

Corporations Bill 1988

1988

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

CORPORATIONS BILL 1988

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and New Clauses Passed By The House of
Representatives To The Bill As Introduced

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

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CORPORATIONS BILL 1988 - AMENDMENTS AND
INSERTION OF NEW CLAUSES

OUTLINE

The Corporations Bill ("the Bill") was introduced into the House of Representatives by the Attorney-General on 25 May 1988. It contains the substantive provisions necessary for the regulation of companies and of the securities and futures industries in Australia. It is part of a package of Bills to replace the existing co-operative scheme under which the Commonwealth shares regulatory responsibilities with the States and the Northern Territory. The Bill was introduced together with the Australian Securities Commission Bill and the Close Corporations Bill.

2. The amendments to the Bill to be moved on behalf of the Government can be grouped as follows:

- (a) amendments designed to clarify aspects of the fundraising reforms (Part 7.12 of the Bill).
- (b) amendments necessary to bring administrative law elements of the Bills into conformity with Commonwealth practice (see also the supplementary explanatory memorandum to the Australian Securities Commission Bill).
- (c) amendments to ameliorate some unintended consequences of reforms which were designed to clarify, and to rectify some technical anomalies in the operation of certain co-operative scheme provisions.
- (d) amendments to the futures industry provisions, which the Attorney-General foreshadowed at the time of introduction of the Bill, to minimise any disruption

as a result of the constitutional underpinnings of those provisions.

FINANCIAL IMPACT STATEMENT

3. The amendments will not have a significant financial impact. There will, however, be some reduction of costs for securities and futures industry participants by an amelioration of the impact of certain of the Bill's provisions on operational efficiency. In addition, fundraising costs will be reduced by amendments designed to limit the number of cases in which a prospectus is required and, in appropriate cases, by amendments clarifying the information to be included in a prospectus in those cases where prospectuses are still required.

4. Conferral of jurisdiction on the Administrative Appeals Tribunal (AAT) to conduct merits review of administrative decisions (apart from decisions by the Corporations and Securities Panel) will require additional resources for the Tribunal. It is difficult to quantify the level of additional resources required as a review of this nature has not been available under the co-operative scheme. Whilst the simpler procedures of the AAT may give rise to more applications for review of administrative decisions than at present, there have been very few appeals to the Supreme Court against decisions of either the NCSC or its delegates.

ABBREVIATIONS

5. The following abbreviations are used in this supplementary explanatory memorandum:

ASC	-	Australian Securities Commission
ASC Bill	-	Australian Securities Commission Bill 1988
CA	-	<u>Companies Act 1981</u>
CASA	-	<u>Companies (Acquisition of Shares) Act 1980</u>
CB	-	Corporations Bill 1988
FIA	-	<u>Futures Industry Act 1986</u>
NCSC	-	National Companies and Securities Commission
SIA	-	<u>Securities Industry Act 1980</u>

NOTES ON AMENDMENTS TO CLAUSESAMENDMENTS TO CHAPTER 1 - INTRODUCTORYAmendment (1) : Cl.9 - Dictionary : "convertible note"

6. A definition of convertible note has been inserted in the general definition provision in cl.9 of the Bill. This definition, which adopts the meaning of that term in the Income Tax Assessment Act 1936, is the same as the definition of convertible note in cl.603 that applied specifically for the purposes of Chapter 6 - Acquisition of Shares. The provision now has a wider application because of its use in other amendments to the Bill (eg see new cl.66(1)(h)(ii) of the Bill). The existing definition in cl.603 is now not necessary and is to be deleted (see Amendment ()).

Amendment (2) : Cl.9 - Dictionary : "debenture"

7. A new paragraph (aa) is to be inserted into the definition of debenture in cl.9 of the Bill. The new provision will make it clear that a document acknowledging a debt transaction is not to be regarded as a debenture where the transaction occurs in the ordinary course of business for both the borrower and the lender. It will exempt transactions such as ordinary business loans.

8. On the other hand the exemption will not be available in respect of that part of the business of a corporation comprising borrowing or providing finance, unless the offer or issue of the debenture is otherwise excluded under cl.66 or an exempting regulation is made under paragraph (e) of the existing definition of debenture. This will mean, for example, that a finance company or borrowing corporation, will continue to be required to have a prospectus when offering debentures to the public.

Amendment (3) : Cl. 9 - Dictionary : "eligible investment advice business"

9. This amendment provides a reference to the definition of this phrase in cl.77.

Amendment (4): Cl.9 - Dictionary: "eligible securities"

10. This amendment clarifies which meaning of securities exchange is intended.

Amendment (5) : Cl.9 - Dictionary : "eligible securities"

11. This amendment makes a minor drafting correction

Amendment (6) : Cl. 9 - Dictionary : "eligible securities business"

12. This amendment provides a reference to the definition of this phrase in cl. 93.

Amendment (7) : Cl.9 - Dictionary : "participation interest"

13. The definition of "participation interest" is to be amended in the light of the inclusion of a reference to a "unit of a share" in cl.92.

Amendment (8) : Cl.9 - Dictionary : "responsible officer"

14. This amendment makes a minor drafting correction.

Amendment (9) : Cl. 9 - Dictionary : "securities"

15. This amendment is consequent upon the amendment to cl.92.

16. The definition of securities has caused some confusion in its present form, appearing as it does partly in cl.9 and partly in cl.92. The cl.9 definition has therefore been moved and consolidated into the definition in cl.92. The cl.9 definition of securities now performs merely a cross-referencing function.

Amendment (10) : Cl. 9 - Dictionary : "securities adviser"

17. This amendment qualifies "representative" as a "securities representative", a term which is defined in cl.94.

Amendment (11) : Cl. 9 - Dictionary : "securities business"

18. This amendment provides a reference to the definition of this phrase in cl.93.

Amendments (12) and (13) : Cl. 9 - Dictionary : "stock exchange" and "securities exchange"

19. These amendments make minor changes to the above definitions.

20. "Stock exchange" and "securities exchange" are both defined in cl. 9 for the purposes of Chapter 6 (the takeovers chapter), as the Australian Stock Exchange Ltd or a body corporate declared by the regulations to be a stock exchange or securities exchange respectively.

21. These definitions reflect the existing definitions in CASA. A regulation under CASA declares the ASX subsidiaries as stock exchanges and securities exchanges. These subsidiaries will remain stock exchanges and securities exchanges for the purposes of the Bill. Accordingly the definitions of stock exchange and securities exchange have been amended to explicitly include the ASX subsidiaries in those definitions.

Amendment (14) : Cl. 9 - Insertion of new definition of Tribunal

22. Unless the contrary intention appears in the Bill, 'Tribunal' will mean the Administrative Appeals Tribunal (AAT).

23. This definition is relevant for the purposes of the amendment to cl.290 which is consequent upon new Part 9.4A of the Bill which will provide for the AAT to review certain decisions made under the Bill by the Minister, the ASC and the Companies Auditors and Liquidators Disciplinary Board.

Amendment (15) : Cl. 12 - Matters in respect of voting shares

24. This is a minor clarifying amendment.

25. Clause 12 deals with the circumstances in which an "association" between 2 people may arise. The use of the word "may" in cl.12(1)(d) is imprecise and could cause some doubts about the application of the provision. Replacing the word "may" with the phrase "has or will" clarifies the position.

Amendment (16) : Cl.25 - Dealing in futures contracts : general

26. There has been some confusion about what conduct is encompassed by the expression "on the broker's behalf". Some commentators have interpreted this expression as covering only conduct within a representative's actual or apparent authority whereas it was intended that it also encompass conduct which is outside the authority of the representative. The words "on the broker's behalf" have therefore been deleted and replaced with words which make it clear that conduct outside the authority of the representative is included.

Amendment (17) : Cl.25 - Dealing in futures contracts : general

27. This amendment is consequent upon the amendment to paras. 1126(2)(c) and 1132(2)(c) of the Bill and also prevents sub-cl. 25(3)-(5) having an unintended effect for the purposes of cls. 26, 27 and 28 (which are other interpretation provisions concerning dealing in futures contracts).

Amendment (18) : Cl.58 - Corresponding laws

28. Clause 58 deals, for transitional purposes with the correspondence of the provisions of the Bill to the similar provisions of previous State or Territory laws.

29. The clause is to be amended to add a new sub-clause (2) to make it clear that the 'short-hand' reference to the lodgement or registration of a prospectus under a corresponding law means the lodgement with, or registration by, the National Companies and Securities Commission of a copy of the prospectus under the previous corresponding law (for an example of the use of this reference, see proposed new cl.66(3)).

Amendment (19) : Cl.66 - Excluded issues, offers and invitations

30. Clause 66 of the Bill replaces the concept of "offer to the public" and similar expressions in the CA. Instead an approach is adopted in the Bill which specifically excludes those situations in which a prospectus or other information will not be required to be given to a person to whom an offer, invitation or issue of securities is made.

31. The amendment, which will insert a new cl.66, will exclude a wider number of offers and issues for which it would not be appropriate to require a prospectus or other information under Part 7.12. Generally, this is because, for example, the offer or issue is free, is of an essentially 'private' character, or is made to a person who would have, or have ready access to, sufficient information in relation to the matter.

32. The new range of exclusions is set out in cl.66(1) and (2). Cl.66(1) deals with excluded issues and cl.66(2) with excluded offers.

33. The additional categories where both issues and offers will now be excluded are, where:

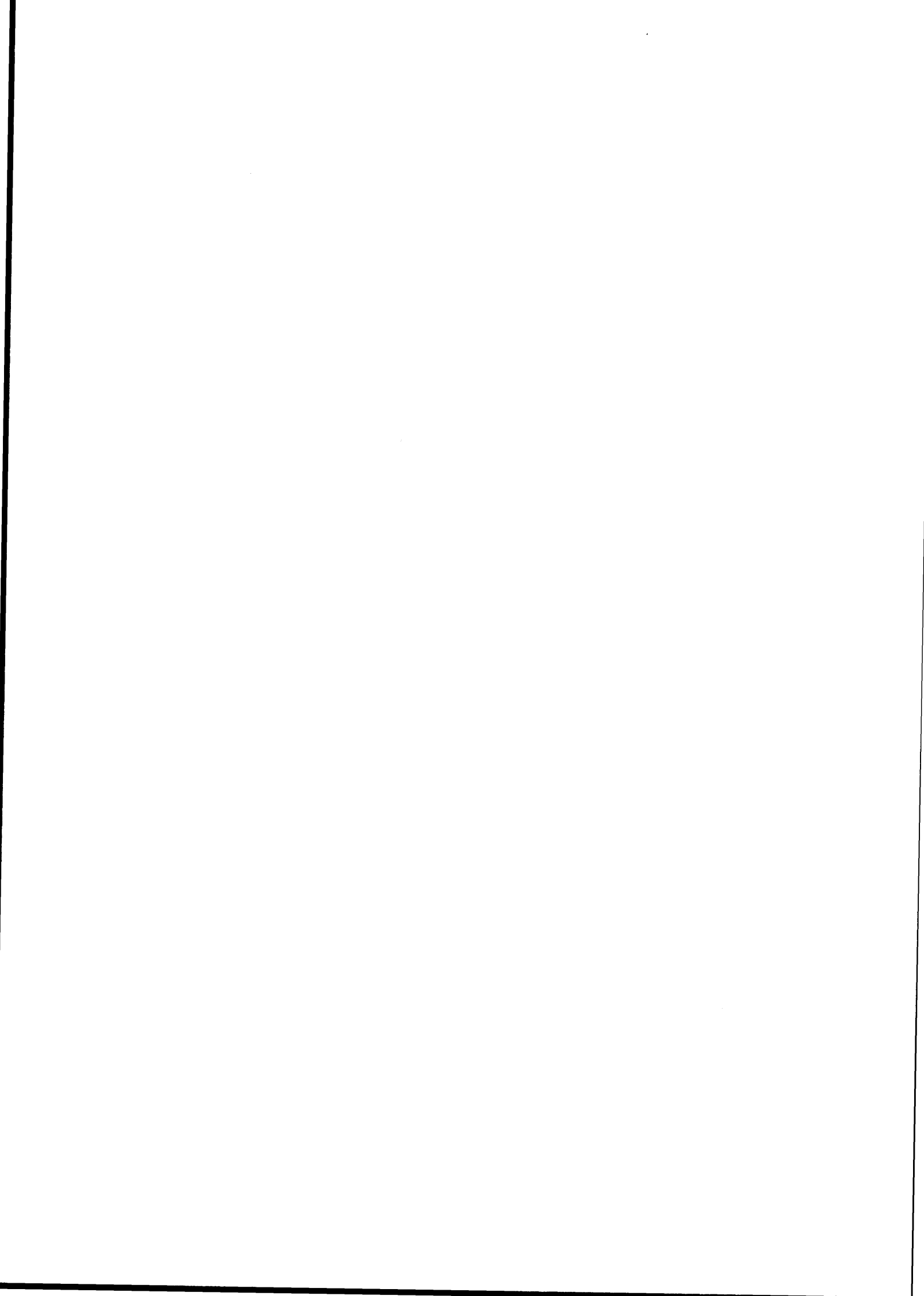
- . the securities are 'free', in that no consideration is given for them (proposed new cl.66(1)(d) and (2)(d) - which clarify and replace the previous reference to "bonus shares" in existing cl.66(1)(d)(ii));

- . the issue or the offer is made personally to not more than 25 persons in the preceding 12 months (proposed new cl.66(1)(e) and (2)(e)); and
- . the issue or offer is made to an executive officer of a corporation or a related corporation, to the close relatives of such an executive officer, or to a body corporate in which the executive officer has or the close relatives have (either individually or together) a controlling interest (proposed new cl.66(1)(f) and (2)(f)).

34. The limit of 25 on the number of offers which may be made has been fixed at a level which will not make the formation of small companies or other small offers or issues unduly expensive. However, it will nevertheless be low enough to ensure that it is unprofitable for fraudulent promoters to operate within the exemption. At the same time, the ASC will have available cl.995 and the injunction remedy from the court in cl.1324 to curtail fraudulent promotions. In the case of executive officers, who are persons concerned in or taking part in the management of the company, it is not necessary to require them to prepare, for their own information, a formal offer document. Those persons and their close relatives can be taken to be in a position to inform themselves about the affairs of the company.

35. It is also not necessary to require a further prospectus to be lodged in respect of the issue of new securities to the existing holders of securities in the corporation or undertaking through the exercise of a right granted by the issuer to acquire, convert, or exchange securities in respect of which a prospectus had been lodged when the person initially became a holder of the securities. In such a case, by acquiring the securities pursuant to that right, the investor was agreeing to become involved in the scheme.

36. For this reason the following issues of securities will also be excluded:



11.

relates to the entering into of an underwriting agreement, and that the excluded issue is made to the underwriter under the agreement.

- . Cl.66(1)(d)(ii) - (bonus shares) deleted as a result of new Cl.66(1)(d) and (2)(d)
- . Cl.66(1)(e) and (2)(e) - (offer or issue of debentures to existing debentures holders) new Cl.66(1)(j) and (2)(h)

39. Proposed cl.66(3) is new and is a transitional provision to save the effect of prospectuses lodged or registered under a similar previous law of a State or Territory.

Amendment (20) : Cl.67 - Exempt brokers and exempt futures advisers

40. This amendment makes a minor drafting correction.

Amendment (21) : Cl. 68 - Exempt dealers and exempt investment advisers

41. This amendment makes a minor drafting correction.

Amendment (22) : Cl. 70 - Extension of period for doing an act

42. The phrase ",or further extend" has been omitted as unnecessary.

Amendment (23) : Cl.71 - Futures advice business and eligible futures advice business

43. This amendment has a similar effect to the amendment to cl.73 (see below).

Amendment (24) : Cl. 73 - Futures representatives

44. This amendment clarifies the operation of cl. 73.

45. Clause 73(3) of the Corporations Bill sets out the circumstances in which a person will be taken to have done an act or engaged in conduct as a futures representative of another person. One of those circumstances, set out in paragraph (c), is that the person must have acted or engaged in the conduct "on the other person's behalf".

46. There has been some confusion about what conduct is encompassed by this expression. Some commentators have interpreted this expression as only covering conduct within a representative's actual or apparent authority whereas it was intended that it also encompass conduct which is outside the authority of the representative. The words "on the other person's behalf" have therefore been deleted and replaced with words which make it clear that conduct outside the authority of the representative is included.

Amendment (25) : Cl.73 - Futures representatives

47. This amendment makes a minor drafting correction.

Amendment (26) : Cl. 77 - Investment advice business and eligible investment advice business

48. This amendment makes a minor drafting correction by substituting "securities" for "futures".

Amendment (27) : Cl.77 - Investment advice business and eligible investment advice business

49. This amendment is consequent upon the amendment to cl.94 (3)(c).

50. Clause 77(9), in effect, provides that where a person A does an act as a representative of another person B then those acts will be disregarded for the purposes of determining

whether or not person A is carrying on an investment advice business. As a consequence of the changes to the definition of securities representative, cl.77(9)(b) has been amended to use an expression corresponding with that used in cl.94(3)(c).

Amendment (28) : Cl.92 - Securities

51. The definition of securities has caused some confusion in its present form, appearing as it does partly in cl.9 and partly in cl.92. Clause 92 has therefore been amended by consolidating the two definitions.

52. The amendment also makes it clear that a reference to a share includes a unit in a share (see definition of "securities" in CA sub-s.5(1)).

Amendment (29) : Cl.93 - Securities business and eligible securities business

53. This amendment is consequent upon the amendment to cl.94(3)

54. Clause 93(6), in effect, provides that where a person A does an act as a representative of another person B then those acts will be disregarded for the purposes of determining whether or not person A is carrying on a securities business. As a consequence of the changes to the definition of securities representative, cl.93(6)(b) has been amended to use an expression corresponding with that used in cl.94(3)(c).

Amendment (30) : Cl. 94 - Securities representatives

55. This amendment clarifies the operation of cl. 94 (3).

56. Clause 94(3) of the Corporations Bill sets out the circumstances in which a person will be taken to have done an act or engaged in conduct as a securities representative of

another person. One of those circumstances, set out in paragraph (c), is that the person must have acted or engaged in the conduct "on the other person's behalf".

57. There has been some confusion about what conduct is encompassed by this expression. Some commentators have interpreted this expression as only covering conduct within a representative's actual or apparent authority whereas it was intended that it also encompass conduct which is outside the authority of the representative. The words "on the other person's behalf" have therefore been deleted and replaced with words which make it clear that conduct outside the authority of the representative is included.

Amendment (31) : Cl. 94 - Securities representatives

58. This amendment clarifies the operation of cl. 94 (4).

59. Clause 94(4) has been amended by deleting the reference to cl.813 and substituting a reference to Division 4 of Part 7.3. The reference to cl.813 is no longer necessary as a result of the amendments made to cl.813 (see para. below). The reference to Division 4 of Part 7.3 has been inserted to make absolutely clear that a person will not incur any liability under Division 4 of Part 7.3 (liability of principals for representatives' conduct) merely because another person holds himself or herself out to be a representative of that person. That is, a person will only be liable under Division 4 of Part 7.3 for the acts of persons who are actually their representatives.

Amendment (32) : Cl. 98 - Transfer days for bodies corporate

60. This amendment makes a minor drafting correction.

AMENDMENTS TO CHAPTER 2 - CONSTITUTION OF COMPANIES

Amendment (33) : Cl.112 - Outsize partnerships and associations

61. This amendment makes a minor drafting correction.

Amendment (34) : Cl.191 - Issue of shares at a premium

62. This amendment makes a minor drafting correction.

AMENDMENTS TO CHAPTER 3 - INTERNAL ADMINISTRATION

Amendments (35) and (36): Cl. 234 - Loans to directors

63. These amendments make minor drafting corrections.

Amendment (37) : Cl.240 - Secretary

64. This amendment makes it clear that the obligations imposed under the clause are cast on the particular company and any officers involved in the contravention.

65. This approach contrasts with the general approach taken in the Bill where section 5 of the Crimes Act 1914 has been relied on to impose liability on "involved" officers. However, because of possible doubts about which persons are responsible for particular contraventions of cl.240, proposed sub-cl.(8) has been inserted to specifically identify those persons who are liable.

Amendment (38) : Cl. 259 - Inspection of minute books

66. This amendment makes a minor drafting correction.

Amendment (39) : Cl.259 - Inspection of minute books

67. This amendment is consistent with the general approach in the Bill that officers of a company "involved" in a contravention will be subject to liability under s.5 of the Crimes Act 1914. No specific provision is required.

Amendment (40) : Cl. 290 - Synchronisation

68. Clause 290 requires directors of a group holding company to ensure that the financial year of each subsidiary coincides with the financial year of the company. If there is good reason for the financial years not to coincide, an application is able to be made to the ASC. As presently worded, cl. 290 provides a right of appeal to the Court against the ASC's decision.

69. The amendment removes the right to an appeal to the Court, since an ASC decision under cl.290 will be subject to review by the AAT under new Part 9.4A, and makes several consequential changes.

70. The effect of the consequential changes is that where an application to the ASC is made for an order authorising a subsidiary to have a financial year that does not coincide with that of its holding company:

(a) no action to ensure coinciding financial years is necessary until 12 months after the 'determination day' i.e. the day when:

- any AAT decision relating to the application comes into operation;
- any appeal arising out of an AAT decision is determined;
- any application to the AAT is withdrawn or dismissed; or
- in any other case - the day when the ASC's order on the application is served on the holding company; and

(b) no further application may be made to the ASC in relation to the subsidiary within 3 years after the determination day unless the ASC's order granted the application (conditionally or otherwise) or the ASC is satisfied that there has been a substantial change in the relevant facts or circumstances since that day.

Amendment (41) : Cl. 313 - Relief from requirements as to accounts and reports

71. The right of appeal to the Court provided by sub-cl.(15) is being deleted because an aggrieved person will be able to apply to the AAT for review instead under new Part 9.4A of the Bill.

Amendment (42) : Cl.322 - Continued application to Division 2 company of requirements of corresponding law

72. This amendment makes a minor drafting correction.

Amendment (43) : Cl.328 - Nomination of directors

73. This amendment makes a minor drafting correction.

Amendments (44) and (45) : Cl. 329 - Removal and resignation of auditors

74. Sub-cl.(8) is being deleted and sub-cl.(9) is being consequentially amended to remove the right of an aggrieved person to appeal to the Court. Instead, the person can apply for AAT review under new Part 9.4A of the Bill.

AMENDMENTS TO CHAPTER 4 - VARIOUS CORPORATIONS

Amendment (46) : Cl.362 - Publication of name etc.

75. This amendment makes a minor drafting correction.

Amendments (47) and (48) : Cl.371 - Abbreviations of words included in a company's name

76. These amendments omit paras. 371(e) and (k).

77. These paragraphs provide that an Australian Registered Body may use the abbreviations "Regd." or "ARBN" in its name instead of the words "Registered" or "Australian Registered Body Number". The use of these abbreviations in a name would only occur where the body has a number name. However, as the legislation does not provide for such bodies to have number names, paragraphs 371(e) and (k) are of no utility.

Amendments (49), (50), and (51) : Cls. 374 and 376 - Names by body corporate and registrable body propose to be registered

78. These amendments make minor drafting corrections to include reference to "incorporated" after "registered".

Amendments (52) and (53) : Cl.378 - Applications under sections 373 to 382

79. These amendments make minor drafting corrections.

Amendment (54) : Cl. 383 - Omission of "Limited " in names of charitable and other companies

80. This amendment makes a minor drafting correction.

Amendment (55) : Cl.384 - Applicaton of Act to no libility companies

81. This amendment makes a minor drafting correction.

Amendment (56) : Cl.388 - Forfeiture of shares

82. This amendment makes a minor drafting correction.

Amendment (57) : Cl.390 - Shares held by, or in trust for, company

83. This amendment makes a minor drafting correction.

Amendment (58) : Cl.393 - Redemption of forfeited shares

84. This amendment makes a minor drafting correction.

Amendments (59) to (66) : Cl.399 - Interpretation

85. These amendments make minor drafting corrections.

Amendment (67) : Cl. 408 - Contraventions

86. This amendment makes a minor drafting correction.

AMENDMENTS TO CHAPTER 5 - EXTERNAL ADMINISTRATION

Amendment (68) : Cl.443 - Six-monthly meetings of creditors and members

87. This amendment makes a minor drafting correction.

Amendment (69) : Cl.474 - Custody and vesting of company's property

88. This amendment makes a minor drafting correction.

Amendment (70) : Cl.542 - Books of company

89. This amendment makes a minor drafting correction.

Amendment (71) : Cl. 544 - Unclaimed money to be paid to Minister

90. This amendment makes a minor drafting correction.

Amendment (72) : Cl.556 - Priority payments

91. This amendment makes a minor drafting correction.

Amendment (73) : Cl. 581 - Courts to act in aid of each other

92. This amendment makes a minor drafting clarification.

Amendment (74) : Cl.585 - Insolvency of Part 5.7 body

93. This amendment makes a minor drafting correction.

Amendment (75) : Cl.593 - Powers of Court

94. This amendment makes a minor drafting correction.

Amendment (76) : Cl.597 - Examination of persons concerned with corporations

95. Clause 597 deals with the procedure for the Court examination of persons concerned in the affairs of companies. Sub-clause (12) provides that a person is not excused from answering an incriminating question put at the examination but that where the person claims before answering that the answer might tend to incriminate him or her, the answer is not admissible in evidence against the person in criminal proceedings other than proceedings under cl.597 or proceedings for perjury.

96. The amendment widens sub-cl.(12) to provide a use derivative use indemnity. This means that where the person claims that the answer might tend to incriminate him or her, neither the answer nor anything obtained as a consequence of the answer will be admissible in criminal proceedings other than proceedings under cl.597 or proceedings for perjury.

Amendments (77) to (82) : Cl.601 - Operation of certain Ordinances

97. The amendment replaces incorrect references to "Division 6 of Part 5.6" (Proof and ranking of claims in a winding-up) with correct references to "Part 5.7" (Winding-up of bodies other than companies) and defines "Ordinance" for the purposes of cl.601 to mean an ACT Ordinance.

AMENDMENTS TO CHAPTER 6 - ACQUISITION OF SHARESAmendment (83) : Cl. 603 - Definitions : "convertible note"

98. This amendment is consequent upon Amendment () to cl.9 - the definition of "convertible note" inserted in cl.9 will apply for the purposes of the Act as a whole (e.g. cl.66(1)(h)(ii)).

Amendments (84), (85) and (86) : Cl. 609 - Entitlement to shares

99. These amendments overcome some anomalies arising by virtue of the relationship between the association provisions in cl.12 and the entitlement provisions in cl.609.

100. The effect of cl.609(1) is that the shares to which a person is entitled include those shares in which the person or any associate of the person has a relevant interest. (Provisions dealing with associates are contained in Division 2 of Part 1.2 and provisions dealing with relevant interests are contained in Division 5 of Part 1.2 of the Bill).

101. Sub-clause 609(2) provides for an exception to cl.609(1) where associations arise by virtue of acquisition agreements under cl.12(1)(f). Sub-clause 609(2) was intended to rectify an anomaly in the equivalent co-operative scheme provisions whereby even those of the proposed seller's shares which were not subject to the agreement were counted in the entitlement of the proposed acquirer.

102. However, sub-cl.609(2) had an unintended effect in the case of agreements in relation to shares giving rise to associations. Both parties to the agreement are associates of each other and accordingly, by virtue of cl.609(1)(b), each has the relevant interest in shares of the other attributed to them. This unintended effect will also arise where such agreements gave rise to associations under cl.12(1)(d) and (g).

103. Using the example of call options, the person with the option of requiring the owner of the shares to sell them (i.e. the taker of the option) has a relevant interest in the shares the owner (i.e. the writer of the option) holds. Equally, however, the writer has a relevant interest in the shares in which the taker has a relevant interest. The first result is clearly intended (provided the attribution is limited to the shares the subject of the agreement). The second result is not intended. A similar problem arises in relation to put options.

104. The amendments rectify this problem by exempting from the application of cl.609(1)(b) an associate's relevant interest where the association arises by virtue of paras.12(1)(d),(f) or (g) and replacing existing sub-cl.609(2) with a provision focusing specifically on the agreements covered by those paragraphs. Proposed sub-cl.609(2) will attribute a relevant interest only to the person who, on performance of the agreement or proposed agreement, actually acquires the shares.

Amendments (87) and (88) : Cl.622 - Acquisitions pursuant to prospectus

105. Clause 622 provides that the prohibitions in cl.615 will not apply to an acquisition of shares following an allotment or purchase pursuant to a prospectus. The provision is similar to CASA s.12(b), except that in CASA the prospectus must be offered to the public.

106. The clause, as presently expressed, may have the result that a person may not have to make a full takeover offer to all the members of the company when a prospectus is lodged under Part 7.12 offering shares to any person.

107. Amendment (88) will eliminate this possibility by only exempting a prospectus which offers shares to persons who include, at least, all the members of the company. Thus, an acquisition pursuant to a prospectus which is a full public offer, and includes an offer to all members of the company, will be exempt, as under the current law.

109. Amendment (87) makes a drafting change to the opening words of cl.622(1) to make it clear that the reference to shares is to the shares in a company to which Chapter 6 applies.

Amendment (89) : New Cl. 623 - Acquisitions approved by resolution of target company

110. This amendment replaces cl. 623 with a new clause which corresponds to CASA s.12(g)

111. Clause 623 provides an exemption from the operation of cl. 615 in relation to allotments of and purchases of shares including those made pursuant to an option. The clause is based on CASA s.12(g) although it does differ from that provision in that it includes acquisitions of shares pursuant to the exercise of an option.

112. Concern has been expressed that the extension of cl. 623 to allotment of and purchase of shares pursuant to options may not provide an appropriate level of protection for shareholders. Clause 623 has accordingly been amended to a form corresponding to CASA s.12(g).

Amendment (90) : New Cl. 629 - Downstream acquisitions resulting from acquisition of shares in a listed company

113. This amendment substitutes a new cl.629.

114. Clause 629 of the Bill provides an exemption from the general prohibition in cl.615 against acquiring or increasing control of a company without making a takeover offer or announcement. Clause 629 applies where the acquisition of shares in a listed company ('the upstream company') has the result that the acquirer also acquires shares in a "downstream company" by virtue of the listed company's holding in the downstream company. However, unlike the previous CASA s.12(k) exemption, cl. 629 is restricted to cases where the listed company already has control (i.e. 20% or greater) of the downstream company.

115. Clause 629 has been redrafted to incorporate two changes. Firstly the requirement that the listed upstream company have control (i.e. 20%) of the downstream company before cl.629 would have effect has been removed. This has been done because the inclusion of such a condition may have produced unintended consequences e.g. allowing the listed upstream company to more easily discourage hostile takeovers.

116. The second change to cl.629 is to include the requirement that, for the exemption to apply, the acquisition of shares in the upstream company must be made pursuant to a takeover scheme or takeover announcement or under the on-market purchase provisions in cl.620. This amendment will clarify and buttress the takeover provisions insofar as they apply to holding companies.

Amendment (91) : New Cl.633 - Acquisitions permitted by regulations or by the Commission

117. This amendment provides greater flexibility in the administration of the takeover provisions.

118. Under the present co-operative scheme, in some States, some bodies such as building societies are exempted by their governing legislation from the Companies (Acquisition of Shares) Code of their State. However, these exemptions do not apply in relation to the coverage of the Corporations Bill. Chapter 6 of the Bill, which replaces CASA, applies in relation to acquisitions of shares in companies which, for the purposes of Chapter 6, will include bodies such as building societies.

119. The amendment provides a means whereby acquisitions of shares in prescribed companies can be exempted from the operation of cl.615. The prescription of a company could be made by reference to matters including membership of a class or by reference to the company having a particular attribute.

Amendment (92) ; Cl. 659 - Registration of notices of variation

120. The amendment makes a minor drafting correction.

121. The proposed variation must be permitted by all the relevant sections of the Division (not just cl. 659), which refer, inter alia, to the circumstances in which offers may be varied, to variation of consideration and to offer periods.

Amendment (93) ; Cl. 669 - Definitions

122. This amendment makes a minor drafting correction.

Amendment (94) ; Cl. 686 - Restriction on disposal of shares by offeror

123. This amendment makes a minor drafting correction.

Amendments (95) and (96) ; Cl. 698 - Offerees not to be given benefits except under takeover scheme or takeover announcement

124. These amendments delete the deeming provisions in cl. 698 in relation to the sub-clauses prohibiting the offeror giving benefits to shareholders in the 4 months preceding a takeover offer or announcement without offering those benefits to all shareholders to whom the offer or announcement applies.

125. These deeming provisions could have produced unnecessarily harsh results in respect of reasonably innocuous benefits. In the absence of these deeming provisions, contraventions of sub-cl. 698(2) and (5) will have to be proved by reference to the offeror's intention, inferences about which, where appropriate, may be made from relevant conduct.

Amendment (97) : Cl. 710 - Substantial shareholder to notify company of changes in interests

126. This amendment brings cl. 710 into line with cl. 709.

127. Para 710(3)(a) will now require the use of a particular form only if one is prescribed. Notice will still be required even if a form is not prescribed.

Amendment (98) ; Cl. 711 - Person who ceases to be a substantial shareholder to notify company

128. This amendment brings cl. 711 into line with cl. 709.

129. Para 711(3)(a) will now require the use of a particular form if one is prescribed. Notice will still be required even if a form is not prescribed.

Amendment (99) : Cl. 721 - Request by person to whom notice given

130. This amendment makes a minor drafting correction.

Amendment (100) : Cl. 750 - Part A, B, C and D statements; Part A - Statement to be given by offeror under takeover scheme; 13. Other agreements with directors of target

131. This amendment makes a minor drafting correction.

132. The clause now explicitly states that the statement is required to set out the particulars to which cl. 13 refers.

Amendment (101) : Part C - Statement to be given by offeror under takeover announcement; 10. Other agreements with directors of target

133. This amendment makes a minor drafting correction.

134. This clause now explicitly states that the statement is required to set out the particulars to which cl.10 refers.

AMENDMENTS TO CHAPTER 7 - SECURITIES

Amendment (102) : Cl. 776 - Securities exchanges to provide assistance to Commission

135. This amendment makes a minor drafting correction.

Amendment (103) : Cl. 779 - Qualified privilege in respect of disciplinary proceedings

136. This amendment makes a minor drafting correction.

Amendment (104) : Cl. 781 - Investment advisers

137. This amendment makes a minor drafting correction

Amendment (105) : Cl. 785 - Effect of certain provisions

138. This amendment makes a minor drafting correction.

139. Cls. 783 and 784 require the ASC to grant a dealers or investment advisers licence if certain criteria are met. Cl. 785 now explicitly makes cls. 783 and 784 subject to cl. 836 which prohibits the ASC from granting such a licence if the person is forbidden by a banning order from acting as a representative of a dealer or investment adviser.

Amendment (106) : Cl. 786 - Conditions of licence

140. This amendment corrects a cross-reference in sub-cl.786(7).

Amendment (107) : Cl. 799A - Client may apply to Court for partial rescission

141. This amendment inserts a new clause to provide, in effect, for Court assisted partial rescission of contracts with unlicensed dealers.

142. Division 2 of Part 7.3 of the Corporations Bill is designed to prevent the enforcement of a contract by a person who either advises or deals in securities and does not have a licence but who should be licenced. Under cl.799 a notice of rescission has the effect of rescinding the agreement unless rescission would prejudice third party rights.

143. A potential problem caused by this protection of third party rights arises in cases where the agreement between the client and the unlicensed person relates to a variety of transactions. In such a case, a third party right might be affected in only one of those transactions, yet the existence of that third party right will prevent the agreement being rescinded in relation to all of the other transactions under the agreement.

144. Clause 799A has accordingly been introduced to allow a client to apply for a Court order which will, in effect, produce the result that the contract is partially rescinded. This will only be possible insofar as it relates to transactions not affected by third party rights.

Amendments (108) and (109) : Cl. 813 - Disclosure to client by representative

145. These amendments delete sub-cl.813(1) and (3).

146. Clause 813(1) of the Bill requires a person acting as a representative to advise the client of the person for whom the representative is acting and the address of that person (the latter advice being required in writing). The representative must also show a copy of his proper authority (defined in cl. 88) to the client.

147. These requirements may however cause inconvenience particularly in relation to the conduct of telephone business. Because of the potential inconvenience and possible associated efficiency losses, and because the Bill provides other means whereby a client can find out who a representative is authorised to act on behalf of (see cls.810 and 811 of the Bill), clause 813(1) has been deleted. It follows that cl.813(3) is unnecessary and therefore has been deleted.

Amendment (110) : Cl.817 - Conduct engaged in as a representative

148. This amendment makes a minor drafting correction.

Amendment (111) : Cl. 824 - Power to revoke, without a hearing, licence held by natural person

149. This amendment rectifies an anomaly.

150. Clause 824(d) gives the ASC power to revoke a licence without a hearing if the licensee contravenes a condition of the licence existing by virtue of cl. 791, 792 or 860.

151. However in the case of non-compliance with other conditions of a licence or a contravention of relevant provisions of the Bill, the ASC is obliged to give the licensee an opportunity for a hearing before deciding to revoke a licence.

152. There is no intrinsic reason why failure to comply with the obligations dealt with in cls. 791, 792 and 860, should be treated any differently to failure to comply with other obligations under the Bill.

153. Accordingly, cl. 824(d) has been deleted, and cl. 826(1)(d) has been amended to make it clear that the ASC must give a licensee an opportunity for a hearing before revoking the licence on the grounds of a contravention of cl. 791, 792 or 860.

Amendment (112) : Cl. 825 - Power to revoke, without a hearing, licence held by body corporate.

154. This amendment achieves the same result in relation to corporate licence holders as Amendment (111), described above, achieves in respect of natural person licence holders.

Amendment (113) : Cl. 826 - Power to revoke licence after a hearing

155. This amendment is consequential on amendments (111) and (112) described above at paras. 149 to 154.

156. This amendment provides, in effect, that the ASC must give the licensee an opportunity for a hearing before revoking a licence on the ground of contravening a condition of the licence existing by virtue of cl. 791, 792 or 860.

Amendment (114) : Cl. 840 - Effect of previous orders under laws corresponding to section 88

157. This amendment clarifies the operation of the clause and ensures that orders given previously have full application.

Amendments (115) and (116) : Cl. 844 - Dealer to give priority to clients' orders

158. These amendments make minor drafting corrections.

Amendment (117) : Cl. 846 - Short selling

159. This amendment makes a minor drafting correction.

Amendment (118) : Cl. 849 : Client to be told if adviser's interests may influence recommendation

160. This amendment deletes the requirement in cl.849(4).

161. Clause 849 provides that a dealer, investment adviser or one of their representatives (i.e. a "securities adviser") who makes written or oral recommendations must disclose any interest they have in making the recommendation.

162. Where an oral recommendation is made by a securities adviser and the securities adviser discloses to the client any "interests" he has in making the recommendation, cl.849(4) requires the securities adviser to confirm in writing (within 2 business days) the interests disclosed.

163. This requirement may, however, cause practical difficulties as many securities advisers provide a large proportion of their recommendations over the phone. To avoid these practical difficulties, cl. 849(4) has been omitted to remove the requirement for written confirmation of interests in relation to oral recommendations. The requirement to disclose interests when making oral recommendations will, however, remain.

Amendments (119) and (120) : Cl. 850 - Defence to alleged breach of sub-section 849(2)

164. Clause 849 requires securities advisers, when making a recommendation, to disclose any interest they or their associates have in making the recommendation. Clause 850 provides a defence to an alleged contravention of cl. 849 in that failure to disclose an interest under cl. 849 will not be a contravention if it is shown that the person was not and could not reasonably be expected to have been aware of that interest when making the recommendation.

165. There have been some doubts expressed that corporate advisers operating Chinese Walls, despite the defence offered by cl.850, may still be in breach of cl. 849. A Chinese Wall is a term used to describe a set of internal rules and procedures established by a company or firm for the purpose of preventing sensitive information known to one division or part of the company from being communicated to other divisions.

166. To remove any uncertainty, an additional defence has been inserted (proposed cl. 850(2)). It provides that where there is a failure to comply with cl.849(2), ie a failure to disclose an interest, and there is in place a Chinese Wall (see proposed cl.850(2)(c)) and the person making the recommendation did not in fact know of the interest and received no advice in relation to the recommendation from anyone who did know of the interest, then there is no contravention of cl.849(2).

167. A number of features of this additional defence can be noted.

168. The defence is not limited only to corporate advisers or to partnerships eg. it also applies to arrangements between natural person advisers and their representatives and to arrangements between related bodies corporate. The only limitation in this regard is that the person actually giving the advice be "enclosed" by the Chinese Wall.

169. A director, secretary or executive officer of a corporate adviser when acting as its representative or a partner in a partnership engaged in securities advice are included within the scope of this defence. So also is the corporate adviser and other partners in the partnership who are deemed, by virtue of cl. 848, to have made the recommendation.

Amendment (121) : Cl. 851 - Adviser must have reasonable basis for recommendation

170. This amendment provides that contravention of cl. 851 is not an offence.

171. Clause 851 (read with cl. 1311) makes a contravention of the clause an offence. The amendment restores the position under the equivalent co-operative scheme provision (SIA s.65A).

Amendment (122) : New Cl. 852 - Adviser who breaches this Division liable to compensate client

172. This amendment establishes a more appropriate causal connection between liability for damages and the relevant contravention.

173. Clause 852 imposes a civil liability on a securities adviser to compensate a client who suffers loss as a result of a contravention of cl.849 or cl.851. It is based on, and contains the same elements as, SIA s.65A(4). One problem with cl.852 (and SIA s.65A(4)) is that the damages a person suffers and can claim against the securities adviser, may not be caused by the failure of the securities adviser to comply with cl.849 or cl.851.

174. To deal with this problem, cl.852 has been amended to, in effect, require a causal connection between the damages and the contravention. The client will not, however, bear the onus of proving this causal connection (the causal connection required in para 852 (1)(d) will still need to be proved by the client). This has been achieved by amending cl.852 to provide a securities adviser with a defence to a claim for damages under that section.

175. In the case of a contravention of cl.849, it will be a defence to a claim for damages if the securities adviser can show that a reasonable person in the client's circumstances would still have acted in the way which brought about the loss even if the securities adviser had complied with cl.849 (see proposed cl.852(3)). In the case of a contravention of cl.851, it will be a defence to a claim for damages if the securities adviser can show that the recommendation was in fact appropriate, despite the fact that the adviser had not in fact ascertained that this was so having regard to the client's particular circumstances etc. (see para 851(2)(a)).

Amendment (123) : Cl. 858 - Removal and resignation of auditors

176. This amendment makes a minor drafting correction.

Amendments (124) and (125) : Cl. 858 - Removal and resignation of auditors

177. Sub-cl. (7) is being omitted so as to remove the right of an aggrieved person to appeal to the Court. An aggrieved person will have a right to apply to the AAT under new Part 9.4A of the Bill for review of the Commission's decision to refuse consent to the removal or resignation of an auditor of a securities dealer. A consequential amendment is being made to sub-cl.(5).

Amendment (126) : Cl. 899 - Payment to the credit of the fidelity fund of a futures exchange or futures association

178. This amendment makes a minor drafting correction.

Amendment (127) : Cl. 906 - Investment of Fund

179. This amendment makes a minor drafting change so that the reference to investment of excess money in a fidelity fund in any way in which trustees are for the time being authorised by law to invest has been expanded to refer specifically to a law in force in a State or Territory.

Amendment (128) : Cl.920 - Interpretation

180. This amendment makes a minor drafting correction.

Amendment (129) : Cl.949 - Claim by selling dealer in respect of default by buying dealer

181. This amendment makes a minor drafting correction.

Amendment (130) : Cl.950 - Claim by buying dealer in respect of default by selling dealer

182. This amendment makes a minor drafting correction.

Amendment (131) : Cl.965 - Ordering of alternative claims and prevention of double recovery

183. This amendment makes a minor drafting correction.

Amendments (132), (133), (134) and (135) : Cl.973 - Application of Fund in respect of certain claims

184. These amendments make minor drafting changes.

185. Clause 973 deals with the situation where the National Guarantee Fund is used to purchase securities under those provisions where the Securities Exchange Guarantee Corporation (SEGC) is required to compensate claimants but for some reason e.g. sufficient scrip cannot be bought, a cash settlement is later made to the client. In such circumstances, the SEGC is required to sell the securities purchased and pay the proceeds into the NGF (see cl.973(3)).

186. Clause 973 was meant to include reference to such a situation arising under cl.960(2). Clause 973 has been accordingly amended to include such a reference.

Amendment (136) : Cl.982 - SEGC may enter into contracts of insurance or indemnity

187. This amendment deletes unnecessary words.

Amendments (137) and (138) : Cl.1006 - Civil liability for false and misleading statement in, or omission from, prospectus

188. Clause 1006 requires persons responsible for the prospectus, including professional advisers named with their consent in the prospectus, to compensate subscribers who suffer loss as a result of the prospectus containing a false or misleading statement or material omission. The nature of the liability of each of these persons differs according to their role in the preparation of the prospectus which is reflected in the range of different defences provided in cls. 1008 (directors), 1009 (experts), 1010 and 1011 (named advisers).

189. This clause is to be amended to further differentiate the appropriate responsibilities among advisers named in the prospectus, namely on the one hand, stockbrokers, sharebrokers and underwriters and, on the other hand auditors, bankers and solicitors and other advisers. The effect of the amendments will be that auditors, bankers and solicitors and other advisers will bear similar liability to 'experts' under cl.1009 of the Bill. Thus those advisers who consent to be named in the prospectus will bear liability for the functions or matters for which they are responsible in relation to the prospectus, or the statements they make in the prospectus in their capacity as advisers. They will not be responsible for the functions of other advisers in relation to the prospectus.

190. The other professionals who choose to be named in the prospectus, namely underwriters, sharebrokers and stockbrokers, will continue to be responsible for the prospectus in the same manner as under the present Bill. This is because underwriters and brokers to the issue are, in practice, intimately involved in the structuring and preparation of the issue. It should be noted, however, that underwriters and brokers will still be able to limit their liability under cl.1010 to the part of the prospectus with which they have been involved and, under cl.1011, will not be liable where they have reasonably relied on information provided by the directors or officers of the company or other persons.

Amendments (139), (140) and (141) : Cl.1009 - Liability of experts

191. This clause is to be amended so that auditors, bankers, solicitors and other professional advisers (except stockbrokers, sharebrokers and underwriters) will have similar liability to experts for a false and misleading statement or omission for which they are responsible in a prospectus. The purpose of these amendments is explained in the explanatory note on the amendments to cl.1006.

Amendments (142) and (143) : Cl.1010 - Liability of persons named in prospectus

192. These amendments make minor drafting corrections.

Amendment (144) : Cl.1011 - No liability for mistake etc if reasonable precautions taken

193. This amendment makes a minor drafting correction.

Amendment (145) : Cl.1016 - Holding companies etc

194. Clause 1016 applies to holding companies the provisions of Part 7.12 - Offering Securities for Subscription or Purchase.

195. The adaptation of cl.1020 in cl.1016(3) is to be consequentially amended to bring it into line with the corresponding amendment made to cl.1020.

Amendment (146) : Cl.1017 - Exceptions

196. Clause 1017 is to be restructured and amended to enable regulations to be made to give a corresponding exemption from the application of Part 7.12 in respect of those registrable Australian corporations (such as building societies, co-operative societies, credit unions and friendly societies) that are presently exempted from the application of the prospectus provisions of the Companies Codes in the State or Territory of incorporation of those bodies.

Amendment (147) : New Cl.1017A - Registrable prospectuses

197. The proposed new cl.1017A to be inserted in the Bill by this amendment specifies those classes of prospectuses which will not be required to be registered and subject to a process of pre-registration examination under new cl.1020A.

198. Under the present Bill all prospectuses need only be lodged (and not registered) before an offer on issue of the securities pursuant to the prospectus may be made. However, in order to provide greater protection to the wider investing public in respect of offerings to such persons by unlisted companies, the Bill adopts the proposed classification for registering prospectuses recommended in the report of the Securities Information Review Committee 'Reforming the Law Relating to the Offer of Securities'.

199. Registration will not be required for a prospectus in the case of:-

- (a) a corporation listed on the stock market of a securities exchange; and
- (b) an unlisted corporation where the issue or offer is made to
 - (i) existing shareholders or debenture holders;
 - (ii) an institutional investor, including a statutory superannuation fund, a securities dealer acting as principal, a finance or insurance company, an investment company or other declared institutional investor; or
 - (iii) employees where the corporation keeps those employees adequately informed about the operations of the company. (cl.1017A(3)).

200. A prospectus in relation to prescribed interests made available by a corporation is classified along corresponding lines (cl.1017A(4)).

201. The rationale for excluding these prospectuses from the registration requirement is that there is an existing substantial level of post-issue scrutiny of the prospectus by the market to which it is directed (in the case of offerings by listed companies, the ASX scrutinises prospectuses for the purpose of ensuring compliance with listing requirements and the companies are subject to an on-market disclosure regime), or the persons to whom the prospectus is offered have sufficient expertise, or access to relevant background information (eg existing members or employees) so as to not require pre-registration 'vetting' by the ASC. In those cases the prospectuses will still be required to be lodged with the ASC.

Amendment (148) : Cl.1018 - Prospectus in relation to securities

202. Clause 1018 is to be amended to:

- (a) prohibit the issue of securities unless a prospectus which, under cl.1017 is required to be registered, is in fact registered;
- (b) to remove the prohibition, in cl.1018(a) of the present Bill on the allotment or issue of securities without a prospectus, which appears to have given rise to some confusion as to the extent to which the prospectus provision would apply to secondary trading; and
- (c) exempt from the requirement to lodge or register a prospectus the trading of securities on the stock market, where a prospectus has been previously lodged in respect of the offer or issue of those securities, and where the corporation has complied with the listing requirements applicable to it regarding the further information required by the securities exchange in the case of a 'back door' or 'compliance' listing.

Amendment (149) : Cl.1020 - Forms of application for securities to be attached to prospectus

203. This clause will be consequentially amended to take account of the inclusion of new cl.1020A.

Amendment (150) : New Cl.1020A - Registration of Prospectuses

204. This new clause will establish the criteria by which the ASC will register a prospectus that is required to be registered under proposed new cl.1017A. The proposed test is expressed in a way which is designed to alleviate the unnecessary rigour in the way the existing test in CA s.103 is applied without affecting the efficacy of the pre-registration examination by the ASC.

205. The new test follows the approach recommended by the Securities Information Review Committee in its report 'Reforming the Law Relating to the Offer of Securities'. Under proposed new cl.1020A the ASC will be required to register a prospectus unless it appears that the prospectus does not comply with the law or contains false or misleading material. The Committee noted (at p.15 of its report), 'This will allow the Commission to redirect its resources to substantive considerations. The amount of effort devoted to the consideration of a particular prospectus will be determined on the basis of need, reflecting the level of concern felt about the content of the prospectus. The proposal will allow for more flexibility and permit more efficient resource allocation'. At the same time it will facilitate the reduction of the costs and delays to business in having to strictly comply with sometimes unnecessary and irrelevant statutory or administrative rules.

Amendment (151) : Cl.1021 - Specific provisions applicable to all prospectuses

206. This amendment will restructure the regulation making power in cl.1021(7) which enables the specification of the further matters or reports to be included in a specified class of prospectuses. The provision will enable the general prospectus content requirements in cl.1022 to be supplemented, although not overridden by, minimum specific disclosure rules. The prescription of additional rules will assist the preparers of prospectuses in disclosing basic information and will act as a focus for the general information requirement in cl.1022. It will permit different content rules for different classes of prospectuses, e.g. for listed and unlisted companies, rights issues, issues to employees (cl.1021(7A)).

Amendments (152) and (153) : Cl.1022 - General provisions applicable to all prospectuses

207. The absence of a general exclusion for issues of shares to existing members of a corporation under cl.66 means that 'rights' issues, to shareholders will require a 'prospectus'. A rights issue essentially involves a new investment decision in the company by the shareholder. For that reason shareholders are entitled to relevant material information on the position of the company in order to make an informed decision on whether to participate in the issue.

208. It is also clearly the case that, in most cases, the general disclosure requirement of cl.1022 would not require a 'rights issue' prospectus to contain the same degree of information as would be required in a full public offer prospectus. The issuer is entitled to have regard under cl.1022(3) to the kinds of persons likely to subscribe to the prospectus and any information already known to them or their professional advisers. Existing members would normally possess some relevant existing information about the company.

209. However, to make this position clearer for issuers, new cl.1022(3)(ca) is to be inserted in the Bill. The amendment will provide that one of the factors that may be taken into account in the preparation of a prospectus is that it will be offered to existing members of the company who will already be aware of information provided to them that is contained in the last annual return or other statutory information prepared by the corporation, or in the case of a listed company, in further reports or information required under stock exchange rules.

Amendment (154) : Cl.1063 - Exceptions and modifications

210. Cl.1063 will be amended to make it clear that Division 5 - Prescribed Interests does not apply to offers or issues of prescribed interests excluded under cl.66. Although it is likely that this result is imported from cl.1017 by the general application provision now in cl.1063(2), it is preferable to remove any doubt on the matter by specifically identifying the intended effect.

Amendment (155) : Cl.1065 - No issue without approved deed

211. Clause 1065 is to be amended to include a new sub-clause (1A) to give the ASC a power to continue an approved deed in force for an interim period where a trustee ceases to be an approved trustee or ceases to hold office.

212. Such a provision is desirable otherwise, upon such circumstances occurring, the deed would automatically cease to be an approved deed until a new trustee was appointed. This would occur, for example, upon the liquidation of the trustee, the revocation of the trustee's approval, the resignation of the trustee or the trustee's removal by the unit holders or the court.

213. In the normal event the appointment of a new trustee and its approval by the ASC, and the resignation of the old trustee would occur virtually simultaneously. However this may not happen where the trustee's approval is revoked or the

trustee unilaterally resigns. In these circumstances the mechanism in cl.1065 will ensure that there are no undesirable consequences for interest holders from the deed ceasing to be an approved deed.

Amendments (156) and (157) : Cl.1066 - Approved deeds

214. Clause 1066 establishes the circumstances in which a deed is an approved deed. Under the present Bill the ASC does not 'pre-vet' deeds. An 'approved' deed is one which complies with the requirements of the legislation.

215. Consistent with the decision that certain prescribed interest prospectuses will be required to be registered rather than only lodged, cl.1066(1)(a) has been amended so that a deed will be an approved deed if it is approved by the ASC under cl.1067. A deed will also be an approved deed if it is approved under the existing Companies Codes or corresponding previous legislation prior to the commencement of the Bill. Thus a deed legitimised under previous law will be an approved deed even if it does not contain the covenants referred to in cl.1069(1). The consequence of this is that the specific savings provisions in cl.1066(2) and (3) are now unnecessary and they are to be removed from the Bill.

216. A new cl.1066(2) is to be inserted to preserve the interest holders' entitlement to sell back their interests to the management company, notwithstanding that the deed has ceased to be an approved deed. In that event a management company will not be prevented from repurchasing an interest from a holder in accordance with the provisions of the former deed or the deemed covenant in cl.1069(1)(c) although the deed no longer legally exists as an approved deed.

Amendment (158) : New Cl.1067 - Approvals

217. Clause 1067 is to be amended to add a new sub-cl.(1) to provide for the grounds on which the ASC will approve a trust deed.

218. This amendment is consequential upon the amendment to cl.1066 to require trust deeds to be approved. Consistent with the approach taken to the registration of prospectuses under cl.1020A, the test has been restated so that the ASC is under an obligation to grant its approval to the deed unless it is of the opinion it does not comply with the requirements of the Bill.

219. The present provisions of cl.1067 dealing with the approval of the trustee and the revocation of any approvals are to be retained and re-numbered as cl.1067(2) and (3), respectively.

Amendment (159) : Cl.1069 - Covenants to be included in deeds

220. Clause 1069(1)(a) is to be amended so that the covenants to be contained in the deed may be 'to the effect' of the statutory covenants set out in cl.1069. The purpose of this amendment is to provide some flexibility in drafting deeds by avoiding an interpretation that the covenants in the deed must literally follow the statutory wording.

Amendment (160) : Cl.1073 - Consequences of contravention

221. Under present law, it appears that the effect of an illegal offer or issue of a prescribed interest is to render the contract void. This may have adverse effects for the interest holder. On the other hand it is considered a fair result for the offeror or issuer of the interest, who is responsible for the breach, to bear the consequences of that illegality.

222. For this reason, cl.1073 is to be amended by adding a new sub-cl.(2) which provides that a breach of the Bill or regulations will not render a contract for the purchase of a

prescribed interest necessarily void. It will be voidable at the option of the subscriber for, or the holder of, the interest.

Amendment (161) : Cl.1078 - Restriction on hawking securities

223. Clause 1078 is to be amended by adding a new sub-cl.(3) so that a securities dealer, such as a stockbroker, is not prevented from offering securities listed for sale on a stock exchange over the telephone or other communications service. This will facilitate the conduct of securities business while at the same time retaining sufficient protection for investors. Securities dealers and advisers are governed by licensing requirements imposed by the ASC and, when giving securities recommendations to a person, must have a reasonable basis for their recommendation (cl.851), and must disclose any interest in a recommendation (cl.849).

Amendment (162) : Cl.1079 - Restriction on written invitations or offers in respect of securities

224. An amendment is to be made to cl.1079(1)(c) to enable regulations to be made prescribing the appropriate additional information that may be required in a statement to accompany a written offer for the sale of securities.

225. The purpose of the amendment is to prevent persons from devising any arrangement to avoid the prohibitions of the prospectus provisions, in favour of the more lenient requirements of the statement permitted under cl.1079, in any secondary trading of securities in circumstances where it is appropriate that the sale should be treated more like a primary offer of the securities.

AMENDMENTS TO CHAPTER 8 - THE FUTURES INDUSTRY

Amendments (163) to (165) : Cls. 1120, 1121, 1122 - Business rules

226. These amendments make minor drafting corrections.

Amendment (166) : New Cl.1123A - Using eligible communications services in connection with unauthorised futures markets

227. This amendment prohibits a person using an eligible communications service (eg. the telephone or the mail) in connection with the conduct or establishment of an unauthorised futures market, or to hold out that the person is conducting a futures market which is unauthorised. This amendment complements clauses 1123, 1124 and 1125, which are intended to prevent the emergence of unauthorised futures markets. Overseas experience has indicated that trading on unauthorised markets is frequently rigged so that investors' funds can be fraudulently misappropriated.

Amendment (167) : Cl.1126 - Approval of futures exchange

228. The amendment to paras.1126(2)(b) and (c) varies the requirements for approval of a futures exchange. The Minister may approve a body as a futures exchange if satisfied that, among other things, the body's constitution provides that a person who is not an eligible corporation may not become or remain a member of the body unless:

- (i) the person deals in futures contracts only on the person's own account; or
- (ii) where the person deals in futures contracts on behalf of other persons, the person does so as a representative of an eligible corporation.

229. This amendment is intended to permit futures exchanges to admit individuals and other non-corporate entities to membership, provided they deal only on their own account or, where they act on behalf of others, they do so as the representative of a licenced futures broker. By enabling individuals and other non-corporate entities direct access to authorised futures markets, those markets should develop greater depth and liquidity.

Amendments (168) to (174) : Cl.1126 - Approval of futures exchange

230. These amendments to para.1126(2)(d) are consequent upon the amendments to paras.1126(2)(b) and (c). They vary the wording of para.1126(2)(d) to recognise that some members of a futures exchange may not be incorporated.

Amendments (175) to (183) : Cl.1132 - Approval of futures association

231. The amendments to paras.1132(2)(b), (c) and (e) are similar to the amendments to paras.1126(2)(b), (c) and (d). They enable a futures association to admit individuals and other non-corporate entities to membership, provided those persons deal only on their own account or, if they deal on behalf of other persons, they do so as a representative of an eligible corporation.

Amendment (184) : Cl.1132 - Approval of futures association

232. New sub-cl.1132(3) is a transitional provision, similar in effect to sub-cl.1126(3) and 1131(4). It provides that a body which was a futures association under a co-operative scheme law is deemed to have been approved as a futures association under the Corporations Bill, thereby avoiding the need for such a body to apply for approval when the Corporations Bill comes into effect.

Amendment (185) : Cl.1136 - Commission to be notified of amendments of business rules

233. This amendment makes a minor drafting correction.

Amendment (186) : New Cl.1141A - Qualified privilege in respect of disciplinary proceedings

234. New cl.1141A, which is based on cl.779, provides qualified privilege in proceedings for defamation (see cl.89) to futures organisations, their members, officers or employees in respect of statements made by them arising out of disciplinary proceedings of the organisation (sub-cl.(2)). Publication of such statements is similarly protected (sub-cl.(3)). This protection recognises the importance of the possibility of publication of the results of disciplinary proceedings as a deterrent, in addition to, or instead of, a fine or other penalty.

Amendment (187) : Cl.1142 - Futures brokers

235. This amendment rectifies a minor typographical error, and makes the wording of sub-cl.1142(1) consistent with the wording of the rest of the provision.

Amendment (188) : Cl.1143 - Futures advisers

236. This amendment makes a minor drafting correction.

Amendment (189) : Cl.1145 - Grant of licence

237. Clause 1145 deals with the grant of licences to a futures broker or futures adviser. This clause is made subject to cl.1200 which requires the ASC to give an applicant an opportunity for hearing before refusing to grant the applicant a licence. The amendment will also make cl.1145 subject to cl.1202 which provides that the ASC is not to grant a licence to a person who is disqualified by the Court from holding a licence.

Amendment (190) : Cl.1146 - Licences under corresponding laws

238. This amendment makes a minor drafting correction.

Amendments (191) and (192) : Cl.1157 - Annual statement of licensee

239. These amendments make minor drafting corrections.

Amendment (193) : New Cl.1165A - Client may apply to Court for partial rescission

240. This amendment inserts a new clause to provide, in effect, for Court assisted partial rescission of contracts with unlicensed futures brokers or advisers.

241. Division 2 of Part 8.3 of the Corporations Bill is designed to prevent the enforcement of a contract by a person who either advises about or deals in futures contracts and does not have a licence but who should be licenced. Under cl.1165 a notice of rescission has the effect of rescinding the agreement unless rescission would prejudice third party rights.

242. A potential problem caused by this protection of third party rights arises in cases where the agreement between the client and the unlicensed person relates to a variety of transactions. In such a case a third party right might be affected in only one of those transactions, yet the existence of that third party right will prevent the agreement being rescinded in relation to all of the other transactions under the agreement.

243. Clause 1165A has accordingly been introduced to allow a client to apply for a Court order which will, in effect, produce the result that a contract is partially rescinded. This will only be possible insofar as it relates to transactions not affected by third party rights.

Amendment (194) : Cl.1179 - Disclosure to client by representative

244. Clause 1179 of the Bill requires a person acting as a representative to advise the client of the person for whom the representative is acting and the address of that person (the latter advice being required in writing). The representative must also show a copy of his proper authority (defined in cl.87) to the client.

245. These requirements may however cause inconvenience, particularly in relation to the conduct of telephone business. Because of the potential inconvenience and possible associated efficiency losses, and because the Bill provides other means whereby a client can find out on whose behalf a representative is authorised to act (see cls. 1176 and 1178 of the Bill), cl.1179 is proposed to be deleted.

Amendment (195) : Cl.1181 - Commission may give licensee information about representative

246. This amendment makes a minor drafting correction.

Amendment (196) : Cl.1190 - Power to revoke licence without a hearing

247. This amendment rectifies an anomaly.

248. Paragraph 1190(d) gives the ASC power to revoke a licence without a hearing if the licensee contravenes cls.1157, 1158 or 1218. However in the case of non-compliance with other conditions of a licence or a contravention of relevant provisions of the Bill, the ASC is obliged to give the licensee an opportunity for a hearing before deciding to revoke a licence.

249. This is no intrinsic reason why failure to comply with the obligations dealt with in cls. 1157, 1158 and 1218 should be treated any differently to failure to comply with other obligations under the Bill. Accordingly para 1190(d) is proposed to be deleted, and para 1191(1)(c) is proposed to be amended to make it clear that the ASC must give a licensee an opportunity for a hearing before revoking his or her licence on the grounds of a contravention of cl. 1157, 1158 or 1218.

Amendment (197) : Cl.1191 - Power to revoke licence after a hearing

250. This amendment is consequent upon the above amendment to cl.1190.

Amendment (198) : Cl.1191 - Power to revoke licence after a hearing

251. This amendment makes a minor drafting correction.

Amendment (199) : Cl.1205 - Undesirable advertising

252. This amendment makes a minor drafting correction.

Amendment (200) : Cl.1206 - Issue of contract notes

253. This amendment makes a minor drafting correction.

Amendments (201) and (202) : Cl. 1216 - Removal and resignation of auditors

254. Sub-cl.(7) is being omitted so as to remove the right of an aggrieved person to appeal to the Court. An aggrieved person will have a right to apply to the AAT under new Part 9.4A of the Bill for review of a decision by the Commission to refuse consent to the removal or resignation of an auditor of a futures broker. A consequential amendment is being made to sub-cl.(5).

Amendment (203) : Cl.1218 - Futures brokers' accounts

255. This amendment makes a minor drafting correction.

Amendment (204) : Cl.1219 - Auditor's right of access to records, information etc

256. This amendment makes a minor drafting correction.

Amendments (205) and (206) : Cl.1229 - Money constituting fidelity fund

257. These amendments enable the Minister to approve the repayment to a futures organisation of the amount it paid on the establishment of its fidelity fund to the credit of the fund, whether the fund was established before or after the commencement of the legislation. At present, the legislation allows repayment of amounts paid to establish fidelity funds only after the commencement of the legislation, and therefore does not enable the Minister to approve the repayments of amounts used by futures organisations to establish fidelity funds under the co-operative scheme.

Amendment (207) : Cl.1235 - Levy in addition to annual contributions

258. As presently worded cl.1235 requires each contributing member of a futures organisation to pay an additional fidelity fund levy if the organisation so determines. The amendment will permit a futures organisation to determine that an additional levy is payable only by specified contributing members. This amendment is consequent upon the amendment to cl.1236 (below).

Amendment (208) : New Cl.1236 - Contributions and levies not payable unless imposed by another Act

259. Clause 1236 provides that a person will not be liable to pay a contribution or levy to the fidelity fund of a futures organisation unless it has been imposed by separate legislation.

260. On 25 May 1988 the Attorney-General introduced 3 Bills dealing with contributions and levies to the fidelity fund of a futures organisation.

261. These were:

- 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.

262. The Sydney Futures Exchange has advised that at present contributions to the fidelity fund are made by way of a transaction fee on each contract made on the Exchange. The transaction fee is imposed by the Exchange's business rules and is payable to the fidelity fund pursuant to para.107(1)(b)

of the Futures Industry Act 1986 (i.e. "money paid to the relevant organisation, in accordance with the business rules of the relevant organisation, by contributing members of the relevant organisation"). While there is provision in s.112 of that Act for contributions by way of an annual membership fee determined by the relevant organisation, the Exchange has never determined such a fee.

263. The Exchange has expressed two concerns:

- (a) At present the Exchange does not require Local Members (ie those who trade only on their own account) to contribute to the fidelity fund. The contributions they make by way of the transaction fee are refunded to them. Local members are not required to contribute because they get no direct benefit from the fund - because they cannot deal except on their own behalf, they are never in the position where they can misappropriate clients' funds. The Exchange wants this to continue, but as presently worded, the Bill will require all members, including Local Members, to pay an application for membership fee and an annual membership fee.
- (b) The Corporations Bill and the ancillary Levy Bills require the Exchange to determine the amount of the application for membership fee at not less than \$500 and the amount of the annual membership fee at not less than \$100. The Exchange wishes to retain the current system of transaction fees imposed by the business rules (which would not be paid into Consolidated Revenue), and to have the option of imposing the application for membership or annual membership fee if the number of transactions falls. In the current climate, it does not need these fees to be levied.

264. The amendment will permit the Sydney Futures Exchange or other futures organisations to determine that the fidelity fund levy regime set out in cls. 1234 and 1235 and the separate Levy Bills do not apply in relation to specified persons. It will permit the Sydney Futures Exchange to continue its existing practices.

Amendment (209) : Cl.1238 - Investment of fund

265. This amendment makes a minor drafting correction.

Amendment (210) : Cl.1239 - Application of fund

266. This amendment makes a minor drafting correction.

Amendment (211) : Cl.1243 - Power of board to settle claims

267. This amendment makes a minor drafting correction.

Amendment (212) : Cl.1249 - Power of futures organisation to enter into contract of insurance or indemnity

268. This amendment makes a minor drafting correction. The phrase "in its discretion" is unnecessary.

Amendment (213) : Cl.1250 - Application of insurance money

269. This amendment makes a minor drafting correction.

Amendment (214) : Cl.1256 - Prohibitions on dealing when precluded

270. This amendment makes a minor drafting correction.

Amendment (215) : Cl.1264 - Fraud in connection with dealings in futures contracts

271. This amendment rectifies a minor typographical error.

Amendment (216) : Cl.1269 - Restrictions on use of titles "futures broker", "futures exchange" etc.

272. Clause 1269 prohibits the use of titles such as "futures broker" by corporations that do not fit that description under the Bill.

273. The amendment extends this prohibition to any person.

Amendment (217) : Cl.1273 - Precautions against falsification of records

274. This amendment makes a minor drafting correction.

Amendment (218) : Cl.1275 - Relodging of lost registered documents

275. Under this provision, the ASC may certify that it is satisfied that an original document has been lost or destroyed and may grant leave for a correct copy to be lodged in lieu of the original. sub-cl.(5), which permits a person aggrieved by such action to appeal to the Court, is being omitted as a consequence of new Part 9.4A of the Bill which will permit AAT review. The amendment inserts a new sub-cl.(5) which provides that an AAT decision varying or setting aside an ASC certificate may be lodged with the ASC and is to be registered by it, but nothing done in good faith before the registration of the Tribunal's decision in reliance on the ASC certificate will be invalidated or affected by the AAT's decision.

AMENDMENTS TO CHAPTER 9 - MISCELLANEOUS

Amendment (219) : Cl. 1291 - Official liquidators

276. These amendments enable the ASC's decision to cancel or suspend the registration of an official liquidator to be reviewed by the AAT. Under the clause as presently drafted and under s.30C of the Companies Act 1981, the ASC's decision is declared to be final. However, there appears to be no justification for denying an aggrieved person the right to seek review in this instance.

Amendments (220) to (225) : Cl.1292 - Powers of Board in relation to Auditors and liquidators

277. These amendments make minor drafting corrections.

Amendment (226) : Cl.1292 - Powers of Board in relation to auditors and liquidators

278. Sub-clause (11), which provides that the amount of any penalty imposed on a person under sub-cl.1292(9) may be recovered as a debt due to the Commonwealth, is being omitted. Sub-cl.(9) does not provide power to impose a pecuniary penalty and hence sub-cl.(11) is redundant.

Amendment (227) and (228) : Cl.1297 - Time when Board's decision comes into effect

279. The amendments to cl.1297 are consequent upon the omission of cl.1299 and the insertion of New Part 9.4A which will permit AAT review of the Disciplinary Board's decisions.

280. The effect of the amendments is that an order of the Disciplinary Board cancelling or suspending the registration of a person as an auditor or liquidator will come into effect at the expiration of the day on which the notice of the decision is given to the affected person, subject to:

- (a) any order which the AAT or Federal Court may make under ss.41 or 44A of the AAT Act staying or otherwise affecting the operation of an ASC or AAT decision; and
- (b) any determination which the Disciplinary Board makes that the order is not to come into effect until a specified time or until the happening of a specified event (to enable an application for review to be made to the AAT).

Amendment (229) : Cl. 1299 - Appeal from decision of Board

281. As presently drafted, this clause permits a person aggrieved by a decision of the Companies Auditors and Liquidators Disciplinary Board to appeal to the Court. This clause is being deleted. Instead, an aggrieved person may apply to the AAT under new Part 9.4A for review of any decision by the Board.

Amendments (230) and (231) : Cl.1315 : Proceedings: how taken

282. Clause 1315 requires the ASC, an ASC delegate or a person authorised by the Minister to have the sole duty to cause proceedings to be begun for offences against the Bill.

283. The amendments to cl.1315 seek to preserve the statutory functions and powers of the Director of Public Prosecutions and, in particular, the DPP's general functions which are to institute and carry on proceedings for commitment for trial, and to institute and carry on proceedings for summary conviction, in relation to Commonwealth offences.

284. The amendments will empower the ASC, an ASC delegate or a person authorised by the Minister to commence and carry on prosecutions, but without prejudice to the DPP's statutory functions and powers. In particular, the DPP's powers to take over, to carry on or to terminate a proceeding for commitment for trial or summary conviction and to give directions or furnish guidelines with respect to the prosecution of offences will not be prejudiced.

285. In accordance with Commonwealth prosecution policy the ASC will have to send the DPP a brief of evidence if, as a result of an investigation, an offence appears to have been committed. Although the ASC will be able to make an initial decision to prosecute, the DPP has the responsibility to determine whether a prosecution should proceed.

286. Similar amendments are proposed to the corresponding provisions in the Australian Securities Commission Bill (cl.49) and the Close Corporations Bill (cl.142).

287. The amendment proposed to cl.127 of the Australian Securities Commission Bill will enable the ASC to provide the DPP with all the information necessary to enable it to exercise all relevant functions and powers in relation to the prosecution of offences created by the Bill.

Amendment (232) : Insertion of new Part 9.4A - Review by Administrative Appeals Tribunal of Certain Decisions

288. Under the present co-operative scheme, decisions of the NCSC and other bodies are reviewed on the merits by the State and Territory Supreme Courts. As presently drafted, the Bills provide for a general right of appeal to the Supreme Courts and the Federal Court from administrative decisions of the Minister, the ASC and other bodies such as the Companies Auditors and Liquidators Disciplinary Board.

289. However, because of judicial power constraints in the Constitution, under Commonwealth legislation full merits review is not available before a court. For this reason, new Part 9.4A provides for review by the Administrative Appeals Tribunal of certain decisions of the Minister, the ASC and the Companies Auditors and Liquidators Disciplinary Board. (Decisions of the Corporations and Securities Panel will, because of the nature of the Panel, be reviewable only by the Federal Court under the Administrative Decisions (Judicial Review) Act 1977. Accounting standards made by the Accounting Standards Review Board may be disallowed by the Parliament under cl.283).

New Cl. 1317A - Interpretation

290. The amendment provides that in Part 9.4A 'decision' will have the same meaning as in the AAT Act. The relevant provision of that Act is sub-s.3(3) which defines 'decision' widely to include:

- (a) making, suspending, revoking or refusing to make an order or determination;
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement;
- (f) retaining, or refusing to deliver up, an article; or
- (g) doing or refusing to do any other act or thing.

New Cl.1317B - Applications for review

291. Subject to subsequent provisions of Part 9.4A, applications to the AAT will be able to be made for review of decisions made under the Bill by the Minister, ASC or Disciplinary Board (sub-cl.(1)).

292. The ASC will have standing to apply to the AAT for review of a decision made under the Bill by the Disciplinary Board (sub-cl.(2)).

293. Unlike other provisions conferring jurisdiction on the AAT, there will be no requirement for the decision-maker to notify persons affected by reviewable decisions of their right to AAT review. Because this clause gives a general right to review, rather than identifying particular reviewable decisions, a requirement to notify appeal rights would be difficult to administer, both in terms of identifying when a reviewable decision has been made and in identifying the person(s) affected. In addition, it could be expected that the business community would be well advised of its entitlements under the Bills and so should not require the same level of protection as individuals affected by other reviewable decisions. The ASC and other decision makers could voluntarily notify individuals of rights of appeal in appropriate cases. Such an administrative practice would be undertaken consistently with the code of practice recommended by the Administrative Review Council in its Report No. 27 - Notification of Decisions and Rights of Review.

New Cl.1317C - Excluded decisions

294. No right to AAT review will apply to:

- (a) a decision in respect of which an appeal or review right is expressly provided by the Bill;
- (b) a decision that is declared by the Bill to be conclusive or final or that is embodied in a document declared by the Bill to be conclusive evidence of an act, matter or thing (see eg cls.122, 171(10), 195(8), 272(4), 329(7), 858(4), 1216(4));
- (c) decisions of the Minister declaring or refusing to declare that an unincorporated body consisting of up to a specified number of persons may carry on a profession or calling of a specified kind (see sub-cl.112(3));

- (d) decisions of the ASC under cls.342 or 350 concerning the restoration of a company's name to the Register and under Division 8 of Part 5.6 of the Bill relating to defunct companies (since ancillary orders may need to be made and there is the possibility of related private actions); and
- (e) a decision by the ASC to refuse to exercise a power under Division 8 of Part 5.6.

Amendment (233) : Cl.1320 - Appeals from decisions of Commission

295. Clause 1320 provides a right for persons aggrieved by a decision of the ASC to appeal to the Federal Court or a Supreme Court.

296. As a consequence of new Part 9.4A which provides for AAT, rather than Court, review of decisions of the ASC, the amendment omits cl.1320.

Amendment (234) : Cl.1329 - Jurisdiction of Courts

297. Clause 1329 confers concurrent jurisdiction on the Federal Court and the Supreme Courts for matters arising under the Bill.

298. The amendment omits this clause. The jurisdiction of Courts to deal with matters arising under the proposed national companies and securities legislation is proposed to be dealt with by a new Part 12A to the Australian Securities Commission Bill. Reference should be made to the supplementary explanatory memorandum to that Bill.

299. In brief:

- (a) The Federal Court will have jurisdiction to hear matters arising under the legislation except for criminal prosecutions.

AMENDMENTS TO SCHEDULES 1, 2 AND 3Amendments (239) and (240) : Schedule 1 - Table A and B

303. These amendments clarify the meaning of the interpretation provision in the respective sub-regulations.

Amendments (241) and (242) : Schedule 2 - Forms of Transfer of Marketable Securities; Forms 4 and 8

304. The requirement for the register to be specified in Part 1 of the consolidated transfer forms has been omitted as unnecessary. The shares or rights subject to the transfer will be sufficiently identified by the other details in Part 1.

Amendments (243) to (253) : Schedule 3 - Penalties

305. These amendments rectify some inconsistencies between the penalties provided under the Bill and the penalties provided under the co-operative scheme legislation. In general, the Bill will provide the same level and type of penalties as does the co-operative scheme for corresponding offences. The penalty for a breach of sub-cl.775(6) (securities exchange permitting trading in securities when prohibited) and sub-cl.847(5) (securities exchange permitting short selling when prohibited) have been brought into line with the penalty for a breach of sub-cl.1138(10) or (11) (futures exchange or clearing house failing to comply with ASC orders designed to ensure an orderly market).