1483. A receiver of property will be accorded qualified privilege in respect of any matter contained in a report made by him pursuant to cl.422 or a comment made under para.429(2)(c).

Cl.427 : Notification of Appointment of Receiver

1484. This clause is based on CA s.326.

1485. The ASC is to be notified of the appointment of and ceasing to act of a receiver of property of a corporation.

Cl.428 : Statement that Receiver Appointed

1486. This clause is based on CA s.327.

1487. On every public document and every eligible negotiable instrument on or in which the corporation's name appears there should be a statement immediately following the name of the corporation that a receiver, or a receiver and manager as the case may be, has been appointed.

Cl.429 : Provisions as to Information Where Receiver Appointed

1488. This clause is based on CA s.328.

1489. The receiver must serve notice of appointment on the corporation. The directors or agent must then provide a report on its affairs within 14 days. The receiver must then lodge a copy of this report with the ASC and any trustee for debenture holders and send a copy of his or her comments to the corporation.

Cl.430 : Receiver may Require Reports

1490. This clause is based on CA s.329.

1491. A receiver of the property (or part of the property) of a corporation will be able to require certain persons (including officers, employees and promoters) to submit reports containing information as to the affairs of the corporation.

Cl.431 : Receiver May Inspect Books

1492. This clause is based on CA s.329A.

1493. A receiver of property of a corporation will be entitled to inspect at any reasonable time any books of the corporation that relate to that property.

Cl.432 : Lodging of Accounts of Receiver

1494. This clause is based on CA s.330.

1495. A receiver of property of a corporation will be required to lodge accounts with the ASC every 6 months. The ASC may cause the accounts to be audited.

Cl.433 : Payments of Certain Debts out of Property Subject to Floating Charge in Priority to Claims Under Charge

1496. This clause is based on CA s.331.

1497. Where a receiver has been appointed under a floating charge, certain other debts will have to be paid out of the property covered by the floating charge in priority to claims under the charge.

Cl.434 : Enforcement of Duty of Receiver to Make Returns

1498. This clause is based on CA s.332.

1499. The Court will be able to make orders directing a receiver of property of a corporation to make good certain defaults.

PART 5.3 : OFFICIAL MANAGEMENT

1500. This Part (cls.435-458) deals with the placing of a company under official management. It is based on CA Part XI. All penalties that were previously found in Part XI are now found in Schedule 3 to the Bill.

Cl.435 : Interpretation

1501. This clause is based on CA s.333 and contains definitional and interpretation provisions.

Cl.436 : Power of Company to call Meeting of Creditors to Appoint Official Manager

1502. This clause is based on CA s.335.

1503. Where it is resolved by the majority of directors of a company at a meeting specially convened for the purpose that a

company is unable to pay its debts as they become due and payable, the company will be able to (or, if requested in writing by a judgement creditor for not less than \$1,000 must) call a meeting of its creditors for the purpose of placing the company under official management. The procedures for the convening of the meeting and the information concerning the company's affairs that has to be made available are specified.

Cl.437 : Report as to Affairs of Company to be submitted to Meeting of Creditors

1504. This clause is based on CA s.336.

1505. One director will be appointed by the directors of the company to attend the meeting of creditors to submit the report prepared in accordance with the preceding clause and also to disclose the company's affairs and the circumstances leading up to the convening of the meeting.

Cl.438 : Power to adjourn meeting

1506. This clause is based on CA s.337.

1507. A creditors' meeting may, by resolution, be adjourned from time to time.

Cl.439 : Power of Creditors to Place Company Under Official Management

1508. This clause is based on CA s.338

1509. This provision sets out the details of how creditors of a company can, by special resolution, place the company under official management.

Cl.440 : Appointment of Committee of Management

1510. This clause is based on CA s.339.

1511. The creditors will be able to resolve that a committee of management be appointed. The number of members and criteria for eligibility are set out.

Cl.441 : Notice of Appointment and Address of Official Manager

1512. This clause is based on CA s.340.

1513. This provision imposes a requirement on an official manager to notify the ASC of his appointment, address, resignation or removal.

Cl.442 : Effect of Resolution

1514. This clause is based on CA s.341.

1515. This provision deals with the effect of a special resolution placing the company under official management.

Cl.443 : Six-monthly Meetings of Creditors and Members

1516. This clause is based on CA s.342.

1517. The official manager will be obliged to summon six monthly meetings of members and creditors to consider the statement he or she is required to prepare in relation to the affairs of the company. Such meetings may be required or permitted, by the ASC, to be held at less than 6 monthly intervals.

Cl.444 : Stay of Proceedings

1518. This clause is based on CA s.343.

1519. Where a company is under official management, no action or other civil proceeding in any court in Australia will be able to be begun or carried on against the company without the leave of the Court (cf s.58(3) of the Bankruptcy Act 1966 which renders incompetent the person bringing the action rather than directly prohibiting the action). Where a company has convened a meeting of creditors but no resolution appointing an official manager has been made, the company or a creditor may apply for a stay of any civil proceeding.

Cl.445 : Power to Extend Period of Official Management

1520. This clause is based on CA s.344.

1521. The creditors will be able, by special resolution, to extend the period of official management for a further period not exceeding 12 months.

Cl.446 : Extension of Period of Official Management

1522. This clause is based on CA s.345.

1523. Where the period of official management has been extended in accordance with the above clause, the extension will continue to apply until the official management is further extended or is terminated.

Cl.447 : Appointment of Official Manager Not to Affect Appointment and Duties of Auditor

1524. This clause is based on CA s.346.

1525. The appointment of the official manager will not affect the appointment, rights and duties of the auditor of the company.

Cl.448 : Duties of Official Manager

1526. This clause is based on CA s. 347.

1527. This provision sets out the duties of the official manager.

Cl.449 : Undue Preferences in the Case of Official Management

1528. This clause is based on CA s.348.

1529. Undue preferences will be void as against an official manager where the company has been placed under official management.

Cl.450 : Application and Disposal of Property During Official Management

1530. This clause is based on CA s.349.

1531. Certain restrictions will be imposed on the official manager in relation to the sale and disposition of company property during the official management.

Cl.451 : Official Manager may apply to Court for directions

1532. This clause is based on CA s.350.

1533. The official manager will be able to apply to the Court for directions. Acts done in accordance with such directions will be deemed to have been properly done for the purposes of this Bill.

Cl.452 : Certain Provisions Applicable to Official Management

1534. This clause is based on CA s.351.

1535. The winding up provisions which apply to a company under official management, as if it were a company being wound up, are listed in this provision.

Cl.453 : Power of Court to Terminate Official Management and Give Directions

1536. This clause is based on CA s.352.

1537. This provision describes the situations in which the Court will be able to terminate an official management and give such directions as it thinks fit for the resumption of the management and control of the company by its officers.

Cl.454 : Resolution to Place Company under Official Management Effective, Subject to Appeal

1538. This clause is based on CA s.353.

1539. Certain creditors and members of the company will be able to apply to the Court to cancel or vary the resolution placing the company under official management if, in their opinion, there is no reasonable prospect of the company being rehabilitated or that the resolution is not in the interests of the creditors and the members of the company.

Cl.455 : Lodgement of office copy of Court Order

1540. This clause is based on CA s.354.

1541. Where the Court makes an order under either of the two preceding clauses, terminating an official management, or varying or cancelling a resolution to place a company under official management, respectively, the person on whose application the order is made will be required to lodge with the ASC, notice of the making of the order within seven days after the order is made and also lodge an office copy of the order within seven days of the passing and entering of the order.

Cl.456 : Termination of appointment and release of official manager

1542. This clause is based on CA s.355.

1543. The appointment of a person as official manager will terminate where:

- the person tenders his resignation in writing to the committee of management or a meeting of creditors of the company;
- a special resolution that the appointment of the person be terminated is passed at a meeting of creditors of the company of which special notice has been given;
- the Court makes an order that the appointment be terminated.

1544. The appointment of a person as official manager will be terminated when the grounds set out in Bill sub-cl.456(2) occur.

Cl.457 : Notification that Company is under Official Management

1545. This clause is based on CA s.356.

1546. Where a company is under official management pursuant to this Bill, all company documentation will have to indicate that the company is under official management.

Cl.458 : Functions of Committee of Management; Appointment of Deputy Official Manager

1547. This clause is based on CA s.357.

1548. This provision sets out the functions of the committee of management and details the means of appointment of a deputy official manager.

PART 5.4 - WINDING UP BY THE COURT

1549. This Part is based on CA Part XII Division 2. Interpretations of the words: company, corporation, creditors' voluntary winding up, insolvent under administration, liquidator, Minister, members' voluntary winding up, official liquidator and relevant date can be found in Chapter 1. These provisions essentially follow those of the CA. There have however been a number of drafting alterations made in order to clarify constitutional links and also in some cases to improve the drafting of provisions. There have been a few amendments. Clauses 573, (Application to Commission for Deregistration of defunct company) and 581 (Courts to Act in aid of each other) are new. CA Part XII Divisions 5 and 6 have been deleted. Part 5.7 parallels CA Part XII Division 6 in respect of the winding up of bodies other than companies. All penalties that were previously found in Part XII are now found in Schedule 3 to the Bill.

Division 1 - Order for winding up

1550. This Division specifies the grounds on which a winding up order may be made.

Cl.459 : Winding up of company that has ceased to be a trading or banking corporation

1551. The Court may order the winding up of a company (other than a new company as defined in cl.81) that is neither a trading corporation nor a banking corporation.

1552. Sub-clauses 459(3) and (4) indicate the grounds on which a Court may presume that a company is neither a trading corporation nor a banking corporation; for example that the company has contravened cl.155 and has not lodged an annual return. Consequently dormant companies can be wound up.

1553. Sub-clauses 459(5) and (6) provide specific grounds on which a Court can presume that a company is not a trading corporation and is not a banking corporation respectively.

Cl.460 : Winding up of company on the ground of insolvency

1554. This clause is based on CA para.364(1)(e) and sub-s.364(2).

1555. A company that is unable to pay its debts may be wound up.

1556. The grounds in which a company is deemed to be unable to pay its debts are specified.

Cl.461 : General grounds on which company may be wound up by Court

1557. The clause is based on CA s.364.

1558. This provision sets out the circumstances other than inability to pay debts in which a company may be wound up by the court.

Cl.462 : Standing to apply for winding up

1559. This clause is based on CA 363.

1560. This provision lists the persons who may apply for a winding up order under clauses 459, 460 or 461.

1561. The following persons can apply for an order under clause 459:

(a) the ASC;

(b) the Minister;

(c) the Minister of State who is administering provisions of the company law of that State;

(d) the company.

1562. Any one or more of the following persons can apply for an order under clauses 460 or 461:

(a) the company;

(b) a creditor;

(c) a contributory

(d) a liquidator of the company;

(e) the ASC;

(f) an official manager of the company;

(g) a person who is granted leave under cl.453; or

(h) the Insurance and Superannuation Commissioner.

Cl.463 : Court may order winding up of company that is being wound up voluntarily

1563. This provision makes it clear that the Court may make an order under clauses 459, 460 or 461 even if the company is being wound up voluntarily.

Cl.464 : Application for winding up in connection with investigation under Commission Act

1564. This provision is based on CA s.312.

1565. Where the ASC is investigating or has investigated certain matters concerning the affairs of a company under Division 1 of Part 3 of the Commission Act the ASC may apply to the Court for the winding up of the company. The Bill will apply, with such modifications as are necessary as if the company made the winding up application (sub-cl.464(2)).

Cl.465 : Commencement of Winding Up by the Court

1566. This clause is based on CA s.365.

1567. Where a company passes a resolution for voluntary winding up before the filing of an application, the winding up will be deemed to have commenced at the time of the passing of the resolution. In any other case the winding up will be deemed to have commenced at the time of the filing of the application for the winding up.

Cl.466 : Payment of preliminary costs etc.

1568. This clause is based on CA s.366.

1569. Until a liquidator is appointed all persons who apply for a winding up order must pay for the costs of the proceedings. Those persons may subsequently be reimbursed.

Cl.467 : Powers of Court on Hearing Application

1570. This clause is based on CA s.367.

1571. The Court will have extensive powers to deal with a winding up application including power to dismiss the application, adjourn the hearing or make any order including interim orders that it thinks fit.

Cl.468 : Avoidance of Dispositions of Property, Attachments etc

1572. This clause is based on CA s.368.

1573. Any disposition of the property of the company and transfer of shares or alteration in the status of the members and any attachment or execution against property of the company made after the commencement of the winding up will be void. The Court will have power to validate certain disposition of property and to permit the company to carry on business on such terms as the Court thinks fit.

Cl.469 : Application to be Lis Pendens

1574. This clause is based on CA s.369.

1575. Any application for winding up will be a pending legal action, i.e. a lis pendens, within the meaning of any law relating to the effect of a lis pendens upon purchasers or mortgagees.

Cl.470 : Certain Notices to be Lodged

1576. This clause is based on CA s.370.

1577. This provision sets out the requirements for notice of application for a winding up, the order etc. to be lodged with the ASC.

Cl.471 : Effect of Winding Up Order

1578. This clause is based on CA s.371.

1579. A winding up order will operate in favour of all creditors and contributories. Where a winding up order has been made or a provisional liquidator has been appointed no action or other civil proceedings will be able to start or

continue against the company except by leave of the Court, and on such terms as the Court imposes.

Division 2 - Court-appointed Liquidators

1580. The registration of liquidators is dealt with in Part 9.2.

Cl.472 : Power of Court to Appoint Official Liquidator

1581. This clause is based on CA s.372.

1582. The Court will have power, on an order being made for the winding up of the company, to appoint an official liquidator to be the liquidator of the company. The Court will also be to appoint a provisional liquidator who will exercise such functions and powers as are conferred by the Bill or as prescribed by the Court or Rules of Court.

Cl.473 : General Provisions about Liquidators

1583. This clause is based on CA s.373.

1584. This provision deals with: the resignation, removal and remuneration of a liquidator; vacancies in the office of liquidator; and the validity of acts of a liquidator whose appointment or qualifications are subsequently discovered to be defective.

Cl.474 : Custody and Vesting of Company's Property

1585. This clause is based on CA s.374.

1586. Where a winding up order is made or a provisional liquidator appointed, the liquidator or provisional liquidator will take into his or her custody or control all of the

property to which the company is or appears to be entitled. If there is no liquidator, all of the property of the company will be in the custody of the Court.

1587. On application by the liquidator, the Court will be able to order that the company's property vest in the liquidator.

Cl.475 : Report as to Company's Affairs to be Submitted to Liquidator

1588. This clause is based on CA s.375.

1589. The directors and secretary of the company at the date of the winding up order or such earlier time as specified by the liquidator, will be obliged to provide a statement to the liquidator as to the affairs of the company. The liquidator will be able to require such a statement from former or present officers of the company, from persons involved with the formation of the company, if the formation was within a year of the winding up, or from officers or employees capable of giving the information.

Cl.476 : Preliminary Report by Liquidator

1590. This clause is based on CA s.376.

1591. A liquidator of a company being wound up by the Court, after receiving the above statement of the company's affairs, will be required to lodge a preliminary report about the company with the ASC.

Cl.477 : Powers of Liquidator

1592. This clause is based on CA s.377.

1593. This provision lists the powers that the liquidator can exercise with the approval of the Court, the committee of inspection or a resolution of the creditors.

Cl.478 : Settlement of List of Contributories and Application of Property

1594. This clause is based on CA s.378.

1595. As soon as practicable after a winding up order, the liquidator will be required to settle a list of contributories. The liquidator will also have power to rectify the register of members, where necessary, and cause the property of the company to be collected and applied to discharge its liabilities.

Cl.479 : Exercise and Control of Liquidator's Powers

1596. This clause is based on CA s.379.

1597. In administering and distributing the property, the liquidator will be required to have regard to any directions given by resolution of the creditors or contributories at a general meeting or by the committee of inspection.

Cl.480 : Release of Liquidators and Dissolution of Company

1598. This clause is based on CA s.381.

1599. On completion of his task or on resignation, a liquidator may apply to the Court for an order that he or she be released or an order that the company be dissolved.

Cl.481 : Orders for Release or Dissolution

1600. This clause is based on CA s.382.

1601. This provision deals with the effect of an order for release or dissolution and the powers of the Court in relation to the release of the liquidator.

Division 3 - General Powers of Court

Cl.482 : Power to Stay or terminate Winding Up

1602. This clause is based on CA s.383.

1603. At any time during the winding up of a company, the Court will be able, on the application of the liquidator, creditor or contributory, to make an order staying the winding up either indefinitely or for a limited time or terminating the winding up. Where the Court has made an order terminating the winding up, the Court may give directions for the resumption of the management and control of the company by its officers (sub-cl.482(3)).

Cl.483 : Delivery of Property to Liquidator

1604. This clause is based on CA s.384.

1605. The Court will have power to require persons connected with the company to deliver to the liquidator or provisional liquidator any property to which the company is prima facie entitled. The Court will be able to direct contributories to pay to the company any moneys due.

Cl.484 : Appointment of Special Manager

1606. This clause is based on CA s.385.

1607. The liquidator will be able, where necessary, to apply to the Court for the appointment of a special manager whose remuneration and powers are to be fixed by the Court.

Cl.485 : Claims of Creditors and Distribution of Property

1608. This clause is based on CA s.386.

1609. The Court will be able to fix the date on or before which creditors must prove their debts or claims, to adjust the rights of the contributories, and make certain orders in respect of priority of payment of costs and charges. When the property is insufficient to meet liabilities, the Court may give such priority to the costs, charges and expenses incurred in the winding up as it thinks just.

Cl.486 : Inspection of Books by Creditors and Contributories

1610. This clause is based on CA s.387.

1611. The Court will have power to make any order for the inspection of the books and papers of the company that it thinks just.

Cl.487 : Power to Arrest Absconding Contributory

1612. This clause is based on CA s.388.

1613. The Court will have, on being shown that a contributory is about to abscond or conceal property, power to arrest the contributory and seize his books, papers and movable personal property.

Cl.488 : Delegation to Liquidator of Certain Powers of Court

1614. This clause is based on CA s.389.

1615. Powers and duties conferred on the Court in respect of certain matters, including the holding and conducting of meetings of creditors and contributories, the making of calls, the fixing of the time for the proof of debts and claims etc will be able to be exercised by the liquidator as an officer of the Court subject to the control of the Court.

Cl.489 : Powers of Court Cumulative

1616. This clause is based on CA s.390.

1617. Any powers conferred on the Court by the CB will be in addition to any existing powers of instituting proceedings against any contributory or debtor of the company.

Part 5.5 - VOLUNTARY WINDING UP

1618. This Part is based on CA Part XII Division 3.

Division 1 - Resolution for winding up.

Cl.490 : Limitation on right to Wind Up Voluntarily

1619. This clause is based on CA s.391.

1620. Where a winding up application on the ground that the company is unable to pay its debts has been filed with the Court the company will not, without the leave of the Court, be entitled to resolve that it be wound up voluntarily.

Cl.491 : Circumstances in which Company may be Wound Up Voluntarily

1621. This clause is based on CA s.392.

1622. Subject to the above limitation, a company will be able to be wound up voluntarily if it so resolves by special resolution. A printed copy of such resolution must be lodged with the ASC within 7 days after the passing of the resolution.

Cl.492 : Commencement of Winding Up

1623. This clause is based on CA s.393.

1624. A voluntary winding up will commence at the time of passing of the resolution for the voluntary winding up .

Cl.493 : Effect of Voluntary Winding Up

1625. This clause is based on CA s.394.

1626. From the commencement of the winding up, a company will be required to cease to carry on its business except so far as, in the opinion of the liquidator, is required for the beneficial disposal or winding up of the business.

1627. The corporate state and powers of the company remain until it is dissolved.

Cl.494 : Declaration of Solvency

1628. This clause is based on CA s.395.

1629. Where it is proposed to wind up a company voluntarily, the directors of the company will be able to make a written declaration that they are of the opinion that the company will be able to pay its debts in full within 12 months after the commencement of the winding up. A statement of affairs should be attached to such a declaration.

1630. Such a declaration will have no effect unless certain requirements, expressed in sub-cl.494(3), are fulfilled.

1631. If a declaration of solvency is made, the winding up will be a members' voluntary winding up if the members so resolve. Where no such declaration is made, the winding up will be a creditors' voluntary winding up.

Division 2 - Members' Voluntary Winding Up

Cl.495 : Liquidators

1632. This clause is based on CA s.396.

1633. The company in general meeting will have to appoint a liquidator to wind up the company's affairs and distribute the company's property. Once a liquidator is appointed, all powers of the directors cease unless the liquidator approves the continuance of any of those powers.

Cl.496 : Duty to Liquidator to Call Creditors' Meeting in Case of Insolvency

1634. This clause is based on CA s.397.

1635. Where a declaration of solvency has been made and the liquidator is of the opinion that the company will not be able to pay its debts in full within the period stated in the declaration he will be required to call a meeting of creditors.

1636. At such a meeting, the liquidator will be required to submit a statement of the assets and liabilities of the company. The creditors at such a meeting will be able to appoint another liquidator. The liquidator, or new appointee, will be required to lodge a notice of the holding of the meeting within 7 days thereafter.

Division 3 - Creditors' Voluntary Winding Up

Cl.497 : Meeting of creditors

1637. This clause is based on CA s.398.

1638. A company will be required to call a meeting of creditors at a time and place convenient to the majority of

creditors on the day on which (or the day after) there is to be a meeting proposing a resolution for voluntary winding up.

1639. The company will be required to give the creditors at least 7 days notice of the meeting and to provide certain information to them.

Cl.498 : Power to Adjourn Meeting

1640. This clause is based on CA s.399.

1641. A meeting of creditors should be able to be adjourned for up to 21 days. If a meeting is adjourned and the resolution for winding up is passed at an adjourned meeting, any resolution passed at the meeting of creditors will have effect as if it had been passed immediately after the passing of the resolution.

1642. References to the circulation of newspapers in CA s.399(3) have been altered to newspapers circulating in the State where the meeting is to be held.

Cl.499 : Liquidators

1643. This clause is based on CA s.400.

1644. The Company will be required and the creditors will be permitted, at their respective meetings, to nominate a person to be a liquidator. In the event of any conflict the Court should have power to settle the nominations. On the appointment of a liquidator the powers of the directors cease except as far as the committee of inspection or, if there is no such committee, the creditors approve.

Cl.500 : Execution and Civil Proceedings

1645. This clause is based on CA s.401.

1646. After the commencement of the creditors' voluntary winding up, any attempt by a creditor to enforce a remedy by proceeding against the property of the company will be void and civil proceedings will only be able to be commenced against the company with the leave of the Court.

Division 4 - Voluntary winding up generally.

Cl.501 : Distribution of Property of Company

1647. This clause is based on CA s.403.

1648. The property of a company will, on its winding up, be applied equally in satisfaction of its liabilities and subject to that application, be distributed among the members according to their rights and interests in the company.

Cl.502 : Appointment of Liquidator

1649. This clause is based on CA s.404.

1650. If for any reason there is no liquidator acting, the Court will be able to appoint a liquidator.

Cl.503 : Removal of Liquidator

1651. This clause is based on CA s.405.

1652. The Court will be able to remove a liquidator, on cause shown, and appoint another liquidator.

Cl.504 : Review of Liquidators' Remuneration

1653. This clause is based on CA s.406.

1654. Any member or creditor or the liquidator will be able to apply to the Court to review the remuneration of the liquidator. The decision of the Court will be final.

Cl.505 : Acts of Liquidator Valid etc.

1655. This clause is based on CA s.407.

1656. The acts of a liquidator will be valid notwithstanding any defects that may afterwards be found in his appointment or qualification.

Cl.506 : Powers and Duties of Liquidator

1657. This clause is based on CA s.408.

1658. The liquidator will be able to exercise certain powers given to him or her by the Court, certain other powers of the Court and other powers given by the Bill.

Cl.507 : Powers of Liquidator to Accept Shares etc. as consideration for Sale of Property of Company

1659. This clause is based on CA s.409.

1660. The liquidator, with the sanction of a special resolution of the company, will be able to accept shares, debentures, policies or other like interests as consideration for the sale of property of the company.

1661. In relation to the law relating to commercial arbitration (sub-cl.507(7)) the law will be that of the Australian Capital Territory.

Cl.508 : Annual Meeting of Creditors

1662. This clause is based on CA s.410.

1663. If the winding up continues for more than one year, the liquidator must convene a general meeting of the company, or in the case of a creditors' voluntary winding up, a general meeting of the company and a meeting of the creditors, within 3 months after the end of the first year from the commencement of the winding up and thereafter yearly. He must lay before the meeting an account of his acts and dealing and of the conduct of the winding up in the preceding year.

Cl.509 : Final Meeting and Dissolution

1664. This clause is based on CA s.411.

1665. Once the affairs of a company are fully wound up, the liquidator will be required to make an account showing how the winding up has been conducted and how the company's property has been disposed of. He will be required to convene a general meeting of the company, or in the case of a creditors' voluntary winding up, a meeting of the company and the creditors, and lay the account before that meeting.

Cl.510 : Arrangement, when Binding on Creditors

1666. This clause is based on CA s.412.

1667. An arrangement entered into between a company about to be or in the course of being wound up and its creditors is binding on the company if sanctioned by a special resolution, and on the creditors if acceded to by a majority in number present and voting, where such majority represents 75% of the total amount of the debts of the creditors present and voting either in person or by proxy.

Cl.511 : Application to Court to Have Questions Determined or Powers Exercised.

1668. This clause is based on CA s.413.

1669. The liquidator, any contributory or creditor will be able to apply to the Court to determine any question arising out of the winding up of a company or to exercise any of the Court's powers under the Bill.

Cl.512 : Costs

1670. This clause is based on CA s.414.

1671. All proper costs, charges and expenses of and incidental to the winding up (including the remuneration of the liquidator) will be payable out of the property of the company in priority to all other claims.

PART 5.6 - WINDING UP GENERALLY

1672. This Part is based on CA Part XII Divisions 1 and 4.

Division 1 - Preliminary

Cl.513 : Application

1673. This clause is based on CA s.359.

1674. Unless the contrary intention appears, the provisions of this Bill apply to windings up by the Court and voluntary windings up.

Division 2 - Contributions

1675. This Division is based on CA ss.360-362.

Cl.514 : Where Division Applies

1676. This Division applies where a company is being wound up.

Cl.515 : General liability of contributory

1677. This clause is based on part of CA s.360(1).

1678. Subject to this Division, every present and past member will be liable to contribute to the assets of the company on its being wound up.

Cl.516 : Company limited by shares

1679. This clause is based on CA para.360(1)(e).

1680. The liability of a member of a company limited by shares is the amount unpaid on the shares.

Cl.517 : Company limited by guarantee

1681. This clause is based on CA para.360(1)(f).

1682. The liability of a member of a company limited by guarantee is the amount he has undertaken to contribute.

Cl.518 : Company limited both by shares and by guarantee.

1683. A member of a company limited by shares and guarantee is the aggregate of the amount unpaid on the shares and the amount he has undertaken to contribute.

Cl.519 : Exceptions for former unlimited company.

1684. This clause is based on CA para.360(1)(g).

1685. The liability of a person who was a member at the time of the change from unlimited to limited company in respect of debts contracted before that time is unlimited.

Cl.520 : Past member: later debts

1686. This clause is based on CA para.360(1)(c).

1687. A past member need not contribute towards the payment of debts contracted after he ceased to be a member.

Cl.521 : Person ceasing to be a member a year or more before winding up.

1688. A past member who was not a member during the year preceding the commencement of the winding up need not contribute. This is subject to cl.523.

Cl.522 : Present members to contribute first.

1689. This clause is based on CA para.360(1)(d).

1690. A past member need not contribute unless it appears that existing members are unable to satisfy the contributions they are liable to make.

Cl.523 : Past member of former unlimited company.

1691. This clause is based on CA para.360(1)(b).

1692. A past member who was a member at the time the company changed from unlimited to limited status (if that occurred within the 3 years preceding the commencement of winding up) will be liable to contribute towards the payment of debts incurred before that time.

Cl.524 : Past member of former limited company.

1693. This clause is based on CA para.360(1)(h).

1694. A person who was a past member at the time a company changed from limited to unlimited status is only liable to

contribute the amount he would have been liable if the company had remained limited.

Cl.525 : Debts to a member.

1695. A sum due as a dividend, profit or otherwise to a member is only to be taken into account in the final adjustment of rights between contributories and is not treated as a debt in the case of competition between a member and a creditor.

Cl.526 : Liability on certain contracts.

1696. This clause is based on CA para.360(1)(j).

1697. A provision in a policy of insurance or other contract limiting the liability of individual members is not invalidated.

Cl.527 : Nature of Liability of Contributory

1698. This clause is based on CA s.361.

1699. The liability of a contributory will be of the nature of a specialty debt according to the law of the Australian Capital Territory. The debt will be payable at the time when calls are made for enforcing the liability.

Cl.528 : Death of contributory

1700. This clause is based on CA s.362(1).

1701. If a contributory dies, his personal representatives will be liable in the course of administration to contribute to the property of the company in discharge of his liability.

Cl.529 : Bankruptcy of contributory

1702. This clause is based on CA s.362(2).

1703. If a contributory becomes insolvent under administration or assigns his estate for the benefit of his creditors, his trustee will represent him and be a contributory. The estimated value of his liability to future calls as well as calls already made may be proved against his estate.

Cl.530 : Division 2 Company

1704. This provision picks up changes in status under corresponding laws.

Division 3 - Liquidators

Cl.531 : Books to be Kept by Liquidator

1705. This clause is based on CA s.416.

1706. The liquidator will be required to keep proper books in which he or she must record certain matters. Any contributory or creditor may inspect them, unless the Court orders otherwise.

Cl.532 : Disqualification of Liquidators

1707. This clause is based on CA s.417.

1708. A person will not be able to be a liquidator of a company unless he or she is either a registered liquidator or registered as a liquidator of that company. Other grounds for disqualification are set out in the provision.

Cl.533 : Reports by Liquidator

1709. This clause is based on CA ss.324C and 418.

1710. If it appears to the liquidator that an officer or member may be guilty of an offence, that a person connected with the company has misappropriated money or property or may be guilty of negligence or a breach of duty the liquidator is bound to report this to the ASC.

1711. The liquidator must also report if the company may be unable to pay its unsecured creditors more than 50 cents in the dollar. The Court may also order certain reports to be made.

Cl.534 : Prosecution by liquidator of delinquent officers and members.

1712. This clause is based on CA s.324D.

1713. Where a report has been lodged by the liquidator but the ASC has decided not to prosecute, it must so inform the liquidator and the liquidator may begin a prosecution. The ASC may pay the part or whole of the cost of the proceedings. Otherwise it is payable out of the company's property as part of the costs of the winding up.

Cl.535 : Liquidator has Qualified Privilege in Certain Circumstances

1714. This clause is based on CA s.419.

1715. In the absence of malice on his part, a liquidator will not be liable to any action for defamation in regard to any statement he makes in the course of his duties as liquidator. Qualified privilege is defined in Cl.89.

Cl.536 : Supervision of Liquidators

1716. This clause is based on CA s.420.

1717. If it appears to the Court or to the ASC that a liquidator has not faithfully performed or is not faithfully performing his duties, or has not observed or is not observing any of the requirements of the Court, the CB or regulations or rules, the Court or ASC may inquire into the matter and the Court may take such action as it thinks fit.

1718. While the Commission may conduct an inquiry the Court is the final arbitrator of the matter.

Cl.537 : Notice of Appointment and Address of Liquidator

1719. This clause is based on CA s.421.

1720. A liquidator will be required to lodge notice of his or her appointment, address and resignation, removal from office or change of address with the ASC.

Cl.538 : Regulations Relating to Money, etc Received by Liquidator

1721. This clause is based on CA s.421A.

1722. This provision enables regulations to be made dealing with payments into and out of banks.

1723. The regulations may apply generally or to specified windings up.

Cl.539 : Liquidator's Accounts

1724. This clause is based on CA s.422.

1725. The liquidator will be required to lodge with the ASC half-yearly accounts of his receipts and payments and a statement of the position in the winding up. The ASC will be able to cause these accounts to be audited.

Cl.540 : Liquidator to Make Good Defaults

1726. This clause is based on CA s.423.

1727. If a liquidator has not lodged any document that he is required to lodge, and fails to make good the default within 14 days after service on him or a notice requiring him to do so, the Court will be able to make an order directing the liquidator to make good the default.

Division 4 - General

Cl.541 : Notification that a Company is in Liquidation

1728. This clause is based on CA s.424.

1729. When a company is being wound up, the words 'in liquidation' should be set out by the company, after its name, on every public document and in every negotiable instrument issued or signed by or on behalf of the company.

Cl.542 : Books of Company

1730. This clause is based on CA s.425.

1731. Where a company is being wound up, all books of the company and of the liquidator that are relevant to the company will be, as between the contributories of the company, prima facie evidence of the truth of all matters recorded within them.

1732. When a company has been wound up the liquidator will be required to retain the books for at least 5 years.

Cl.543 : Investment of Surplus Funds on General Account

1733. This clause is based on CA s.426.

1734. Whenever the cash balance standing to the credit of a company is in excess of the amount that is required for the time being to answer demands in respect of the property of the company, the liquidator will be able to invest any part of the sum in authorised trustee investments or with authorised dealers in the short term money market in addition to being able to deposit it at interest with any bank. Any interest received will be part of the property of the company.

Cl.544 : Unclaimed Property to be Paid to Minister

1735. This clause is based on CA s.427.

1736. Where a dividend remains unclaimed for more than 6 months from the date it became payable or an amount remains unclaimed or undistributed after the final distribution, the liquidator should pay these moneys to the Minister who will deal with them in accordance with Part 9.7.

Cl.545 : Expenses of Winding Up Where Property Insufficient

1737. This clause is based on CA s.429.

1738. Unless expressly directed to do so by the ASC or the Court, a liquidator will not be liable to incur any expense unless there is sufficient available property.

Cl.546 : Resolutions Passed at Adjourned Meetings of Creditors and Contributories

1739. This clause is based on CA s.430.

1740. Subject to clause 498(4) (power to adjourn meeting), where a resolution is passed at an adjourned meeting of any creditors or contributories of a company, the resolution will be treated as if it were passed on the date on which it was in fact passed and not on any earlier date.

Cl.547 : Meetings to Ascertain Wishes of Creditors or Contributories

1741. This clause is based on CA s.431.

1742. The Court will have power to have regard to the wishes of the creditors and contributories as to all matters relating to the winding up. If it thinks it necessary, the Court may order meetings of creditors and contributories to ascertain those wishes.

Division 5 - Committees of Inspection

1743. The provisions relating to committees of inspection are based on CA ss.432-436 (Part XII, Division 4, Subdivision B).

Cl.548 : Convening of Meetings by Liquidator for Appointment of Committee of Inspection

1744. This clause is based on CA s.432.

1745. If requested by a creditor or contributory, the liquidator will have to convene separate meetings of creditors and contributories to see if they require a committee of inspection to be appointed to act with the liquidator. Criteria for eligibility to be appointed a member of a committee are set out.

Cl.549 : Proceedings of Committee of Inspection

1746. This clause is based on CA s.433.

1747. Provision is made for the convening of meetings of a committee of inspection and then taking decisions.

Cl.550 : Vacancies on Committee of Inspection

1748. This clause is based on CA s.434.

1749. There are provisions for filling vacancies on committees of inspection.

Cl.551 : Member of Committee Not to Accept Extra Benefit

1750. This clause is based on CA s.435.

1751. A member of the committee of inspection shall not, except as provided in the Bill or with leave of the Court, make an arrangement to derive a pecuniary benefit from the winding up or become the purchaser of any property of the company.

Cl.552 : Powers of Court Where No Committee of Inspection

1752. This clause is based on CA s.436.

1753. Where there is no committee of inspection, the liquidator will be able to seek comparable directions or permission from the Court.

Division 6 - Proof and Ranking of Claims

1754. This Division is based on CA ss.437-450 (Part XII, Division 4, Subdivision C).

Cl.553 : Proofs of Debts

1755. This clause is based on CA s.438.

1756. In every winding up, all debts payable on a contingency and all claims against the company will be admissible to proof against the company. In the winding up of insolvent companies the relevant provisions of the Bankruptcy Act 1966 apply in relation to the rights of secured and unsecured creditors, debts provable, and the valuation of annuities and future and contingent liabilities.

Cl.554 : Computation of Debts

1757. This clause is based on CA s.439.

1758. With the exception of certain amounts required to be paid under cl.557 the amount of a debt of a company will, for the purposes of a winding up, be computed as at the relevant date.

1759. 'Relevant date' is defined in the Chapter 1.

Cl.555 : Debts proved to Rank Equally except as Otherwise Provided

1760. This clause is based on CA s.440.

1761. Except as otherwise provided in the CB, all debts proved in a winding up will rank equally. If the property of the company is insufficient to meet them in full, debts must be paid proportionately.

Cl.556 : Priority Payments

1762. This is based on CA s.441.

1763. The order of priority of payment of debts are set out in this provision. Both sections 441(1)(h) and 449 CA have been deleted. It is Commonwealth policy not to support Crown priorities in general. Exceptions to this policy are made in special provisions in this and other legislation.

Cl.557 : Orders under section 91 of the Commission Act

1764. This clause is based on CA s.442.

1765. Where an Order is made under clause 91 of the Commission Act against a company being wound up, the amount the company is liable to pay under the order should be admissible to proof against the company and is to be given the priority stated sub-cl.556.

Cl.558 : Debts Due to Employees

1766. This clause is based on CA s.443.

1767. Where a contract of employment with a company being wound up is in existence immediately before the relevant date, the employee under the contract will be entitled to payment under cl.556 as if his services with the company were terminated by the company on the relevant date.

Cl.559 : Debts of a Class to Rank Equally

1768. This clause is based on CA s.444.

1769. After provision is made for the costs, charges and expenses referred to in para.556(1)(a), debts of a class referred to in the remaining paragraphs of sub-cl.556(1) will rank equally between themselves and will be paid in full, unless the property of the company is insufficient to meet them, in which case they will be paid proportionately.

Cl.560 : Advances in Respect of Wages, Retrenchment Payments and Leave of Absence

1770. This clause is based on CA s.445.

1771. A person who advances money in respect of wages or leave of absence payments etc will have a specified right of priority in relation to the money so advanced and paid.

Cl.561 : Priority of Employees' Claims Over Floating Charges

1772. This clause is based on CA s.446.

1773. Employees' claims for wages, leave of absence, retrenchment or long service leave will have a specified priority in relation to floating charges.

Cl.562 : Insurance Against Liabilities to Third Parties

1774. This clause is based on CA s.447.

1775. The amounts received by the company or liquidator under a pre-liquidation contract of insurance against liability to third parties will be paid to the third party in respect of whom the liability was incurred in priority to other priority debts.

Cl.563 : Provisions relating to Injury Compensation

1776. This clause is based on CA s.448.

1777. Notwithstanding anything in cl.556, para.556(1)(f) will not apply:

- (a) where the company is being wound up for the purpose of reconstruction or amalgamation and the right to injury compensation has been preserved; or
- (b) the company has entered into a contract with an insurer in respect of any liability for injury compensation.

1778. This clause also clarifies the method of calculating certain worker's compensation payments.

Cl.564 : Power of Court to Make Orders in Favour of Certain Creditors

1779. This clause is based on CA s.450.

1780. Where in a winding up:

- (a) property has been recovered under an indemnity for costs of litigation given by creditors; or
- (b) expenses in relation to which a creditor has indemnified a liquidator have been recovered,

the Court will be able to make such order as it deems just with respect to the distribution of that property and those expenses.

Division 7 - Effect of Other Transactions

1781. This Division is based on CA ss.451-456 (Part XII, Division 4, Subdivision D).

Cl.565 : Undue Preference

1782. This clause is based on CA s.451.

1783. A settlement, conveyance or transfer of property, a charge on property, a payment made or an obligation incurred by a company which would be void against the trustee in bankruptcy if it had been made by a natural person who had become bankrupt, will be void against the liquidator. This provision also deals with the date in relation to winding up that corresponds with the date of the presentation of the petition in bankruptcy proceedings.

Cl.566 : Effect of Floating Charge

1784. This clause is based on CA s.452.

1785. Certain floating charges created within 6 months of the commencement of the winding up will be invalid.

Cl.567 : Liquidator's Right to Recover In Respect of Certain Transactions

1786. This clause is based on CA s.453.

1787. Where, within a 4 year period preceding the commencement of the winding up, the company has, for cash consideration, either acquired from or sold to certain persons closely associated with the formation or management of the company, any property, business or undertaking, the liquidator will be able to recover from those persons the difference between the cash consideration and the value of the property at the time of its acquisition or sale.

Cl.568 : Disclaimer of Onerous Property

1788. This clause is based on CA s.454.

1789. A liquidator will be able to disclaim onerous property.

Cl.569 : Executions, Attachments etc Before Winding Up

1790. This clause is based on as CA s.455.

1791. Where a creditor has issued execution or instituted proceedings against the property of a company within 6 months before the commencement of the winding up of a company the creditor will be obliged to pay the liquidator the amount he received as a result of such proceedings. Where the creditor

has paid the liquidator under such circumstances he will be able to prove his debt in the winding up as an unsecured creditor.

Cl.570 : Duties of Sheriff after Receiving Notice of Application

1792. This clause is based on CA s.456 CA.

1793. Where a sheriff (defined in Chapter 1) receives notice in writing of:

- (a) an application to the Court for the winding up of a company; or
- (b) the covering of a meeting of a company to consider a resolution that the company be wound up voluntarily,

the sheriff must not sell property of the company pursuant to any process of execution by a creditor, or pay to such creditor the proceeds of a sale of property which has taken place under such a process.

Division 8 - Dissolution

1794. This Division is based on CA ss.458-464 (Part X, Division 4, Subdivision F). Clause 573 is new.

Cl.571 : Power of Court to Declare Dissolution of Company Void

1795. This clause is based on CA s.458.

1796. Where a company has been dissolved following a winding-up, the Court will be able at any time, on an application by the liquidator or other interested person, to make an order declaring the dissolution to be void. The Court

will be able to give directions and make such provisions as seem just for placing the company and all other persons in the same position, as far as possible, as if the company had not been dissolved.

Cl.572 : Notice by Commission of intention to deregister defunct Company

1797. This clause is based on CA sub-ss.459(1), (2), (3) and (8).

1798. Where the ASC has reasonable cause to believe that a company is not carrying on business it will be able to publish a notice in the Gazette, after sending certain notices to the company, with a view to cancelling the registration of the company.

1799. The ASC will also be able to cancel the registration of a company in a similar manner if the company is being wound up and no liquidator is acting; the affairs of the company are fully wound up and the liquidator is 6 months in default in lodging a return; or the affairs of the company have been fully wound up under Division 1 and there is no property or the property available is not sufficient to pay the costs of obtaining an order of the Court dissolving the company. Sub-cl.572(4) indicates the means of addressing notices or letters to be sent under this clause.

Cl.573 : Application to Commissioner for deregistration of defunct company

1800. This is a new provision.

1801. In addition to the above clause, this clause provides for 'eligible applicants', namely, the company, its members, or any other interested person to make an application to the ASC to publish a particular notice in relation to the company

that may ultimately result in the registration of the company being cancelled and the company being dissolved.

1802. An eligible applicant will be required to seek the approval of the ASC by applying and lodging a declaration in the prescribed form attesting that certain circumstances exist in relation to the status of the company, namely that the company is not carrying on business or is not in operation; and that all of the members desire that the company be deregistered and dissolved (sub-cl.573(3)). An eligible applicant will be required within 7 days of having obtained the above approval, to publish a notice in the prescribed form in a daily newspaper circulating generally in each State or Territory in which the company has carried on business, of its application for deregistration (sub-cl.573(5)). The notice should set out the terms of the declaration and state that, unless cause to the contrary is shown to the ASC within 3 months of the date of the notice, the ASC may cancel the registration and the company will be dissolved (sub-cl.573(6)). Copies of these notices should be sent by the eligible applicant to the ASC and the company (sub-cl.573(7)).

1803. Unless it has reason to suspect to the contrary, the ASC will not be under any obligation to ensure the veracity of the statutory declaration. It can assume the truth of the declaration (sub-cl.573(4)).

Cl.574 : Power of Commission to deregister defunct company

1804. This clause is based on CA sub-ss.459(4), (5), (6) and (7).

1805. At the expiration of the time specified in notices under sub-cl.572(2) or (3) or 573(5) above the ASC may, unless cause to the contrary is shown, by notice in writing published in the Gazette cancel the registration and dissolve the company.

1806. Sub-clauses 574(2) and (3) deal with the situations when a company should be reinstated. Sub-clauses 574(4) and (5) enable reinstatement and empower the Court to give any directions necessary to place the company and all persons in the same position, so far as possible, as if the company's registration had not been cancelled.

Cl.575 : Commission to Act as Representative of Defunct Company

1807. This clause is based on CA s.460.

1808. This clause enables the ASC in the listed circumstances to act as a representative of the defunct company or its liquidator.

Cl.576 : Outstanding Property of Defunct Company to Vest in Commission

1809. This clause is based on CA s.461.

1810. After a company has been dissolved, any outstanding property within or outside Australia which was vested in the company, to which the company was entitled or over which the company had a disposing power, will vest in the ASC.

Cl.577 : Outstanding Interests in Property : How Disposed of

1811. This clause is based on CA s.462.

1812. Once the ASC has an estate or interest in property vested in it under the preceding clause, it will be able to get in, sell or otherwise dispose of, or deal with any part or all of that estate or interest.

1813. Any commission payable and the remainder (after deduction of expenses) will be paid to the Minister to be dealt with under Part 9.7.

Cl.578 : Liability of Commission and Commonwealth as to Property vested in Commission

1814. This clause is based on CA s.463.

1815. Property vested in the ASC under this Division will continue to be liable to all charges etc imposed on that property by reason of any law as to rates, taxes, etc to which the property would have been liable had it continued in the ownership of the company.

Cl.579 : Accounts

1816. This clause is based on CA s.464.

1817. The ASC will be required to keep accounts relating to property vested in it under this subdivision.

Division 9 - Co-operation between Australian and foreign courts in external administration matters

1818. The provisions of the previous Division 5 of Part XII - Reciprocity with Participating States and Territories - which confers recognition under the CA of decisions of the Supreme Courts concerning the winding up of a company under the law of a participating jurisdiction are not necessary under the Bill. However, it has been decided to provide various clauses which enable mutual assistance between foreign and Australian courts in insolvency matters. Similar provisions are found in the Bankruptcy Act 1966 and are desirable in the light of the greater mobility of persons and assets today.

Cl.580 : Interpretation

1819. This Division provides for mutual assistance in external administration matters. The latter term is defined in the interpretation clause to relate to:

- (a) the winding up of a company or a Part 5.7 body under this Chapter;
- (b) the winding up of a body corporate or a Part 5.7 body outside Australia;
- (c) the insolvency of a body corporate or of a Part 5.7 body.

1820. A prescribed country for the purposes of the new section is:

- (a) a country prescribed by the regulations;
- (b) a colony, overseas territory or protectorate of a country so prescribed.

Cl.581 : Courts to Act in Aid of each other

1821. This clause is based on s.29 of the Bankruptcy Act 1966.

1822. It requires all courts having jurisdiction under the Corporations Bill and officers of or under the control of those courts, to act in aid of one another in all external administration matters.

1823. By virtue of the Foreign Tribunals Evidence Act 1856, an Imperial Act still in force in Australia, assistance to foreign courts in corporate insolvency matters is limited to the taking of evidence. By contrast, in relation to the bankruptcy of a natural person, s.29 of the Bankruptcy Act 1966 also enables an overseas bankruptcy official to obtain control, or the proceeds from the sale, of an overseas bankrupt's property situated in Australia : Re Ayres ex parte Evans (1981) 51 FLR 395; Ayres v. Evans (1982) 56 FLR 235. These provisions aim to complement the assistance provisions in the Bankruptcy Act by providing for mutual assistance in 'winding up and other insolvency matters'.

1824. In all external administration matters the Court will be bound to act in aid of, and be auxiliary to, the courts of excluded Territories, and of prescribed countries that have jurisdiction in external administration matters; and may act in aid of, and be auxiliary to, the courts of other countries that have jurisdiction in external administration matters (sub-cl.581(2)). This provision parallels s.29(2) of the Bankruptcy Act 1966.

PART 5.7 - WINDING UP OF BODIES OTHER THAN COMPANIES

1825. Division 6 of Part XII has been modified to reflect the position that the provisions of CA s.470 which provide for grounds of winding up which extend beyond insolvency, are not applicable in their present form to bodies which are not trading and financial corporations, foreign corporations, nor bodies formed within an internal Territory.

1826. Accordingly, two different approaches have been taken to the winding up of such bodies, called Type A bodies and Type B bodies in this Bill. Type A bodies and Type B bodies are defined in Chapter 1.

1827. Relying on the corporations and territories powers in the Constitution for Type A bodies and relying on the insolvency power for Type B bodies, those bodies will be subject to winding up provisions based on CA s.470.

1828. A Type A body is defined in the Chapter 1 to be:

- (a) a foreign company;
- (b) a corporation (other than a company) that consists of more than 5 members; or

- (c) a partnership or unincorporated body that:
 - (i) was formed in a Territory or in an excluded Territory
 - (ii) consists of more than 5 members;but does not include an exempt public authority.

1829. A Type B body is defined to be:

- (a) a body corporate that is incorporated in a State; or
 - (b) a partnership or unincorporated body that was formed in a State or outside Australia and the external Territories; and consisted of more than 5 members.
- but does not include an exempt public authority.

Cl.582 : Application of Part

1830. This Part operates in addition to and not in derogation of other provisions in the Bill or any other Australian law which concerns the winding up of Part 5.7 bodies (sub-cl.582(1)).

1831. Nothing in this Part affects the operation of the Bankruptcy Act 1966 (sub-cl.582(2)).

1832. A Part 5.7 body incorporated outside Australia may be wound up under this Part even though it is being wound up or has been dissolved or has otherwise ceased to exist as a body corporate under or by virtue of the law of the place under which it was incorporated (sub-cl.582(3)).

Cl.583 : Winding up of Type A Bodies

1833. This provision is based on CA s.470 but is limited to Type A bodies.

1834. Subject to Part 5.7, Type A bodies may be wound up under this Chapter where such adaptations to the Chapter as are necessary, including : deeming the principal place of business of the Type A body in Australia to be its registered office; providing that a Type A body cannot be wound up voluntarily and listing the circumstances when winding up may take place are made. The circumstances when winding up may take place are:

- . where the Type A body is unable to pay its debts, has been dissolved, has ceased to carry on business in Australia, or has a place of business in Australia only for the purpose of winding up its affairs.
- . if the Court is of the opinion that it is just and equitable that the Type A body should be wound up; or
- . that the Commission has stated in a report prepared under Part 3, Division 1 of the ASC Bill that in its opinion:
 - (a) the Type A body cannot pay its debts and should be wound up;
 - (b) it is in the interest of the public, of the members or of the creditors, that the Type A body should be wound up.
- . CA sub-para.470(1)(c)(iv) has been replaced by a provision, making it a ground of winding up if an investigation is being or has been carried out under the Act as to whether an offence may have been committed by a

person, and the ASC has formed either of the opinions referred to in para 583(1)(c)(iii) (based on CA s.470(1)(c)(iv) (A) and (B)).

Cl.584 : Winding up Type B bodies

1835. Subject to Part 5.7, Type B bodies may be wound up under this Chapter where such adaptations to the Chapter as are necessary are made.

1836. Adaptations include:

- (a) deeming the principal place of business in Australia of the Type B body to be its registered office;
- (b) a Type B body cannot be wound up voluntarily; and
- (c) listing the circumstances when a Type B body may be wound up to be:
 - (i) if the Type B body is unable to pay its debts.
 - (ii) if the Type B body has been dissolved because it was unable to pay its debts.

Cl.585 : Insolvency of Part 5.7 Body

1837. This clause is based on CA sub-s.470(2).

1838. The cases when a Part 5.7 body is deemed to be unable to pay its debts are listed.

Cl.586 : Contributories in winding up of Part 5.7 body

1839. This clause is based on CA s.471.

1840. In the winding up of a Part 5.7 body every person who is liable to pay (i) any debt or liability of the Part 5.7 body (ii) a sum for the adjustment of members rights or (iii) the costs and expenses of the winding up, will be a contributory. Every contributory will be liable to pay all sums due from him in respect of such a liability.

Cl.587 : Power of Court to stay or restrain proceedings

1841. This clause is based on CA s.472.

1842. The provisions of the Bill relating to staying and restraining actions and other civil proceedings against a company being wound up will extend in the case of a Part 5.7 body to actions and other civil proceedings against the contributory of a company where the application to stay or restrain is by a creditor.

Cl.588 : Outstanding Property of a defunct Part 5.7 body

1843. This clause is based on CA ss.473 and 474.

1844. This clause applies where:

- (a) a Type A body has been dissolved; or
- (b) a Type B body has been dissolved because it was unable to pay its debts;

and there remains certain outstanding property in Australia vested in that body, to which that body was entitled or over which the body had a disposing power (sub-cl.588(1)).

1845. Sub-cl.588(2) lists the persons in whom the estate or interest in that property vests by virtue of this clause. If the body was incorporated in Australia or an excluded Territory, the property vests in the person entitled to the

property under the law of the body's place of origin; if it was not so incorporated the property vests in the ASC.

PART 5.8 - OFFENCES

Cl.589 : Interpretation and application

1846. This part (other than Bill cl.595) will apply to a Division 2, 3 or 4 company, and as it so applies:

- (i) a reference to the company will include a reference to the company as it existed at a time before its registration day (including a time before the commencement of this application clause);
- (ii) a reference to a provision of this Bill will include a reference to a law corresponding to that provision, and
- (iii) a reference to the Commission (the ASC) in relation to a provision of this Bill, will include a reference to the NCSC (Bill sub-cl.589(6)).

1847. This Part will also apply to a Division 2 or 3 or 4 company with such other modifications as the circumstances require (Bill sub-cl.589(6)).

1848. Cls.589 to 593 of the Bill are based on CA.ss.553 to 557 and will deal with offences committed by officers of certain companies. These provisions will apply to a company:

- (a) that has been or is being wound up, including one where the winding up has been stayed or terminated (by an order under Bill cl.482);
- (b) that is or has been under official management;

- (c) whose affairs are being or have been under investigation by the ASC under Division 1 of Part 4 of the ASC Bill or have been at any time under investigation under Part VII of the CA or under a law or a previous law of a State or an Territory that corresponds to that Part of CA (Bill sub-cl.589(2));
- (d) in respect to property of which a receiver, or a receiver and manager, has at any time been appointed;
- (e) that has ceased to carry on business or is unable to pay its debts; or
- (f) that "has entered into a compromise or arrangement with its creditors.

1849. The definitions of "appropriate officer" and "relevant day" are directly related to the companies to which these clauses will apply (Bill cl.589).

Cl.590 : Offences by officers of certain companies

1850. This provision is based on CA s.554.

1851. It will be an offence for a past or present officer of a company to which this provision applies:

- (a) not to disclose, as far as he is capable, to the appropriate officer (ie a liquidator, official manager, receiver, receiver and manager, the ASC or a person administering a compromise or arrangement of all the property of the company or, not to provide information concerning the disposal of property of the company during the past 5 years (except property disposed of in the ordinary course of business);
- (b) not to hand over all the property or books in the person's custody or control to an appropriate officer;

- (c) to conceal or remove property of the company or to conceal a debt due to or by the company;
- (d) fraudulently to part with or alter any of the company's books;
- (e) to obtain on credit by fraud property that the company has not subsequently paid for;
- (f) to pawn, pledge or dispose of property, otherwise than in the ordinary course of business, that the company has obtained on credit and not paid for;
- (g) to make a material omission in a statement or report relating to the affairs of the company;
- (h) to fail to inform the appropriate officer of any knowledge or belief that a false debt has been proved by a person;
- (i) to prevent the production of any of the company's books;
- (j) to make entries in the books of the company showing fictitious transactions, losses or expenses; or
- (k) to make any false representation or to commit any other fraud to obtain the consent of the creditors of the company to an agreement in relation to the company's affairs or to the winding up.

(Bill sub-cl.590(1))

1852. It will also be an offence for a person to receive property of a company knowing it to have been pawned, pledged or disposed of by a person in the circumstances referred to in paragraph (f) above (Bill sub-cl.590(5)).

1853. Moreover, the person who receives or takes the property, regardless of the circumstances in which it was obtained and pledged, pawned or disposed of, will be deemed to hold the property as trustee for the company and will be liable to account to the company for the property (Bill sub-cl.590(6)).

1854. In proceedings pursuant to the above provision, it will only be necessary to establish on the balance of probabilities that the person had the required knowledge (Bill sub-cl.590(7)).

Cl.591 : Liability where proper accounts not kept

1855. This provision is based on CA.s.555.

1856. It will provide that where a company to which Bill cl.589 applies, or which becomes such a company, has failed to keep proper accounting records in contravention of Bill cl.289 during the whole or part of a specified period, a director or officer who fails to take all reasonable steps to secure compliance by the company with that provision will be guilty of an offence.

1857. It will be a defence with regard to such non-compliance if reasonable grounds existed for the belief that a competent and reliable person was handling the discharge of the duty to comply with Bill cl.289.

Cl.592 : Offences relating to incurring of debts or fraudulent conduct

1858. This provision is based on CA.s.556.

1859. It will provide that if a company to which Bill cl.589 applies incurs a debt, and at the time the debt was incurred or immediately before that time, there were reasonable grounds of expectation that the company would be unable to pay its debts, any person who was a director, or who took part in the

management of the company at the time when the debt was incurred, will be guilty of an offence and those persons and the company will be jointly and severally liable to creditors for the payment of the debt.

1860. The question of what constitutes reasonable grounds has been discussed by the High Court in Shapowloff v Dunn (1981) 148 CLR 72 at p.86; (1981)CLC 40-707 at p.33,134.

1861. Bill sub-cl.592(2) will provide that it will be a defence to a charge under Bill sub-cl.592(1) if the defendant proves that the debt was incurred without the person's express or implied authority or consent, or that the defendant did not have reasonable grounds to expect that the company would not be able to pay its debts as and when they became due.

1862. Bill sub-cl.592(3) will provide that a criminal conviction need not be obtained before civil proceedings can be instituted pursuant to Bill sub-cl.592(1). The liability of a person under Bill sub-cl.592(1) will need only to be established on the balance of probabilities (Bill sub-cl.592(4)).

1863. Where a person repays, in accordance with an obligation imposed by Bill sub-cl.592(5) a debt incurred by a company, that repayment will not make the company liable to the person concerned in respect of the amount paid. This provision will have the effect of ensuring that an officer who repays a debt will not be able subsequently to claim the amount paid from the company, and to that extent will restrict the operation of Bill cl.594 (Bill sub-cl.592(5)).

1864. If a company does any act with intent to defraud creditors or any other person, or for any other fraudulent purpose, and the company is or becomes a company as defined in Bill cl.589, any person who is knowingly concerned in the doing of the act with that intent will be guilty of an offence (Bill sub-cl.592(6)).

Cl.593 : Powers of Supreme Court

1865. This clause is based on CA s.557. It will provide that where a person has been convicted of an offence under Bill sub-cl.592(1) or 592(6), the Court will be able to declare that person to be personally liable for certain debts, and will be able to give directions and make orders to enforce such declarations (Bill sub-cl.593(1) and (2)).

1866. Where a company is or has been under official management and Bill cl.592 applies, a member of the company will be able to make an application under Bill para.593(3)(b).

1867. On the hearing of an application under Bill sub-cl.593 the appropriate officer or other applicant will be able to give evidence or call witnesses (Bill sub-cl.593(8)).

Cl.594 : Certain rights not affected

1868. This provision is based on CA s.558.

1869. It will provide that nothing in Bill sub-cl.592(1) or 593(1) or (2) will affect any rights of a person to indemnity, subrogation or contribution, except that Bill sub-cl.592(4) will prevent a director, who becomes personally liable under Bill sub-cl.592(1) to pay a debt incurred by a company, from seeking re-imburement from the company.

Cl.595 : Inducement to be appointed liquidator or official manager

1870. This provision is based on CA s.559.

1871. It will be an offence for a person to offer or give to a member or creditor of a company valuable consideration in order to secure the person's own appointment, or to secure or to prevent the appointment of another person, as the company's

liquidator, provisional liquidator or official manager, or as receiver, or receiver and manager of the company's property or to administer a compromise or arrangement in relation to the company.

Cl.596 : Frauds by officers

1872. This provision is based on CA s.561.

1873. It will provide that a person will be guilty of an offence if the person while an officer of a company:

- (a) fraudulently induces a person to give credit to the company or a related body corporate;
- (b) with intent to defraud the company or a related body corporate or members or creditors of the company or related body corporate, makes a gift or transfer of or charge on, the property of the company or of a related body corporate, or is involved in a levy of execution against such property; or
- (c) with intent to defraud the company or a related body corporate, conceals or removes any such property after or within 2 months before the due date of any unsatisfied judgement for payment of money against the company or related body corporate.

PART 5.9 - MISCELLANEOUS

Cl.597 : Examinations of persons concerned with corporations

1874. This provision is based on CA s.541.

1875. It will deal with the procedure for the examination of persons concerned in the affairs of companies.

1876. The procedures involved in such examinations will be as follows:

- (a) Where it appears to the ASC or a prescribed person (i.e. an official manager or liquidator or other person authorised by the ASC) that a person concerned in the affairs of a company is guilty of fraud, default, negligence, breach of duty or trust in relation to the corporation, or has information in relation to the affairs of a corporation, the ASC will be able to apply to the Court for an order; the Court will be able if it thinks fit, to order that the person attend before the Court to be examined on oath as to the affairs of the company; such an examination will be held in public except in special circumstances; the Court will be able to give directions as to the matters to be inquired into and the procedure to be followed.
- (b) A person who is ordered to attend must not:-
 - (i) fail to attend without reasonable excuse;
 - (ii) fail to take an oath or make an affirmation;
 - (iii) refuse to answer a question;
 - (iv) fail to produce relevant books under his or her control if directed to produce them by the Court;
 - (v) make a statement that is false or misleading in a material particular.
- (c) A person will not be excused from answering a question on the ground that the answer might tend to incriminate him or her, but where the person claims

that this will be the case, the answer will not be admissible in evidence against that person in criminal proceedings other than proceedings under this provision or other proceedings in respect of the falsity of the answer.

- (d) The Court will be able to order the questions put and answers given at the examination to be put in writing and signed by the person; such a signed transcript will be able to be used in evidence in any legal proceedings against the person; an examination under this clause will be able, if the Court so directs, to be held in another court; a person under examination will be able to employ a solicitor and counsel who may ask the person such questions as the Court considers just to allow the person to explain or qualify answers or evidence given by the person; the Court will be able to adjourn the examination from time to time; and the Court will have the right, if it thinks that the order for the examination was unreasonably obtained, to order that the costs be paid by the applicant or by any other person who took part in the examination with the Court's consent.

Cl.598 : Orders against persons concerned with corporations

1877. This provision is based on CA s.542.

1878. It will provide that on the application of the ASC or a prescribed person, where the Court is satisfied that a person is guilty of fraud, negligence, default, breach of trust or breach of duty in relation to a corporation, and the corporation has suffered loss or damage as a result, the Court will be able to make such orders as it thinks appropriate. Such an order may direct the person to pay money or transfer property or pay the amount of any loss or damage to the corporation, but an order will not be able to be made unless

the person has been given an opportunity to be heard and to give evidence. A prescribed person will be defined as meaning an official manager, a liquidator or a person authorised by the ASC.

Cl.599 : Court may disqualify person from being a director, &c.

1879. On an application by the ASC, the Court will be able to make an order prohibiting a person from being a director or promoter of, or from being concerned in or taking part in the management of, a company for a period of up to 5 years, provided that:

- (a) the person was given notice of the application;
- (b) the person was, up to 7 years before the application, a director of, or concerned in the management of, two or more companies to which this provision applies, whether that period commenced before or after the commencement of this Bill; and
- (c) in the case of each such company, the manner in which the affairs of the company had been managed was wholly or partly responsible for that company being wound up, being under official management, ceasing to carry on business, being unable to satisfy a levy of execution, being subject to the appointment of a receiver or of a receiver and manager, or entering into a compromise or arrangement with its creditors.

1880. For the purposes of this provision, a "company" will be defined to mean a corporation or a Part 5.7 body (Bill sub-cl.599(5)).

1881. Bill sub-cl.599(4) will prohibit a person, who is the subject of a Bill clause 599 order (whether made before or after the commencement of this Bill), from being a director or promoter, or being in any way concerned in, or taking part in, the management of a corporation.

Cl.600 : Commission may order persons not to manage corporations

1882. This provision is based on CA s.562A and will enable the ASC to make orders prohibiting certain persons from managing a corporation.

1883. Where the ASC receives a notice from a liquidator, in respect of two or more companies as to their inability to pay their unsecured creditors more than 50 cents in the dollar, and each company has a common director, being a person who was a director of each company at any time during the period of 12 months ending on the date of the commencement of each winding up, the ASC will be able to give notice in writing to such a person requiring that person to show cause why he or she should not be prohibited from managing a corporation.

1884. Unless the ASC is satisfied that such a person should not be prohibited from taking part in the management of a corporation, the ASC will be able to serve on that person a notice in writing to the effect that that person will be prohibited from managing of a corporation for a period of up to 5 years. The person will have a right of appeal to the Court against the ASC's decision.

1885. Where the ASC serves notice under Bill sub-cl.600(2) on a person who was a common director to two or more "relevant companies" (as defined in Bill sub-cl.600(1)) and those companies have at any time been related to each other, the ASC will be required to have regard to that fact in deciding whether or not to serve a notice under Bill sub-cl.600(3) prohibiting that person from managing of a corporation. This provision will be relevant in the case of a failure of a group of companies which is in substance a single entity.

1886. A person who is the subject of a Bill clause 600 notice will be prohibited from being a director or promoter of, or in any way being concerned in or taking part in the management of a corporation, whether the notice was served before or after the commencement of this provision (Bill sub-cl.600(5)).

Cl.601 : Operation of Certain Ordinances

1887. Bill Cl.601 will provide that various provisions of the Bill will have effect subject to, or as modified by certain ACT Ordinances.

CHAPTER 6 - ACQUISITION OF SHARES

Introduction

1888. This Chapter covers the same subject matter as CASA and also incorporates the substantial shareholding provisions from CA Part IV Division 4 and the disclosure of beneficial ownership provisions from CA Part V Division 4.

1889. The basic framework of CASA and its pivotal concepts are retained. Apart from the reform measures specifically adverted to in the clause descriptions, the law, insofar as the Commonwealth's constitutional powers permit, has not been changed. This is so even though, where possible, the provisions have been restructured in a more logical way and again, where possible, the drafting of a number of provisions has been simplified.

1890. Two of the most significant changes made to the CASA provisions are:

- (a) discontinuation of pre-registration vetting by the Commission of Part A statements and offers (see cl.644); and
- (b) discontinuation of the requirement that the Commission consent to profit forecasts and asset revaluations during takeovers.

1891. These reforms will not change the liability of persons issuing Part A statements and offers, profit forecasts and asset revaluations if those statements contain false or misleading material. Nor will the reforms change the role of the Commission in investigating and taking action against such statements. This will be supplemented by a new provision (see cl.995) in the Securities Chapter which will provide civil

remedies for misleading or deceptive conduct in relation to, among other things, takeovers.

1892. The major change to the substantial shareholder provisions is the reduction of the threshold for disclosure from 10% to 5%. In addition, notification will no longer be required to be in the prescribed form.

1893. The major change to the disclosure of beneficial ownership provisions as they appeared in CA is the restriction of the right to serve a "s.261" notice to the ASC.

1894. As a result of the omnibus nature of the Bill, a number of definitions and interpretative provisions previously contained in CASA but which are common to other Chapters of the Bill have been put in the interpretation Chapter. Some of the more important examples include provisions dealing with:

"acquisition" and "disposal" of shares (CASA sub-ss.7(1) and (2) - now in cl.51)

"associated persons" (CASA sub-ss.7(4), (5), (6) and (7) - now dealt with in Division 2 of Part 1.2)

"relevant interest" in shares (CASA s.9 - now dealt with in Division 5 of Part 1.2).

PART 6.1 - INTERPRETATION

Cl.602 : Effect of this Part

1895. The provisions of Part 6.2 are expressed to have effect, unless the contrary intention appears, for the purposes of Chapter 6.

Cl.603 : Definitions

1896. Clause 603 contains definitions for the purposes of this Chapter of the Bill.

1897. Some of the more important definitions are as follows:

appropriate dealer is an expression used in relation to takeover announcements for a listed company (see Part 6.4) and means a member of the Australian Stock Exchange Ltd (ASX) in the case of ASX main board or second board companies, or a member of the company's home stock exchange (see definition below) for other companies.

closing phase is defined to mean the period of five trading days immediately before the end of the period of an offer under a takeover announcement. As with many of the definitions in this clause, this definition does not appear in CASA s.6. It is however included because the period is relevant to a number of provisions and avoids the need to repeat the description each time.

defeating condition is defined to mean certain conditions which prevent or defeat acceptance of a takeover offer under certain conditions. The description of such conditions as defeating conditions replaces their description as "prescribed conditions" under CASA.

full takeover scheme is defined to mean a scheme of offers for all the shares in a particular class of shares. Such schemes are first described at Bill para.635(a) and are then subsequently referred to by use of the definition. This replaces the references in CASA to "takeover schemes under which offers have been made in accordance with para.16(2)(a)(i)" and is intended to remove the need for such lengthy cross referencing.

home stock exchange is given a wider meaning than in CASA to identify home stock exchanges for companies listed on the second board of an Australian Stock Exchange (ASX) subsidiary or on a non-ASX stock exchange. In the case of ASX main board or second board companies, the home exchange is that designated in the ASX or the ASX subsidiary's listing rules. In the case of companies listed on non-ASX exchanges, the home exchange is the exchange itself or, if the company is listed on more than one exchange, the exchange designated by the ASC. This definition is relevant for the purposes of the clauses dealing with takeover announcements for listed companies (see Part 6.4). These provisions now allow for takeover announcements to be made for companies listed on the second boards of ASX subsidiaries and, conceivably, on non-ASX exchanges. (CASA S.17 is currently confined to ASX main board listed companies).

invitation is defined to mean a statement falling short of an offer in respect of shares or rights. The definition is essentially the same as in CASA s.6.

listed company is defined as a company included in the official list of a stock exchange. The substance of the definition is unchanged from CASA.

notifiable securities exchange means a listed company's home stock exchange and all other exchanges (other than

the ASX or its subsidiaries) on which the company is listed. This definition is relevant for the purposes of notifications of acquisitions in companies the subject of a takeover offer or announcement (see Division 2 of Part 6.5)

offer period means the period during which offers under a takeover scheme or takeover announcement remain or would have remained open if not accepted. This definition was not included in CASA and serves to reduce the length of many substantive sections later in the Bill.

prescribed occurrence is a definition consisting of a number of events in relation to a target company or its subsidiary which would make the continuation of the takeover scheme, or continuation of it on the terms offered, unacceptable to the offeror. The definition corresponds with that in CASA s.6.

proportional takeover scheme is a scheme under which each offer relates to the same proportion of shares held by the shareholder. Again this definition will remove the need for lengthy cross-referencing.

relevant official meeting in relation to a takeover announcement for a listed company (see Part 6.4) means an official meeting of the ASX (in relation to a main board or second board company) or of the company's home stock exchange in respect of companies listed on non-ASX exchanges. The meeting must be held on a stock market of the company's home exchange (see above definition) and must be of a type on which the company's shares are usually traded. This definition represents an extension of the corresponding CASA definition which only referred to official meetings of ASX.

stock market is defined to include, in the case of the Australian Stock Exchange Ltd, a stock market of an ASX subsidiary.

takeover announcement and takeover scheme are defined by reference to Part 6.4 and cl.634 respectively.

takeover period is a new definition designed to avoid repetition of description of the period in many substantive provisions. In relation to takeover offers under a takeover scheme (see Part 6.3) the period begins when the Part A statement is served and ends 28 days after that service, or, if offers are despatched before then, at the end of the offer period.

Cl.604 : Acquisition of shares by "special" transaction

1898. This provision is based on CASA sub-s.8(9).

1899. It provides that "special" transactions within the meaning of the listing rules of a stock exchange are not included within the meaning of an acquisition in the ordinary course of trading on a stock market of the exchange.

Cl.605 : Acquisition and disposal of, entitlement to, and relevant interests in, marketable securities other than shares

1900. This clause applies the concepts of acquisition, disposal, entitlement and relevant interest contained in Part 1.2 of Chapter 1 of the Bill to references to marketable securities in this Chapter (for example in the clauses setting out disclosure requirements in Part A, B, C, and D statements - see cl.750).

Cl.606 : Announcement by representative of dealer

1901. This provision is based on CASA sub-s.8(9B).

1902. It provides that an announcement by a stock exchange member's representative under this Chapter is deemed to be that of the member.

Cl.607 : Approved manner of sending documents

1903. Various provisions in this Chapter require documents to be sent in an approved manner (eg cls.636, 679). The approved manner can be as directed or approved by the Commission, or in the manner prescribed in the regulations.

Cl.608 : Doing acts

1904. This interpretative provision was not included in CASA. It is designed to save repetition of the full concept in each relevant provision.

1905. A reference to a person doing any act or thing will include a reference to doing the act or thing together with others.

Cl.609 : Entitlement to shares

1906. This provision is based on CASA sub-ss.7(3) and 7(8). Sub-cl. 609(2) is a new provision.

1907. The shares to which a person is entitled include those in which the person or any associate (provisions dealing with associates are contained in Division 2 of Part 1.2), has a relevant interest. (Provisions dealing with relevant interests are contained in Division 5 of Part 1.2).

1908. An approved nominee body corporate under sub-cl.609(3) will not have a relevant interest held by an associate attributed to it under cl.609 (para.609(1)(b)). In addition, any shares held by an associate of a person (the association arising by virtue of an agreement by the person to acquire

particular shares from the other person) which are not subject to the agreement will not be included in the person's entitlement (sub-cl.609(2)).

1909. Apart from these exceptions, the effect is that the interests of a person and that person's associates must be aggregated when applying provisions of this Chapter which are based on share entitlements, eg:

- (a) in determining whether a contravention of cl.615 has occurred ; and
- (b) for the purposes of the notification requirements (see Div 2 of Part 6.5 and Part 6.7).

Cl.610 : Inadvertance or mistake, etc.

1910. This clause is the same in substance as CASA sub-s.8(11).

1911. Ignorance of the law or mistake of law cannot be used as a defence to prosecutions or actions brought under this Chapter.

Cl.611 : Knowledge of employee or agent imputed to employer or principal

1912. This clause is the same in substance as CASA sub-s.8(10).

1913. In any proceedings arising out of this Chapter, knowledge of a servant or agent is to be imputed to the master or principal.

Cl.612 : Odd lots

1914. This clause is the same in substance as CASA sub-s.8(5).

1915. An "odd lot" is defined as less than a marketable parcel (defined in cl.603)

Cl.613 : Remedial Orders

1916. This clause categorises as "remedial orders" a number of the orders a Court can make under cls.733, 737, 738, 739, 741 and 742. Accordingly, the length of the above clauses is considerably reduced. The orders coming within the definition do not differ in substance from those available under the equivalent sections of CASA.

Cl.614 : Persons to whom Chapter applies

1917. This clause is substantially the same as CASA s.10.

1918. The Chapter applies to all natural persons, whether Australian residents and citizens or not, and to all bodies corporate or unincorporate and extends to all acts done outside Australia.

PART 6.2 - CONTROL OF ACQUISITION OF SHARES

Introduction

1919. Part 6.2 contains the central controls on the acquisition of voting shares.

1920. As in CASA, there is a basic prohibition on any acquisition of voting shares which would increase a holding to more than 20% of the total number of issued shares of a company or which would increase a holding already between 20% and 90%.

1921. There are various exceptions to which the prohibition does not apply:

- (a) acquisitions as a result of a takeover scheme (cl.616);
- (b) acquisitions as a result of a takeover announcement (cl.617);
- (c) "creeping" acquisitions of not more than 3% every 6 months (cl.618);
- (d) acquisitions of shares in small companies or in proprietary companies with the consent of members (sub-cl.619);
- (e) "on market" acquisitions during a takeover (cl.620);
- (f) acquisitions as a result of "pari passu" allotments (cl.621);
- (g) various acquisitions listed in cls.622 to 633.

Each of these clauses is dealt with in turn.

Cl.615 : Restrictions on acquisitions

1922. This clause is based on CASA s.11 and retains the same fundamental concepts and thresholds as in CASA. It differs from CASA, however, in that the prohibition is linked to the acquisition of shares in a "constitutional" corporation, the acquisition of shares by such a corporation or an acquisition of shares which increases such a corporation's "entitlement" (see cl.609) to voting shares.

1923. Clause 615 provides the central control on acquisitions of voting shares which may result in a change of control of a company. This is established by prohibiting certain acquisitions unless made in accordance with this Chapter. The prohibited acquisitions are those which would:

- (a) result in an entitlement to voting shares being increased to more than 20% (or such lesser amount as is prescribed) (paras.615(1)(a), (2)(a) and (3)(a)); or
- (b) increase an existing entitlement to voting shares which is not less than 20% (or such lesser amount as is prescribed) but less than 90% (paras.615(1)(b), (2)(b) and (3)(b)).

1924. 20% has been chosen as the appropriate threshold beyond which the acquisition controls imposed by the Chapter will apply. This figure was considered appropriate for CASA as in most cases it would fall short of the figure that could be regarded as indicating that control resides with that holding. This figure remains appropriate.

1925. The prohibition applies in three ways.

- (a) A person is prohibited from acquiring shares in a "constitutional" corporation if the entitlement of any person (including the first mentioned person) would, after the acquisition, exceed the 20% threshold or increase an existing 20-90% entitlement (sub-cl.615(1)).
- (b) A corporation is prohibited from acquiring shares in a company that is not a corporation if the entitlement of any person would exceed the threshold or increase an existing entitlement of 20-90% (sub-cl.615(2)).
- (c) A person other than a corporation is prohibited from acquiring shares in a company that is not a corporation if the entitlement of a corporation would exceed the threshold or increase an existing 20-90% entitlement (sub-cl.615(3)).

1926. In all cases the prohibition relates in some way to a corporation. The prohibition, although expressed in cl.615 to refer only to an acquisition by a single person or company, does contemplate, by virtue of the interpretative provision in sub-cl.608(2) relating to "doing acts", acquisitions by a person or company together with any other person or persons. Accordingly, the width of the prohibition in this regard does not differ from CASA s.11 which expressly contains the words "alone or together with another person" in the section. If a person is precluded from acquiring shares, an offer or invitation for the shares is also precluded (sub-cl.615(4) - based on CASA sub-s.11(3)).

1927. There will be a defence for inadvertent breaches of the provision (sub-cl.615(5) based on CASA sub-s.11(4)). This

defence is necessary given the extensive controls affecting remote interests.

1928. Acquisitions will remain valid despite a breach of the prohibition (sub-cl.615(6) - based on CASA sub-s.11(5)). A Court order may, however, provide otherwise (see cl.737)

Cl.616 : Acquisitions permitted under takeover scheme

1929. This clause is to the same effect as CASA sub-s.16(1).

1930. One major exception to the prohibition in cl.615 is the acquisition of voting shares as a result of the acceptance of an offer made under a formal takeover scheme. Provisions relating to the nature of a takeover scheme are found in Part 6.3 of this Chapter (cls.634 to 672) and in Part 6.5 (cls.686 to 703).

Cl.617 : Certain acquisitions permitted under takeover announcements

1931. This clause is to the same effect as CASA sub-s.17(1).

1932. Another major exception to the prohibition in cl.615 is the acquisition of shares in a listed company as a result of an offer made under a formal takeover announcement. Provisions relating to the nature of a takeover announcement are found in Part 6.4 of this Chapter (cls.673 to 685) and in Part 6.5 (cls.686-703).

Cl.618 : Acquisition of not more than 3% of voting shares permitted in each 6 months

1933. This provision is to the same effect as CASA s.15.

1934. The prohibition in cl.615 does not apply to "creeping" acquisitions. In any six month period there may be a net increase of 3% of a holding of voting shares (cl.618).

1935. The provision will apply from the time when the entitlement is at least 19%, not 20%, of the total number of voting shares. The use of the figure "19%" avoids a requirement to have exactly 20% of the total number of voting shares.

1936. In calculating the number of voting shares acquired in any six month period, those shares acquired by way of a pari passu allotment under cl.621 are not included.

Cl.619 : Acquisition of shares in small companies or with consent of shareholders

1937. This clause is to the same effect as CASA sub-s.13(1).

1938. Certain acquisitions are permitted in small companies or proprietary companies. This clause applies to acquisitions in a company with not more than fifteen members (joint members are treated as one - sub-cl.619(2)), or a proprietary company with more than fifteen members all of whom consent in writing to the acquisition (sub-cl.619(1)).

Cl.620 : Acquisition on market during takeovers

1939. This clause is to the same effect as CASA sub-ss.13(3), (4) and (5).

1940. The prohibition in cl.615 will not apply to acquisitions by an offeror (but not those of associates unless they participate in the bid) outside a relevant takeover scheme or on-market announcement if those acquisitions are made on a stock exchange:

- (a) by an offeror after service of the Part A statement on the target company and within 28 days after service or, if offers are sent, for as long as the offer remains open (para.620(1)(a) and definition of "takeover period" in cl.603). This offer must be for all of the remaining shares (see definition of "full takeover scheme" in cl.603) and must not contain any "defeating condition" other than those relating to "prescribed occurrences" (see definitions in cl.603) or one approved by the ASC (para.620(1)(b)); or
- (b) by an offeror under a takeover announcement after the announcement, and for as long as the offer remains open (sub-cl.620(2)).

1941. By insisting on an absence of all but protective conditions, token offers made to gain access to stock exchange trading are avoided.

1942. In the case of a takeover scheme, if offers are not sent within 28 days of service of the Part A statement on the target company, then the offeror is not entitled, without the consent of the ASC, to exercise any voting rights attached to shares acquired under sub-cl.620(1) (sub-cl.620(3)). This provision avoids what could be an unfair use of control gained by acquisitions which would otherwise have been in contravention of the prohibition in cl.615. The Court may make various orders, including "remedial orders" in such a case (see cl.739).

1943. The basis for this exception to the prohibition in cl.615 is that failure to provide access to stock exchange trading during the takeover period would place the proposing offeror at an unfair disadvantage to any competitors (who have access to the market during that period) and might enable successful counter-measures, thereby defeating the bid and depriving shareholders of the benefits of the bid.

Cl.621 : Acquisition as a result of pari passu allotments

1944. This clause is to the same effect as CASA s.14.

1945. The prohibition in cl.615 will not apply to an acquisition by a shareholder under a pari passu allotment of shares or by an underwriter or sub-underwriter of the allotment (sub-cl.621(1)), provided that the allotment is to all registered shareholders in proportion to their shareholding (sub-cl.621(2)). The formula in para.621(2)(c) restates the requirement in CASA para.14(2)(c) to assist understanding (the same comment applies in relation to para.621(3)(c)).

1946. Where there are foreign shareholdings, a company is deemed to comply with the provisions of sub-cl.621(2) if, instead of making offers to those foreign shareholders, it allots their respective entitlements to an approved nominee for sale on approved terms, and then pays the proceeds of the sales to the foreign shareholders (sub-cl.621(3)).

Cl.622: Acquisitions pursuant to prospectus

1947. This clause is to the same effect as CASA paras.12(b), (c) and (d).

1948. The prohibition in cl.615 will not apply to acquisitions:

- (a) under a prospectus (lodged in accordance with the requirements in Div.2 of Part 7.12) seeking subscriptions (sub-cl.622(1));
- (b) by a provision in respect of a first (lodged) prospectus issued by a company where the acquirer is a promoter of the prospectus (sub-cl.622(2)); and

- (c) by underwriters or sub-underwriters under agreements disclosed in a (lodged) prospectus seeking subscriptions (sub-cl.622(3)).

Cl.623 : Acquisitions approved by resolution of target company

1949. This clause is based on CASA para.12(g). It does, however, differ from that paragraph by virtue of its express coverage of allotments pursuant to the grant of an option.

1950. The prohibition in cl.615 will not apply to acquisitions under an allotment approved by a majority vote of shareholders other than the acquirer and associates of the acquirer. If the allotment did not involve an option, then the approval must have been obtained prior to the allotment (para.623(1)(a)).

1951. If the allotment involved an option, then either before the option was granted, approval must have been given to the grant or, if the option required, after the option was granted, the company must have agreed to the allotment under the option where the grantee or acquirer of the option or their associates do not vote (para.623(1)(b)).

1952. The prohibition in cl.615 will not apply to acquisitions under a purchase approved by a majority vote of shareholders other than the acquirer and associates of the acquirer (sub-cl.623(2)). If the purchase did not involve an option, then the approval must have been obtained before the agreement to purchase was made or under a conditional agreement prior to the purchase (para.623(2)(a)).

1953. If the purchase was under the exercise of an option, then, either before the option was granted approval must have been given to the grant of the option, or, if the option required, after the option was granted the company must have agreed to the purchase under the option (para.623(2)(b)).

Cl.624 : Allotment by newly formed company

1954. This clause is to the same effect as CASA para.12(e).

1955. The prohibition in cl.615 will not apply to acquisitions by allotments made before it would be necessary to issue a prospectus.

Cl.625 : Acquisition under compromise or arrangement approved by Court

1956. This clause is based on CASA para.12(ea).

1957. The prohibition in cl.615 will not apply to acquisitions under Court approved compromises or arrangements under Part 5.1 of this Bill or a corresponding law, whether or not that compromise or arrangement relates to the shares acquired.

Cl.626 : Acquisition by liquidator

1958. This clause is to the same effect as CASA para.12(f).

1959. The prohibition in cl.615 will not apply to acquisitions under a transfer to a liquidator under cl.507 or under a corresponding law.

Cl.627 : Acquisition by exercise of option or right

1960. This clause is to the same effect as CASA para.(12)(h).

1961. The prohibition in cl.615 will not apply to acquisitions resulting from the exercise of an option or right where the shares could lawfully have been acquired at the time when the option or right was acquired.

Cl.628 : Acquisition of shares as consideration for takeover offer

1962. This clause is to the same effect as CASA para 12(j).

1963. The prohibition in 615 will not apply to acquisitions resulting from the acceptance of shares as consideration for a takeover offer.

Cl.629 : Acquisition by acquiring shares in listed company

1964. This clause derives from CASA para.12(k) but limits it in two important respects indicated below.

1965. The clause covers the situation where the acquisition of shares of one company indirectly gives the offeror an entitlement (see cl.609) to shares of another company by virtue of the first company's holding in that other company, and the indirect entitlement would otherwise be prohibited by cl.615.

1966. The clause precludes the use of investments above the level prescribed in cl.615 as an undesirable defence tactic to a takeover of a listed company.

1967. However, whereas CASA para.12(k) applied to the initial acquisition in listed corporations (defined for the purposes of CASA to include foreign corporations listed in Australia), cl.629 will only apply to acquisition of shares in listed Australian incorporated companies. In addition, CASA para.12(k) allowed the indirect acquisition in the "downstream" company even where the listed corporation may not have held more than 20% of the downstream company (but aggregation of that holding with the acquirer's existing holding in the downstream company brought the holding above the 20% threshold in CASA s.11). Clause 629 will only exempt such downstream acquisitions where the actual holding by the listed company in the downstream company is not less than 20%.

Cl.630 : Acquisition by exercise of power vested in lender

1968. This clause is to the same effect as CASA para.12(1).

1969. The prohibition in cl.615 will not apply to acquisitions pursuant to powers granted in relation to shares in connection with the ordinary course of the business of lending money.

Cl.631 : Acquisition by will or operation of law

1970. This clause is to the same effect as CASA para.12(a).

1971. The prohibition in cl.615 will not apply to acquisitions by will or operation of law.

Cl.632 : Acquisition of forfeited shares

1972. This clause is to the same effect as CASA para.12(m).

1973. The prohibition in cl.615 will not apply to acquisitions of forfeited shares at an auction conducted by a stock exchange.

Cl.633 : Other permitted acquisitions

1974. This clause consolidates CASA paras.12(n) and (o).

1975. The prohibition in cl.615 will not apply to acquisitions made in a prescribed manner or in prescribed circumstances or with the written approval of the ASC.

PART 6.3 - TAKEOVER SCHEMES

Introduction

1976. Part 6.3 of the Bill deals with takeover schemes which, in accordance with cl.616, constitute one of the permissible forms of acquisition of shares which would otherwise be prohibited by cl.615.

Division 1 - Nature of Takeover Offers

1977. Division 1 of Part 6.3 sets out the requirements to bring takeover offers under the description "takeover scheme" for the purposes of cl.616.

Cl.634 : Offers must comply with this Division

1978. This clause is to the same effect as the introductory words to CASA sub-s.16(2).

1979. Under cl.634 offers to acquire shares will only be made under a takeover scheme where they relate to a class of shares and they comply with the following requirements of Division 1.

Cl.635 : Full takeover schemes and proportional takeover schemes

1980. This clause is to the same effect as CASA para.16(2)(a).

1981. Each offer must either relate to all the shares in a class or to a proportion, the same for each offer, of the shares in a class.

Cl.636 : Identical offers

1982. This clause is based on CASA para.16(2)(b).

1983. Offers must be the same. Differences in offers that merely reflect the different number of shares held by offerees or differentials in accrued dividends or in amounts paid up are disregarded. The clause differs from CASA para.16(2)(b) by allowing amounts of unpaid premium as well as unpaid capital in relation to shares to be disregarded. Separate takeover schemes will accordingly not be necessary in such cases. The offeror is required to send an offer in an approved manner (see cl.607) to each holder of shares of the class in respect of which the offer was made (the same requirement as CASA para.16(2)(c)).

Cl.637 : Service of Part A statement and copy of offer on target company

1984. This clause is to the same effect as CASA paras.16(2)(d) and (e).

1985. The offeror must, between 14 and 28 days before the offers are sent, serve on the target company a Part A statement (the requirements of which are set out in cl.750) signed and endorsed in accordance with the requirements of para.637(1)(a) and a copy of one of the proposed offers (certain details may be omitted e.g. name and address of the offeree - see para.637(1)(b)).

1986. The offeror must on the same day lodge with the ASC a notice stating that the Part A statement has been served and, if the target company is a listed company, serve on each notifiable securities exchange (see definition in cl.603) a copy of each of the documents served on the company. The ASC will already have copies of these documents (see cl.644).

Cl.638 : Contents of offers

1987. This clause is based on CASA para.16(2)(f).

1988. The required contents of the offer have not been altered and remain the same as those in the above paragraph. Each offer must:

- be in writing (sub-cl.638(1));
- have the same date being no earlier than 3 days before the offer is sent and no later than that date (sub-cl.638(2));
- stay open for a period of between 1 and 6 months unless withdrawn (sub-cl.638(3));
- specify the total number of shares in the class and the number held by the offeror prior to the offer (sub-cl.638(4));
- if subject to a "defeating condition" (see definition in cl.603), specify a date during the second last week of the offer as the date for publication of the notice required by sub-cl.663(4) - sub-cl.638(5));
- set out how the obligations of the offeror are to be satisfied (sub-cl.638(6)); and
- set out that the consideration is to be paid by the offeror within 30 days of the offer being accepted or becoming unconditional but in any event no later than 21 days after the end of the offer period (sub-cl.638(7)).

Cl.639 ; Part A statement, and Part B statement if available, to accompany offers

1989. This clause is to the same effect as CASA sub-para.16(2)(f)(viii).

1990. Each offer is to be accompanied by a Part A statement and, if the target company has, within 14 days of receiving the Part A statement, given to the offeror a Part B statement, a copy of the Part B statement and a copy of its accompanying reports.

Cl.640 : Service on Commission of copies of documents accompanying offers

1991. This is a new provision that requires the offeror to lodge with the ASC, no later than the day the offers are sent, a copy of every document that accompanied the offer other than a document previously lodged with the ASC. There is no requirement for such material to be registered by the ASC (only the Part A statement and the offer itself are required to be registered - see cl.644). An example of such a document is a "Chairman's letter".

Cl.641 : Offer Price

1992. This clause consolidates the requirements of CASA para.16(2)(g) and sub-ss.16(2AA) and (2AB).

1993. The offer price must not, when made in cash terms, be less than the highest price paid by the offeror during the 4 months leading up to the dispatch of offers. However, if during that period the target company had taken or announced that it proposed to take action involving an allotment of shares, a granting of share options, an issuing of convertible notes or a declaration of a dividend, the ASC may (under sub-cl.641(3)), upon application by the offeror, approve a specified amount as the offer price. Variations to specified prices in accordance with the terms of agreements to purchase shares shall be disregarded for the purpose of determining the agreed purchase price of shares under sub-cl.641(1) (sub-cl.641(2)).

Cl.642 : Offers not to contain certain conditions

1994. Subject to the clarifying measures mentioned below, this clause incorporates the requirements of CASA paras.16(2)(h) and (2)(j).

1995. A takeover offer is not to be made subject to a maximum acceptance condition ie a condition that allows an offer to lapse if more than a specified number or percentage of acceptances are received. To make it clear that minimum acceptance conditions are permitted in takeover offers and are not unintentionally prohibited by a possible interpretation of the current section's wording, sub-cl.642(4) and (5) specifically exclude such conditions from the operation of sub-cl.642(1) and (2).

1996. Sub-cl.642(6) serves the same purpose as CASA sub-s.16(2AE) in declaring the identified Companies and Securities Law Review Committee document as a relevant document for interpretation purposes.

Division 2 - Part A Statements and Takeover OffersCl.643 : Additional matter in Part A statement

1997. This clause is to the same effect as CASA sub-s.16(3).

1998. Such additional information as the offeror thinks fit can be included in a Part A statement (i.e. in addition to that required by cl.750) provided it is not false in a material particular or materially misleading. This provision is in line with cl.704 dealing with liability for mis-statements.

1999. The requirements of CASA para.16(2A)(a) relating to additional matters and reports to be set out in Part A statements in certain prescribed circumstances are now

contained in cl.750 (Part A, cl.18). The requirements of CASA para.16(2A)(b) have not been included in the Bill because they are not consistent with the reform to discontinue detailed pre-registration vetting of Part A statements by the ASC.

Cl.644 : Registration of Part A statements and offers

2000. This clause is based on CASA s.18 but differs in the following significant respects.

2001. CASA required a copy of the Part A statement and of one of the offers to which it relates to be registered by the ASC not later than 21 days before the Part A statement is served on the target company. This requirement is preserved in sub-cl.644(1) but the reference to Part A statement has been amended to refer to a "statement that purports to be a Part A statement". This removes an existing anomaly in the legislation in that a Part A statement was defined (and still is - cl.603) as a written statement that complies with the requirements of the legislation. Accordingly, on a strict literal interpretation, any of the provisions operating on "Part A statements" would not apply in the case of a defective Part A statement. Such an interpretation was rejected in Target Petroleum NL v. Pretroz NL, (1987) 5 ACLC, 687, but the opportunity has been taken to put the matter beyond doubt. This approach also coincides with the treatment of Part A statements in CASA sub-s.44(1).

2002. Where the statement appears to have been duly signed by the offeror and, where reports are included in the statement, notices are signed by the makers of reports consenting to their inclusion in the form and context in which they appear in the statement, the ASC is required to register the copies (sub-cl.644(2)). If these formal requirements are not satisfied, the ASC must refuse registration (sub-cl.644(3)). If by 5.00pm on the day after the copies were lodged the ASC has neither registered nor refused registration the copies shall be deemed to be registered (sub-cl.644(4)).

2003. These provisions reflect a different approach to registration of Part A statements. Under the CASA regime the NCSC was not permitted to register the copies unless it was satisfied that the documents complied with the requirements of the Act and did not contain any false or misleading material. Such a requirement required detailed pre-registration vetting of Part A statements and has proved to be a resource intensive exercise and, in contested bids, has often given rise to litigation against the Commission.

2004. Persons responsible for omissions or false or misleading statements in Part A statements and other offer documents will still be subject to criminal and civil liability (see cl.704). These sanctions and remedies, in conjunction with the general prohibition on misleading or deceptive conduct in cl.995 of the Securities Chapter, are considered sufficient safeguards.

2005. As in CASA sub-s.18(3), an unregistered statement served on a target company shall be deemed not to have been served (sub-cl.644(5)).

Cl.645 : Extension of time for paying consideration

2006. This clause is to the same effect as CASA s.19.

2007. The offeror will continue to be able to apply to the ASC for an extension of time for payment of the consideration which is required by the terms of the offer to be paid (see sub-cl.638(7) which provides a basic maximum of 30 days after acceptance). If the ASC fixes a later time for payment the offeror must ensure that payment is made by that time (sub-cl.645(3)). Any application for an extension must be made before the time specified in the offer has expired.

Cl.646 : Notice of offers to be served

2008. This clause is to the same effect as CASA s.24.

2009. Where takeover offers are sent, the offeror must notify the target company accordingly and, if it is a listed company, its home stock exchange on the day on which the last offer is sent. A copy of that notice must be lodged with the ASC (para.646(1)(c)). The notice and the copy lodged with the ASC must be accompanied by a copy of one of the offers and a copy of every document that accompanied that offer (sub-cl.646(2)).

Division 3 - Part B Statements

Cl.647 : Part B statement

2010. This clause is to the same effect as CASA s.22.

2011. The target company must respond to a bid under a takeover scheme by preparing a Part B statement which complies with Part B of cl.750. The Part B statement must be given to the offeror:

- either within 14 days of receiving the Part A statement (in which case the offeror has to send copies of the Part B statement out with its offer documents - see cl.639).
- or within 14 days after the day it was advised under cl.646 that the last offer has been sent (in which case the target company must copy the Part B statement to all offeree shareholders).

2012. The details required for a Part B statement are set out in Part B of cl.750.

2013. In addition, the Part B statement:

- (a) must be signed as prescribed (sub-cl.647(2));

- (b) must not refer to an expert's report unless the report is set out in the statement and the expert has given his consent for the inclusion of the report (sub-cl.647(3));
- (c) must be copied to the ASC and to each "notifiable securities exchange" of the company along with a copy of every accompanying document. In addition, the company making the Part B must lodge with the ASC a notice of consent by the author(s) of any accompanying report (sub-cl.647(4)). (Note that the provision refers to a statement that purports to be a Part B statement);
- (d) may contain additional material not required in cl.750 provided it is not false or misleading (sub-cl.647(5)).

2014. (The provisions in cl.647 are similar to those in cl.683 of the Bill which deals with the Part D statement that a target company has to prepare after it has received a Part C statement from an on-market offeror).

Cl.648 : Offeror connected with target company

2015. This clause is the same effect as CASA s.23 (except sub-s.23(2A) discussed below).

2016. Where an offeror holds 30% or more of, or of a class of, voting shares in a target company or the offeror is a director of the target or the offeror and target company have common directors, the Part B statement must be accompanied by a report on the fairness and reasonableness of the offer by an independent expert (sub-cl.648(1)). Particulars must be given in the report of any relationships or interests that might affect the expert's ability to give an unbiased opinion (sub-cl.648(2)). To prevent selective use of reports each

report must be attached to the Part B statement where the target company obtains more than one report (sub-cl.648(3)).

2017. The requirements of CASA sub-s.23(2A) are not contained in the Bill because they are not consistent with the reform to remove the necessity for Commission consent to a profit forecast or asset revaluation (the requirements of CASA ss.37 and 38 are not included in the Bill).

Division 4 - Effect of Offers in Special Circumstances

Cl.649 : Acquisition by third party of shares subject to takeover offer

2018. This clause is to the same effect as CASA s.25.

2019. Takeover offers under full or proportional takeover schemes are extended to all persons registered or entitled to be registered during the offer period as the holder of shares to which the offer relates. This covers the situation where third parties buy shares during a bid or have previously purchased shares but are not yet on the register. The offeror is taken to have made a corresponding offer to the third parties in relation to the purchased shares and a corresponding offer to the original shareholder in relation to any remaining shares that were not sold. The original offers are deemed to have been withdrawn.

Cl.650 : Acceptance of takeover offers by trustees, nominees etc.

2020. Except in relation to the reform noted below, this clause is to the same effect as CASA s.25A.

2021. Amendments were made to CASA in 1986 to ensure that a nominee or trustee could accept or reject a takeover offer under both full and proportional takeover schemes according to

the differing interests of each of the underlying beneficial shareholders. Previously a takeover offer made to a nominee or trustee could only be accepted in relation to the whole of the nominee's or trustee's holding. An offer to a nominee or trustee is deemed by CASA s.25A to be a separate offer in respect of each distinct part of the shareholding. While this provision has been restructured for the purposes of simplification and clarification the effect of cl.650 remains substantially the same.

2022. A trustee will continue to have the capacity to accept offers on behalf of different beneficiaries provided he gives the offeror notice that the shares he holds consist of distinct portions and acceptances relate to a specified number of shares for each portion (sub-cl.650(3)). A trustee will contravene the section if he accepts an offer in relation to shares that do not constitute a distinct portion but this will not affect the validity of the acceptances (sub-cl.650(4)).

2023. An extension has, however, been made to the CASA s.25A provisions. Under that section, a trustee or nominee only has one opportunity in the takeover period to notify the offeror of aggregate acceptances by the beneficial holders. Clause 650 allows a trustee or nominee etc. to accept progressively through the offer period in respect of those distinct portions for which he has instructions. In other words, it is not a one-off opportunity to accept in aggregate.

Cl.651 : Avoidance of odd lots where takeover offer relates to proportion of offeree's shares

2024. This clause is to the same effect as CASA s.25B.

2025. The provision in CASA was introduced to ensure that the acceptance of a proportional takeover offer did not leave a shareholder holding an odd lot of shares. This was achieved

by deeming the percentage specified in the offer to include any odd lot. Clause 651 retains this concept.

Cl.652 : Offeror not entitled to bid for balance where takeover offer relates to proportion of offeree's shares.

2026. This clause is to the same effect as CASA s.25C.

2027. It makes clear that where any offer had been made for a particular proportion of shares held by offerees any further offers for any of the remaining shares by the offeror would be deemed to have been made otherwise than under a takeover scheme.

Division 5 - Withdrawal and Variation of Offers

Cl.653 : Withdrawal of offers

2028. This clause is to the same effect as CASA s.21.

2029. A takeover offer may only be withdrawn with the written consent of the Commission which may be made conditional. This provision guards against discrimination and unfairness associated with withdrawals of offers.

Cl.654 : Circumstances in which offers may be varied.

2030. This clause is to the same effect as CASA sub-ss.27(1), (2) and (3).

2031. An offer can only be varied in accordance with the requirements of the Division, the regulations or with the written consent of, and subject to conditions imposed by, the Commission (sub-cl.654(1)). Variations to one offer under a takeover scheme have to be repeated in every other offer under the scheme (sub-cl.654(2)).

Cl.655 : Variation of consideration

2032. This clause is to the same effect as CASA sub-ss.27(4), (5), (6) and (7).

2033. Consideration specified in an offer may only be varied in accordance with cl.655, which generally ensures that any variation does not disadvantage offerees. The consideration offered may be increased, or a cash sum may be included as an alternative to non-cash consideration previously offered (sub-cl.655(1) and (3)). If consideration in an offer is so varied, the benefits are also to be given to offerees who accepted prior to the variation being made (sub-cl.655(2) and (4)).

Cl.656 : Variation of offer period

2034. This clause is to the same effect as CASA sub-ss.27(8), (8A) and (9).

2035. An offer may be extended by an offeror before the end of an offer period or, if the offer is subject to a "defeating condition" as defined in cl.603, before the publication of a notice under sub-cl.663(4) (sub-cl.656(1)). The offer period including extensions cannot, however, exceed 12 months. A condition specified by the Commission in a consent under cl.653 overrides this provision (sub-cl.656(2)).

Cl.657 : Manner of varying offers

2036. Except in regard to the change effected by sub-cl.657(3), this clause is to the same effect as CASA sub-ss.27(10) and (11).

2037. Sub-clause 657(1) sets out the requirements for the notice of variation to be served on the target company by the offeror when an offer is varied. Each offeree, subject to

sub-cl.657(3) discussed below, must receive a copy of the notice. Where a variation results in an offer exceeding 6 months, the offeror must within the sixth month of the offer serve a notice on the target company indicating any changes necessary to update the information included in the original Part A statement and send a copy of the notice to each offeree and to each "notifiable securities exchange" (see cl.603) of the target (sub-cl.657(2)).

2038. Sub-clause 657(3) provides that notices under 627C(1) and (2) need not be served on those persons who have accepted an offer if the variation relates only to an extension of the offer period and the offers are not subject to a defeating condition when notices are served on the target company i.e. where binding contracts have already resulted. This is a new provision designed to remove an unnecessary requirement.

Cl.658: Effect of variation on offeree who has accepted offer

2039. This clause is to the same effect as CASA sub-s.27(12).

2040. An offeree, who has accepted a takeover offer subject to a defeating condition, may withdraw his acceptance if notified of a variation which allows the offeror to defer payment by more than one month. Para 658(a) prescribes the method of withdrawal by the offeree (notice to the offeror and return of consideration). Upon such withdrawal any documents supplied by the offeree as a result of the previous acceptance of the offer should be returned (para.658(b)).

Cl.659: Registration of notices of variation

2041. Subject to the reform identified below, this clause is based on CASA sub-ss.27(13), (14) and (15).

2042. Notices under cl.657 have to be registered by the ASC before they can be served by an offeror (sub-cl.659(1)) and

the requirements for registration are set out in sub-cl.659(2). Under CASA sub-s.24(14) the NCSC was required, before it could register a variation, to be satisfied that the variation did not contain false or misleading material. The ASC, under sub-cl.659(2), will only need to be satisfied that, in the case of variation in the consideration, the variation is permitted by the section and, in all cases of variation, the notice is properly signed. These changes are consistent with the reform in cl.644 which no longer requires the ASC to engage in detailed vetting of Part A statements before registration.

2043. A statement is to appear on notices under cl.657 that a copy has been registered by the Commission on a specified date and that the Commission takes no responsibility as to the contents of the notice (sub-cl.659(3)).

Cl.660: Acquisition not affected by contravention

2044. This clause is to the same effect as CASA sub-s.27(16).

2045. An acquisition of shares resulting from acceptance of a takeover offer is not invalidated where the offeror has purported to vary the takeover offer but a contravention has occurred.

Cl.661: Section 645 not affected

2046. This clause is to the same effect as CASA sub-s.27(17).

2047. The operation of s.645 is not affected by any provision in Division 5.

Division 6 - Conditional Offers and ContractsCl.662: Takeover offers not to be subject to certain terms or conditions.

2048. Sub-cl. 662(1), (3), (4), (5) and (6) are to the same effect as CASA s.20. Subject to the reform identified below, sub-cl.662(2) is based on CASA sub-s.18(2A).

2049. An offeror is prohibited from making a takeover offer that requires the offeree's approval to a payment to an executive of the target or related company as compensation for loss of office and any such requirement is void (sub-cl.662(1)).

2050. Offerors must not include defeating conditions in takeover offers where their fulfilment depends on an opinion, belief or other state of mind of the offeror or an associate or whether an event, within the sole control of the offeror or an associate, happens. Such conditions are void (sub-cl.662(2)). As noted, this sub-clause is based on CASA sub-s.18(2A). However, whereas that provision provided the NCSC with a discretion to refuse registration, sub-cl.662(2) prohibits and voids the offending conditions. This reform is consistent with the reform in cl.644 which no longer requires the Commission to engage in detailed pre-registration vetting of Part A statements and offers.

2051. Minimum acceptance conditions are void unless the particular number or percentage of shares or offers is specified in the offer (sub-cl.662(3) and (5)) and provisions that allow that number or percentage to be varied are void (sub-cl.662(6)).

Cl.663: Declaration where takeover offers are conditional

2052. This clause is to the same effect as CASA s.28.

2053. An offeror cannot declare that a takeover offer subject to a defeating condition is free of the condition unless it is done in accordance with cl.663. It may be done not less than 7 days before the last day of the offer period (where such a term is contained in the offer) provided that, at the same time, all other offers under the takeover scheme are freed from the condition (sub-cl.663(2)). If all offers are freed from a defeating condition the offeror must as soon as practicable publish this fact in a notice that must also specify the offeror's share entitlement in the target company (sub-cl.663(3)). The offeror must also publish, within the second last week of an offer period, a notice indicating whether the offer was free from the condition and whether the condition had at that time been fulfilled (sub-cl.663(4) and (5)), and if so, the offeror's share entitlement should be included in the notice (sub-cl.663(6)).

2054. If, by the end of the offer period, the offeror has not declared the offer unconditional, the offer has not otherwise become free from the condition (see cl.664(2)) and the condition has not been fulfilled, then all acceptances are void (sub-cl.663(9)).

2055. Notices must appear in a newspaper circulating in each State or Territory where the target company is listed (sub-cl.663(7)) and a copy of the notice must be lodged with the ASC and the company's home stock exchange when the notice is lodged for publication (sub-cl.663(8)).

Division 7 - Effect of Outside Acquisitions

Cl.664: Effect on conditional offers

2056. This clause is to the same effect as CASA s.30.

2057. While an offeror who has made a takeover offer is entitled to buy shares outside his offer (i.e. on-market under

cl.620), if his takeover offer has a minimum acceptance condition and he acquires outside his offer more than 20% of the voting shares in the company to which he was not entitled, the offer is free from that minimum acceptance condition (sub-cl.664(1) and (2)). If the purchases outside the offer are not sufficient to make the offers unconditional (i.e. they don't exceed 20%), they will stand to be counted in determining whether the minimum acceptance condition is fulfilled (sub-cl.664(3)) - though not for the purpose of determining the number of offers that have been accepted (sub-cl.664(4)).

2058. The purpose of the remaining provisions in Division 7 are to ensure that an offeror must pay all offerees, including those who have already accepted at the lower price in the offer, the highest price that he has paid for a permitted share acquisition outside the takeover scheme. This means that persons who accept under a takeover offer get the same benefits as those who sell direct or through the market to the offeror while the offer is open. As associates are not given the right to purchase on the market under cl.620 in circumstances that would otherwise be a breach of cl.615, it is not considered reasonable that the price they pay should affect the price that the offeror is obliged to pay under Division 7.

Cl.665: Effect on offers

2059. This clause is to the same effect as CASA sub-s.31(1).

2060. Where an offer is for cash (alone or as one alternative) and the offeror purchases for cash outside his offer, the offer price is deemed to be varied to the highest price so paid.

Cl.666: Effect on contracts

2061. This clause is to the same effect as CASA sub-s.31(2).

2062. Where an offeree has already accepted the offer, the contract is deemed to be varied so that the offeree is entitled to receive the highest amount paid by the offeror and is entitled to receive immediately the additional consideration resulting from the variation.

Cl.667: Notice to offerees where cash not the sole consideration

2063. This clause is to the same effect as CASA sub-ss.31(3) and (5).

2064. Where the consideration under an offer is not solely cash, the offeror has 14 days after the offer period to notify the offeree of the highest cash price paid outside the offer and that the offeree has the option of accepting, with 28 days, that highest cash price paid or the original consideration under the offer. If the offeree elects to accept the cash offer, he is entitled to receive that amount immediately, or if he has already received the original non-cash consideration, immediately on returning that consideration to the offeror (sub-cl.667(1) and (2)). Where an offeree returns to a company any certificates and any necessary documents of transfer in respect of shares allotted by that company as consideration, the company may cancel the allotment of those shares (sub-cl.667(3)).

Cl.668: Notice to offerees where cash consideration to constitute a loan

2065. This clause is to the same effect as CASA sub-s.31(4).

2066. Similar option provisions to cl.667 apply where offers involving solely a cash sum have been accepted and it is a term of the contract that the offeree use all or part of the cash consideration as a deposit or a loan. The offeree, if he so elects, is entitled to receive the substituted higher amount immediately (which is not subject to the above term) but is required as soon as practicable to return to the offeror any received consideration and any documents evidencing payment of a deposit or loan. Any debts due to the offeree arising from such a deposit or loan are discharged upon payment of the substituted amount to the offeree (sub-cl.667(2)).

Division 8 - Takeover Approval Conditions

2067. Amendments to CASA were made in 1986 (ss.31A and 31B were added) to enable a company to have provisions in its constituent documents permitting it to refuse to register shares acquired under a proportional takeover scheme unless a resolution has been passed by the shareholders. These provisions are also contained in the Bill.

Cl.669: Definitions

2068. This clause contains the same definitions of "relevant day" and "takeover approval provisions" as are in CASA sub-s.31A(1). The definition of "renew" has been adopted from CASA sub-s.31B(1).

Cl.670: Effect of Division

2069. This clause is to the same effect as CASA sub-s.31A(8).

2070. Division 7 applies regardless of any business or listing rules of a securities exchange or anything contained in the constituent documents of a company or in any agreement.

Cl.671: Constitution may contain takeover approval provisions

2071. This clause is to the same effect as CASA s.31A(2)-(7).

2072. The constitution of a company may contain provisions prohibiting registration of a transfer resulting from the acceptance of an offer under a proportional takeover scheme unless and until an approving resolution, on which the offeror or his associates are not entitled to vote, is passed (sub-cl.671(1)).

2073. Other features of cl.671 are as follows:

- (a) Unless the company's constitution otherwise provides, the laws and articles etc. that apply in relation to a general meeting of the company will apply to a meeting of shareholders convened to vote on the resolution (sub-cl.671(2)).
- (b) Where the company's constitution contains takeover approval provisions, the directors are obliged to hold a meeting or postal ballot to vote on the partial bid at least 14 days before the close of the offer period (sub-cl.671(3)).
- (c) Where the company's constituent documents contain takeover approval provisions and no resolution to approve a partial bid has been voted on 14 days before the close of the offer period, a resolution approving the bid will be deemed to have been passed (sub-cl.671(5)).
- (d) Where a resolution is rejected, all offers will be deemed to be withdrawn and the offeror will be required to rescind any accepted offers (sub-cl.671(6)).

Cl.672 : Provisions relating to the inclusion, effect and renewal of takeover approval provisions

2074. This clause is to the same effect as CASA S.31B.

2075. Takeover approval provisions referred to in cl.671 will cease to have effect after 3 years or such lesser time as the company's constitution provides (sub-cl.672(1)).

2076. Other features of cl.672 are as follows:

- (a) Takeover approval provisions will be able to be renewed (sub-cl.672(2)).
- (b) A company will be required to provide an explanatory statement (setting out various matters including the effects, advantages and disadvantages of the provisions) where a resolution to include a takeover approval provision in the company's constituent documents is despatched to shareholders (sub-cl.672(3)).
- (c) 10% of the shareholders will be able to apply to the Court to have a takeover approval provision set aside (sub-cl.672(4) and (5)).
- (d) The Court has a discretion to set aside the takeover approval provision (sub-cl.672(6)).

PART 6.4 - TAKEOVER ANNOUNCEMENTSIntroduction

2077. The second form of takeover permitted by this Chapter is the acquisition of shares in a listed company through announcement to the home exchange of the target company of an unconditional undertaking to stand in the market during a minimum period of one month and to accept all shares tendered at or above the specified minimum cash price.

Division 1 - Offers Constituted by AnnouncementCl.673 : Nature of offers

2078. This clause is to the same effect as CASA sub-s.17(1).

2079. This clause describes the nature of the manner of making takeover announcements under the cl.617 exemption to the prohibition in cl.615. The offers must be made in accordance with the Division, and all requirements of the Division complied with.

Cl.674 : Making of announcement

2080. This clause, except in relation to the reform identified below, is to the same effect as CASA sub-ss.17(2) and (3).

2081. A takeover announcement is made on the offeror's behalf by an "appropriate dealer" (see cl.603) at a "relevant official meeting" of the exchange (also defined in cl.603). Under CASA, takeover announcements could only be made in respect of companies listed on the main board of the Australian Stock Exchange Ltd. Clause 674, by virtue of the definitions of "listed company", "home stock exchange" and "relevant official meeting" in cl.603, extends the takeover announcement alternative to companies listed on the second

board of ASX Ltd subsidiary exchanges and to companies included in the official list of other exchanges.

2082. The announcement provides that the dealer, during the trading period (a minimum of 1 month) will acquire all shares in the offer class at the price specified in the announcement. The trading period commences 14 days after the announcement (sub-cl.674(1)).

2083. Separate announcements are required for each class of share.

2084. Except with the consent of the ASC, this on-market alternative will not be available where the offeror holds 30% or more of the target company. This avoids collusion from common shareholdings (sub-cl.674(2)).

Cl.675E : Acceptance of offers

2085. This clause is to the same effect as CASA sub-ss.17(2A) and 17(5).

2086. A holder of shares will be able to accept an offer under a takeover announcement at a "relevant official meeting" of the exchange or by notice served on the exchange itself (sub-cl.675(1)). This latter alternative ensures that the unconditional nature of the offer is not prejudiced by such events as a dealer not appearing on the floor or suspension of trading in the shares.

2087. The stock exchange must notify the dealer of the acceptances as soon as practicable (sub-cl.675(2)).

Cl.676 : Price to be specified

2088. This clause is to the same effect as CASA sub-ss.17(6) and 17(7).

2089. The price specified in the announcement must not be less than the highest price paid by the offeror (or an associate) in the four months preceding the announcement (sub-cl.676(1)). The price originally specified in a pre-bid agreement is the price payable for the shares for the purposes of sub-cl.676(1), regardless of any variation subsequent to the making of the agreement (sub-cl.676(2)).

Cl.677 : Acquisitions at higher price

2090. This clause is to the same effect as CASA sub-ss.17(8) and (9).

2091. If the offeror has acquired some shares on a stock exchange outside the takeover announcement under cl.620 at a price higher than the announced price, then the higher price paid will be deemed to be the price specified in the announcement for the purposes of any offer that is accepted after the acquisition takes place (sub-cl.677(2)).

2092. The offeror cannot acquire shares at a higher price during the last five trading days that the offer remains open (sub-cl.677(3)). This provision is designed to overcome the problems that could arise from a last minute price rise which, because of the time constraint, would be available to only a limited number of offerees. However, if a rival bid is made in this period the offeror will be able to extend the offer period, and so pay a price higher than that of the rival, to the benefit of the shareholders (see sub-cl.681(3)).

Cl.678 : Offer period

2093. This clause is to the same effect as CASA sub-s.17(4).

2094. There is no right of withdrawal on grounds other than those set out in cl.684. All shares tendered during the trading period of one month or the extended period under sub-cl.681(3) must be accepted.

Cl.679 : Part C statements

2095. This clause is to the same effect as CASA sub-ss.17(10) and (17).

2096. On the day of the announcement, the offeror must provide the target company with a Part C statement and, the target company's home stock exchange and the ASC with a copy of that statement. The Part C statement must be signed in the prescribed manner. This statement contains information similar to that required to be provided in a Part A statement involving cash consideration. Within fourteen days of the announcement copies of the statement must be sent in the approved manner to each shareholder (sub-cl.679(1)).

2097. Information additional to that required in Part C of cl.750 may be included in the statement provided it is not false or misleading (sub-cl.679(2)).

Cl.680 : Service on Commission of copies of documents accompanying offers

2098. This is an additional provision to those contained in CASA.

2099. It provides that all documents sent to shareholders with a Part C statement should be lodged with the ASC. This ensures the ASC is aware of all information given and statements made to shareholders.

Cl.681 - Variation of offers

2100. Subject to the reform identified below in sub-cl.681(3), this clause is to the same effect as CASA sub-ss.17(11), (12) and (13).

2101. The announcement price may be reduced with the consent of the Commission (rather than a fresh offer being made) where the target company allots shares, grants options, issues convertible notes or declares a dividend (sub-cl.681(1)). Any reduced price allowed is deemed to be the price specified in the announcement unless or until the price is increased (sub-cl.681(2)).

2102. The trading period can be extended for a period of up to one month at a time, but so that the total period for which the offer remains open does not exceed six months (sub-cl.681(3)). Whereas CASA did not allow an offeror to increase the price or extend the takeover period during the last 5 trading days of the offer period, para.681(3)(b) provides that an offeror can extend the offer period during the last 5 days ("the closing phase" - see cl.603) if a counter bid is made. This enables the offeror to effectively respond to the counter bid.

2103. Where the price is reduced or the period varied, the offeror must notify the home stock exchange, the company and the Commission (sub-cl.681(4)).

Cl.682 : Liability of dealers

2104. This clause is to the same effect as CASA sub-ss.17(15) and (16).

2105. The obligation pursuant to the takeover announcement to acquire shares in respect of which acceptances are received is placed on the dealer actually making the announcement (the dealer is deemed to have contracted as principal with the acceptors). This clause does not, however, affect the rights or obligations as between the dealer and the offeror.

2106. Where the dealer is a member of a dealing partnership, the obligations placed on the dealer are also deemed to be the

obligations of the other members of the partnership (sub-cl.682(2)).

Division 2 - Response of Target Company

Cl.683 : Part D statement

2107. This clause is to the same affect as CASA s.32.

2108. Where a target company has received a Part C statement, it must serve on its home stock exchange a Part D statement within 14 days of the making of the takeover announcement (sub-cl.683(1)). The detailed requirements for a Part D statement are set out in Part D of cl.750.

2109. In addition, the Part D statement:

- (a) must be signed in the prescribed manner (sub-cl.683(2));
- (b) must not refer to an expert's report unless the report is set out in the statement and the expert has given his consent for the inclusion of the report (sub-cl.683(3));
- (c) must be copied, together with any other document accompanying it, to the ASC and the offeror (sub-cl.683(4)); and
- (d) may contain additional material to that required by cl.750 provided it is not false or misleading (sub-cl.683(5)).

Division 3 - Withdrawal and Suspension of Offers

Cl.684 : Withdrawal of offers

2110. This clause is to the same effect as CASA s.33.

2111. Clause 684 seeks to ensure that on-market offerors are not unduly disadvantaged because of the unconditional nature of the offer to stand in the market for a fixed period by permitting the withdrawal of the on-market offer (in respect of such of the offers as have not at that stage been accepted) in the following circumstances:

- (a) if certain "prescribed occurrences" (defined in cl.603) take place in relation to the target, or one of its subsidiaries, which would make continuation of the takeover intolerable for the on-market offeror. Withdrawal on this basis is not however possible once the offeror has attained a majority (50%) shareholding in the target company (sub-cl.684(2)).
- (b) if the offeror's own position is affected by certain events: bankruptcy, mental incapacity or death in the case of a natural person (sub-cl.684(3)) or official management, winding up or the appointment of a provisional liquidator in the case of a body corporate (sub-cl.684(4)).
- (c) if the dealer's position is affected by any of the following events:
 - (i) bankruptcy;
 - (ii) a direction from the governing body of the dealer's exchange to cease to carry on the business of dealing in securities; and

(iii) in the case of a sole trader: death or mental incapacity.

(sub-cl.684(5)).

(d) if the Commission consents to the offeror or the dealer so doing, in which case an announcement to that effect is made on the relevant exchange (sub-cl.684(7)).

Cl.685 : Suspension of acceptance of offers made under take over announcement

2112. This clause is to the same effect as CASA s.34.

2113. Acceptance of offers is suspended if the Commission grants an order, on the application of the offeror or the dealer who made the announcement on behalf of the offeror, declaring that those offers that have not been accepted are not capable of being accepted while the order is in force (sub-cl.685(1)). Such an order does not have the effect of extending the offer period (sub-cl.685(2)).

PART 6.5 - PROVISIONS RELATING TO BOTH TAKEOVER OFFERS AND
TAKEOVER ANNOUNCEMENTS

Introduction

2114. Part 6.5 of this Chapter contains provisions which apply to both takeover offers under a takeover scheme (cl.634) and takeover announcements (cl.673) conducted under this Chapter.

2115. The provisions of this Part generally follow those in CASA Part V. However, provisions equivalent to CASA ss.37 and 38 have not been included in this Part or elsewhere in the Bill. Accordingly, the particular persons who under CASA had to obtain Commission consent to profit forecasts or asset revaluations in takeover situations will no longer need to obtain that consent. The decision as to whether profit forecasts or asset revaluations are accurate is one best left to the market which will discount any such statements which are inaccurate. Liability will still, however, attach to persons making any such statements which are false or misleading (cl.704). In addition, cl.995 of the Securities Chapter contains a general prohibition on misleading or deceptive conduct which is intended to apply to, amongst other things, takeover-related conduct.

Division 1 Restrictions on Offerors

Cl.686: Restrictions on disposal of shares by offeror

2116. This clause is to the same effect as CASA s.35.

2117. An offeror will be prohibited from disposing of shares, after the offeror's Part A statement has been served or the offeror's takeover announcement has been made, for the duration of the offer, unless a rival bid is made.

Division 2 - Notification of Acquisitions and Disposals of
Shares in Listed Companies

Introduction

2118. During the course of a takeover of a listed company (defined in cl.603), the offeror will be required to keep each "notifiable securities exchange" (defined in cl.603) of the target company informed on a daily basis of details of any dealings in the shares. Any person who holds 5% or more of the shares of the target company at any time during the relevant period must notify the home securities exchange if the holding is varied by 1% or more. This Division provides for the availability to the market of this relevant information.

Cl.687: Periods in respect of which notification to be given

2119. This clause is to the same effect as CASA para 39(1)(a).

2120. It sets out the periods during which the notification requirements apply. They are the periods in which takeover offers remain, or are required to remain, open.

Cl.688: Persons by whom notification to be given

2121. This clause is to the same effect as CASA para.39(1)(b).

2122. It sets out the persons to whom the notification requirements apply. These are the offeror and any person, apart from the offeror or the offeror's associates, who is entitled to more than 5%, or such lesser amount as prescribed, of the voting shares of the target company.

Cl.689: Notifications by offeror

2123. This clause is to the same effect as CASA sub-s.39(2).

2124. An offeror must give each notifiable securities exchange of the target company, by 9.30am on the day after the commencement of the offer period, a notice indicating any change in entitlement of the offeror since the start of the offer period and whether he is entitled to any shares at the time of the notice. ("Notifiable particulars" are set out cl.693). After this notice, the offeror must give similar daily advice to the notifiable securities exchanges of details of any change in entitlement (para.689(b)).

Cl.690: Notifications by other persons acquiring more than 5% shareholding

2125. This clause is to the same effect as CASA sub-s.39(3).

2126. A person who becomes entitled to more than 5% of the shares during the offer period will also be required to notify the relevant exchange of particulars of the holding and of his entitlement at the time of service of the notice.

Cl.691: Notification by persons ceasing to hold more than 5% shareholding

2127. This clause is to the same effect as CASA sub-s.39(4).

2128. A person who has been required to notify, because that person holds more than 5%, of the company but who reduces that entitlement to below 5% must notify the relevant securities exchange of the target company, again before 9.30 am on the day after the change, of the changes in entitlement which resulted in the reduction of the holding below the 5% level, and of any changes in the entitlement since last giving notice.

Cl.692: Notification of changes in shareholdings exceeding 1% by persons with more than 5% shareholding

2129. This clause is to the same effect as CASA sub-ss.39(5) and (8).

2130. A person entitled to more than 5% of the voting shares in a company must notify the required details of changes in that entitlement only where the nett fluctuation in that entitlement since the last notice is 1% or more of the number of voting shares in the company.

2131. Only one person need give such a notice (sub-cl.692(3)), so associates of the person who notifies need not also notify the relevant securities exchange.

Cl.693: Particulars to be notified

2132. This clause is to the same effect as CASA sub-s.39(9), (10), (11), and (12).

2133. It sets out the "notifiable particulars" of entitlements and changes in entitlements of CASA. These include, where specified, the number of shares involved, the consideration, numbers of shares in each class and any other person the person notifying is aware has a relevant interest in the shares. Notification will also be required of the highest price paid in relation to acquisitions of shares or the highest price obtained with respect to disposals of shares, giving rise to a change in entitlement (sub-cl.693(4)). Other matters may be prescribed.

Cl.694: Person need serve only one notice per day

2134. This clause is to the same effect as CASA sub-s.39(7).

2135. Notification need not be more frequent than one per day.

Cl.695: Defence

2136. This clause is to the same effect as CASA sub-s.39(6).

2137. Ignorance of changes in entitlement will be a defence to prosecutions for failure to notify under this Division. This defence is necessary because of the extensive operation of the provisions dealing with relevant interests and entitlements.

Division 3 - Notification of Acquisition Of Shares In Unlisted CompanyCl.696: Notification of offeror's entitlement

2138. This clause is to the same effect as CASA s.39A and provides a formal mechanism for making available to shareholders of an unlisted target company reasonably current information about an offeror's entitlement. Such information assists directors and shareholders of the target company in assessing the likelihood of success of the offer. An offeror for an unlisted company will be required during the offer period to notify the target company as soon as practical, and in any event before the end of 2 business days, after its entitlement to shares in the target reaches 25%, 50%, 75% and 90% (sub-cl.696(1) and (2)). The company must make the notice available for inspection at its registered office to any member free of charge (sub-cl.696(3)).

Division 4 - Prohibition on Additional Benefits

2139. The Acquisition of Shares Chapter seeks to ensure all shareholders may share in any premium for control of a corporation. This requires all premiums (if any) to be offered under formal takeover bids. This Division prohibits exclusive benefits before an actual or a proposed takeover or during the takeover and is based on CASA s.39B.

Cl.697: Persons selling shares before the making of offers not to be given additional benefits in certain cases.

2140. This clause is to the same effect as CASA s.39B.

2141. It prohibits special arrangements between the offeror (or an associate) and certain shareholders to acquire their shares and to give them additional benefits or for them to give the offeror additional benefits should a takeover occur. This prohibition applies where the benefits are attributable to an acquisition of shares which took place within six months of a takeover (para. 697(1)(b)) or proposed takeover (para. 697(2)(b)).

2142. The benefit must go from the offeror (or an associate) to any person, or to the offeror from any person, who had a relevant interest in any of the shares immediately before the acquisition (paras. 697(1)(c) and (2)(c)). The benefit may be given or received (or offered or agreed to be so) at any time before, at or after the offer period. This prohibition applies to benefits which are attributable to the value of the consideration in the takeover or proposed takeover.

2143. Any agreement in contravention of sub-cl.697(1) or (2) is void to the extent of the benefit conferred (sub-cl.697(3)).

Cl.698: Offerees not to be given benefits except under takeover scheme or takeover announcement

2144. Sub-clauses 640(1), (4) and (7) are to the same effect as CASA s.40. Sub-cl. (2), (3), (5) and (6) represent extensions to that provision.

2145. An offeror (or his associate) are prohibited, during the takeover period, from giving to (or offering or agreeing to give to) any person whose shares may be acquired under the takeover scheme (sub-cl.698(1)) or takeover announcement

(sub-cl.698(4)) any benefit not provided for under the takeover bid. This prohibition applies even if the bid is varied.

2146. Any person who proposes to make a takeover offer or make a takeover announcement within the next 4 months is also prohibited from giving, offering to give, or agreeing to give, benefits to shareholders whose shares may be acquired under the offer or announcement where the person proposes not to include those benefits in the offer or announcement (sub-cl.698(2) and (5)). Because of the difficulties of establishing the requisite intention of the person in such circumstances, sub-cl.698(3) and (6) deem the person to have so proposed where:

- (a) the benefit is given (etc);
- (b) a takeover offer or announcement is made within 4 months of that benefit;
- (c) the offer or announcement did not provide for the benefit; and
- (d) the person to whom the benefit was given held shares, at the time of the benefit, which were the subject of the offer or announcement.

2147. The prohibition does not apply to formal variations, or to acquisitions in the ordinary course of securities exchange trading (sub-cl.698(7)).

Division 5 - Obligations of Target Company

Cl.699: Obligations of target company to provide information

2148. This clause is to the same effect as CASA s.36.

2149. If requested, a target company which has received a Part A or Part C statement must provide the offeror with a list of shareholders (and holders of renounceable options and convertible notes) as at the time of service of the statement, together with details of the holdings (sub-cl.699(1)). This must be sent within seven days of receiving the request or of receiving the fee, if required. This list will provide the offeror with the information required to send the formal offers and accompanying materials, and to make offers under the common law to holders of non-voting shares, convertible notes and renounceable options.

Cl.700: Expenses of directors of target company

2150. This clause is to the same effect as CASA s.41.

2151. To avoid difficulties of resolving conflicts in the duties of directors so as to facilitate appropriate conduct by the directors of a target company, directors will be entitled to be recompensed for reasonable expenses they incur in relation to a bid.

Division 6 Rights of Offerors and Shareholders

Cl.701: Provisions relating to dissenting shareholders

2152. Subject to the different test applied in para.701(2)(c) and clarification in relation to allotments during the offer period, this clause is to the same effect as CASA s.42.

2153. A person who makes offers for all the shares in a company will be able compulsorily to acquire the interests of the minority shareholders after the offer period, provided appropriate notice is given and the appropriate number of shares are first acquired. If the offerer was entitled to not more than 10% of the shares before the commencement of the offer period, but at the end of that period become entitled to

not less than 90% of all those shares (subsequent allotments being disregarded), the offeror will be able compulsorily to acquire the interests of the remaining shareholders (para.701(2)(b)).

2154. If the offeror began with more than 10% of the shares of the target company, then acquisition of the interests of the minority shareholders will not be permitted unless the offeror becomes entitled to at least 90% of all shares, as above (para 701(2)(b)) and, one of:

- (a) during the offer period the offeror becomes entitled to three-quarters of the number of shares to which the offeror was not entitled before the offer period began (sub-para 701(2)(c)(i)); or
- (b) one month after the end of the offer period, at least three-quarters of the shareholders registered as at the commencement of the takeover period are not so registered (sub-para 701(2)(c)(ii)).

2155. These alternative requirements applicable to the case of an offeror beginning with more than 10% of the shares in the target company improve upon similar provisions in CASA (para.(b) of sub-ss.42(2) and (3)) by introducing greater certainty as to when the test is satisfied, by avoiding doubts as to what constitutes an "offeree" and by avoiding undesirable exploitation of these standards through the practice of share-splitting. *

2156. In contrast to the one month period in CASA s.42, the offeror has two months to send the appropriate notices indicating a desire to acquire the outstanding shares. This is due to satisfaction of the test in sub-para.701(2)(c)(ii) being dependent on the state of the target register one month after the end of the offer period. The giving of this notice entitles and binds the offeror to acquire the shares

(sub-cl.701(5)) subject to a dissenting shareholder successfully applying to the Court to have the offeror's notice declared to be of no effect in respect of that dissenting shareholder's shares (sub-cl.701(6)).

2157. Other provisions set out procedures for the compulsory acquisition and safeguard the interests of the parties involved in this process of compulsory acquisition (sub-cl.642(7) to (12)).

Cl.702: Money or property unclaimed by dissenting shareholders

2158. Consideration received by the target company in respect of the shares compulsorily acquired under cl.701 is held on trust (sub-cl.701(11)) and if money, in a separate bank account (sub-cl. 701(12)). Cl 702 provides a regime for dealing with and disposing of any unclaimed consideration. This regime differs from that imposed by CASA sub-ss.42(12) to (18) CASA.

2159. Where a company holds unclaimed property at the end of a year, the company has until the end of the following January to compile a register of such property (sub-cl.702(2)), and another calendar month to give a copy of that register to the Minister for publication in the Gazette (sub-cl.702(5)). Sub-cl.702(3) provides a right of inspection of the register for a fee, if required. If the property remains unclaimed for a period of twelve months following publication in the Gazette, the company must within 28 days after that period of twelve months transfer the unclaimed property to the Minister to be dealt with under Part 9.7 (sub-cl. 702(6)). Other provisions safeguard property owners, the company and the Minister (sub-cl.702(7) to (11)).

Cl.703: Rights of remaining shareholders and holders of options and notes

2160. This clause is to the same effect as CASA s.43.

2161. Where a person makes a takeover offer under a takeover scheme or a takeover announcement and becomes entitled to more than 90% of the voting shares in the target company, then the offeror is required, within one month of the end of the offer to:

- (a) notify the remaining shareholders of his entitlement to more than 90% of the voting shares. Such a shareholder then has 3 months in which to require the offeror to acquire the shares held on the same terms as applied in relation to the takeover scheme or takeover announcement and to elect, in the case of alternative terms, which term to accept (sub-cl.703(2)); and
- (b) give a similar notice to the holders of non-voting shares, convertible notes and renounceable options (sub-cl.703(4)). If this notice proposes terms for acquisition, it must be accompanied by an expert's report stating whether in the expert's opinion the terms are fair and reasonable (sub-cl.703(5)).

2162. The expert who prepares the report must not be associated with the target company or the offeror and will be required to set out the reasons for forming the opinion whether or not the terms proposed in the notice are fair and reasonable.

2163. Where there are 2 or more experts' reports, a copy of each report will be required to accompany the notice (sub-cl.703(6)). The purpose of this requirement is to ensure that an offeror or on-market offeror does not make selective use of experts' reports.

2164. The expert will be required to set out in the report:

- (a) particulars of any relationship of the expert with the offeror, the target company or any of their associates;
- (b) particulars of any pecuniary or other interest of the expert that could reasonably be regarded as being capable of affecting the experts' ability to give an unbiased opinion in relation to the proposed terms; and
- (c) particulars of any fee and any benefit that the expert has received, or will or may receive, in connection with the making of the report
(sub-cl.703(7))

2165. This requirement enables shareholders to take into account, in assessing the expert's report, any factor which might be considered to influence the expert's independence.

2166. Where a notice under sub-cl.703(4) is given to a non-voting shareholder, option or note holder, that person can, within 3 months of the notice, require the offeror to acquire the holding on such terms as are agreed or as the Court, on application, determines (sub-cl.703(8)).

PART 6.6 - LIABILITY FOR MIS-STATEMENTSIntroduction

2167. Criminal and civil liability was imposed by CASA s.44 on certain specified persons for false or misleading material (or omissions) in documents and statements issued in relation to takeovers or proposed takeovers. Various defences were provided to ensure that the provisions only applied in cases of wilful mis-statement. While the substance of the provisions has been predominantly retained the provisions have been restructured so as to draw together related provisions in a logical sequence for the purpose of improving clarity and ease of reference.

2168. These provisions are supplemented by a new provision in the Securities Chapter which prohibits misleading or deceptive conduct in relation to a number of securities related matters including takeovers (cl.995).

Cl.704: Mis-statements in Part 6.12 statements etc.

2169. This clause is to the same effect as CASA sub-ss.44(1)-(4), (9), (11), (12), (15), (16) and (18).

2170. It is an offence to include materially false or materially misleading matter in, or to omit material matter from:

- (a) purported Part A or Part C statements, purported takeover offers or notices under cl.657 (varying a takeover offer), sub-cl.701(2) (notifying dissenting shareholders of desire to compulsorily acquire), and sub-cl.703(1) or (4) (notifying dissenting shareholders and holders of non-voting shares, options and notes of offerors holding)

(sub-cl.704(1)). The persons to whom sub-cl.704(1) applies are identified in sub-cl.704(2) ie the offeror, certain directors of the offeror and any expert who consented to his report being included (but only in respect of matter in the report - (sub-cl.704(9))).

(b) purported Part B or Part D statements - sub-cl.704(3). The persons to whom this clause applies are set out in sub-cl.704(4) ie the target company, certain directors of that company or liquidators or official managers who signed the statement.

(c) certain experts' reports permitted or required under the Bill (sub-cl.704(5) - applies to the author of the report).

2171. A defence to a prosecution under cl.704 is available where the person responsible for the offending statement can show that he reasonably believed that the relevant matter was not false or misleading or, in the case of an omission, reasonably believed that no material matter had been omitted or did not know that omitted matter was material. (If such a belief or knowledge is not maintained at the date of commencement of the prosecution, timely corrective notice is a prerequisite for a defence to be made out (sub-cl.704(6))).

2172. Persons guilty of an offence under cl.704 are liable to compensate persons who suffer loss, either because they acted or failed to act because of the false or misleading matter or the omission that constitutes the offence (sub-cl.704(7)). A defence, based on similar grounds to those available in prosecution cases (see sub-cl.704(6) above), is provided in relation to actions for compensation (sub-cl.704(8)).

Cl.705: Mis-statements in public statements, advertisements etc.

2173. This clause is to the same effect as CASA sub-ss.44(5)-(8), (10), (14), (17) and (19).

2174. It is an offence to include materially false or materially misleading matter in statements, advertisements or documents (widely defined in para.705(5)(a)) relating to the affairs of, or to marketable securities of, the target company or a related corporation or of the bidder or rival bidder (referred to in the clause as "prescribed matters" and defined in para.705(5)(b)) where:

- (a) a person (or persons) propose to make a takeover bid (sub-cl.705(1)).
- (b) directors of a company believe it will be subjected to a bid (sub-cl.705(2))
- (c) takeover offers have been dispatched or an on-market announcement is made (sub-cl.705(3)).

2175. In respect of sub.cls.705(1) and (2) the person who made or issued the statement, published the advertisement or sent the document is guilty of an offence. Sub-cl.705(4) sets out those persons to whom sub-cl.705(3) is applicable - basically the offeror, the target company and their officers and associates.

2176. Provisions relating to a defence to a prosecution based on reasonable belief in the truth of a matter (sub-cl.705(6)), liability to actions for compensation (sub-cl.705(7)) and an appropriate civil defence (sub-cl.705(8)) are included and are consistent with the treatment of like offences under cl.704.

Cl.706: Existing causes of action not affected.

2177. This clause is to the same effect as CASA sub-s.44(21).

2178. The availability of other remedies is expressly preserved.

PART 6.7 - SUBSTANTIAL SHAREHOLDINGS

2179. Part 6.7 of the Acquisition of Shares Chapter, is based on CA Part IV, Division 4. It deals with the notification of substantial shareholdings in listed companies and companies other than listed companies that have been declared by the Minister for the purposes of the Part.

2180. As a consequence of the removal of the capacity of the company and shareholders to issue notices under the tracing provisions (see Part 6.8 of this Chapter), added reliance will be placed upon the shareholder notification provisions. In order to ensure that appropriate levels of public disclosure are maintained, the threshold for a shareholding will be reduced from 10% to 5%.

2181. The notification procedures have also been simplified to the extent that there is no longer a need to provide notification in accordance with a prescribed form.

2182. Where a person fails to comply with the substantial shareholding requirements, the Court has the powers set out in cl.741.

Cl.707 : Companies in relation to which Part 6.7 applies

2183. This provision is based on CA sub-ss.134(2) and (3).

2184. For the purposes of Part 6.7 references to the word "company" will mean:

- . a listed company (see definition of "listed company" in cl.603); or

- . a company that has been declared by the Minister to be a company for the purposes of Part 6.7 (see definition of "company" in cl.9).

(sub-cl.707(1) - based on CA sub-s.134(2).)

Cl.708 : Substantial shareholdings and substantial shareholders

2185. This provision is based on CA s.136.

2186. A person entitled to no less than the prescribed percentage of voting shares in a body corporate or the prescribed percentage of a class of voting shares in a body corporate will be deemed to have a substantial shareholding in that body corporate (sub-cl.708(1) - based on CA sub-s.136(1)).

2187. The shares to which a person is "entitled" will include:

- (a) shares in which the person has a relevant interest (para.609(1)(a) - based on CA para.136(2)(a)); and
- (b) the shares in which an associate of that person has a relevant interest except for:
 - (i) a nominee body corporate which has been issued a certificate by the ASC under sub-cl.609(3) (based on CA para.136(2)(b)); or
 - (ii) shares in respect of which the associate has obtained a certificate from the ASC under Bill sub-cl.708(3)(cl.708(2) - based on CA sub-s.136(2)).

2188. The term "associate" is defined in Part 1.2, Division 2 and the term "relevant interest" is defined in Part 1.2, Division 5.

2189. In accordance with the amendments referred to in the introduction to this Part, a reference in cl.708 to "prescribed percentage" is a reference to 5% instead of 10%, or if a lesser percentage has been prescribed by regulation that lesser percentage (sub-cl.708(5)).

Cl.709 : Substantial shareholder to notify company of interests

2190. This provision is based on CA s.137.

2191. A substantial shareholder in a company that is a corporation (see definition of "corporation" in cl.9) will be required to give the company a substantial shareholding notice (sub-cl.709(1) - based on CA sub-s.137(1)).

2192. A corporation that is a substantial shareholder in a company will be required to give the company a substantial shareholding notice (sub-cl.709(2)).

2193. It is no longer necessary for the form to be in a 'prescribed form' but the following matters must be included in the notice:

- (a) the substantial shareholder's name and address;
- (b) prescribed particulars of the voting shares in which the substantial shareholder or an associate has a relevant interest (including, unless the interest cannot be related to particular shares, the name of the registered holder);
- (c) prescribed particulars of each such interest; and
- (d) prescribed particulars of any contracts etc. by reason of which the substantial shareholder or an associate acquired that interest.

(sub-cl.709(3) - based on CA sub-s.137(1).)

2194. Similar notices will be required of a substantial shareholder whose interest changes by at least 1% (cl.710) or who ceases to be a substantial shareholder(cl.711).

2195. The period within which a substantial shareholder will be required to give the company notice will be 2 business days after the day on which the person became aware of the relevant interests by virtue of which he is a substantial shareholder (sub-cl.709(4) - based on CA sub-s.137(2)).

Cl.710 : Substantial shareholder to notify company of changes in interests

2196. This provision is based on CA s.138.

2197. A substantial shareholder in a company that is a corporation will be required to give the company written notice of any changes in interest of more than 1% (sub-cl.710(1) - based on CA sub-s.138(1)).

2198. A corporation that is a substantial shareholder in a company will be required to give the company written notice of any changes in its interest of more than 1% (sub-cl.710(2)).

Cl.711 : Person who ceases to be a substantial shareholder to notify company

2199. This provision is based on CA s.139.

2200. A substantial shareholder in a company that is a corporation will be required to give written notice to the company if it ceases to be a substantial shareholder (sub-cl.711(1) - based on CA sub-s.139(1)).

2201. A corporation that ceases to be a substantial shareholder in a company will be required to give the company written notice of the fact that it has ceased to be a substantial shareholder (sub-cl.711(2)).

Cl.712 : References to operation of Division 5 of Part 1.2

2202. This provision is based on CA s.140.

2203. The circumstances under which a person has a relevant interest, changes a relevant interest or ceases to have a relevant interest by virtue of Division 5 of Part 1.2 of the Bill are circumstances which will be required to be stated in any notice under cls.709, 710 and 711.

Cl.713 : Copy of notice to be served on securities exchanges

2204. This provision is based on CA sub-s.141(1).

2205. A person who gives notice of a substantial shareholding, or a change in or cessation of that substantial shareholder to a listed company, will also be required to serve a copy of such notice on the company's home stock exchange (see definition of "home stock exchange" in cl.603).

Cl.714 : Commission may extend period for giving notice under this Part

2206. This provision is based on CA s.142.

2207. The ASC will be able to extend the period for giving notice under cls.709, 710 and 712. Such an extension may be granted even after the notification period has expired.

Cl.715 : Company to keep register of substantial shareholders

2208. This provision is based on CA s.143.

2209. A company will be required to keep a register of all information relating to substantial shareholders. Such a register is to be open for inspection by any person.

Cl.716 : Civil remedy where Part contravened

2210. This provision is based on CA s.144A.

2211. A person who contravenes the notification requirements in cls.709, 710 or 711 will be liable to pay damages to a person who suffers loss or damage as a result of that contravention unless the contravention was unintentional (sub-cl.716(1) - based on CA sub-s.144A(1)).

2212. A person who contravenes cl.715 (which requires a company to keep a register of substantial shareholders) will be liable to pay damages to a person who suffers loss or damage as a result of that failure (sub-cl.716(2) and (3) - based on CA sub-s.144A(2)).

PART 6.8 - POWER OF COMMISSION TO OBTAIN INFORMATION AS TO BENEFICIAL OWNERSHIP OF SHARES

2213. This Part contains new provisions. The ASC is to have power to require information from persons holding voting shares in the company or a relevant interest in those shares, as to any beneficial ownership of the company's shares. The information received may, but need not, be given to the company. The provisions differ from the tracing provisions of the CA (ie s.261) in that the capacity for a company, or a shareholder of the company with not less than 5% of the voting shares of the company to trace the beneficial ownership of shares has been removed.

2214. The corollary of removing this capacity is that under the shareholder notification requirements of cl.708, the previous CA 'prescribed percentage' of 10% has been lowered to 5%.

2215. The powers of the Court contained in CA s.261A have been absorbed into the General Powers of the Court (Part 6.10, more specifically cl.742).

2216. Under the CA, the tracing provisions have been open to abuse by members and companies seeking to obtain strategically important information. The actual search is often deliberately circuitous and extremely vulnerable to legal imperfections. The potential for non-productive deploying of resources in the search for information beneficial only to a board seeking to entrench itself or to a small group of members may be at the expense of the other shareholders' interests in the proper functioning of the company.

2217. It is for these reasons that the power to initiate and pursue an inquiry is to be left with the ASC, as the least partial and most expert possible participant in the inquiry.

2218. This Part will only apply to listed companies and other prescribed companies.

Cl.717 : Definitions

2219. This clause contains definitions including those of 'primary notice' and 'secondary notice' which correspond to sub-section (2) and sub-section (3) notices respectively (see CA sub-s.261(1)).

2220. Both primary and secondary notices require the giving of notice to the ASC in the form of a written statement setting out relevant interests in shares and details and particulars relating to the relevant interests which other persons are known to have.

2221. The corresponding provision of the CA (s.261(1)) required notification to the company rather than the ASC.

2222. "Company" is defined by reference to Part 6.7, which in sub-cl.707(1) refers to listed and prescribed companies, in contrast with the far wider definition in CA sub-s.261(1)).

Cl.718 : Primary notice

2223. This clause deals with the issue of a primary notice. The ASC may give a notice to a holder of voting shares at any time. The corresponding provision of the CA (sub-s.261(2)) allowed the company to initiate an inquiry itself at any time or at the request of either the ASC or a member or members entitled to not less than 5% of the total voting rights.

Cl.719 : Secondary notice

2224. A secondary notice may be given by the ASC to a person on the basis of information received by it in response to a primary notice i.e. it has been advised that another person has a relevant interest in any of the shares or has given relevant instructions in relation to them ('Relevant instructions' is defined in cl.717). This provision differs from CA sub-ss.261(3) and (4) in that it is the ASC and not the company which gives the secondary notice in relation to information received.

Cl.720 : Commission may give notice to the company

2225. The ASC has power to provide to a company, the voting shares of which are the subject of a notice, any information given pursuant to a primary or secondary notice.

Cl.721 : Request by person to whom notice given

2226. This clause is based on CA sub-ss.261(5) and (6).

2227. A person who receives a primary or secondary notice may request of the ASC, a full exemption from compliance with a notice, or a partial exemption to the extent that the information is only passed on to the company in a particular form. The ASC may comply with the request if satisfied that there are special reasons why particular information should not be given to a company.

2228. This request must be made within 2 business days of receipt of a notice.

Cl.722 : Compliance with notices

2229. This clause is based on CA sub-s.261(7).

2230. It requires compliance with a notice within 2 business days after receipt of the notice unless within that time an application has been made under sub-cl.721(1).

Cl.723 : Consequences of decision by Commission on a request

2231. This clause is based on CA sub-s.261(8) in providing for the consequences of the different decisions the ASC could make in response to a request that the information should not be given. In contrast with CA, the applicant is not required to inform the company of the request.

Cl.724 : Register of notices

2232. This clause is based on CA sub-ss.261(9), (10), (11) and (12) but has been modified to the extent that the company will not receive the information directly from the shareholders.

2233. A company shall keep a register of the information provided to it by the ASC pursuant to this Part or provisions corresponding with this Part such as CA s.261. That register shall contain particulars of the relevant interest and the person who holds it. The register shall be open to inspection by members of the company. Members of the public may also inspect subject to the payment of any charge not exceeding the prescribed amount. Copies will also be made available on request on the same conditions relating to payment.

Cl.725 : No notice of rights

2234. This clause is based on CA sub-s.261(12A).

2235. A company is not, by reason of any information received pursuant to this part, to be taken to have notice of, or to be put on inquiry as to, a right of a person in relation to a share in the company.

Cl.726 : Civil liability

2236. This clause is based on CA sub-s.261(16), (17) and (18).

2237. Damages are payable to any person who suffers loss or damage as a result of contraventions of cls.722, 723 and 724 by the person who has contravened the provision. A defence of inadvertance, mistake or lack of awareness of a relevant fact or occurrence is available in respect of a contravention of cls.722 and 723. Joint and several liability is provided for if two or more persons are involved in the same contravention.

Cl.727 : Exceptions to criminal or civil liability

2238. This clause is based upon CA sub-s.261(19).

2239. There are exceptions to civil and criminal liability in cases where the information required to be given in a notice is already kept by the company on a register kept pursuant to cls.715 or 724 or if the giving of the notice was for any reason frivolous or vexatious.

PART 6.9 - POWERS OF COMMISSION AND ANCILLARY POWERS OF COURT

2240. This Part sets out the powers of the ASC in relation to this Chapter. Powers of the Court ancillary to the exercise of powers of the ASC are also set out.

Cl. 728 - Power of Commission to exempt from compliance with this Chapter.

2241. This clause represents a significant extension of the exemption powers under CASA s.57. Whereas under that provision the NCSC could only grant an exemption to a particular person in a particular case, under sub-cl.728(1) the ASC will also be able to exempt classes of persons generally, and in particular cases or classes of cases from any or all of the provisions of the Chapter. All exemptions must be published in the Gazette (sub-cl.728(2)). A person is not permitted to contravene a condition attached to the exemption (sub-cl.728(3)). Note that in exercising its exemption powers the ASC must take account of certain matters set out in cl.731.

Cl.729 - Power of Court to enforce exemption condition

2242. This clause is to the same effect as CASA sub-s.57(4). Upon a contravention of a condition to which an exemption is subject, the Commission may apply to the Court to order the person to comply with that condition.

Cl.730 - Power of Commission to modify operation of this Chapter

2243. This clause represents a significant extension of the modification powers under CASA s.58. Under that provision, the NCSC could modify or vary the provisions of CASA in their application to a particular person in a particular case. The ASC, under sub-cl.730(1) will also be able, so far as the Commonwealth Constitution permits, to modify or vary the provisions in their application to classes of persons either generally or in particular cases or classes of case. All declarations modifying or varying the provisions must be published in the Gazette (sub-cl.730(2)).

Cl.731 - Commission to take account of certain matters

2244. This clause is to the same effect as CASA s.59.

2245. In exercising its exemption or modification powers, the Commission must take account of, and have regard to, a number of matters set out in the clause.

2246. These include the desirability of ensuring that an acquisition of shares takes place in an efficient, competitive and informed market, and the need to ensure:

- (a) the identity of a person proposing to acquire a substantial interest is known to the shareholders and directors of the company concerned;
- (b) the shareholders and directors have sufficient time to consider any proposal for a person to acquire a substantial interest;
- (c) that shareholders and directors have sufficient information to enable them to assess the merits of any proposal to acquire a substantial interest; and
- (d) that as far as is practicable, all shareholders have equal opportunities to participate in the benefits of the acquisition.

2247. (These principles derive from the report of the Eggleston Committee.)

Cl.732 - Power of Commission to declare acquisition or other conduct to be unacceptable

2248. This clause is based on CASA sub-ss.60(1), (3), (6) and (7).

2249. The ASC will be able to declare that, for the purposes of this Chapter, a specified acquisition is an unacceptable acquisition, and that specified conduct is unacceptable conduct. Such declarations will enable the Court (cl.733) and the ASC (cl.734) to make a wide range of orders to protect the rights of persons affected by the acquisition or conduct. This declaration power is designed to discourage activities which would frustrate the basic aims of this Chapter.

2250. The ASC can make a declaration that an acquisition was an unacceptable acquisition or that certain conduct was unacceptable conduct where it is satisfied that "unacceptable circumstances" (defined in sub-cl.732(1)) occurred in relation to the acquisition or conduct. Such declarations must be made within 90 days of the acquisition or conduct and in the case of an unacceptable acquisition declaration, the person who acquired the shares is deemed, for the purposes of the Court making certain orders under cl.737, to have contravened cl.615 (sub-cl.732(2) and (3)).

2251. The "unacceptable circumstances" identified in sub-cl.732(1) are that the shareholders (and directors in the case of (a), (b) and (c)) of a company):

- (a) did not know the identity of a person acquiring a substantial interest in the company;
- (b) did not have a reasonable time to consider a proposal for such an acquisition;
- (c) were not supplied with enough information to assess the proposal's merits; or
- (d) did not have a reasonable opportunity to participate in any benefits accruing to any shareholder or associate of the shareholder in connection with the acquisition.

2252. In all such circumstances either the target company or the acquirer must be a corporation.

2253. After making either declaration, the ASC must, as soon as possible, give a copy of the declaration to the person to whom it relates and must publish a copy in the Gazette (sub-cl.732(4)). Failure to comply with that sub-clause doesn't however affect the validity of the declaration.

Cl.733 - Powers of Court where Commission declares acquisition or conduct unacceptable

2254. This clause is based on CASA sub-ss.60(2), (4) and (5).

2255. Where an application is made to the Court for orders under cl.737 as a result of an unacceptable acquisition declaration, the Court in deciding whether to grant the orders can have regard to findings of fact made by the ASC or can make its own findings. Instead of making any such orders, it can declare that the acquisition was not unacceptable in which case the declaration no longer has any effect (sub-cl.733(1)).

2256. If the ASC has declared conduct to have been unacceptable, the Court, on the application of the ASC, the company or a member of the company, may make any order it thinks necessary to protect the rights of any person affected by the conduct including a "remedial order" (defined in cl.603) or a direction to supply shareholders in the relevant company with information. The Court may on the other hand declare that the conduct is not unacceptable and the declaration by the Commission will cease to have effect (sub-cl.733(2)).

2257. A person in respect of whose conduct or acquisition a declaration has been made may apply to the Court for a declaration that the acquisition or conduct was not unacceptable (sub-cl.733(3)).

Cl.734 - Power of Commission to make certain orders

2258. This clause is to the same effect as CASA s.60A (except sub-s.60A(4) dealt with in cl.735).

2259. Where the ASC has declared certain conduct or acquisitions to be unacceptable, this clause confers power on the ASC to make certain "freezing" orders by written instrument published in the Gazette. The orders may be one or more of those set out in sub-cl.734(1) e.g. orders restraining particular persons from acquiring or disposing of certain shares or from exercising voting rights attached to certain shares. The ASC will be able to vary or revoke an order (sub-cl.734(2)). A person is not permitted to contravene such an order (sub-cl.734(4)). The fact that the ASC has previously made an order in respect of a particular declaration does not prevent it from making further orders (sub-cl.734(1)).

2260. An order under the clause ceases to operate after 30 days, or on the day specified in the order, whichever is the earlier (sub-cl.734(5)). Such an order cannot be made unless the person to whom it is directed has had an opportunity to be heard and to make submissions (sub-cl.734(6)). Under sub-cl.734(7), the ASC may not make an order in reliance on a declaration made by it, if:

- (a) an application has been made to the Court for an order under cl.737;
- (b) an application has been made to the Court under sub-cl.733(2); or
- (c) the Court has revoked an order made in reliance on the declaration under cl.735.

Cl.735 - Power of Court to vary or revoke orders of Commission

2261. This clause is to the same effect as CASA sub-s.60A(4).

2262. If the ASC makes an order under cl.734, a person aggrieved by the order will be able to apply to the Court for its variation or revocation and the Court will be able to do either if satisfied it is just and reasonable to do so.

Cl.736 - Power of Commission to intervene in proceedings

2263. This clause is to the same effect as CASA s.61.

2264. The ASC will be able to intervene in any proceedings under this Chapter (sub-cl.736(1)). If it does intervene, it will be deemed to be a party to the proceedings with all rights, duties and liabilities of such a party (sub-cl.736(2)).

PART 6.10 - POWERS OF COURT

2265. This Part sets out the powers of the Court in respect of this Chapter. These powers relate to the acquisition of shares, substantial shareholdings and notification of beneficial interests.

Cl.737: Orders where prohibited acquisitions take place

2266. This clause is to the same effect as CASA s.45.

2267. Wide powers are conferred on the Court to make orders where prohibited acquisitions take place. These include a "remedial order" (defined in cl.613) and, for the purpose of securing compliance with an order, a direction to a person to do or not to do a certain act (sub-cl.737(1)). Examples of some of the orders available include orders directing divestiture or restraining the exercise of voting rights.

2268. In certain circumstances the Court will be able to have regard to associations formed after the acquisition takes place (sub-cl.737(2)). Where two persons are "associated" (see Division 2 Part 1.2) at the time when an application under sub-cl.737(1) is considered by the Court, and one of them acquired all or any of his shares in the preceding six months, and those matters are proved to the satisfaction of the Court, then that proof constitutes prima face evidence that those persons were associated at the time when those shares were acquired. This sub-clause has the effect that each of the two persons is to be treated as having been entitled at that time to the shares of the other. Therefore, in determining whether the acquisition breached cl.615 by increasing a person's entitlement to shares beyond the permitted level, the Court may look not only that person's actual entitlement at the time of the acquisition, but also at the person's entitlement as increased by virtue of that person

having been associated with another person at that time. This provision has effect only for the purpose of the making of orders by the Court and does not operate to make a person retrospectively guilty of an offence.

Cl.738: Orders where offers not sent pursuant to Part A statement

2269. This clause is to the same effect as CASA s.46.

2270. Where an offeror serves a Part A statement on the target company and subsequently acquires shares which would, but for the enabling provision in sub-cl.620(1) - (see para. above), have contravened cl.611, but then does not dispatch offers to shareholders, the ASC will be able to apply to the Court for a "remedial order" (defined in cl.613) and an order directing the offeror to send an offer in an approved manner to each holder of shares (sub-cl.738(1)). Where the latter order is made, the Court can also order the person to send additional information in a notice to shareholders and to serve a copy of that notice on the target company and any notifiable securities exchange of the target and lodge a copy with the ASC (sub-cl.738(2)). Offers dispatched under an order of the Court will be deemed to be made under a takeover scheme (sub-cl.738(3)).

Cl.739: Orders to protect rights under takeover schemes or announcements

2271. This clause is to the same effect as CASA s.47.

2272. The Court will be able to make a wide range of orders (including "remedial orders") to protect the interests of a person affected by a takeover scheme or announcement where a provision of this Chapter has been contravened (sub-cl.739(1)). Where an offeror contravenes a condition specified in a consent by the ASC to withdrawal of an offer

given under cl.653, the Court will be able to make any orders necessary to protect persons affected by the contravention (sub-cl.739(2)). The right to seek relief is given to offerors, the Commission, the target company and, in the case of sub-cl.739(1), a person who holds shares in the target company and, in the case of sub-cl.739(2), a person affected by the contravention.

2273. The provision applies to non-voting shares, convertible notes and renounceable options (sub-cl.739(4)).

Cl.740: Powers of Court in relation to unfair or unconscionable agreements, payments or benefits

2274. This clause is based on CASA s.50.

2275. The Court will be able to make certain orders where it is satisfied that the provision of a benefit for management was unfair or unconscionable having regard to the interests of the body corporate concerned.

2276. The clause applies to a benefit given by a body corporate to its management or that of a related body corporate where the benefit is provided:

- (a) within 12 months after a takeover offer or announcement is made for the body corporate or a related body corporate; or
- (b) at a time when the directors of the body corporate have reason to believe such a bid will be made for the body corporate or a related body corporate.

2277. For the provision to operate either the body corporate above giving the benefit must be a corporation (sub-cl.740(1)) or the takeover bid must have been made for a corporation, or be contemplated in respect of a corporation, that is related to the body corporate providing the benefit (sub-cl.740(2)).

2278. This provision is directed at service agreements used by target companies as a defence tactic or to confer unfair benefits on management. The provision applies only to those officers who take part in the management of the target company, and does not affect contracts between companies and employees.

2279. If the agreement, payment or benefit is made by the target company (or a company related to the target company) it will be capable of approval by ordinary resolution at a general meeting of the target company, provided that the beneficiary and associates of the beneficiary do not vote on the resolution (sub-cl.740(4)).

2280. An application to the Court for any of the orders described in sub-cl.740(5) must be made within 12 months of the payment, benefit or agreement (unless the Court thinks a longer period is just in the circumstances). The application may be made by the body corporate, the Commission or persons who hold not less than 10% of the total of the nominal value of the shares in the body corporate.

Cl.741: Powers of Court with respect to defaulting substantial shareholder

2281. This clause is based on CA s.146.

2282. This clause sets out the powers of the Court specifically with respect to substantial shareholders who breach provisions setting out their obligations (see cls.709, 710 and 711). The Court has the power to make a wide variety of orders including "remedial orders" (defined in Cl.613). In some cases, the Court may have regard to associations formed after an acquisition giving rise to a substantial shareholding (sub-cl.741(2)).

Cl.742 Powers of Court where beneficial ownership of shares not disclosed.

2283. This clause is based on CA s261A.

2284. This clause sets out the powers of the Court upon a failure to comply with the provisions requiring disclosure of beneficial interests (see cls.722 and 723). If a recipient of a notice given under cl.718 or 719 has replied that he does not know particular information in relation to the shares or know of anyone with a relevant interest in, or anyone who has given relevant instructions in relation to, shares the subject of the notice, then, on the application of the company, a member or members of the company holding 5% or more of total voting rights, or the Commission, the Court may make an unlimited variety of orders (sub-cl.742(1) and (2) and see cl.613).

2285. The Court shall not make an order if the information required to be given to the company already appears on a register kept for that purpose (see cls 715 and 724) or that giving of the notice was for any reason frivolous or vexatious (sub-cl.742(3) and see CA sub-s.261A(9)). Nothing the company does under this clause is to be taken as putting the company on notice of or putting upon enquiry as to the right of any person in relation to shares (sub-cl.742(4)).

Cl.743: Contravention due to inadvertence, etc.

2286. This clause is based on CASA s.48 and sub-s.45(3) and CA sub-s.261A(10).

2287. The Court will be able to validate any acts or matters not in compliance with this Chapter if it satisfied that, in all the circumstances, the contravention ought to be excused (sub-cl.743(1)). Where the Court is satisfied that a contravention of cl.615 (prohibited acquisition), cls.709,

710, and 711 (substantial shareholder provisions) or cls.722 and 723 (notification of beneficial interests) ought to be excused it is not able to make orders under cls.737, 741 or 742 except those specified in sub-cl.743(2) relating to voting rights. The circumstances justifying such an order include the contravention having been due to the person's inadvertence or mistake, and to the person not having been aware of a relevant fact or occurrence and to circumstances beyond the control of the person (sub-cl.743(3)). This clause has effect notwithstanding anything contained in any other provision of this Chapter (sub-cl.743(4)).

Cl.744: Miscellaneous provisions relating to orders

2288. This clause is based on CASA s.49 and CA ss.146 and 261A.

2289. This clause brings together a number of provisions relating to the whole range of orders a Court can make in respect of contraventions of the acquisition of shares and substantial shareholder provisions.

2290. Aspects of this clause include:

- (a) Before making an order under relevant provisions (defined in sub-cl.744(1)) the Court must satisfy itself that the order would not unfairly prejudice any person (sub-cl.744(2)).
- (b) The Court will be able to direct that notice of the relevant application be given or given or published (sub-cl.744(3)).
- (c) The Court will be able to give interim orders (sub-cl.744(4)).

- (d) Undertakings as to damages in connection with the making of an interim order are not required (sub-cl.744(5)).
- (e) The Court will be able to include ancillary or consequential provisions in such orders (sub-cl.744(6)).
- (f) An order for disposal of an interest in a share can be subject to any conditions the Court thinks fit (sub-cl.744(7)).
- (g) If an interest is not disposed of in accordance with the order of the Court, it will be able to vest it in ASC (sub-cl.744(8)). The disposal procedure is set out in sub-cl.744(9).
- (h) The Court will be able to rescind, vary, discharge or suspend its order (sub-cl.744(10)).
- (i) The powers of the Court in relation to contempt of court are expressly reserved (sub-cl.744(12)).

PART 6.11 - MISCELLANEOUS

2291. This Part contains a number of miscellaneous provisions.

Cl.745: Recording of resolutions

2292. This clause is to the same effect as CASA s.51.

2293. The minutes of a directors' resolution for the purposes of this Chapter must record the names of absent directors and the names of directors who vote against, or abstain from voting on, such a resolution.

Cl.746: Announcements of proposed takeover bids

2294. This clause is to the same effect as CASA s.52.

2295. Bluffing notices or announcements of takeovers are prohibited by this clause.

2296. A person will be prohibited from making a public announcement that the person proposes to make a takeover offer or announcement if the person:

- (a) knows the announcement is false, or is recklessly indifferent to whether it is true or false; or
- (b) has no reasonable grounds for believing that the person's obligations arising under the takeover bid will be fulfilled if there are a substantial number of acceptances (sub-cl.746(2)).

2297. This prohibition applies if the person making the announcement is, or the proposed offer or announcement relates to, a corporation (sub-cl.746(3)).

2298. A person will also be prohibited from making an announcement proposing a takeover if a bid is not commenced within two months (or such further period or the Commission permits) (sub-cl.746(4)). This bid must be on terms the same as the terms of the original announcement (sub-cl.746(1)). This prohibition applies to any announcement in relation to which a corporation is involved (sub-cl.746(5)).

2299. A person who has contravened both sub-cl.746(2) and (4) will only be liable to be convicted in respect of one of those offences (sub-cl.746(6)). A person who has contravened either provision will be liable to pay compensation to any person who has suffered loss as a result of that contravention (sub-cl.746(8) and (9)).

2300. A person will not be guilty of an offence for contravening sub-cl.746(4) and will not be liable to pay compensation under sub-cl.746(8) if it can be established that the person could not reasonably have been expected to proceed with the takeover bid:

- (a) as a result of circumstances existing at the time of the announcement but of which the person had no knowledge and could not reasonably have been expected to know about; or
- (b) as a result of a change in circumstances after the making of the announcement not being a change in circumstances caused by the person (sub-cl.746(10)).

2301. The right to apply for any injunction under cl.1324 will not be available in respect of a failure to make a takeover bid in accordance with an announcement. Cl.1314, dealing with "continuing offences", will also not apply (sub-cl.746(11)).

Cl.747: Service of documents and publication of notices

2302. This clause is to the same effect as CASA s.56.

2303. The following provisions will apply to the service of documents:

- (a) Any document which is not required to be signed will be able to be served on a securities exchange by a telex, facsimile service etc. message to the effect of the document (sub-cl.747(1)).
- (b) A document that has to be given to a securities exchange or lodged with the ASC on a particular day when the exchange or ASC office is closed will be able to be given on the next day when the body is open (sub-cl.747(2)).
- (c) A copy of a notice that is required to be given to the Commission or to a securities exchange need not specify the individual to whom it was sent (sub-cl.747(3)).
- (d) Where a provision requires a person to publish a notice in a newspaper and due to circumstances beyond the person's control the notice is not published, the person is deemed to have complied with that provision:
 - if the person's actions would have resulted in the publication of the notice, except for those circumstances, and
 - the person has caused the notice to be published as soon as practicable after those circumstances ceased to exist (sub-cl.747(4)).

Cl.748: Regulations

2304. The Governor-General will be able to make regulations, not inconsistent with the Chapter, on matters required or permitted to be prescribed or necessary or convenient for the

purposes of the Chapter. Among other things, these regulations will be able to:

- (a) vary the requirements contained in Part 6.12;
- (b) require the securities exchanges and the Commission to be given signed copies of documents or prescribed notices; and
- (c) make provision as to what constitutes a class of shares for the purposes of this Chapter.

PART 6.12 - STATEMENTS

2305. This Part provides the same function as the schedule to CASA.

Cl.749 : Interpretation of certain clauses in s.750

2306. This clause is based on cl.3 of Parts B and D of the Schedule to CASA.

2307. Certain interpretation provisions in cl.237 relating to benefits for loss of, or retirement from, office are applied to clauses in statements dealing with the requirement for disclosure of benefits proposed in connection with a takeover offer to be given to officers of a target company.

Cl.750 : Part A, B, C, and D Statements

2308. This clause sets out the detailed requirements in relation to four different statements required under this Chapter:

- Part A: Statement to be given by an offeror under a takeover scheme.
- Part B: Statement to be given by the target company to which the takeover scheme relates.
- Part C: Statement to be given by the offeror under the takeover announcement.
- Part D: Statement to be given by the target company to which the takeover announcement relates.

Part A : Statement to be given by the offeror under takeover scheme

2309. The information required to be set out in a Part A statement is substantially similar to that required to be given under Part A of the Schedule to CASA.

2310. These details relate to the offer period, the offeror, funding arrangements, the activities of the offeror and associates, relevant acquisitions and disposals of shares, agreements made in connection with the offer, other material information known to the offeror and any other matter required by regulations. Cl.18 dealing with information required by regulations is based on CASA sub-s.16(2A). The requirement to set out particulars of the offeror's intentions (cl. 20) is different to the requirement found in cl. 5A of Part A to the schedule of CASA in that it provides that, where a relevant intention has not been finalised but the offeror is considering possible courses of action, those possibilities are to be specified (sub-cl. 20(2)).

2311. The provisions in Part A and C statements in relation to proposed benefits for officers of target companies (cl.12 of Part A and cl.9 of Part C) have been altered to bring them into line with the corresponding Parts B and D provisions and with the general benefits provisions in cl.237.

Part B - Statement to be given by target company to which takeover scheme relates

2312. The details required to be set out in a Part B statement are substantially similar to those required to be set out in Part B of the schedule to CASA.

2313. Amongst other things, the Part B must include:

- (a) each director's reasons for making a recommendation, or not, as the case may be.
- (b) a statement as to whether there have been any known material changes to the financial position of the target company since the date of the last accounts of the company; and
- (e) any other material information.

2314. Copies of relevant experts' reports have to be attached (see cl. 647).

Part C - Statement to be given by offeror under takeover announcement

2315. Details required in a Part C statement under this Chapter are substantially similar to those required under Part C of the schedule to CASA.

2316. The Part C statement must include the same information as would be included in a Part A statement which involves only a cash consideration (including details of the offeror's intentions or possible courses of action).

Part D - Statement to be given by target company to which takeover announcement relates

2317. This Part sets out the requirements which must be complied with by a listed target company the subject of a bid under a takeover announcement. These requirements are substantially similar to those set out in Part B of the schedule to CASA and are the same as those set out in Part B of this clause with the exception of cl. 11 of Part B which is not relevant.

PART 6.13 - TRANSITIONAL

2318. A number of provisions necessary for orderly transition from co-operative scheme regulation of takeovers to regulation under the national scheme provided for by this Bill are included in this Part.

Cl.751 : Application

2319. The provisions in this Part override any other provision in the Chapter.

Cl.752 : Definition

2320. A definition of "State or Territory Acquisition of Shares Law" is included for the purposes of Part 6.13. These comprise the various Companies (Acquisition of Shares) Codes and Act under the co-operative scheme.

Cl.753 - Acquisitions pursuant to Part A statements served before commencement of Chapter

2321. Where a Part A statement has been served in accordance with a relevant State or Territory law before the commencement of this Chapter, the Chapter will not apply to any subsequent acquisitions pursuant to the statement or other related matters that are permitted under the State or Territory law.

Cl.754 : Acquisitions pursuant to takeover announcements made before commencement of Chapter

2322. This is a similar provision to cl.753 excluding the Chapters' application to acquisitions pursuant to takeover announcements made prior to the commencement of the Chapter under a relevant State or Territory law.

Cl.755 : Application of State or Territory laws to excluded acquisitions not affected

2323. State or Territory laws will continue to operate in respect of acquisitions or related matters to which the Chapter does not apply.

Cl.756 : Acts of NCSC deemed to be acts of Commission

2324. Acts done by the NCSC or its delegates under a corresponding State or Territory law will, after the Chapters' commencement, be taken to have been done by the ASC (provided the Chapter applies to the matter to which the action relates).

Cl.757 : Acts done before commencement of Chapter

2325. A reference in the Chapter to an act or thing having been done will include reference to acts or things done before the Chapters' commencement other than the making of a takeover offer.

Cl.758 : Notices of substantial shareholdings

2326. Substantial shareholders who have already given notice to a company under a corresponding State or Territory law will not be required to give further notice to the company under cl.709.

Cl.759 : Information as to beneficial ownership of shares

2327. A State or Territory law corresponding to Part 6.8 will continue to apply to any matters occurring before the Chapters' commencement.