

1980-81

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

COMPANIES BILL 1981

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for
Business and Consumer Affairs, the Honourable J. Moore, M.P.)

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ABBREVIATIONS

The following is a list of abbreviations used:

- August CB - draft of companies legislation introduced into House of Representatives on 27 August 1980.
- A.B.L.R. - Australian Business Law Review
- ACT CO - Australian Capital Territory Companies Ordinance 1962 as amended
- CASA - Commonwealth Companies (Acquisition of Shares) Act
- CB - Commonwealth Companies Bill 1981
- CSIB - Companies and Securities Industry Bill 1975
- C & S - Commonwealth Companies and Securities (I & MP) A (Interpretation and Miscellaneous Provisions) Act 1980
- C(TP)B - Commonwealth Companies (Transitional Provisions) Bill 1981
- ex memo - the explanatory memorandum
- exposure - draft of companies legislation exposed for public
draft or comment in April 1980
- ED
- Eggleston - Company law Advisory Committee appointed by the
Committee Standing Committee of Commonwealth and State Attorneys-General in August 1976 and chaired by Sir Richard Eggleston.

ABBREVIATIONS

Ford	-	H.A.J. Ford : 'Principles of Company Law' 2nd edition. Butterworths 1978.
Formal Agreement	-	Agreement entered into by the Commonwealth and all States on 22 December 1978 to provide the framework for the co-operative companies and securities scheme, as amended by the First Amending Agreement dated 24 February 1981
ICAC CAs	-	Companies Acts of the States which are parties to the Interstate Corporate Affairs Agreement
ICAC SIAs	-	Securities Industry Acts of the States which are parties to the Interstate Corporate Affairs Agreement
NCB	-	National Companies Bill 1975
NCSC	-	National Companies and Securities Commission
NCSC Act	-	Commonwealth National Companies and Securities Commission Act 1979
NT CO	-	Northern Territory Companies Ordinance
SA CA	-	South Australian Companies Act
SIA	-	Commonwealth Securities Industry Act 1980
SULS sem	-	Notes of a seminar held on 10 October 1980 by the University of Sydney Committee for Post-graduate studies in the Department of Law.
VIC CA	-	Victorian Companies Act 1961 as amended
VIC MSA	-	Victorian Marketable Securities Act
WA CA	-	Western Australian Companies Act

OUTLINE

Companies Bill 1981

1. The Companies Bill 1981 will contain the proposed new Australian companies code under the co-operative companies and securities scheme.
2. In accordance with the Formal Agreement between the Commonwealth and the 6 States on the co-operative companies and securities scheme, the Companies Bill is based on the Companies Acts in force in the four States which are parties to the Interstate Corporate Affairs Agreement. The major modifications to this existing legislation are set out at para 23 and paras 40 to 43 of this explanatory memorandum.
3. The Bill will come into effect on a date to be fixed by Proclamation. The Ministerial Council for Companies and Securities is working towards an implementation date of 1 January 1982 for the companies code.

INTRODUCTION

4. The remainder of this explanatory memorandum
- (a) contains a brief introduction to the co-operative companies and securities scheme (paras 7 to 36);
 - (b) contains a brief outline of the proposed new companies code and mentions some other matters that may be relevant to this code (paras 37 to 43); and
 - (c) deals sequentially with each clause of the Companies Bill (paras 50 to 1267E).

5. Separate explanatory memoranda have been circulated in relation to the following Bills which are consequential in whole or in part on the Companies Bill :

- the Companies (Fees) Bill 1981
- the Companies (Transitional Provisions) Bill 1981
- the Companies (Acquisition of Shares) Amendment Bill (No. 2) 1981
- the Securities Industry Amendment Bill (No. 2) 1981
- the Companies and Securities (Interpretation and Miscellaneous Provisions) Amendment Bill (No. 2) 1981.

6. Separate explanatory memoranda have also been circulated in relation to the following two Bills which, although related to the Companies Bill, are not part of the co-operative scheme legislation and therefore do not require the approval of the Ministerial Council:

- the Companies (Miscellaneous Amendments) Bill 1981
- the Crown Debts (Priority) Bill 1981.

CO-OPERATIVE COMPANIES AND SECURITIES SCHEME

Formal Agreement

7. On 22 December 1978 the Commonwealth and the six States executed a Formal Agreement that provided the framework for a co-operative Commonwealth/State scheme for a uniform system of law and administration in relation to company law and the regulation of the securities industry in the six States and the Australian Capital Territory. (A copy of this Agreement is set out in the Schedule to the National Companies and Securities Commission Act 1979). The Formal Agreement also provides a procedure to enable the Northern Territory to become a party to the Agreement (see Formal Agreement cl. 49) and to enable the Agreement to be extended to one or more of the various external Territories (see Formal Agreement cl. 50).

8. The Commonwealth and the six States also executed on 24 February 1981, the First Amending Agreement to the Formal Agreement. This Amending Agreement clarifies the manner in which the Formal Agreement may be amended (see cl. 3); enables the making of "translator" amendments by State regulation where necessary to ensure the meaningful application of the amending Commonwealth legislation in a particular State (see cl. 5) and provides additional procedures for the extension of the Formal Agreement to the external territories (see cl. 6).

9. The Formal Agreement sets out, among other things, the four basic elements of the co-operative scheme that were identified by the then Minister for Business and Consumer Affairs (the Honourable Mr J.W. Howard, M.P.) in his statement to the House of Representatives on March 1977:-

- (a) The establishment of a Ministerial Council comprising Ministers of the Commonwealth and each of the six States.
- (b) The establishment of a full-time National Companies and Securities Commission to have responsibility in the entire area, subject to directions from the Ministerial Council.
- (c) The continuation of existing State and Territory corporate affairs offices.
- (d) The adoption of a proposal for legislative uniformity which recognises that the States are not required to surrender or refer any constitutional power.

10. Each of these basic elements is discussed below.

The Ministerial Council for Companies and Securities

11. The first of the four basic elements of the co-operative scheme is the Ministerial Council for Companies and Securities, which is established by the Formal Agreement itself. The Council is composed of one Ministerial representative from each party to the Formal Agreement.

12. The functions of the Ministerial Council, as set out in s-cl. 21(1) of the Formal Agreement, are as follows:-

- "(a) to consider and to keep under review the formulation and operation of the legislation and regulations provided for by this agreement; and
- (b) to exercise general oversight and control over the implementation and operation of the scheme."

13. In exercising its review functions over legislation, the Ministerial Council will be responsible for approving all the legislation that is required to give effect to the co-operative scheme (discussed in paras 24 to 36, below). The initial legislation requires unanimous approval and amending legislation with certain exceptions requires approval by a simple majority (see cl. 29 of the Formal Agreement).

National Companies and Securities Commission

14. The second basic element in the co-operative scheme, the National Companies and Securities Commission hereafter referred to as the 'NCSC', was established by the Commonwealth's National Companies and Securities Commission Act 1979 (hereafter referred to as the 'NCSC Act') which came into operation on 1 February 1980.

15. The NCSC Act was the first of a series of enactments to give effect to the legislative obligations of the Commonwealth under the Formal Agreement.

16. Under the NCSC Act, the NCSC will have responsibility for the companies and securities laws covered by the Formal Agreement, subject to directions from the Ministerial Council. The NCSC will have such functions and powers as are conferred on it by the various pieces of Commonwealth, State and Territory legislation that are required to give effect to the co-operative companies and securities scheme (hereafter referred to as the 'co-operative scheme legislation'). The administration of the co-operative scheme legislation within each State and Territory will, so far as practicable, be carried out by the corporate affairs office in that State or Territory under delegation from the NCSC.

17. Each State is required, by virtue of cl. 9 of the Formal Agreement, to pass legislation to support the operation of the NCSC in its jurisdiction. Western Australia and South Australia have already passed this legislation in the form approved by the Ministerial Council. The remaining four States have also had their National Companies and Securities Commission (State Provisions) Bills approved by the Ministerial Council and it is expected that these Bills will be introduced into the relevant State Parliaments in the near future.

18. Once these NCSC (State Provisions) Bills, together with the Bills applying the Commonwealth substantive laws in the States, are brought into operation, the NCSC will be able to be the new codes relating to the acquisition of company shares and the regulation of the securities industry.

Use of existing administrations

19. The existing State and Territory corporate affairs offices were identified by Mr Howard as the third basic element in the co-operative scheme.

20. Under the Formal Agreement, the NCSC is required to work through these local corporate affairs offices to the maximum extent practicable (see Formal Agreement cl. 37) and with due regard to the maximum development of a decentralized administrative capacity (see Formal Agreement cl. 35).

21. In recognition of these requirements, all documents that are required to be lodged with the NCSC under the law of a particular jurisdiction must be lodged with the local corporate affairs office in that jurisdiction. For example, s-sec 14(1) of the C & S (I & MP)A provides that:-

"A document that is required by a relevant Act to be lodged with the Commission (i.e. the NCSC) shall be lodged at the office of the Corporate Affairs Commission for the Territory (i.e. the A.C.T.) and any such document that is lodged, or submitted for lodgement, at that office shall be deemed to be lodged or submitted for lodgement, as the case may be, with the Commission."

22. The Companies and Securities (Interpretation and Miscellaneous Provisions) (Application of Laws) Bill for each jurisdiction other than the A.C.T. will ensure that s-sec 14(1) applies in that jurisdiction as if the reference to the office of the A.C.T. Corporate Affairs Commission were a reference to the local corporate affairs office in that jurisdiction.

The Legislative Framework

23. The final basic element of the co-operative scheme is the legislative framework. The basic features of the proposal for legislative uniformity (sometimes referred to as 'the legislative device' could be summarised as follows:-

- (a) The content of the substantive laws under the scheme will be set out in Commonwealth legislation that will apply to the Australian Capital Territory. The initial Bills and Regulations containing these laws require the unanimous approval of the Ministerial Council (see Formal Agreement s-cl. 8(1)).
- (b) Each other jurisdiction that is covered by the Formal Agreement will pass legislation which will apply the relevant Commonwealth (subject to any necessary local modifications) law as the law of that jurisdiction to the exclusion of its present legislation, as from the date of commencement of the Commonwealth law. (See Formal Agreement paras 9(a) and (b)).
- (c) Any amendments to the Commonwealth Acts must be approved by the Ministerial Council, and then submitted by the Commonwealth to the Commonwealth Parliament. Once

enacted, those amendments will, subject to the making of regulations for each jurisdiction other than the ACT to effect any necessary local modifications to the amendments (sometimes referred to as "translator regulations") have automatic effect in particular jurisdictions without the necessity for further and separate substantive legislation in each other jurisdiction. In the event of the Commonwealth Parliament not enacting, within six months, an amendment approved by the Ministerial Council, each State will have the right to take action separately to implement the decision of the Ministerial Council. (See Formal Agreement cl. 44).

- (d) Similar provisions apply in relation to the making of amendments to the initial Commonwealth Regulations (see Formal Agreement cl 45).

The context of the legislation to give effect to the scheme

24. The initial Commonwealth legislation is to be based on the general companies and securities legislation in force in the States which are parties to the Inter-State Corporate Affairs Agreement (the ICAC States) except to the extent that amendments are agreed upon by the Ministerial Council or are required to give effect to the Agreement (see Formal Agreement para 8(2)(b)).

25. The initial Commonwealth legislation modifies the legislation of the ICAC States to take account of:-

- (a) the requirements of the Formal Agreement and the nature of the scheme: for example, one of the basic assumptions of the scheme (as recognized in para (A) of the recitals to the Formal Agreement) was that a person should be able to act in relation to general companies and securities matters as if he were subject to only one system of law and administration throughout Australia;
- (b) substantive amendments that have been agreed to by the Ministerial Council;
- (c) the need to ensure that the substantive legislation under the co-operative scheme will be capable of application in each jurisdiction with a minimum of specific supporting provisions in that jurisdiction's application legislation;

- (d) any differences in the present ICAC legislation;
and
- (e) other desirable changes in the light of experience
with the operation of the existing ICAC legislation.

26. All these modifications in the initial legislation require the unanimous approval of the Ministerial Council.

27. The Commonwealth legislation relating to each code can be divided into five groups:-

- the NCSC Act (which has already been discussed) and the regulations made thereunder;
- that relating to the interpretation code;
- that relating to the new Australian share acquisition code;
- that relating to the new Australian securities industry code; and
- that relating to the new Australian companies code.

28. The first three codes are discussed, briefly, below.

The interpretation code

29. The initial substantive provisions of the interpretation code for the companies and securities scheme are set out in the Companies and Securities (Interpretation and

Miscellaneous Provisions) Act 1980 which was passed by the Commonwealth Parliament during the Autumn Session 1980 and received Royal Assent on 28 May 1980.

30. The interpretation code will provide for the interpretation of the Commonwealth Acts under the co-operative scheme to be governed by the laws in force in the A.C.T. relating to the interpretation of Ordinances at the commencement of the Companies and Securities (Interpretation and Miscellaneous Provisions) Act except for:-

- the matters covered by the provisions in Parts II and IV of the Companies and Securities (Interpretation and Miscellaneous Provisions) Act (except for ss. 14, 24 and 30, these provisions in Parts II and IV are expressed to apply in the absence of a contrary intention); and
- the provisions of the Commonwealth Acts Interpretation Act 1901 that are expressly saved see Companies and Securities (Interpretation and Miscellaneous Provisions Act s-sec. 4(2)).

New Australian share acquisition code

31. The initial substantive provisions for the new Australian share acquisition code are contained in the Companies (Acquisition of Shares) Act 1980 which was passed by the Commonwealth Parliament during the Autumn Session 1980 and received Royal Assent on 28 May 1980.

32. The policy of the new code is very different from that of the existing take-over legislation in that it is aimed at regulating acquisitions by a person who holds between the prescribed percentage (at present 20%) and 90% of the voting shares of a company, or whose holding would increase to more than the prescribed percentage through acquisition.

New Australian securities industry code

33. The initial substantive provisions for the new Australian securities industry code are contained in the Securities Industry Act 1980 which was passed by the Commonwealth Parliament during the Autumn Session 1980 and received Royal Assent on 28 May 1980.

34. The purpose of the securities industry code is to regulate persons and institutions involved in dealing in securities. This includes investors, stockbrokers, investment advisers, stock exchanges and corporations whose securities, are listed on any stock exchange in Australia.

Commonwealth and State legislation

35. The Commonwealth legislation for each of the codes (see para 27) consists of several parts:-

- (a) The main Commonwealth Act which (together with any later amendments to that Act) contains the main code and then applies that code in the A.C.T.
- (b) The Regulations made under the Commonwealth Act.
(No Commonwealth Regulations can or will be made in relation to the interpretation code).
- (c) The Commonwealth Fees Act which provides for the making of Fees Regulations to set out the fees that will be payable to the Commonwealth in the A.C.T. in relation to the substantive Commonwealth Act and the Regulations made thereunder (There will be no separate Fees Act in relation to the interpretation code).
- (d) Any miscellaneous legislation. The only code in relation to which there will be any such miscellaneous legislation is the companies code where there will be a Companies (Transitional Provisions) Bill and Regulations to be made thereunder. These transitional provisions will apply in relation to the A.C.T. Similar provisions appropriate to the jurisdiction concerned will be contained in a separate Part of the Companies (Application of Laws) Bill for that jurisdiction.

36. The legislation for each State in relation to each code also consists of several parts:-

(a) The (Application of Laws) Act relating to each code.
This Act will, in effect:-

- (i) apply the Commonwealth Code, the Regulations under the Code and the Fees Regulations;
- (ii) enable to be printed as they apply in that jurisdiction, the Code, the Regulations under the Code and the Fees Regulations.

(b) The Regulations that will be made if the Commonwealth fails to amend its initial legislation within 6 months of the amendments being approved by the Ministerial Council.

(c) Any regulations effecting necessary local modifications which will be made as and when needed to ensure that particular amendments to the Commonwealth Regulations will have a meaningful application in a particular jurisdiction other than the A.C.T.

COMPANY LAW

Proposed new Australian companies code

37. The proposed new Australian companies code will be set out in the Companies Bill (hereafter referred to as 'CB').

38. In accordance with the Formal Agreement the CB is based on the Companies Acts of the four States which are parties to the Interstate Corporate Affairs Agreement (these Acts are hereafter referred to as the 'ICAC CAs').

39. The ICAC CAs have, however, been modified in the same way as the other existing ICAC legislation (see para 23).

One place of registration

40. The most important of these modifications are those that are required to ensure that an Australian company incorporated in a jurisdiction covered by the co-operative scheme (referred to in the CB as a 'participating State' or 'participating Territory') can lodge all its documents with the local corporate affairs office in its jurisdiction of incorporation ('home jurisdiction') without the need to lodge documents anywhere else. A company incorporated in a participating State or another participating Territory is referred to as a "recognized company" in the CB (see definition in s-cl. 5(1)).

41. Similarly, overseas corporations will only have to register in one of the jurisdictions covered by the co-operat scheme. An overseas corporation that is registered as a fore company in a participating State or another participating Territory is referred to as a "recognized foreign company" in the CB (see definition in sub-cl. 5(1)).

42. Any Australian body which is not a company in its jurisdiction of formation and any Australian company incorpor in a non-participating Australian jurisdiction will still be required to register as a 'foreign company' in each other Australian jurisdiction covered by the co-operative scheme in which that body wishes to carry on business or to establish a place of business.

Other modifications

43. Some of the more important of the other modification are as follows:

- (a) An attempt has been made to provide a more appropri monetary penalty for some offences and to resolve a large number of anomalies that exist in the penal provisions of the existing companies legislation. Further details are contained at Appendix A.
- (b) Provisions requiring companies to publish notices in newspapers and the Gazette have been examined an

rationalised so that there are similar requirements where the different provisions reflect similar policies. A list of all the requirements for publication in a newspaper and the Gazette and the type of publication required is set out in Appendix B.

- (c) New powers of inspection are contained in Division 1 of Part II to ensure that the NCSC will have adequate powers of inquiry when performing its functions under the CB.
- (d) A national system of registration for auditors, liquidators and official liquidators has been formulated (see CB Division 2 of Part II).
- (e) More flexibility will be able to be exercised in determining the upper limit to the size of accounting and other professional partnerships see CB s-cl. 33(4)).
- (f) A company will be permitted to alter any condition in its memorandum that might have been included in its articles (see CB cl. 73).

- (g) The law in relation to pre-incorporation contract is reformed (see CB cl. 81).
- (h) There are new provisions dealing with the transfer of incorporation of companies and of certain corporations (see CB Division 4 of Part III).
- (i) The content of prospectuses and statements made under cl. 170 will now be prescribed in the regulations (i.e. the provisions contained in the Fifth and Seventh Schedules to the ICAC CAs are generally not contained in the CB).
- (j) Provisions dealing with statements in lieu of a prospectus have been omitted from the CB.
- (k) The existing provisions of the ICAC CAs relating to the power of a company to pay commissions etc. have been amended (see CB cl. 117).
- (l) Comprehensive amendments have been made to the existing provisions of the ICAC CAs relating to the prohibition of a company financing and dealing in its own shares (see CB cls 129 and 130).

- (m) A company will now be required to keep a register of options (see CB cl. 131).
- (n) The State and Territory Marketable Securities Acts and Ordinances will be repealed as similar provisions are contained in CB Division 8 of Part IV.
- (o) Comprehensive reforms are made of the provisions relating to the registration of charges (see CB Division 9 of Part IV.)
- (p) S 124 of the ICAC CAs which imposes duties of honesty and diligence on directors has been extended to all officers (see definition in s-cl. 229(5)).
- (q) A number of amendments have been made to the provisions prohibiting loans to directors (see CB cl 230).
- (r) A number of amendments have been made to the provisions which deal with payments by a company to persons for loss of or retirement from office, to give effect to recommendations in the UK Jenkins Committee Report (see CB cl 233).
- (s) There are new provisions which will enable a company to obtain information as to the beneficial ownership of its shares (see CB Cl 261).

- (t) Significant amendments have been made to the provisions relating to the preparation and laying of accounts to remedy defects in the existing provisions of the ICAC CAs that were identified in Jensen v. Viney [1979] VR 597 (see CB Part VI and definition of "financial year" in s-cl. 5(1)).
- (u) S-sec 162(12) of the ICAC CAs, which imposes an obligation on principal accounting officers of companies to state whether to the best of their knowledge and belief the accounts give a true and fair view of the matters required to be dealt with, has been deleted.
- (v) The special investigation provisions, while based generally on Part VIA of the ICAC CAs, have been substantially redrafted to incorporate the system of control and the allocation of powers set out in Part VI of the First Schedule to the Formal Agreement (see CB Part VII).
- (w) A person appointed to administer a compromise or arrangement will now have a number of the obligations that are imposed on a receiver (see CB s-cl. 315(7) to (11)).

- (x) There are new provisions designed to overcome jurisdictional problems that exist under the ICAC CAs in relation to schemes of arrangement (see CB cl 315). These new provisions are consistent with the "one place of registration" concept (see paras 40 to 42, above).
- (y) Expenses of an auditor in certain circumstances will now be accorded priority in a receivership (see CB cl. 331).
- (z) Consistent with the "one place of registration" concept, provisions have been included in Part XII to ensure that there is only one winding up in all participating jurisdictions in relation to the affairs of a company incorporated in a participating jurisdiction or an overseas corporation registered as a foreign company in a participating jurisdiction (see CB Division 5 of Part XII).
- (aa) There is a new provision that rationalizes existing provisions in the ICAC CAs relating to reports by a liquidator and now applies to all forms of winding up (see CB cl 418 cf. s. 235 of the ICAC CAs).
- (ab) New powers have been given to the NCSC in relation to the supervision of liquidators (see CB cl 420).

- (ac) A new provision has been included which gives a liquidator the right to recover from an officer of a corporation in certain circumstances (see CB s-cl. 453(5)).
- (ad) More flexibility has been given to the NCSC in relation to the exercise of its powers concerning investment companies under Division 2 of Part XIII (see CB cl 490).
- (ae) A general power has been given to the NCSC to intervene in any proceeding relating to a matter arising under the legislation (see cl. 540).
- (af) There are comprehensive examination provisions which replace a number of existing provisions (e.g. ss 249 and 250) in the ICAC CAs, (see CB cl 541).
- (ag) The provisions which deal with the form and inspection of books contain new provisions to take account of the fact that many company records are now kept in computerized form (see CB cls 544 to 546).
- (ah) A number of amendments have been made to the "defaulting officers" provisions (see generally CB Division 2 of Part XIV).

- (a1) Consistent with the 'one place of registration' concept, various minute books and registers will be able to be kept at the registered office of the company, at its principal place of business in its home jurisdiction or at such other place in Australia as has been approved by the NCSC (see ex. memo paras 609 to 611).

Fees

44. The fees that will be charged in connection with the proposed new companies code will be set out in Regulations under a separate Companies (Fees) Bill 1980.

Companies (Transitional Provisions) Bill

45. It will be necessary for the Commonwealth to pass a Companies (Transitional Provisions) Bill (hereafter referred to as the C(TP)B) which will contain necessary transitional provisions consequent upon the enactment of the CB and the repeal of the ACT CO.

Companies (Miscellaneous Amendments) Bill

46. It will be necessary for the Commonwealth Parliament to pass a Companies (Miscellaneous Amendments) Bill to effect consequential amendments to specified Commonwealth Acts containing references, whether expressed or implied, to the ACT Companies Ordinance 1962 (hereafter referred to as the ACT CO) which will be repealed by the CB. There will also be a separate A.C.T. Companies (Miscellaneous Amendments) Ordinance containing consequential amendments to ACT Ordinances.

Previous exposure

47. Earlier drafts of the CB and C(TP)B were exposed to the public in April 1980 and August 1980. Appendix C to the ex memo lists the main differences between the two earlier drafts of the CB and Appendix D highlights the changes between the August CB and the Companies Bill 1981. Appendix E to the ex-memo is a concordance that compares the re-numbered clauses of the CB with the clause numbers of the two exposure drafts of the CB.

COMPANIES BILL 1981

48. The Companies Bill 1981 is divided into the following Parts:

PART I	-	PRELIMINARY
PART II	-	ADMINISTRATION
PART III	-	CONSTITUTION OF COMPANIES
PART IV	-	PROSPECTUSES, SECURITIES AND CHARGES
PART V	-	MANAGEMENT AND ADMINISTRATION
PART VI	-	ACCOUNTS AND AUDIT
PART VII	-	SPECIAL INVESTIGATIONS
PART VIII	-	ARRANGEMENTS AND RECONSTRUCTIONS
PART IX	-	CONDUCT OF AFFAIRS OF COMPANY IN OPPRESSIVE MANNER
PART XV	-	RECEIVERS AND MANAGERS
PART X	-	OFFICIAL MANAGEMENT
PART XII	-	WINDING UP
PART XIII	-	VARIOUS TYPES OF COMPANIES
PART XIV	-	MISCELLANEOUS

49. The remainder of this ex memo deals sequentially with the separate clauses in each of these Parts.

CB : PART I : PRELIMINARY

50. Part I of the CB (cls 1 to 9) deals with various preliminary matters.

Cl. 1 : Short title

51. When enacted the CB will be cited as the Companies Act 1981 (CB cl. 1).

Cl. 2 : Commencement

52. The CB will come into operation on a date to be fixed by Proclamation by the Governor-General published in the Commonwealth Gazette (CB cl. 2 - see also C & S (I & MP) A s.9 for definition of Proclamation)

53. The following Bills are also expressed to come into operation on the day on which the Companies Act 1981 comes into operation:-

Companies (Transitional Provisions) Bill 1981;
Companies (Fees) Bill 1981;
Companies (Acquisition of Shares) Amendment Bill (No. 2) 1981;
Securities Industry Amendment Bill (No. 2) 1981;
Companies and Securities (Interpretation and Miscellaneous Provisions) Amendment Bill (No. 2) 1981;
Companies (Miscellaneous Amendments) Bill 1981 (other than Part I and Division 1 of Part XI);

Crown Debts (Priority) Bill 1981;

(see, in each case, cl 2 of these Bills).

Cl 3 : Objects and application

54. The object of the CB will be to make provision for the formation of companies in the A.C.T., the general regulation of such companies, and the registration of certain bodies as foreign companies in the A.C.T. (CB s-cl 3(1)). See also CASA s. 3 and SIA s.3 which set out the objects of each of those Acts.

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

56. Each jurisdiction other than the ACT covered by the co-operative scheme will pass a Companies (Application of Laws) Bill which, among other things (see paras 23 and 36 of this ex memo), will apply the CB (other than CB cls 1, 2, 3 and 4) as amended by a Schedule to its Application Bill and subject to the interpretation code (see para 29 of this ex memo), as a law of that jurisdiction.

57. The CB in its application to ACT companies will apply generally to all acts and persons within or without the ACT (CB s-cl. 3(2)).

58. The interpretation of the CB will be governed by the C & S (I & MP) A (CB s-cl. 3(3)).

Cl 4 : Repeal

59. The ACT Companies Ordinance 1962 and the ACT Marketable Securities Ordinance 1971 (similar provisions to which are contained in Division 8 of Part IV) will be repealed (CB cl 4 and Schedule 1).

Cl. 5 : Interpretation

60. There will be a series of definitions for the purposes of the proposed new Australian companies code (CB s-cl. 5(1)). A full list of those defined terms and the particular provisions of the CB in which they are used is set out in Appendix E. Further definitions etc appear in the interpretation code set out in the C & S (I & MP) A.

61. Some of the terms defined in the CB (with examples of their use) are set out below:-

- Companies Ordinance 1962: new definition
- debenture - defined to include debenture stock, bonds, notes and any other document acknowledging indebtedness but excluding:-

- (a) a document acknowledging receipt of money issued in compliance with CB s-cl. 97(2) (document issued following prospectus) - cf. ICAC s-sec. 5(5);
 - (b) a cheque, order for the payment of money or bill of exchange;
 - (c) a promissory note with a face value of not less than \$50,000;
 - (d) for certain provisions of the CB where regulations provide that the word debenture does not include a prescribed document - that document.
-
- director - modified to include a person "whether or not validly appointed to occupy or duly authorised to act in the position" to take account of NSW Court of Criminal Appeal decision in R v Drysdale (1978) 3 ACLR 680 (Note that the Appeal Court's decision was set aside by the High Court (1978-79) 22 ALR 161).
 - executive officer: this definition replaces "manager" in the ICAC CAs, but is more broadly defined and includes all executive officers, not only "principal executive officers" (note the definition of "principal executive officer" in CB s-cl. 5(1) - similar to ICAC CAs definition of "manager").

- financial year: new definition inserted to enable the obligation to prepare accounts under cl. 269 to be expressed as a requirement to cause accounts to be made out in respect of an identifiable period, namely a "financial year" - the definition takes account of the decision of the VIC Supreme Court in Jensen v. Viney [1979] VR 597.
- industrial instrument: new definition based on cl. 412 of NCB: this definition is particularly relevant to the provisions dealing with the order of payment of debts in corporate insolvency; see, e.g., definition of "wages" in CB s-cl. 5(1).
- injury compensation: new definition: this definition is particularly relevant to the provisions dealing with the order of payment of debts in corporate insolvency; see e.g. CB para 441(f).
- insolvent under administration this definition replaces the definition of undischarged bankrupt in ICAC CAs s-sec 5(1) but has been modified to give effect to the decision that the provisions of the companies code applying to undischarged bankrupts within the meaning of Part IV of the Commonwealth Bankruptcy Act 1966 should also apply to:-
 - (a) persons who are undischarged bankrupts under the laws in force in any country which has bankruptcy provisions similar to those in force in Australia;

- (b) persons whose financial affairs still are subject to an administration under Part X of the Commonwealth Bankruptcy Act 1966 other than an administration based on a deed of assignment or under the corresponding provisions of a law of an external territory or a country other than Australia.
- investment contract: based on definition in CB s-sec. 76(1) of ICAC CAs.
 - leave of absence: new definition: this definition is particularly relevant to the provisions dealing with the order of payment of debts in corporate insolvency; see e.g. CB para 441(g).
 - machine-copy: existing definition modified to take account of definition of "machine-copy" in s. 53 of the VIC Evidence Act 1958.
 - marketable securities: based on existing definition in VIC CA but "funds" is omitted and reference is made to "any prescribed interest" in lieu of "any interest as defined in section seventy-six".
 - negative: new definition based on corresponding definition in s. 53 of VIC Evidence Act 1958.
 - officer: based on ICAC CAs s-sec 5(1) but expanded to include executive officers and trustees or other persons administering a compromise or arrangement between the corporation and its creditors (see CB Part VIII).

- official liquidator: modified definition - refers to a person registered as an official liquidator under CB cl. 21, or deemed to be registered under the CB.
- prescribed interest: definition based on definition in ICAC CAs s-sec 76(1) (Note cl. 17 of C(TP)B which deals with interests in partnership agreements issued prior to the commencement of the CB).
- recognized company: modified definition to take account of co-operative scheme.
- recognized foreign company: new definition to take account of co-operative scheme; see, e.g. CB cl. 507.
- registered company auditor: based on existing definition in VIC CA.
- registered foreign company: new definition; see, e.g. CB cl. 513.
- registered liquidator: modified definition; see, e.g., CB cl. 417.
- reproduction: modified definition based on s. 53 of VIC Evidence Act 1958.
- sheriff: new definition; see, e.g., CB para. 455(6)(a).

- stock exchange: this definition allows different stock exchanges to be prescribed for the purposes of the whole Act and the SIA where a stock exchange is defined as one which must be approved by the Ministerial Council.
- stock market: similar to the CASA and SIA definitions.
- unit: this definition is based on the corresponding provision in ICAC CAs s-sec 5(1) but has been amended to make it clear that it refers to equitable as well as legal interests in shares; see e.g. CB s-cl. 36(1A) and paras 129(1)(b) and (c). This change was made to counter the effect of the decision in the case of Bond Corporation v. White Industries 1980 CLC which raised questions as to whether beneficial interests in shares, as opposed to legal interests, would be caught by the CB unless it specifically provided otherwise. A consequence of the decision was to open up avoidance possibilities in the cases of the prohibition on subsidiaries acquiring shares in their holding companies (CB cl. 36) and of the prohibition on companies financing dealings in their own shares (CB cl. 129).
- wages: new definition from cl. 412 of NCB: see, e.g. CB para 441(e).

62. There are also various other interpretative provisions for the purposes of the companies code (CB s-cl. 5(2) to (9)).

63. Among other things, a reference to an offer to the public is defined in CB s-cl. 5(4). This definition is based on s-sec. 5(6) of the ICAC CAs except that:-

- (a) the words "offering shares or debentures to the public" are replaced by "an offer to the public". When read with s-cl. 5(3), the effect will be to overcome the anomaly shown up in CAC (NSW) v. David Jones [1975] 2 NSWLR 710; and
- (b) the following words have been added "notwithstanding that the offer is capable of acceptance only by each person to whom it is made or that an offer or application may be made pursuant to the invitation only by a person to whom the invitation is issued." This is to take account of Lee v. Evans [1964] 112 CLR 276 which suggests that to be regarded as an offer to the public an offer would need to be made generally and therefore capable of being acted upon by any member of the public, not just those to whom it is addressed.
- (c) para 5(4)(d) is new. It will ensure that offers of interests of the kind dealt with in Part IV Division 6 of the Bill to pre-existing holders of such interests will not be deemed offers to the public.

64. Where a regulation is made including certain partnership agreements within the definition of a prescribed interest, the regulation will not apply to a partnership

agreement for the sole purpose of carrying on a profession or trade that is otherwise regulated under ACT law (CB s-cl. 5(8)) - based on s-sec 76(1A) of the ICAC CAs).

Cl 6 : References to affairs of a corporation

65. 'Affairs' is defined for the purposes of the provisions relating to

- production of books to NCSC (see CB cl. 12) and the admissibility in evidence of copies of or extracts from such books (see CB cl. 15).
- special investigations (see CB Part VII)
- the remedy in cases of oppression (see CB cl. 320).
- the winding up on the ground of the actions of the directors (see CB para 364(1)(f));
- the arrest of an absconding contributory (see CB cl. 388);
- the examination of persons concerned with corporations (see CB cl. 541);
- the falsification of books (see CB s-cl. 560(1));
- the making of false reports (see CB cl. 564).

(CB cl. 6).

66. This definition expands on the corresponding definition in ICAC CAs s. 168.

Cl. 7 Subsidiaries, holding companies and related companies

67. The terms "subsidiary", "holding company" and "related company" will be defined for the purposes of the proposed new code (CB cl. 7).

68. This provision is based on ICAC CAs s. 6 with the following changes:

- (a) CB sub-para 7(1)(a)(ii) refers to a corporation that is in a position to cast, or control the casting of more than one-half of the maximum number of votes that might be cast at a general meeting of another corporation.
- (b) In CB para 7(1)(b) the words "including a corporation that is that other corporation's subsidiary by another application or other applications of this paragraph" have been added at the end of the provision.
- (c) In CB s-cl. 7(2) a corporation will be taken to control the composition of a board of directors of another corporation if it can appoint or remove directors "with or without" the consent of a third person. In ICAC CAs s-sec 6(2) the power to appoint or remove directors in order to constitute control, has to be exercisable without the consent of another person.

- (d) There is a new provision defining "ultimate holding company" (CB s-cl. 7(6)). This term is used in CB s-cl. 129(10), and cls. 230 and 270.
- (e) The definition of "wholly owned subsidiary" will not apply generally in the proposed new code (CB s-cl. 7 - based on ICAC CAs s-sec. 162A(11)). This term is used in CB cls. 231, 269, 270 and 364.

Cl. 8 : Relevant interests in shares

69. In certain circumstances a person will be regarded as having a relevant interest in securities for the purposes of the proposed new code (CB cl. 8).

70. This provision is based on ICAC CAs s. 6A but with substantial drafting alterations. A similar provision is contained in SIA s. 5 (based on ICAC SIAs s. 5) and in CASA s.9 which set out the circumstances in which a person will be regarded as having a relevant interest in securities for the purposes of the securities industry code, the share acquisition code respectively.

71. A brief outline of the provision is as follows:-

- (a) A person will have a relevant interest in a share:-

- (i) for the purposes of the substantial shareholding provisions (CB Part IV Division 4) or of the provision allowing a company to obtain information about the beneficial ownership of shares (CB cl. 261), if he can exercise or control the exercise of the right to vote attached to that share (CB s-para 8(1)(a)(i)) or if he can dispose of, or exercise control over the disposal of, that share (CB s-para 8(1)(a)(ii); and
- (ii) for the purposes of CB cls. 230, 231 and 232, if he has power to dispose of or to exercise control over the disposal of that share (CB para 8(1)(b) - this additional test only applies for the purposes of the substantial shareholding provisions and after obtaining information about beneficial ownership).
- (b) The nature of the person's power to control or influence voting will be immaterial (CB s-cl. 8(2)). Power to control includes power or control that is direct or indirect or is being exercised as a result of, by means of, in breach of, or by revocation of, trusts, arrangements or understandings; a controlling interest includes a reference to such an interest as gives control (CB s-cl. 8(3)).
- (c) A person will be deemed to have the same voting and disposal powers (in relation to shares) as a body corporate if:-

(i) the body corporate or its directors act in accordance with its directions in exercising the power;

(ii) he has controlling interest in the body corporate;
or

(iii) he has power to exercise, or control the exercise of, the voting power attached to not less than the prescribed percentage of votes that might be cast at general meeting. (See CB s-cl. 8(11) for the prescribed percentage).

(CB s-cl. 8(4)).

(d) A person will be deemed to have the power to exercise or control the exercise of the voting power referred to in CB para 8(4)(e) if:-

(i) an associate of his has that power;

(ii) persons associated with him together have that power; or

(iii) he and a person or persons associated with him together have that power.

(CB s-cl. 8(5)).

- (e) A person will be deemed to have a relevant interest if, on the performance of an agreement to which he is a party or on the enforcement of a right or an option that he holds, he would have such a relevant interest (CB s-cl. 8(6)).
- (f) Where a body corporate is deemed to have a relevant interest in a share under CB s-cl. 8(6), a person will be deemed to have a relevant interest in the share if he has -
- (i) power to issue instructions to the body corporate or its directors in relation to that share;
 - (ii) a controlling interest in the body corporate; or
 - (iii) power to exercise or control the voting power attached to not less than the prescribed percentage of the voting shares in the body corporate
- (CB s-cl. 8(7) - corresponding provision in SIA s-sec 5(7)).
- (g) A relevant interest will be disregarded in certain circumstances (CB s-cl. 8(8)).

- (h) A trustee will not cease to be a bare trustee only because he is entitled to remuneration paid out of the trust (CB s-cl. 8(9)).
- (j) A relevant interest will not be disregarded only because of its remoteness or origin (CB s-cl. 8(10) - based on ICAC CAs s-sec. 6A(8) - but cf ACT CO para 6A(10)(c)).
- (k) Relevant interests or particular classes of relevant interests or relevant interests held by particular persons will be able to be disregarded in circumstances specified in the regulations (CB s-cl. 8(11) - cf. IC/ S.I. reg. 8 and SIA s-sec. 5(11)).
- (l) The prescribed percentage (referred to in s-cl. 8(4) and (7)) will be 20% or such lesser percentage as is prescribed by the regulations made under CASA s. 11 (CB s-cl. 8(12)).

72. These provisions relating to relevant interests are relevant to the following provisions of the CB:- cls. 9, 136-40, 146, 230-232 and 261.

Cl. 9 : Associated persons

73. In certain circumstances, one person will be deemed to be associated with another for the purposes of the proposed new Companies code (CB cl. 9). These circumstances are related to the concept of "relevant interest" (see CB s-cl. 8(5)).

74. The provision is based on S.6 of the ICAC SIAs (see also ICAC CAs s-sec. 6A(5) which has been expanded upon). Cl. 9 differs in a number of respects from SIA s. 6 and CASA s. 7, largely because of the different purpose of each piece of legislation. The CASA, for example, contains two methods of determining association: CASA s-sec. 7(4) relates to calculating the shares to which a person is entitled because of the entitlements of an associate, and CASA s-sec. 7(5) contains the test (as similar as practicable to CASA s-sec. 7(4) for the purposes of the rest of the CASA. The SIA contains additional provisions, e.g. s-sec 6(2) requires proof of knowledge of a relevant matter before a partner or co-director in a non-securities related business will be deemed to be associated, and s-sec. 6(3) which deals with association with a dealer or investment adviser constituted by two or more persons. Further differences are referred to in the next paragraph.

75. A brief outline of the provision is as follows:-

(a) A reference to a person associated with another person will include:-

(1) where the other person is a corporation - a director or secretary, a related corporation, or a director or secretary of a related corporation (CB para 9(1)(a) - similar to SIA para 6(1)(a) and CASA paras 7(4)(a) and 7(5)(a);

- (ii) where the matter relates to the power to exercise or control the voting power attached to shares - a person with whom the other person has or proposes to enter into, an agreement or understanding (which may be informal or may be express or implied) affecting the exercise or control of the voting power attached to the shares, or otherwise influencing the management of the company (it is immaterial if the power to exercise or control, or influence the exercise of, voting power is qualified in any way: CB s-cl. 9(3)) - similar to CASA s-cl. 7(7), no equivalent provision in SIA) (CB para 9(1)(b) - similar to SIA para 6(1)(6) and CASA para 7(4)(b); cf. CASA para 7(5)(b) which also includes matters relating to take-over offers or announcements);
- (iii) persons acting or proposing to act in concert (CB para 9(1)(c) - similar to SIA para 6(1)(c) and CASA para 7(5)(c), cf. CASA para 7(4)(c) which refers to action relating to the acquisition of shares in a company referred to in CASA s-sec. 7(3)); and
- (iv) persons who are or propose to become associated, or who propose to do anything with a view to becoming associated (CB para 9(1)(c) and (d) - similar to SIA paras 6(1)(f) and (g), and CASA paras 7(4)(f) and (g), and 7(5)(e) and (f)

respectively, cf. also CASA para 7(4)(d) which relates to association with a view to controlling or influencing the board of directors of a company referred to in CASA s-sec. 7(3)).

CB s-cl. 9(1) will not contain a provision similar to SIA para 6(1)(e) and CASA paras 7(4)(e) and 7(5)(d) which allows regulations to be made treating persons as associated.

The SIA also contains an additional provision, para 6(1)(d), which includes as associates, where a matter is involved which does not relate to the exercise or control of the voting power attached to shares, partners and co-directors (subject to SIA s-sec. 6(2), and trustees and beneficiaries where the trust does not involve the lending of money in the ordinary course of business.

(b) A person will not be taken to be associated with another person if the only reason for the association is that:-

(i) one advises or acts for the other in a professional or business relationship (including the situation where instructions are given to a dealer in securities to acquire shares in the ordinary course of business : CB para 9(2)(b) - similar to CASA para 7(6)(b), not considered necessary in SIA (CB para 9(2)(a) - cf. SIA s-sec. 6(4) and CASA para 7(6)(a) which do not

include the phrases "in the proper performance of functions attaching to" and "or to his business relationship with" : to be the subject of later amendment to SIA); or

- (ii) the other person is appointed by a shareholder to act as his voting proxy at a meeting of members where that other person's relevant interest in the shares would be disregarded under CB cl. 8 because he was appointed without valuable consideration and because his interest arises only by reason of being appointed as a proxy (CB s-cl. 9(2)(c) - no equivalent provision in SIA or CASA, cf. however CASA para 7(6)(c) which provides that a person will not be associated with another by reason only that he dispatches a take-over offer or makes a take-over announcement relating to shares held by the other).

CB : PART II : ADMINISTRATION

76. Part II of the CB (cls 10 to 32) deals with three separate administrative matters:

Division 1 - Powers of inspection (which is concerned with enquiries otherwise than by means of a special investigation);

Division 2 - Registration of auditors and liquidators;
and

Division 3 - Registers and registration of documents.

DIVISION 1 : POWERS OF INSPECTION

77. The provisions of Division 1 of Part II of the CB (10 to 16) are designed to ensure that the NCSC will have adequate powers of enquiry in relation to the matters covered in this Division when performing its functions or exercising its powers under the co-operative scheme legislation (see also A B Green 'powers of inspection' SALS sem).

78. The provisions of Division 1 will replace the general inspection provisions in s-secs 7(6) to 7(10A) and s. 368 of the ICAC CAS. They differ in some ways from the present ICAC provisions:

- (a) The limited powers of inspection in the present ICAC CAS are not expressed in a way that enables them to be used to investigate suspected criminal activity. In addition, they do not enable a corporate affairs office to obtain the information and explanations that are needed to explain the records inspected. If enquiries do not produce voluntary co-operation, a corporate affairs office either has to abandon the case or else has to request a special investigation with all the ramifications that this entails.

- (b) It is considered that more appropriate provisions are those which are contained in ss. 109 to 116 of the UK Companies Act 1967. These provisions appear to have functioned satisfactorily over the past decade. Some of the main provisions are modelled on these UK provisions.

79. The provisions that are proposed in the CB are as follows:

- (a) The NCSC will be able to require the production of books that relate to corporations where the purpose of requiring the production is in furtherance of the function and powers of the NCSC under the scheme legislation (except the power to make recommendations to Ministerial Council for new laws), concerns a possible contravention of scheme legislation, or may involve certain offences relating to a company.
- (b) The power of the NCSC will include power to require explanations in respect of the books.
- (c) Where attempts to exercise these powers are unsuccessful, a magistrate will be able to issue a warrant to be executed by the police, subject to warrant safeguards modelled on the Australian Law Reform Commission recommendations and the Commonwealth Criminal Investigation Bill 1977.

- (d) Information obtained by exercise of these powers will not be able to be disclosed except for the purpose prescribed by the relevant scheme legislation.

Stringent provisions regarding secrecy have been included in the NCSC Act s. 47 and in the proposed NCSC (State Provisions) Bills to ensure this.

- (e) Falsification of relevant books, or of explanations given in respect of them, will be an offence.

80. The provisions of Division 1 follow as closely as possible the comparable provisions in ss 7 to 11 of the SIA. In some cases these provisions of the SIA will be amended by the Securities Industry Amendment Bill (No. 2) to take account of changes to the CB since the August CB.

Cl. 10 : Interpretation

81. There is an interpretative provision for the purposes of the Division that:

- defines 'books' to include banker's books (the same definition as in SIA s.7) : banker's books are widely defined in CB s-cl 5(1) (with a similar definition in SIA s-sec. 5(1)); and
- provides a wide definition of 'premises' (similar definition in s-sec. 9(6) the SIA).

(CB cl 10).

Cl. 11 : NCSC may inspect books without charge

82. A person authorized by the NCSC may inspect without charge any book required to be kept by the CB (CB cl 11 - no equivalent provision in the SIA since there are no books required to be kept by the SIA which are to be open for public scrutiny on payment of a prescribed sum).

Cl. 12 : Power of NCSC to require production of books

83. The NCSC will be able to require the production of various books relating to the affairs of a corporation provided that the production is for a purpose that:-

- (a) is relevant to scheme legislation;
- (b) relates to a possible offence against scheme legislation;
- (c) relates to an offence concerning the management of, or fraud or dishonesty involving, a company; or
- (d) relates to a possible contravention of the ACT CO or a law corresponding thereto.

(CB s-cl. 12(1) - cf. SIA s. 8 which contains similar powers in relation to various books relating to the securities industry).

83A. There is now no right to demand books for the purpose of exercising the power given to the NCSC under s-sec. 6(3) of the NCSC Act. This exclusion from the August Bill was made in response to public submissions that the previous provision was too wide in that it could have allowed the NCSC to require the production of company books for the purpose of making recommendations to the Ministerial Council for the reforms of legislation (see, eg, GFK Santow, SULS sem).

84. The powers given to the NCSC by CB cl. 12 in relation to things and matters in and of the ACT will be given to the NCSC in relation to things and matters in and of each other jurisdiction covered by the co-operative scheme by the operation of CB cl. 12 as a law of each other jurisdiction (by virtue of that jurisdiction's application of laws legislation). Thus one body, the NCSC, will have inspection powers in relation to things and matters in and of all the jurisdictions covered by the co-operative scheme. (There are no provisions corresponding to s-sec. 7(7B) and 7(7C) of the ICAC CAs, which enable an officer of one jurisdiction to carry out inspections in another jurisdiction with the authorisation of the corporate affairs office in that jurisdiction. This same end will be achieved through the system of delegations that will apply under the co-operative scheme).

85. A brief outline of the NCSC's powers under CB cl. 12 is as follows:

- (a) The powers will extend to banker's books (see CB cl. 10).

- (b) The powers will be subject to a purpose test (CB s-cl. 12(1)).
- (c) The NCSC will be able to give a written direction to a corporation or an officer, agent, banker, solicitor or other person acting for or on behalf of any of these persons requiring the production of books relating to affairs of the corporation (CB s-cl. 12(2)).
- (d) The NCSC will be able to authorise a person, on producing evidence of his authority, to require the production of these books (s-cl. 12(3)). This authorisation may be general or limited to a particular corporation or other person (CB s-cl. 12(4) - cf SIA s-sec 8(4) which provides that the corresponding authorisation may be general or limited to a particular stock exchange or other person).
- (e) "Affairs" of the corporation is widely defined for the purposes of this clause (see CB cl. 6 - which expands on the definition in ICAC CAs s-sec. 168(')).
- (f) The NCSC or the authorised person will be able:
 - (i) to require, by written notice, a third person to produce books (CB paras. 12(2)(b) and 12(3)(c)). Any person who complies with such a requirement will be protected from liability

whether or not the requirement itself is a valid exercise of power (see CB s-cl. 12(8) - this is a new provision since the August Bill to meet submissions that persons complying with such a requirement might otherwise be in breach of their common law duties to other persons if the requirement was beyond power). Production of the books will not prejudice any lien (s-cl. 12(5) - similar protection for liens will also apply where a magistrate issues a warrant to seize books : see CB s-cl 13(5)).

- (ii) if the books are produced, to make copies of the books, to require a person who was a party to the compilation of the books to make any explanatory statement that he is able to, and to retain the books for the time needed for inspection or for copies to be made (CB para. 12(6) (a)).
- (iii) if the books are not produced, to require the person to give his opinion as to both the location of the books and their custodian (CB para. 12(6)(b)); and
- (iv) to compel the identification of property of the corporation, insofar as the person compelled is able to identify it (CB para. 12(7)).

- (g) The provisions will apply in the case of a body corporate (including a body corporate that is being wound up) and will apply to an officer or former officer (CB s-cl. 12(9)). "Officer" is given a wide definition (CB s-cl. 12(10)).

Cl. 13 : Power of magistrate to issue warrant to seize books

86. A magistrate will be empowered to issue a warrant if he is satisfied on an information laid before him that there are reasonable grounds for believing that on particular premises, there are books that have not been produced in compliance with cl. 12 (CB cl 13 - cf. SIA s. 9 which differs by not containing the reforms mentioned immediately below; these are proposed to be inserted in the SIA by the Securities Industry Amendment Bill (No. 2)).

86A. CB cl. 13 also contains provisions which are based, with a number of modifications, upon the recommendations on warrant powers in relation to the law of search and seizure contained in the Australian Law Reform Commission's Report No. 2 "Criminal Investigation" (see paras 188-210 of that report), and upon cl. 61 of the Commonwealth Criminal Investigation Bill 1977. These provisions are designed to place appropriate safeguards on the issue of warrants to search for and seize company books.

87. The provisions relating to the issue of a warrant are as follows:

- (a) The warrant will authorize any member of the Australian Federal Police (in jurisdictions other than the ACT the relevant application of laws legislation will provide for this to be the police force of that jurisdiction) and any other person named in the warrant:
- (i) to enter premises (defined widely - see CB cl. 10);
 - (ii) to search the premises;
 - (iii) to take possession of any books (defined widely - see CB cl. 10 and s-cl. 5(1)); and
 - (iv) to deliver the books to a person authorized by the NCSC to receive them.
(CB s-cl. 13(1)).
- (b) The information to be laid before the magistrate will, in addition to stating that the informant suspects that the relevant books are on particular premises, contain the specific grounds for that belief (CB s-cl. 13(12). This provision is based on the Criminal Investigation Bill 1977 s-cl. 61(3) except that:
- The grounds for suspicion are to be stated in the information itself rather than in a separate affidavit.

- The CB provision does not contain a formal procedure for examination of the informant by the magistrate concerning the grounds on which the warrant is to issue.
- 1
- (c) Where the magistrate issues a warrant he will endorse on the warrant which of the grounds contained in the information that he has relied on, and he will also include particulars of any other grounds that he has relied on (CB s-cl. 13(3) - based on Criminal Investigation Bill 1977 s-cl. 61(4)).
 - (d) The warrant will state the time for which it is to remain in force (7 days after the date of issue) and whether the entry is to be made by day or night or during specified hours of the day or night (CB s-cl. 13(4) - cf. Criminal Investigation Bill 1977 s-cl. 61(5), which provides in addition that the purpose of the entry and a description of the nature of the goods to be seized be contained in the warrant - it was considered unnecessary to include these additional requirements in the CB provision having regard to the nature of the powers in the CB).
 - (e) Liens will not be prejudiced (CB s-cl. 13(5) - similar provision in CB s-cl. 12(4) in relation to production following a notice from the NCSC or an authorized person).

(f) A person who takes possession of any books under a warrant:

(i) will be able to make copies of them; to require a person who took part in their compilation to make such explanatory statement that he can make; and to retain the books for the time needed for inspection or for copies to be made; and

(ii) will be required to permit inspection of the books by persons otherwise entitled to inspect them at reasonable times.

(CB s-cl. 13(6)).

Cl. 14 : Offences

88. Failure to comply without reasonable excuse, with a requirement made under CB cl. 12 or 13 will be an offence (CB s-cl. 14(1) - cf. SIA s-sec 10(1)). Furnishing a false or misleading statement in purported compliance with CB cl. 12 or 13 will be an offence (CB s-cl. 14(2)). There will be a defence to prosecution for false and misleading statements : the defendant must be able to prove that he reasonably believed the statement to be true and not misleading (CB s-cl. 14(3) - no similar provision in the SIA but see cl. 8 of the Securities Industry Amendment Bill (No. 2)).

89. It will be an offence to hinder the NCSC or other person exercising power under CB cl. 12 or a person executing

a warrant issued under CB cl. 13 (CB s-cl. 14(4)). The occupier of premises entered pursuant to a warrant must provide reasonable assistance (CB s-cl. 14(5)). It will be no excuse that an explanation of any matter relating to the books or their compilation made in accordance with CB cls. 12 or 13 might incriminate a person, but where a person claims before making a statement that it may incriminate him the explanation is not admissible evidence in criminal proceedings other than proceedings under this provision (CB s-cl. 14(6)). Subject to such a claim a statement made by a person in compliance with CB cl. 12 or 13 may be used in evidence in any civil or criminal proceedings against him (CB s-cl. 14(7)).

Cl. 15 : Copies or extracts of books to be admitted in evidence

90. A copy of any book relating to the affairs of a corporation will be admissible in evidence in any legal proceedings as if it were the original (CB s-cl. 15(1)), provided that the copy is proved to be a true copy (CB s-cl. 15(2)). Evidence that the copy is a true copy will be able to be given by a person who has compared the copy with the original and may be stated orally, or by affidavit or statutory declaration (CB s-cl. 15(3)). There is no equivalent provision in the SIA (but see s. 8 of the Securities Industry Amendment Act 1981 which inserts s. 10A).

Cl. 16 : Privilege

91. A lawyer will be able to refuse to comply with a requirement of the NCSC or an authorized person (see CB cls.

12 and 13) in respect of a document that contains a privileged communication unless the person to whom or by whom or on behalf of whom the communication was made agrees to the lawyer's complying with the requirement (CB s-cl. 16(1) - similar provisions in SIA s-sec 11(1)). The lawyer will also be able to refuse to provide a statement explaining any matter relating to the books or their compilation if the statement would disclose a privileged communication, (CB s-cl. 16(2) - no equivalent provision in SIA although one will be introduced by later amendment to SIA).

92. If the lawyer refuses to produce the document or provide the explanation of the books he must, if he knows the name and address of the person to whom or by whom the communication was made, furnish that name and address to the NCSC. This requirement is based on ICAC CAs s.367 (see also CB cl. 308). The obligation has been placed on lawyers so that (inter alia) the NCSC will be able to ascertain whether the lawyer is acting for the company or is claiming the privilege on behalf of particular officers of the company. See also the recent High Court decision Re Bell : ex parte Lees 30 ALR where Stephen J recognised that at common law the identity of a client is not capable of being the subject of a privileged communication (cf. however the address).

93. The CB contains no equivalent to SIA s-secs. 11(2) and (3) in relation to banking corporations, which have now been omitted by para 9(b) of the Securities Industry Amendment Act 1981.

DIVISION 2 : REGISTRATION OF AUDITORS AND LIQUIDATORS

94. Division 2 of Part II of the CB (cls. 17 to 30) contains provisions permitting, in effect, the registration of auditors, liquidators and official liquidators on an Australia-wide basis (cf. CSIB cls. 137 to 146 and NCB cls 334 to 337).

95. The basic elements of the proposed new scheme are as follows:

- (a) NCSC responsibility: The NCSC will be the body responsible for the registration of auditors, liquidators and official liquidators. This function will not be carried out by the existing Companies Auditors Boards which will be retained for a different function under the proposed companies code. Where the function of registering auditors and liquidators is carried out by a body with other functions (e.g., the NSW and QLD Public Accountants Registration Boards) then that body will continue in existence in relation to those other functions except insofar as other functions in relation to the States' companies codes are conferred by State legislation. (For the future role of the existing bodies see para 95(6), below).

(b) Companies Auditors and Liquidators Disciplinary Board:

The proposed ACT Companies Auditors and Liquidators Disciplinary Board ("the Board") will be the body responsible for the cancellation and suspension of the registration of, and the taking of other disciplinary action against, auditors and liquidators registered under the companies code as it applies in the ACT. The existing Companies Auditors Boards will be reconstituted in each jurisdiction as disciplinary bodies only, to exercise these responsibilities in that particular jurisdiction. In NSW and QLD these responsibilities will be exercised by the existing Public Accountants Registration Boards in those 2 States.

(c) Auditors: Suitably qualified natural persons will be able to apply to the NCSC for registration as auditors. In addition, the Auditors-General of the Commonwealth and of States and Territories of the Commonwealth will be deemed to be registered as auditors.

(d) Liquidators: Suitably qualified natural persons (not only registered auditors, as under the ICAC CAs) will be able to apply to the NCSC for registration as liquidators. The scheme also provides for the registration of a liquidator of a specified corporation.

- (e) Registers: The NCSC will maintain registers of auditors, liquidators and official liquidators containing specified information.
- (f) No requirement to renew registration: The registration of a person as an auditor or a liquidator will remain in force until the registration is revoked, or until the person dies.
- (g) Notification of changes: Where a registered auditor or liquidator ceases to practise, or where a change occurs in particulars to be entered in the NCSC's register, the NCSC must be notified within 21 days.
- (h) Triennial requirements: Each third year, registered auditors and liquidators will have to lodge with the NCSC a statement containing such information as is prescribed. (To simplify administration, the dates at which registered auditors and liquidators will have to lodge their statements will be staggered over the three year period and throughout each of the 3 years.)
- (j) Cancellation or suspension of registration: The relevant Companies Auditors and Liquidators Disciplinary Board will be able to cancel or suspend the registration of an auditor or liquidator in appropriate circumstances, and take certain other disciplinary action. The NCSC will retain the

responsibility it had under the August Bill for cancelling or suspending the registration of official liquidators, and for the cancellation of registration of persons who request that their registration be cancelled.

- (k) Opportunity for hearing: The NCSC will not be able to refuse to register a person as an auditor or liquidator, and the relevant Companies Auditors and Liquidators Disciplinary Board will not be able to cancel or suspend his registration or take other disciplinary action, without first affording the person the opportunity of a hearing.
- (l) Appeals: A person aggrieved by a decision of the NCSC to refuse his application for registration as an auditor or liquidator, or by a decision of the relevant Companies Auditors and Liquidators Disciplinary Board to cancel or suspend his registration or take other disciplinary action, will be able to appeal against the decision to the Supreme Court of the jurisdiction in which that person is registered. The NCSC will also be able to appeal to the Supreme Court against a decision (including a refusal to make an order) of the relevant Companies Auditors and Liquidators Disciplinary Board.

(m) Official liquidators: The NCSC will be able to register as many registered liquidators as it thinks fit to assist the relevant Supreme Court as official liquidators, and may cancel the registration of such liquidators.

(n) Bonds: Registered liquidators and liquidators of specified corporations will be required to give a security.

(o) Registration in other participating jurisdictions: A person registered as an auditor, liquidator, or official liquidator in one participating jurisdiction will be deemed to be registered in all other participating jurisdictions.

96. Each of the new provisions is dealt with separately below.

Cl. 17 : Application for registration as auditor or liquidator

97. A natural person will be able to apply to the NCSC for registration as an auditor, a liquidator, or a liquidator of a specified corporation (CB cl 17).

Cl. 18 : Registration of auditors

98. The provisions relating to the registration of auditors distinguish:

- (a) persons already registered as auditors under the existing companies legislation: the NCSC will be required to grant the application of any existing registrant unless it is satisfied that the applicant is not "a fit and proper person" (CB s-cl. 18 (1)); and
- (b) persons not already registered : these persons will also have to comply with the requirements as to qualifications, experience and character (CB s-cl. 18(2) - based on CSIB cl. 139).

99. There will be two new requirements for such persons:

- (a) If the applicant relies on university or other qualifications in accountancy those courses must include a course in auditing (s-para. 18(2)(a)(ii)).
- (b) The NCSC will have to be satisfied that the applicant has had such practical experience in auditing as is prescribed. It is envisaged that the Regulations will provide that, unless the NCSC deems otherwise, "sufficient practical experience" means:
 - (i) work in auditing under the direction of a registered company auditor at a level acceptable to the NCSC for a period of three years; and

- (ii) at least one continuous year within the past five years, in the supervision of the audits of companies.

(100. Other provisions relating to the registration of auditors are as follows:

- (a) Registration will be refused to the persons who are prohibited from acting as a director or promoter of, or from being concerned in or taking part in the management of, a corporation pursuant to CB cl. 562 or an equivalent provision of a past or present territory law.

(CB s-cl. 18(3)).

- (b) The NCSC will be able to refuse to register as an auditor a person who is not resident in Australia (CB s-cl. 18(4) -based on CSIB s-cl. 139(3) - cf. ICAC CAs sub-s. 9(7A)).

- (c) The NCSC will have to issue a certificate of registration to a person registered as an auditor (CB s-cl. 18(5)).

- (d) Registration as an auditor will remain in force until the registration is cancelled or the person dies (s-cl. 18(7)).

- (e) The NCSC will be obliged to offer a person the opportunity of a hearing before refusing to register the person as an auditor (CB s-cl. 18(8) - based on CSIB cl. 142).
- (f) Within 14 days of a refusal of registration, the NCSC will have to provide an unsuccessful applicant with a notice of the decision, setting out the findings on material questions of fact by reference to the evidence and giving the reasons for the decision (CB s-cl. 18(9) - cf. CSIB cl. 143). This proposed provision follows, for the purposes of the companies legislation to apply in the ACT, the Commonwealth Administrative Appeals Tribunal Act 1975. In accordance with the decision on other aspects of scheme legislation not relating to companies and securities matters, the States will be able to include in their application of laws legislation provisions which differ from this Commonwealth provision. Consequently, it will be up to each State to decide whether the NCSC will be required, under the companies code as in force in that State, to give reasons for its decision.

Cl. 19 : Auditor-General deemed to be registered as auditor

101. The Commonwealth Auditor-General will be deemed to be a registered auditor (CB cl. 19 - based on ICAC CAs sub-s. 9(19)). The Auditor-General of a participating State or Territory will also be deemed to be a registered auditor

(see CB s-cl. 29(2) - the State application legislation will amend cl. 19 so that it refers to the Auditor-General of that State).

Cl. 20 : Registration of liquidators

102. The provisions relating to the registration of liquidators will distinguish:

(a) persons already registered as liquidators under the existing companies legislation: the NCSC will have to grant the application of an existing registrar unless it is satisfied that the applicant is not "a fit and proper person to be registered as a liquidator" (CB s-cl. 20(1)); and

(b) persons not already registered: such applicants will have to have one of the following qualifications:

- . membership of a specified accounting body or other prescribed body (CB sub-para 20(2)(a)(i));
- . a degree or diploma from a prescribed university or tertiary institution that consists of a course in accountancy and in commercial law (including company law) of a specified duration (CB s-para 20(2)(a)(ii)); or
- . equivalent qualifications to either of the above (CB s-para 20(2)(a)(iii)).

103. These qualifications correspond to those required for registration as an auditor when not already registered under present legislation (see CB para. 18(2)(a)), except that there will be no requirement here that the course in accountancy include study in auditing (cf. CB s-para. 18(2)(a)(ii)). These provisions differ from the qualification requirements for registration as a liquidator under ICAC legislation in that it will not be necessary for the applicant to be already a registered company auditor (cf. ICAC CA s-sec 9(3)). In addition to being suitably qualified, the applicant will have to satisfy the NCSC that he has sufficient experience (CB para 20(2)(b)) and is capable of performing the duties of a liquidator and is otherwise a "fit and proper person" (CB para 20(2)(c)).

104. Where a person applies to be the liquidator of a specified corporation, the NCSC will have to be satisfied that the applicant has sufficient experience and ability and is a fit and proper person to act as liquidator of the corporation, having regard to the business of the corporation and the interests of creditors and members (CB s-cl. 20(3)). This provision differs from s-sec. 9(5) of the ICAC CAs by:

- (a) not requiring that the person be qualified to be appointed as a registered company auditor;
- (b) imposing a "fit and proper person" test;
- (c) linking the experience and ability of the person to the specific winding up; and

- (d) omitting the requirement in ICAC CAs para. 9(5)(b) that the nature of the business and the interests of creditors and members require the appointment of a specified person.

105. Other provisions as to the registration of liquidators will be as follows:

- (a) Registration will be refused to persons who are subject to an order made under CB cl. 562 from being concerned in corporate management. This provision also applies to persons in respect of whom orders have been made pursuant to provisions equivalent to CB cl. 562 in existing or past laws of a State or Territory.
- (b) The NCSC will be able to refuse to register a person not resident in Australia (CB s-cl. 20(5) - based on ICAC CAs s-sec.9(4)).
- (c) The NCSC will be required to issue a certificate to a person registered as a liquidator or liquidator of a specified corporation (CB s-cl. 20(6)).
- (d) The NCSC will have to offer a person a hearing before refusing registration (CB s-cl. 20(10)).
- (e) Within 14 days of a refusal of registration, the NCSC will have to provide an unsuccessful applicant with a notice of the decision, setting out the findings

on material questions of fact by reference to the evidence and giving the reason for the decision (CB s-cl. 20(11) - cf. CSIB cl. 143 - see para 100(f) of the ex memo dealing with CB s-cl. 18(9) for the possibility that the States may adopt a different provision to that in the CB).

Cl. 21 : Registration of official liquidators

106. The NCSC will be able to register as an official liquidator a natural person who is a registered liquidator. This provision differs from ICAC CAs s-sec. 231(1) as follows:

- (a) It is the NCSC, not the Minister, that will register official liquidators (CB s-cl. 21(1)).
- (b) Official liquidators will be entitled to be issued with a certificate of registration (CB s-cl. 21(2)).

Cl. 22 : Security to be given by liquidators

107. Liquidators and liquidators of specified corporations will be required to lodge and maintain with the local corporate affairs office a security for the due performance of their duties in such form and for such amount as the NCSC from time to time requires in relation to that liquidator (CB cl. 22) - cf. Securities Industry Amendment Act s. 16 which provides for a security in relation to a dealer's licence to be lodged with the local corporate affairs office.

108. This provision differs from the ICAC CAs s. 231 as follows:

- (a) All liquidators, not merely official liquidators, will have to provide a security (CB s-cl. 22(1)). There is no specific security requirement for official liquidators as all official liquidators will have to be registered liquidators (see CB s-cl. 21(1)).
- (b) The NCSC will have power to determine different securities for individual liquidators.
- (c) The NCSC will have greater discretion than individual Ministers have at present over the type of security that it will accept.
- (d) The regulation-making powers in relation to the application and discharge of securities and the release of sureties in CB s-cl. 22(2) and (3) will be more comprehensive than the existing provisions in ICAC CAs s. 231.

C1 23 : Register of Auditors

109. The NCSC will be required to maintain a Register of Auditors containing specified matters (CB s-cl. 23(1)). A person will be able to inspect and make copies of the Register (CB s-cl. 23(3)).

Cl 24 : Registers of Liquidators and Official Liquidators

110. The NCSC will be required to maintain a Register of Liquidators containing specified matters (CB s-cl. 24(1)), and a Register of Official Liquidators (CB s-cl. 24(2)). Persons will be able to inspect and make copies of these Registers (CB s-cl. 24(4)).

Cl. 25 : Notification of certain matters

111. Where a registered auditor or liquidator, including a liquidator of a specified corporation, ceases to practise, or where a change occurs in any matter particulars of which are entered in the appropriate Register, the NCSC will have to be notified within 21 days (CB s-cl. 25(1) to (3)). Details of certain other matters (relating to insolvency, prohibitions under CB s-cl. 227(2) and Court orders under CB cl. 562) must be notified within 3 days (CB s-cl. 25(4)).

Cl. 26 : Triennial statements by registered auditors and liquidators

112. The legislation contains no requirements for renewal of registration. However, every three years a registered auditor or liquidator will be required to lodge with the NCSC a statement setting out such information as is prescribed (CB s-cl. 26(3)). The provisions in CB s-cl. 26(1) and (2) permit the NCSC, in the case of persons registered in the first year of operation

of the Act, to stagger over a 3 year period the dates on which statements under s-cl. 26(3) are to be submitted. The starting date of the 3 year period will be able to be varied (see CB s-cl. 18(6) and 20(7)).

Cl. 27 : Cancellation or suspension of registration

113. If requested, the NCSC will be able to cancel the registration of a person as an auditor, liquidator, or liquidator of a specified corporation (CB s-cl. 27(1)).

114. The NCSC will also be able, in its discretion and without right of appeal, to cancel or suspend the registration of an official liquidator (CB s-cl. 27(2)). Where the NCSC does so it must, within 14 days of the decision under the companies code as in force in the ACT, provide the affected person with a notice of the decision, setting out the findings on material questions of fact by reference to the evidence and giving the reasons for the decision (CB s-cl. 27(3) - see para 100(f) of this ex memo dealing with CB s-cl. 18(9) for the possibility that the States may adopt a different provision to that in the CB).

115. Upon an application by the NCSC, the relevant Companies Auditors and Liquidators Disciplinary Board ("the Board") will be able after a hearing, to cancel or suspend the registration of an auditor, a liquidator, or a liquidator of a specified corporation in circumstances that relate to:

- (a) being insolvent or under administration;
- (b) convictions for offences referred to in CB s-cl. 227(2);
- (c) prohibitions by virtue of a Court order under CB cl. 562 or under an equivalent provision in a previous law of a Territory;
- (d) lack of capacity to carry out functions;
- (e) failure to submit a triennial statement (cf. CB s-cl. 26(3));
- (f) failure to comply with residential requirements; and
- (g) failure to carry out adequately and properly the relevant duties

(CB s-cl. 27(2) to (6) - based on ICAC CAs paras 9 (11)(a) and (b)).

116. Where the NCSC makes an application and the Board is satisfied at a hearing that a person has shown a lack of capacity to act as an auditor, liquidator or liquidator of a specified corporation it will be able, in addition to or instead of cancelling or suspending the registration of a person, to deal with the person by:

- (a) imposing a fine not exceeding \$1000;
- (b) reprimanding the person;
- (c) requiring the person to engage in or refrain from engaging in specified conduct;

(CB s-cl 27(10)). This provision is based on ICAC CAs paras 9(11) (b) to (f) but expanded to enable a positive undertaking to be obtained (CB para. 27(10)(c)).

117. The Board will not be able to cancel or suspend the registration of an auditor, liquidator, or liquidator of a specified corporation, or otherwise deal with him under CB s-cl. 27(10), without first affording him the opportunity of a hearing (CB s-cl. 27(11)).

118. The Board will be able to require a person to pay all or part of the costs of a hearing where the person's registration as an auditor, liquidator or liquidator of a specified corporation is cancelled or suspended by the Board or where the Board fines, reprimands, or requires an undertaking from, a person (CB s-cl. 27(12) - cf. ICAC CAs para 9(11)(f) which does not specify that part of the costs of the hearing may be required to be paid). Where the Board take none of the above action against a person it will be able to require the NCSC to pay all or part of the costs of the hearing (CB s-cl. 27(13) - new provision).

119. Where the Board exercises its power under this provision as it applies in the ACT in relation to a person, it must notify the person of the decision within 14 days, setting out in the notice the findings on material questions of fact by reference to the evidence and giving the reasons for the decision (CB s-cl. 27(15) - cf. ICAC CAs s-sec. 9(12) which has no provision for the findings or reasons to be given and which does not stipulate the time in which the person is to be notified - see para 100(f) of the ex memo dealing with CB s-cl. 18(9) for the possibility that the States may adopt a different provision to that in the CB).

120. The time at which the decision of the Board is to come into effect is dealt with in CB s-cl. 27(16) - (18). Special provision is made where there are appeals to the Supreme Court from a decision of the Board (CB s-cl. 27(19)).

121. A person whose registration is suspended will be deemed not to be registered except to the extent that he is to remain on the relevant register of auditors, liquidators or official liquidators, and he is not to be released from the obligation to lodge a triennial statement with the NCSC (CB s-cl. 27(20)).

122. The recovery of penalties and cash imposed by the Board is to be dealt with in CB s-cl. 27(21) - (24).

123. The Board will be able to exercise any of its powers under this provision whether or not the conduct engaged in by the person might constitute an offence and whether or not any proceedings have been brought or are pending (CB s-cl. 27(14)).

(1 A statement made by a person in a hearing held by the Board will not be admitted in evidence in criminal proceedings against the person, except in respect of the falsity of the statement (CB s-cl. 27(25)).

124. Rights of appeal to the relevant Supreme Court from decisions of the relevant Board are given to aggrieved persons and to the NCSC (CB s-cl. 27(26) and (27)).

Cl. 28 : Certain persons not to apply for registration as auditor or liquidator

(1 125. The following persons will not be entitled to apply for registration as an auditor or liquidator under the CB:

- (a) a person who has applied for registration in a participating jurisdiction and has not been notified of the result of the application (CB s-cl. 28(1));
- (b) a person whose application for registration in a participating jurisdiction has been refused, unless he has the leave of the Supreme Court of that jurisdiction (CB s-cl. 28(2)); and

- (c) a person whose registration in a participating jurisdiction has been cancelled or suspended, unless he has the leave of the Supreme Court of that jurisdiction (CB s-cl. 28(3)).

126. CB s-cl 29(1) provides that a person registered in another jurisdiction is deemed to be registered under this Act. The purpose of CB cl. 28 is to prevent a person whose application in another jurisdiction is pending or has been refused, or whose registration has been cancelled or suspended, from applying for registration under this Act to benefit from the "deeming" provision in CB cl. 29.

Cl. 29 : Certain persons deemed to be registered under this Act

127. The following persons will be deemed to be registered as an auditor, liquidator, or official liquidator, as the case may be, under this Act:

- (a) a person who is registered as an auditor, liquidator, or official liquidator in a participating jurisdiction (CB s-cl. 29(1)). The effect of this provision and the corresponding provisions of participating jurisdictions is that a person will need be registered in only one jurisdiction to be registered in all participating States and Territories. This provision is the basis of a national system for the registration of auditors, liquidators and official liquidators. Under existing legislation a person must apply and be registered in every State and Territory in which he wishes to carry on business; and

- (b) a person who is deemed to be registered as an auditor under cl. 19 of the companies codes of participating jurisdictions (i.e. Auditors-General).

(128. Note also cl. 26 of the C(TP)B which contains transitional provisions in relation to a person who was, immediately before the commencement of the CB, registered as an auditor or as a liquidator or appointed as an official liquidator under the ACT CO.

Cl. 30 : Auditors and other persons to enjoy qualified privilege in certain circumstances

129. Qualified privilege under the laws of defamation will be given to auditors and certain other persons in respect of statements and reports of auditors made in the course of their duties and the sending of accounts and reports to the NCSC (CB cl 30 - based generally on s. 167B of the VIC CA and WA CA). This provision differs from the present legislation in that the privilege of the auditor is not restricted to comment on the accounts but extends to the directors' report under CB cl. 270 (CB para. 30(1)(b)). The subject of verification of directors reports by auditors was discussed in two working papers received from Mr D.J. Stokes of the Department of Commerce in the University of Newcastle. The two papers are entitled "An A Priori Case for Verification of Disclosure in Directors Reports" and "The Nature and Extent of Contemporary Audit" and the former paper is expected to be published in a forthcoming edition of the ABLR.

DIVISION 3 : REGISTERS AND REGISTRATION OF DOCUMENTS

130. Division 3 of Part II of the CB (cls. 31 and 32) deals with registers and the registration of documents.

Cl. 31 : Registers

131. The NCSC will be able to keep appropriate registers and the public will have access to most documents lodged with the NCSC (CB cl. 31). This provision is based on ICAC CAs s. 12 except that:-

(a) The classes of documents of which copies may be required by the public have been limited to documents that can be inspected by the public or and to certificates that can be issued by the NCSC (CB para 31(2)(c)).

(b) The appeal provision in s-sec 12(6) of the ICAC CAs has been omitted from CB cl. 31 and has been included as part of a general appeal provision in Part XIV of the CB (see CB cl. 537).

132. A register kept under the ACT CO immediately before the proposed new companies code comes into operation will be deemed to be part of a register kept by the NCSC under the corresponding provision of the CB (See C(TP)B cl 11). Similar transitional provisions will probably be included in the Companies (Application of Laws) Bills of the other jurisdictions.

Cl. 32 : Relodging of lost registered documents

133. The procedures to be followed when a document lodged with the NCSC has been lost are set out in CB cl. 32 (based on ICAC CAs s. 13, except that CB s-cl. 32(1) has been broadened to permit any person - not merely the corporation - to lodge copies with the NCSC).

CB : PART III : CONSTITUTION OF COMPANIES

134. Part III of the CB (cls. 33 to 93) contains the following provisions dealing with the constitution of companies:

- Division 1 - Incorporation
- Division 2 - Names
- Division 3 - Powers and Status
- Division 4 - Transfer of Incorporation.

DIVISION 1 : INCORPORATION

135. Division 1 of Part III of the CB (cls 33 to 37) deals with the incorporation of a company.

136. Except where it provides otherwise, the CB uses the term 'company' to refer to a body incorporated under the Bill or under a corresponding previous law of the Territory. This term should be distinguished from the following terms that are used in the CB:

- 'body corporate' : used to refer to any incorporated body;
- 'corporation' : used to refer to any body corporate formed or incorporated within or outside the ACT. It includes any foreign company and any recognised company but excludes:
 - (a) public authorities, agents or instrumentalities of the Crown in right of the Commonwealth or of a Territory (see C & S (I & MP) A s.9);
 - (b) corporations sole;
 - (c) co-operative societies; or

- (d) associations incorporated under the Associations Incorporations Ordinance, 1953.

(see CB s-cl. 5(1) - these exclusions will be modified by the application legislation in each jurisdiction.

- 'foreign company' : used to refer to:-

- (a) a body incorporated outside the ACT, not being a recognized company, a corporation sole or public authority or instrumentality or agency of the Crown;
- (b) an unincorporated society, association or other body which under the law of its place of origin may sue or be sued or hold property in the name of an officer of the society etc., and which does not have its head office or principal place of business in the ACT.

(see CB s-cl. 5(1)).

- 'recognized company' : used to refer to a body incorporated under the Companies Act of a participating jurisdiction (see CB s-cl. 5(1)).

- 'recognized foreign company' : used to refer to a company formed outside Australia and registered as a foreign company in a participating jurisdiction (see CB s-cl. 5(1)).

Cl. 33 : Formation of companies

137. The general requirements of the companies code for forming a company, the type of company, that may be formed, and certain restrictions on the size of associations and partnerships are set out in CB cl 33 (based on ICAC CAs s.14).

138. The size of associations and partnerships that can be formed for profit making purposes will be restricted to 20 persons (CB s-cl. 33(3)). However, where a profession or calling has been declared by notice in the Gazette, a partnership of more than 20 but not more than the number of members specified in the notice may be formed (CB s-cl. 33(4)). The Ministerial Council for Companies and Securities has not yet made a final decision on the professions that will be proclaimed or on the size restriction that will apply to these professions.

139. It will now be an offence for a person to participate in the purported formation of a profit making association or partnership that has more than 20 members. (CB para 33(3)(b) - new provision).

140. Omitted.

Cl. 34 : Proprietary companies

141. In certain circumstances a company will be able to be formed as a proprietary company (CB cl 34 - based on ICAC CAs s.15). For the definition of proprietary company see CB s-cl. 5(1).

142. The major advantages enjoyed by a proprietary company under the existing law are set out in Ford para 128.

Cl. 35 : Registration and incorporation

143. On receipt of the appropriate documents the NCSC will be able to register a company by registering the memorandum and articles (CB s-cl. 35(1)). As and from the date specified in the certificate of incorporation the subscribers and subsequent members are an incorporated company by the name set out in the memorandum (CB s-cl. 35(4)).

144. This clause is based on ICAC CAs s.16 except that:

- (a) There is no equivalent in the CB to s-sec. 16(2) of the ICAC CAs, which enables the registering authority to require a statutory declaration that the requirements of the legislation have been complied with (see Macarthur Report para. 75).

- (b) The entity created under this provisions is now referred to as an 'incorporated company' (CB s-cl. 35(4)) instead of as a 'body corporate' (ICAC CAs s-sec. 16(4) - see also Ford para 101).
- (c) A company will now have power under CB para 35(5)(d) to acquire, hold and dispose of "property" (rather than "land" as in ICAC CAs sub-s. 16(4)); and
- (d) There is a new provision that a company shall not be registered unless the proposed name of the company has been reserved under CB cl. 40 (CB s-cl. 35(9)).

Cl 36 : Membership of holding company

145. Except in certain circumstances, a corporation will not be able to be a member of, or hold a beneficial interest in shares in, a company that is its holding company (CB cl 36)

146. This provisions is based on ICAC CAs s.17 except that the CB provision has been widened (through the definition of "unit" see CB s-cl 5(1)) to ensure that a subsidiary cannot avoid the operation of the provisions by not taking a legal title to a share in the holding company, even though the subsidiary acquires a beneficial interest in the share (CB s-cl 36(2)). This should overcome the doubts raised by Bond Corporation Pty Limited v. White Industries Limited 1980 C.L.C. 34, 365 as to

the effectiveness of s. 17 of the ICAC CAs in this area. In that case Needham J said that s-sec. 17(1) 'refers to registered interests and does not attach contracts or unregistered transfers'. See also D.E. Harding (SULS sem).

Cl. 37 : Requirements as to memorandum

147. The requirements as to the memorandum of a company are set out in CB cl. 37.

148. This provision is based on ICAC CAs s. 18 except that:

- (a) The manner in which a body corporate should subscribe is expressly dealt with (CB s-cl. 37(4)).
- (b) A subscriber will no longer be required to use his own handwriting to indicate the number of shares being subscribed for.
- (c) Each subscriber to the memorandum will now be required to state, if the shares of the company are divided into classes, the class or classes of shares that he agrees to take (CB s-para. 37(2)(a)(ii) - new provision).

DIVISION 2 : NAMES

149. Division 2 of Part III of the CB (cls 38 to 66) sets out the provisions of the legislation governing the names of companies.

150. These provisions seek to give effect to Part V of the Formal Agreement so far as that Part relates to the names of companies:

PART V - NAMES AND REGISTRATION

11. The legislation of the Commonwealth and of the States provided for by Part IV (in this Part referred to as "the Commonwealth and State legislation") shall include provisions under which, except with the consent of the Ministerial Council -

- (a) a company shall not be incorporated in any State or Territory under a name which is undesirable or is a name of a kind which the Ministerial Council has directed to be unacceptable;
- (b) a body formed outside Australia shall not be registered as a foreign company in any State or Territory under a name which is undesirable or is a name of a kind which the Ministerial Council has directed to be unacceptable; and
- (c) a body formed within Australia other than a company shall not be entitled to be registered as a foreign company in any State or Territory under a name which is undesirable or is a name or a name of a kind which the Ministerial Council has directed to be unacceptable.

12. The Commonwealth and State legislation shall include provisions under which -

- (a) a body which immediately before legislation provided for by clauses 8 and 9 comes into force is -
 - (i) a company incorporated in a State or Territory;

- (ii) a body formed outside Australia and registered as a foreign company in a State or Territory;
 - (iii) a body formed within Australia other than a company and registered as a foreign company in any State or Territory, may carry on business or establish a place of business under the name by which, and in any State or Territory in which, it is so incorporated or is registered as a foreign company or in which it is a recognised company and has reserved that name;
- (b) a company incorporated in any State or Territory and a body formed outside Australia which is registered as a foreign company in any State or Territory may reserve its name in any other State or Territory if its name is, in that other State or Territory, not undesirable and not a name of a kind which the Ministerial Council has directed to be unacceptable;
- (c) a company or body which has reserved its name in a State or Territory other than the State or Territory of its incorporation or formation will not be required -
- (i) to register in that other State or Territory in order to carry on business or establish a place of business in that other State or Territory; or
 - (ii) to lodge any documents in that other State or Territory for the purpose of carrying on business or establishing a place of business in that other State or Territory; and
- (d) a body formed within Australia other than a company shall not be entitled to carry on business or establish a place of business in any State or Territory other than the State or Territory in which it is formed unless it is registered in that other State or Territory as a foreign company.

13. The Commonwealth and State legislation shall include provisions by virtue of which -

- (a) a company incorporated in a State or Territory;
- (b) a body formed outside Australia and registered as a foreign company in any State or Territory;

- (c) a body formed within Australia other than a company and registered as a foreign company in any State or Territory,

shall not, except with the consent of the Ministerial Council, change its name to a name which, in any State or Territory in which it is incorporated or in which its name is reserved, as a recognised company, is undesirable or is a name or a name of a kind which the Ministerial Council has directed to be unacceptable.

151. The basic scheme for the reservation of names as set out in Division 2 of Part III of the CB is as follows:

- (a) A company or foreign company will not be able to register a name that is undesirable, etc. (CB s-cl. 38(1)).
- (b) A company or foreign company will not be able to be registered, or change its name unless its name has been reserved (CB s-cl. 35(9), 65(2), and 520(1) and 520(2)).
- (c) A person may apply for the reservation in the ACT of a name of a company or a foreign company (CB s-cl. 40(1), 46(1) and 46(2)).
- (d) Subject to (e), if the name is one by which the company or foreign company could be registered (see CB s-cl. 38(1)), the NCSC will reserve the name for two months (CB s-cl. 40(2) and 46(3)). The reservation can be extended (CB cl. 58).

- (e) Where the application states that it is desired to reserve the name or new name of a (proposed) company or (proposed) foreign company in a participating jurisdiction (see (f)), and the corporation could not be registered by that name in that jurisdiction, the NCSC will not be able to reserve the name (CB s-cla. 40(3), 43(3), 46(4) and 49(3)).
- (f) The prescribed form for the reservation of a name in the ACT will require specification of each jurisdiction in which it is desired to reserve the name or new name of a (proposed) company or (proposed) foreign company (CB s-cla. 40(1), 43(1), 46(1), 46(2) and 49(1)).
- (g) Where a name has been reserved under the legislation of a participating jurisdiction (see CB s-cla. 40(2), 43(2) and 46(3)) and the application for reservation stated that it was desired that the name be reserved in the ACT, the name will be reserved in the ACT until the reservation ceases, or until cancelled by the NCSC in the ACT, or cancelled under the law of that participating jurisdiction (CB cls 41, 44 and 47).
- (h) The reservation of a name will be cancelled in respect of the name or new name of a company or (intended)

foreign company, or in respect of the proposed transfer of incorporation of a recognized company or foreign company, where:

(((i) the name is not available in a participating jurisdiction requested in the application for reservation (CB paras 40(5)(a), 43(5)(a), 46(6)(a), 49(5)(a), 52(5)(a) and 55(5)(a)); or

(ii) the NCSC is notified in writing that the reservation is no longer required (CB paras 40(5)(b), 43(5)(b), 46(6)(b), 49(5)(b), 52(5)(b) and 55(5)(b)).

(i) The registration of a name will be cancelled:

(((i) if the name was the name by which a company or registered foreign company was registered before it changed its name to a new name (CB paras 43(4)(d) and 49(4)(d));

(ii) if, on transfer of incorporation of a recognized company or foreign company into the ACT the name was registered in the ACT under other provisions than those applying to reservation and registration on such transfer of incorporation (CB paras 52(4)(d) and 55(4)(d));

- (iii) if, on transfer of incorporation of a recognized company or foreign company to a participating jurisdiction, the name was registered in the ACT under other provisions than those applying to reservation and registration on such transfer of incorporation (CB paras 54(d) and 57 (d));
- (iv) if a recognized company or recognised foreign company notifies the NCSC that the registration is no longer required in the ACT, or if the NCSC is notified under a law of a participating jurisdiction that the registration is no longer required in the ACT (CB cl. 62);
- (v) if a registered foreign company ceases to be registered under Division 5 of Part XIII (CB cl. 63); or
- (vi) if a name was registered by mistake in respect of a recognized company or recognized foreign company, when it was not available for reservation (CB cl. 64).

152. The content of CB cls 38 to 66 is outlined below.

Cl. 38 : Interpretation

(1) 153. Except with the consent of the Ministerial Council, a name shall not be taken to be available for reservation and registration if it is likely to be mistaken for a name already reserved or registered, or is undesirable, or is a name or kind of name that the Ministerial Council has directed the NCSC not to register (CB cl. 38).

154. Note s-cl. 13(2) of the C(TP)B which deals with a consent given under s-sec. 22(1) of the ACT CO for the registration of a company by a specified name.

Cl. 39 : Names of particular classes of companies

(1) 155. The names and abbreviated forms of particular classes of companies are dealt within CB cl. 39 (cf ICAC CAs s-secs 22(3) and (6)).

Cl. 40 : Reservation and registration of name of intended company

156. If the NCSC is satisfied that an application is made in good faith, the name of an intended company may be reserved in the ACT for two months from the date of lodgement of the application with the NCSC (CB s-cl. 40(2)). Where the application also requires the name to be reserved in a participating State or Territory and the name is not available for reservation in any of the required jurisdictions, then the NCSC will not reserve the name (CB s-cl. 40(3)).

157. Where the NCSC registers a company under CB cl. 35 (the company being required by CB s-cl. 35(9) to first reserve it under CB cl. 40) the name is registered by the NCSC and ceases to be reserved (CB s-cl. 40(4)). This registration remains in force until the registration is cancelled by the NCSC (see CB s-cl. 40(7)).

158. If the name is reserved and it is found that the name was not available for reservation in the ACT or in any of the required jurisdictions, the NCSC will cancel the reservation of the name (CB para 40(5)(a)). The NCSC will also cancel the reservation where the applicant notifies the NCSC in writing that he no longer desires the name to be reserved (CB para 40(5)(b)). Reservation of a name does not of itself entitle an intended company to be registered by that name (CB s-cl. 40(6)).

Cl. 41 : Reservation of name of intended recognized company

159. The NCSC will reserve in the ACT a name that has been reserved in a participating State or Territory where the application asks for reservation of the name in the ACT. The reservation remains in force until it ceases to be reserved or is cancelled by the NCSC under the provision in the participating jurisdiction corresponding to CB cl. 40 (CB cl. 41 - see also cl. 44 dealing with the reservaton of the proposed new name of a recognized company).

Cl. 42 : Registration of name of recognized company

160. Where a name is reserved in the ACT as the name of an intended recognized company (see CB cl. 41) it will be registered in the ACT by the NCSC once it is registered in the participating State or Territory where that recognized company is incorporated. Such registration remains in force until cancelled by the NCSC or until the registration in the participating jurisdiction is cancelled (CB cl 42 - see also cl. 45 dealing with the registration of a new name of a recognized company).

Cl. 43 : Reservation and registration of proposed new name of company

161. A company will be able to have reserved and registered a proposed new name (CB cl 43 - which follows the same pattern as CB cl 40 relating to the reservation and registration of the name of an intended company).

Cl. 44 : Reservation of proposed new name of recognized company

162. A recognized company will be able to reserve a proposed new name which has been reserved in a participating State or Territory where that recognized company is incorporated (CB cl. 44 - which follows the same pattern as CB cl. 41 relating to the reservation of the name of an intended recognized company).

Cl. 45 : Registration of new name of recognized company

163. A recognized company will be able to register in the A.C.T. a new name which

- has been reserved in the A.C.T. (see CB cl. 44); and
- registered in the participating State or Territory where that company is incorporated

(CB cl 45 - which follows the same pattern as CB cl 42 dealing with the registration of the name of a recognized company).

Cl. 46 : Reservation and registration of name of intended foreign company or foreign company

164. An intended foreign company or foreign company will be able to reserve and register its name (CB cl 46).

165. This provision follows the pattern of CB cl. 40, with the additional provision that notwithstanding CB para 38(1)(a) a name is not to be taken as unavailable for reservation by reason only that the name is already reserved or registered in respect of the foreign company that has applied for the reservation under this clause. (CB s-cl. 46(9)).

Cl. 47 : Reservation of name of intended recognized foreign company or recognized foreign company

165A. An intended recognized foreign company or recognized foreign company will be able to reserve its name in the ACT (CB cl. 47 - which follows the pattern of CB cl. 41 relating to the reservation of a name of an intended recognized company).

Cl. 48 : Registration of name of recognized foreign company

166. A recognized foreign company will be able to register its reserved name in the ACT once that name is registered in its 'home' jurisdiction (CB cl 48 - which follows the pattern of CB cl 42 relating to the registration of a name of a recognized company).

Cl. 49 : Reservation and registration of proposed new name of registered foreign company

167. A registered foreign company will be able to apply for the reservation and registration of a new name in the ACT (CB cl 49).

168. This provision (like CB cl. 43) follows basically the same pattern as CB cl. 40 relating to the reservation and registration of the name of an intended company - except that CB cl. 49 contains no equivalent to CB s-cl. 40(6)).

Cl. 50 : Reservation of proposed new name of recognized foreign company

169. A recognized foreign company will be able to register in the ACT a proposed new name which has been reserved in a participating State or Territory which is the 'home jurisdiction' of that recognized foreign company (CB cl. 50 - which is basically the same as CB cls. 41 and 44).

Cl. 51 : Registration of new name of recognized foreign company

170. A recognized foreign company will be able to register in the ACT a new name which it has reserved in the ACT and which has been registered (under a provision corresponding to CB cl. 49) in a participating jurisdiction which is the 'home jurisdiction' of that recognized foreign company (CB cl. 51).

Cl. 52 : Reservation and registration of name of recognized company proposing to transfer incorporation to the Territory

171. A recognized company (i.e., a body incorporated as a 'company' in another jurisdiction covered by the co-operative scheme) proposing to transfer its incorporation to the ACT will be able to apply to reserve and register its name in the ACT (CB cl. 52).

172. This provision follows the pattern of CB cl. 40, with the additional provision (as in CB cl. 46) that notwithstanding CB para. 38(1)(a) a name is not to be taken as unavailable for reservation by reason only that the name is already reserved or registered in respect of the recognized company that has applied for reservation under this clause (CB s-cl. 52(8)). Also, if the registration of the name in respect of the recognized company is already in force the NCSC will cancel that last-mentioned registration (CB para. 52(4)(d)).

Cl. 53 : Reservation of name of company or recognized company proposing to transfer incorporation to participating State or Territory

173. CB cl 53 deals with the reservation of names where a company or recognized company proposes to transfer its incorporation to another participating State or Territory:-

- (a) Where an ACT registered company has reserved a name in a participating State or Territory under a provision corresponding to CB s-cl. 52(2), the NCSC will reserve the name in the ACT (CB s-cl. 53(1)).
- (b) Similarly, where a recognized company in the ACT has reserved a name in a participating jurisdiction and the application states that the name of the recognized company is registered in the ACT, the NCSC will have to reserve that name applied for in the ACT, and such reservation remains in force until it ceases or is cancelled by the NCSC (CB s-cl. 53(2)).

Cl. 54 : Registration of name of recognized company after transfer of incorporation to participating State or Territory

174. The following provisions will apply to registration of the name of a recognized company after the transfer of its incorporation.

- (a) Where a company or recognized company has reserved a name and the name is then registered under the law of a participating State or Territory, the NCSC will be required to register the name in the ACT and such registration remains in force until cancelled by the NCSC.

- (b) Also, if the registration of the name in respect of that company or recognized company is already in force the NCSC will have to cancel that last-mentioned registration.

(CB cl. 54).

Cl. 55 : Reservation and registration of name of foreign company proposing to transfer incorporation to the Territory

175. CB cl. 55 deals with the reservation and registration of the name of a foreign company proposing to transfer incorporation (and follows the pattern of CB cl. 52).

Cl. 56 : Reservation of name of foreign company proposing to transfer incorporation to participating State or Territory

176. CB cl. 56 deals further with the reservation of a name where a foreign company proposes to transfer incorporation (and is along the lines of CB s-cl. 53(2)).

Cl. 57 : Registration of name of foreign company that has become a recognized company after transfer of incorporation to participating State or Territory

177. CB cl. 57 deals with registration of the name of a foreign company that has become a recognized company after transfer of incorporation. The provision follows the pattern

of CB cl. 54 which deals with the registration of the name of a recognized company after it has transferred its incorporation to a participating State or Territory.

Cl. 58 : Extention of reservation

178. Where an application is made in good faith during the currency of a reservation the NCSC may extend the reservation of a name for up to two months (CB cl. 58).

Cl. 59 : Notification that registration of name desired in a State or another Territory

179. A company or registered foreign company will be able to notify the NCSC that it desires a name it has registered to be registered in a State or another Territory as well (CB cl. 59).

Cl. 60 : Registration of name of recognized company or recognized foreign company in the Territory

180. The NCSC will be required to register in the ACT a name notified by a recognized company or recognized foreign company to the NCSC under a provision in another jurisdiction corresponding to CB cl. 59. Before the name is registered in the ACT it has to be available for reservation, but once registered it remains in force until cancelled by the NCSC. (CB cl. 60).

Cl. 61 : Notification that registration of name no longer desired
in a participating State or Territory

181. The NCSC will have to be notified where registration of a name is no longer desired in a participating State or Territory. Notification is to be in writing. CB s-cl. 61(1) deals with the case where the name has been registered in respect of a company, whilst CB s-cl. 61(2) deals with the case of a registered foreign company.

Cl. 62 : Cancellation of registration where registration in the
Territory no longer desired

182. Where registration of a name is no longer desired the NCSC will be required to cancel the registration of a name in respect of:-

- (a) a recognized company (CB s-cl. 62(1)) and
- (b) a recognized foreign company (CB s-cl. 62(2)).

Cl. 63 : Cancellation of registration where company or foreign
company dissolved or foreign company ceases to be registered

183. The NCSC will be required to cancel the registration of a name where a company or registered foreign company is dissolved or where a registered foreign company ceases to be registered under Division 5 of Part XIII (CB cl 63).

Cl. 64 : Cancellation of registration where name registered by mistake

184. The NCSC will be able to cancel the registration of a name of a recognized company or recognized foreign company in the ACT, where the name has been registered by mistake because at the time it was reserved, or registered it was not in fact available for reservation (CB cl. 64).

Cl. 65 : Change of name

185. A company will be able, by special resolution and with the approval of the NCSC, to change its name to a name reserved under cl. 43 (CB s-cl. 65(1) and (2)).

186. The NCSC will be able to direct a company to change its name if the name of the company, for whatever reason, is a name not available for reservation in the ACT (CB s-cl. 65(3)). This power will not be able to be exercised without Ministerial Council approval where an A.C.T. company has used the same name since before 1 July 1962 (the date of commencement of the ACT CO) (CB s-cl. 65(4)).

187. These provisions are based on ICAC CAs s. 23.

Cl. 66 : Omission of "Limited" in names of charitable and other companies

188. The NCSC will be able to license a limited company

to be registered without the word "Limited" as part of its name if the NCSC is satisfied that the company is being formed for charitable or certain other purposes (based on ICAC CAs s.24).

189. This clause differs from s. 24 of the ICAC CAs as follows:

- (a) It is the NCSC rather than the individual Minister who will authorize the omission of the word "Limited" (see s-cl. 32(3) of Formal Agreement).
- (b) The term "principal executive officer" is used in place of "manager".
- (c) In CB s-cl. 66(7) (corresponding to ICAC CAs s-sec. 24(4C)), the words "or a company included in a class of companies" have been omitted after the second occurrence of the word "company."
- (d) Any alteration in the memorandum or articles of a company (except a change of name) will not have effect unless the alteration has been approved by the NCSC. Provided that approval is obtained, the alteration has effect notwithstanding a failure to obtain any consent or approval required to be obtained by virtue of a provision contained in the licence or in the memorandum of the company (CB s-cl. 66(11) and (12) - cf ACT Ordinances Revision (Administrative Arrangements) Ordinance 1976 para 17(b)).

190. See also s-cl. 13(3) of the C(TP)B which deals with a licence issued under a corresponding previous law of the ACT).

DIVISION 3 : POWERS AND STATUS

191. Division 3 of Part III of the CB (cls. 67 to 82) contains various provisions dealing the powers and status of companies.

Cl. 67 : Powers

192. The general powers that will be conferred on companies are set out in CB cl. 67 (based on ICAC CAs s.19 - cf NCB cls. 32 and 33 which took a different approach). See also Schedule 2 which is based on ICAC CAs Schedule 3.

Cl. 68 : Ultra vires transactions

193. No act of a company will be invalid by reason only that the company did not have the capacity or power to do the act (CB cl. 68 - based on ICAC CAs s.20 - cf NCB cls. 34 to 36 which took a different approach).

Cl. 69 : Change of status

194. The requirements of the legislation in relation to a change of status by a company are set out in CB cl. 69.

195. This provision is based on s. 25 of the ICAC CAs except that:

- (a) The additional words "or any corresponding provision of a previous law of the Territory" have been inserted at the end of CB para. 69(1)(a).
- (b) A company limited by shares will now be able to convert to a company limited both by shares and guarantee (CB para. 69(1)(c) - new provision).

196. This second amendment will enable a non-profit company limited solely by shares to convert to a company limited by both shares and guarantee so that such a company will pay a reduced fee under a proposed item in the Companies (Fees) Regulations that will correspond to item 28(b) of the Second Schedule to the existing ICAC CAs.

Cl. 70 : Change from public to proprietary company or from
proprietary to public company

197. Subject to certain conditions, a public company will be able to convert to a proprietary company and vice versa (CB cl. 70).

198. This provision is based on ICAC CAs s. 26 but with the following amendments:

- (a) The requirement under ICAC CAs para 26(2)(b) to lodge a statement in lieu of a prospectus has been omitted.

(b) ICAC CAs para 26(2)(c), dealing with statutory declarations, has been omitted.

(c) It will now be possible for the Supreme Court to review a proposed conversion in the same way and to the same extent as it can review (see CB s-cl. 73(6) to (13)) a proposed alteration of the memorandum (CB s-cl. 70(4)).

Cl. 71 : Default in complying with requirements as to proprietary companies

199. If a proprietary company does not comply with CB para 34(1)(c) or (d), the Supreme Court or the NCSC will be able to determine that the company has ceased to be a proprietary company (CB cl 71 - based on ICAC CAs s.27).

200. It is proposed that the Supreme Court of each other jurisdiction covered by the co-operative scheme, will exercise in relation to its jurisdiction's law, the powers and functions vested in the ACT Supreme Court by the CB.

Cl. 72 : General provisions as to alteration to memorandum

201. The general requirements of the legislation in relation to alterations to the memorandum of association are set out in CB cl. 72.

202. This provision is based on ICAC CAs s. 21, but with the following amendments:-

- (a) Registration will not be required of a resolution for cancellation of a registered name under CB cl. 121 (CB s-cl. 72(5)) and, if requested, the NCSC must certify the registration of a resolution or document (CB para 72(6)(b)) in addition to the automatic certification of Court orders (CB para 72(6)(a)) - cf. ICAC CAs s-sec 21(3)).
- (b) The NCSC will now be required to keep a copy of any certificate issued and such copy will be treated as a document lodged with the NCSC (CB s-cl. 72(10) - new provision).

Cl. 73 : Alterations of provisions of memorandum

203. The requirements of the legislation in relation to alterations to the memorandum of association are set out in CB cl. 73.

204. This provision is based on ICAC CAs s. 28 except that:

- (a) It is made clear that the company's ability to alter its memorandum will extend to the powers as well as the objects of the company (CB s-cl. 73(1)).

- (b) A company will be able, by a special resolution, to alter a provision of its memorandum that could lawfully have been contained in the articles of the company (CB s-cl 73(1) and (5) - in relation to CB s-cl 73(5) see CB s-cl 125(3)). This provision is based on s. 23 of the UK Companies Act 1948 except that the CB requires the alteration to be made by special resolution. Amendments consequential to these new provisions are made in CB s-cl 73(6), (8) and (11).
- (c) The memorandum will be able to provide that a special resolution will have no effect unless a further condition has been complied with (CB s-cl 73(3) and (4) - corresponding provisions in CB cl. 76 dealing with alteration of articles).
- (d) CB para 73(6)(c), corresponding to sub-s. 28(3) of the VIC CA, has been redrafted to cover the situation where there are no trustees for debenture holders, as well as the situation where there are no trustees for a class of debenture holders.
- (e) CB s-cl 73(8), corresponding to VIC CA s-sec 28(5), has been redrafted so that the new para 73(8)(a), corresponding to para 28(5)(b) of the VIC CA, is now limited to an alteration of the memorandum with respect to the objects of the company.

Cl. 74 : Articles of association

205. The requirements as to the articles of a company are set out in CB cl. 74.

206. This provision is based on ICAC CAs s.29 apart from CB s-cl 74(4) which is new and deals with the corporate subscriber.

Cl. 75 : Adoption of Table A or B

207. A company other than a no liability company will be able to adopt all or any of the regulations in Table A; a no liability company will be able to adopt all or any of the regulations in Table B (CB cl 75 - based on ICAC CAs s. 30). These Tables are set out in Schedule 3.

208. See cl. 15 of the C(TP)B which deals with the continued application of Tables A and B of the ACT CO in certain circumstances.

Cl. 76 : Alteration of articles

209. A company will be able, subject to its memorandum and the CB, to alter or add to its articles by special resolution (CB cl. 76).

210. This provision is based on ICAC CAs s. 31 except that the memorandum of the company will be able to include a provision to the effect that a special resolution altering the articles will not have any effect unless a further condition has been complied with (CB s-cl. 76(2) and (3) - corresponds to CB s-cl. 73(3) and (4) in provisions dealing with alteration of memorandum).

Cl. 77 :Memorandum and articles of companies limited by guarantee

211. A company limited by guarantee, registered on or after 1 October 1954, cannot give a person who is not a member a share in the divisible profits of the company by any provision in its memorandum or articles or by any resolution of the company (CB cl. 77 - based on ICAC CAs s.32).

212. The date specified above will differ in the legislation of other participating jurisdictions. For example, in Victoria the date will be 31 January 1911.

Cl. 78 : Effect of memorandum and articles

213. The memorandum and articles will bind the company and the members of the company as if they had been signed and sealed by each member (CB s-cl. 78(1)). No member will be bound by an alteration to the memorandum or articles which is made after he became a member and which requires him to subscribe to more shares unless he agrees in writing to be so bound (CB s-cl. 78(3)).

214. This provision is based on ICAC CAs s. 33.

Cl. 79 : Copies of memorandum and articles

215. The requirements relating to the issuing by the company of copies of the memorandum and articles are set out in CB cl. 79.

216. This provision is based on ICAC CAs s.34 except that:

(a) The NCSC will be able to require a company to lodge with the NCSC a printed copy of the articles of association as altered (CB s-cl. 79(3) - new provision).

(b) CB s-cl. 79(4) differs from the corresponding ICAC CAs s-sec. 34(3) in that the words "and a copy of the articles shall not be lodged with the Commission" have been inserted after "shall not be issued".

Cl. 80 : Confirmation of contracts and authentication and execution of documents

217. There will be provisions dealing with:

- (a) the formalities for making, varying or discharging a contract by a company (CB s-cls 80(1) to (6)): these provisions amend s-sec. 35(1) of the ICAC CAs and some are based on s-secs. 31A(1) to (5) of the VIC Instruments Act and s-cls. 69(1) to (4) of the NCB; and
- (b) the authentication and execution of documents (CB s-cls 80(7) to (12)): s-cls. 80(7) to (11) are based on s-secs. 35 (2) to (5) of the ICAC CAs; s-cl 80(12) is new and is based on NCB s-cl. 69(10).

218. The principal new provisions are as follows:

- (a) A person acting under the authority of a company will be able to make, vary or discharge a contract on behalf of the company in the same manner as if the contract were made, varied or discharged by a natural person (CB s-cl. 80(1)).

- (b) Such a contract will bind the company and other parties to the contract (CB s-cl. 80(2)).
- (c) A contract or document executed under the common seal of the company will not be invalid by reason only that a person attesting the affixing of the common seal was interested in that contract or document or in the matter to which it related (CB s-cl 80(3)). See Sutherland 'Effron Tie - a brief revisit', Law Institute Journal (Victoria) December 1979, pp. 729 to 732.
- (d) The new provisions do not prevent a company being able to make, vary or discharge a contract under its common seal (CB s-cl. 80(4)).

Cl. 81 : Ratification of contracts made before formation of company

219. CB cl. 81 is a new provision intended to reform the existing common law in relation to "pre-incorporation contracts". This clause is based on a Report by the Victorian Law Reform Commissioner entitled "Pre-Incorporation Contracts" (No. 8, published 30 April 1979).

220. The first three paragraphs of the Report provide a concise statement of the existing law:

"1. The law lies within a small compass and can be stated briefly. A limited liability company is an artificial creature created by the law. It is both elementary and axiomatic that until the act of creation is performed it has no existence and can neither acquire nor give rights and thus be subject to obligations. Prior to its coming into existence it can have no "agent" acting for it, and consequently cannot be held liable on the basis that any person, such as the promoter of the company, contracted as "agent" for it. This is so even if the promoters are in fact the only members of the company after its formation.

2. Since 1866 it has been clear in English, Canadian and Australian law that a company when formed cannot adopt or ratify any act performed or obligations incurred on its behalf before incorporation and all that can be done to give binding force to such acts or obligations is to enter into a new contract on the same terms as the old.

3. Attempts to imply new contracts from the conduct of a company after registration have generally not met with success. Nor is it easy to attach the obligations arising under these what are loosely called "pre-incorporation contracts" to the promoters or other individuals who purported to act on behalf of companies yet to be formed. Only if it is clear that all parties to the contract knew that the company on whose behalf the contract was made was not in existence, is it likely that these company "agents" will be held personally liable (and by the same token entitled to the benefits of the contract). But generally a court will have to try to spell out from the manner in and circumstances under which the contract was signed (if a contract in writing) or from the conduct of the parties (if not in writing) what their real intention was. This is usually neither an easy nor satisfactory course."

221. The difficulty that arises from the present law is that, during the time that it takes for a company to be

incorporated (a period that may take months), the promoters of the proposed company may undertake many actions intended to have legal effect and directed to the successful launching into the commercial world of the fledgling company. At least some of these actions may require legally binding agreements. In the case of large enterprises with the services of specialised commercial lawyers, most of these legal difficulties can be overcome.

222. Small companies are in a different position, however, and the law is far less satisfactory for them. The promotions are sometimes executed by persons who are unaware of all the pitfalls. The result is that "the overwhelming majority of cases concerning pre-incorporation contracts have arisen in connection with small non-listed companies" (Canadian study cited with approval, VIC L.R.C. Report para. 15). That the present state of the law is unsatisfactory was made clear by Windeyer J in Black v Smallwood 117 CLR 52 when he said of the decision in the case, which was in conformity with the requirements of the law: "...I do not think that it accords with a belief that bargains should be kept."

(See also Austin, SALS Sem 34 to 56; Baxt, 1980 A.B.L.R. 408 to 411, Ford paras 544 to 550),

223. Reform of the law relating to pre-incorporation contracts has been carried out or recommended elsewhere in the world (e.g. U.K. Jenkins Committee para 44, s. 13 of Ghana Company Code, s.14 of Canada business Corporations Act). The general approach has been to permit a company to adopt or ratify a contract made on its behalf before its incorporation, but to provide that, until a pre-incorporation contract is ratified, the person who entered into the contract is, unless otherwise agreed, personally bound by the contract and entitled to the benefit of it.

224. Although there has been no known judicial interpretation of them, the Victorian Report believes such provisions for personal responsibility and entitlement are a "potential source of difficulty and uncertainty" (para. 34). The difficulties relate to the fact that this provision may impose on a person wishing to contract with the company contractual obligations to a person with whom he had no intention of contracting. These difficulties are accentuated when the agreement is one for employment or the allowing of credit (para. 35). The Victorian Report sets out some hypothetical circumstances by way of the difficulties and uncertainties that could arise from statutory provisions for a promoter or "agent" of a company not yet incorporated to be "liable on the contract" or that he shall be "entitled to the benefits the contract" (paras 36 - 40).

225. The alternative approach proposed by the Report and included in the CB is to make a person who purports to execute a contract on behalf of a non-existent company bear the risk -

- (a) that the company will not be incorporated; or
- (b) that the company will not ratify the contract.

226. This is achieved in the following way:

- (a) a person purporting to contract in the name of the non-existent company will be liable for damages if, within a reasonable time, the company is not incorporated or, if incorporated, does not ratify the contract; and
- (b) the measure of damages shall be the same as on a discharge for breach by the company of the unperformed obligations under the contract had it been ratified.

227. The main provisions of the CB relating to the ratification of, and liability for, pre-incorporation contracts are as follows:

- (a) Where a non-existent company (by a person, agent or trustee) purports to contract and the company is then formed within a reasonable time, the company will then, within a reasonable time, be able to ratify the contract (CB s-cl. 81(2)) and be entitled to the benefit of the contract as if the company had been formed and had been a party to the contract (CB s-cl. 81(3)).
- (b) Where a non-existent company purports to contract, and either the company is not formed within a reasonable time thereafter or the contract is not ratified within a reasonable time after formation, any other party to the contract will be able to recover damages from the person who purported to execute the contract on behalf of the non-existent company. Those damages will be equivalent to damages which would have been obtainable if the company had been formed and had ratified the contract and the contract had been discharged by breach because of the refusal or failure of the company to perform any obligations under the contract (CB s-cl. 81(4)).
- (c) Where proceedings for damages are brought under CB s-cl. 81(4) and the company has been formed, the court

may order the company to give up property or pay for any benefit received as a result of the contract and (or as an alternative) the court may order the company to pay all or some of the damages for which the defendant may be found liable under s-cl. 81(4)(CB s-cl. 81(5)).

(d) Where proceedings are brought under CB s-cl. 81(4), and the court orders the company to give up property or pay for any benefit received, the court may refuse to award damages or may award lesser damages (CB s-cl. 81(6)).

(e) Where the contract is ratified but breach of contract occurs due to a refusal or failure to perform, and proceedings are brought against the company, the court will be able, if it thinks it just and equitable, to order the person executing the contract on behalf of the company to pay part or all of the damages (CB s-cl.81(7)). This provision relates to circumstances where it is just and equitable that the promoter's liability should not cease on ratification and the promoter should remain liable: e.g. where the promoter is the major share holder of a company which, because it is undercapitalised, is unable to meet its contractual obligations. (Vic. Report Para 45).

- (f) A person will be exempt from liability in relation to a pre-incorporation contract where the other party or parties consent in writing to that person being exempted. (CB s-cl. 81(8)).
- (g) CB s-cl. 81(4) and 81(7) will not apply to allow a party to recover damages from a person in relation to a pre-incorporation contract where that party has consented to the person being exempted from liability under CB s-cl. 81(8) (CB s-cl. 81(8A)).
- (h) If the company is formed and it and the other parties to the contract substitute another contract for it, the person who executed the first contract on behalf of the company will be discharged from all liabilities in relation to it (CB s-cl. 81(9)). The purpose of this provision is to ensure that a novation by the company and the other contracting party will discharge the promoter's statutory liability.
- (i) Rights and liabilities under clause 81 in relation to a contract are in substitution for rights and liabilities in relation to the contract accruing apart from the clause (CB s-cl. 81(10)).

(j) For the purpose of clause 81, a trustee for a proposed company who purports to enter into a contract on its behalf will not have any right of indemnity against the company in respect of the contract where the company is formed within a reasonable time after the purported entry into the contract but the company does not ratify the contract within a reasonable time after it is formed (CB s-cl. 81(11)). The purpose of this provision is to prevent the operation of equitable principles by which the trustee may be able to avoid liability for statutory damages under CB s-cl. 81(4). (See Austin SULS sem).

(k) A contract will be able to be ratified by a company under clause 81 in the same manner as a contract may be made by a company under clause 80 (CB s-cl. 81(23)). The provisions of clause 80(3) relating to non-invalidity of contracts by reason that interested persons attested the affixing of the seal will also apply.

Cl. 82 : Prohibition on carrying on business with fewer than statutory minimum number of members

228. It will be an offence for a company (other than a wholly-owned subsidiary of a holding company) to carry on business for more than 6 months if the number of members of the company is reduced below 2 in the case of a proprietary company, or below 5 members in the case of any other company (CB cl 82 based on ICAC CAs s.36).

DIVISION 4 : TRANSFER OF INCORPORATION

Background

229. At present only NSW has general transfer of domicile legislation: Companies (Transfer of Domicile) Act 1968. This Act enables companies to transfer into NSW, but does not permit companies to transfer out of NSW. Other States (e.g. Victoria, South Australia) have passed private Acts to permit a transfer of domicile to those States by specific bodies corporate.

230. Division 4 of Part III (CB cls 83 to 93) contains provisions enabling a company incorporated in one jurisdiction to transfer its domicile to another jurisdiction. The provisions cover both 'transfer in' and transfers out' of jurisdictions covered by the Formal Agreement. They also permit a company incorporated outside Australia or in a non-participating Australian jurisdiction to transfer its domicile to a participating jurisdiction.

Cl. 83 : Certificate authorizing application for transfer of incorporation

231. A company will be able to apply to the NCSC for a certificate authorizing the company to apply for registration as a company under the corresponding law of a participating State or Territory (CB s-cl. 83(1)).

232. A company will not be entitled to make an application (under CB s-cl. 83(1)) if the company is being wound up, if an application to wind up the company has been lodged and has not been dealt with, if a receiver or receiver and manager has been appointed and is acting in respect of the whole or part of the company's property, if the company is under official management or if the company has entered into a compromise or arrangement with another person or persons (CB s-cl. 83(5)).

233. The NCSC will have to issue the certificate if:

- (a) the company has passed a special resolution approving the application for the certificate;
- (b) the company has given its creditors notice of its intention to apply for a certificate;
- (c) the company has complied with any conditions imposed by the Commission;
- (d) the name of the company is reserved in the other participating State or Territory;
- (e) the Commission is not aware of any failure of the company to comply with any requirement of the CB;
- (f) the Commission is not aware of any other reason why the certificate should not be granted; and

- (g) the Minsiter has consented to the issuing of the certificate (CB s-cl. 83(3)).

Cl. 84 : Application by recognized company for registration under Division

234. A recognized company will be able to apply to the NCSC to be registered as a company under the CB (CB s-cl. 84(1)). Certain documents must accompany the application (CB s-cl. 84(2)).

Cl. 85 : Application by foreign company for registration under Division

235. A corporation that is incorporated or formed outside Australia or in a non-participating jurisdiction in Australia will be able to apply for registration as a company under this Division (CB s-cl. 85(1) - cf. NSW Companies (Transfer of Domicile) Act s. 5).

236. A corporation will not be entitled to make an application (under CB s-cl. 85(1)) if, under the law of its place of incorporation, a winding up order has been made in respect of the corporation, or an application to wind up the corporation has been lodged and not withdrawn etc (CB s-cl. 85(2) - cf. NSW Companies (Transfer of Domicile) Act s. 5 and CB s-cl. 84(3) which contains a similar provision in relation to recognized companies).

237. Certain conditions will have to be satisfied if the NCSC is to grant the application (CB s-cl. 85(3) - based on s. 6 of the NSW Companies (Transfer of Domicile) Act).

238. The application under CB s-cl. 85(1) will have to be in the prescribed form, lodged with the NCSC and accompanied by specified documents, information and evidence that other conditions in CB s-cl. 85(1), (2) and (3) have been satisfied (CB s-cl. 85(4) to (6) - based on s. 7 of the NSW Companies (Transfer of Domicile) Act).

Cl. 86 : Registration of corporations as companies

239. A corporation that has made an application under CB cl. 84 or 85 for registration under the transfer of incorporation provision will have to be registered as a company under this Division if the NCSC is satisfied that it has complied with the requirements of CB cl. 84 or 85 and is not disqualified by either provision (CB s-cl. 86(1) and (2)).

240. A corporation will be registered as a proprietary company or a public company in accordance with its previous status or constituent documents (CB s-cl. 86(3)).

241. Where an application is granted, the NCSC will be required to register the corporation as a company of one of a number of different specified classes, the class being that which

is equivalent to the class under which the corporation is included in its jurisdiction of incorporation (CB s-cl. 86(4)).

242. The NCSC will have to issue a certificate to a company registered under this Division (CB s-cl. 86(5)). The NCSC must keep a register for the purposes of CB cl. 86 and set out the details that must be entered in the register (CB s-cl. 86(6)). There are provisions dealing with a company registered under this Division that was already registered as a foreign company under Division 5 of Part XIII (CB s-cl. 86(7) - based on s.11 of the NSW Companies (Transfer of Domicile) Act).

Cl. 87 : Effect of registration

243. At the date of commencement of the registration of a corporation as a company under this Division, the corporation will be deemed to be a company duly incorporated under the CB (CB-cl. 87(1) - based on s-sec 9(1) of the NSW Companies (Transfer of Domicile) Act).

244. The legal personality of the corporation will continue and registration will not affect the property of the corporation or, except as provided by this Division, any powers, rights, actions, obligations etc. of the corporation or of any other person (CB-cl. 87(2): Paras (a), (b), (c), (d) and (e) are based on s-sec 9(2) of the NSW Companies (Transfer of Domicile) Act. No legal proceedings will be defective (CB s-cl. 83(3)). The purpose of s-cl. (3) is similar to that of s.12 of the NSW Companies (Transfer of Domicile) Act - but see also CB s-cl. 90(6)).

245. For the purposes of the company's memorandum and articles under the CB, the constituent documents of a corporation registered pursuant to CB s-cl. 86(2) are dealt with in CB s-cl. 87(4) (based on s. 10 of the NSW Companies (Transfer of Domicile) Act)) and in CB s-cl. 87(5).

Cl. 88 : Alterations to constituent documents of foreign companies

246. There will be certain obligatory alterations of the constituent documents of a corporation registered under CB s-cl. 86(2) (CB cl 88 based on s. 25 of the NSW Companies (Transfer of Domicile) Act).

Cl. 89 : Effect of registration of company under corresponding law

247. Where a company has applied to register as a company in another participating jurisdiction under the provision of a law corresponding to CB cl. 84, and the NCSC has registered that company as a company under the law of that participating jurisdiction, then the company shall be deemed not to be incorporated under this Act from the time it is deemed to be a company duly incorporated under the companies legislation of the participating jurisdiction (CB cl 89).

248. There is no equivalent provision in the NSW Companies (Transfer of Domicile) Act as that Act does not contemplate a company transferring out of the jurisdiction (see para 229 of the ex memo).

Cl. 90 : Application of this Act to corporations registered under this Division

248. The application of certain provisions of the CB to a corporation registered under this Division will be qualified as follows:

- (a) Table A or B of Schedule 3 can be adopted (CB s-cl. 90(1) - based on s. 15 of the NSW Companies (Transfer of Domicile) Act).
- (b) Cl 239 (statutory meeting and statutory report) will not apply to a corporation registered under this Division (CB s-cl. 90(2) - based on s. 16 of the NSW Companies (Transfer of Domicile) Act).
- (c) The application of CB cl. 240 (annual general meeting) to a corporation registered under this Division is dealt with in CB s-cl. 90(3) (based on s. 18 of the NSW Companies (Transfer of Domicile) Act).

(d) Where a corporation registered under CB s-cl. 86(2) is a holding company, the financial years of any subsidiaries of the corporation at the commencement of the corporation's registration under this Division will be as set out in CB s-cl. 90(4) (based on s. 19 of the NSW Companies (Transfer of Domicile) Act).

(e) The application of CB cl. 360 (liability of contributories) to a corporation registered under this Division is dealt with in s-cl. 90(5) (based on s. 21 of the NSW Companies (Transfer of Domicile) Act).

249. The provisions of the C(TP)B will apply to a corporation registered under this Division as if it had been incorporated under the companies legislation in force immediately before the commencement of the Companies Act, and as if the Companies Act commenced on the date of commencement of the registration of the corporation under this Division (CB s-cl. 90(6) - based on s.12 of the NSW Companies (Transfer of Domicile) Act). The purpose of the provision is to ensure that the general transitional provisions of the C(TP)B will apply to the corporation.

Cl. 91 : Establishment of registers and minute books

250. Within 14 days of registration under this Division, the company must comply with all requirements of the CB relating to the maintenance of registers (see cls 131, 143, 147, 172, 209, 231, 238 and 256) and to books of minutes (see cls 253 and

254) (CB s-cl. 91(1)). Where the CB provides that a member or any person may request copies of a register or of any minutes of the company, and the company is required to provide the copy within a prescribed period of time, the prescribed period will be deemed to begin at the end of the fourteen day period mentioned above (CB s-cl. 91(2)).

Cl. 92 : Share warrants

251. Share warrants issued by a corporation before its registration under CB s-cl. 86(2) are dealt with in CB cl. 92 (based on s. 26 of the NSW Companies (Transfer of Domicile) Act). The purpose of this provision is, to protect the bearers of warrants issued prior to registration by requiring the corporation to enter them on the register of members on surrender and cancellation of the warrant (CB s-cl. 92(1)) and to compensate other persons who suffer loss by reason of the bearer being entered on the register before the warrant has been cancelled (CB s-cl. 92(2)). For further discussion of share warrants see under CB cl. 115.

Cl. 93 : Certificate of registration conclusive evidence

252. A certificate of registration under this Division given under the common seal of the NCSC will be conclusive evidence of registration under this Division (CB cl 93 - based on s. 27 of the NSW Companies (Transfer of Domicile) Act).

CB : PART IV : PROSPECTUSES, SECURITIES AND CHARGES

253. Part IV of the CB (cls 94 to 215) deals with prospectuses, shares, debentures and charges:

- Division 1 - Prospectuses;
- Division 2 - Restrictions on Allotment and
Variation of Contracts;
- Division 3 - Shares;
- Division 4 - Substantial Shareholdings;
- Division 5 - Debentures;
- Division 6 - Prescribed Interests;
- Division 7 - Title to and Transfer of Securities;
- Division 8 - Transfer of Marketable Securities;
- Division 9 - Registration of Charges.

DIVISION 1 : PROSPECTUSES

254. Division 1 of Part IV of the CB (cls. 94 to 109) regulates the use of prospectuses (for the definition of prospectuses see CB s-cl.5(1)).

Cl. 94 : Interpretation

255. A statement included in a prospectus is deemed to be untrue if it is misleading in the form or context in which it is included (CB s-cl 94(1)).

256. For the purposes of the prohibition on the issue of certain documents in relation to proposed corporations (see CB cl. 95) and the provisions regulating the forms of applications for shares or debentures to be attached to a prospectus (see CB cl. 96), each form is deemed to be issued to the public irrespective of the method used to select the recipient and irrespective of the fact that each form can only be used by the person to whom it is issued.

257. Forms will not be taken to be issued to the public if they are only issued to -

- (a) persons whose ordinary business is buying and selling shares, debentures or prescribed interests;
- (b) existing members or debenture holders of the corporation;

- (c) holders of prescribed interests made available by the corporation pursuant to a deed that is an approved deed for the purposes of Division 6 of Part IV; and
- (d) existing members in connection with a proposal under cl. 409.

(CB-cl. 94(2) - cf. s-cl. 5(4)).

Cl. 95 : Prohibition of issue of certain documents in relation to proposed corporations

258. It will be unlawful to issue:

- (a) a form of application for shares in, or debentures of;
or
- (b) a form to accompany a deposit of money with, or loan of money to,

a corporation that is to be formed (CB s-cl. 95(1)).

259. This prohibition will not apply if:

- (a) the form is not issued to the public; and
- (b) the invitation or offer to which the form relates is not issued or made to the public.

(CB s-cl. 95(2)).

Cl. 96 : Forms of application for shares or debentures to be attached to prospectus

260. A person must not issue a form of application for shares or debentures, or issue a form to accompany a deposit with or loan to a corporation unless the form is attached to a prospectus, and a copy of both the prospectus and the form have been registered by the NCSC (CB s-cl. 96(1) - cf. ICAC CAs s.37).

261. The restriction will not apply if the form is not issued to the public and the invitation or offer to which the form relates is not issued or made to the public (CB s-cl. 96(2)).

262. There will be a penalty for contravention of the provisions of \$20,000 or imprisonment for 5 years, or both (CB s-cl. 96(3)).

Cl. 97 : Invitations or offers in relation to borrowings by a corporation

263. A corporation will be required to register a prospectus with the NCSC before making a public offering of debentures (CB cl. 97). A corporation is widely defined (see CB s-cl. 5(1)).

264. This provision is based on ICAC CAs s.38 except that:-

- (a) Because of the interpretative provisions in s-cl. 5(3) the clause extends not only to invitations to the public to deposit money with or lend money to a

corporation but also to offers to the the public by a corporation to accept money deposited with, or lent to, the corporation (CB s-cl. 97(1)).

- (b) CB s-cl. 97(4) is based on ICAC CAs s-sec 38(4) but also incorporates the requirements set out in para. 32 of the Fifth Schedule to the ICAC CAs.
- (c) CB s-cl. 97(5) is based on ICAC CAs s-sec. 38(5) but also incorporates in a substantially similar form the requirements set out in para. 33 of the Fifth Schedule to the ICAC CAs. The bracketed words at the end of s-s-para 97(5)(b)(ii)(I) have been added to ensure that the net position as between guarantors need not be disclosed.
- (d) The formerly discretionary nature of paras 33(2)(c) and (d) of the Fifth Schedule is now mandatory and is contained in s-s-paras 97(5)(b)(ii)(F) and (G) of the CB.
- (e) CB s-cl. 97(6) to (13) are based on s-secs 38(6) to (12) of the VIC CA. There are some minor differences in the other ICAC CAs and more substantial differences in the SA and TAS CAs. The following differences are noted:

- (1) There is a machinery provision in CB para. 97(7)(b) and CB s-cl 97(8) giving to the NCSC, rather than to the Minister, the power to declare corporations to be authorized dealers in the short term money market (and thus prescribed corporations). (Note s-cl 13(4) and (5) of the C(TP)B which deal respectively with a declaration made under para. 38(7)(b) or (c) of the ACT CO and with a notice published under sub-s. 38(8) of the ACT CO).
- (11) The penalties in CB s-cl. 97(10) for breach of the provision have been increased from \$2,000 or 6 months imprisonment to:
- (a) \$20,000 or 5 years gaol, or both for a breach of sub-cl. 97(1) arising from failure to comply with para 97(1)(a);
- (b) \$2,500 or 6 months gaol, or both in any other case

Cl. 98 : Contents of prospectuses

265. The requirements as to the contents of prospectuses are set out in CB cl. 98.

266. S-cl. 98(1) of the CB lists a series of requirements that must be met if a prospectus is to comply with the CB:

- (a) Paras (a), (b) and (c) are based on ICAC CAs paras 39(1)(a), (b) and (c).
- (b) Para (d) incorporates certain requirements at present set out in para. 4 of Part I of the Fifth Schedule.
- (c) Para (e) is based on ICAC CAs paras 39(1)(d) and (e) and para 31 of Part III of the Fifth Schedule, except that various matters and reports to be set out in a prospectus which are presently specified in the Fifth Schedule will now either be prescribed by regulation or, in those cases not covered by the regulations, be specified by the NCSC.
- (d) Para (f) is based on ICAC CAs para 42(2)(e).
- (e) Para (g) and (h) are similar to ICAC CAs paras 39(1)(f) and (g).
- (f) Para (j) is similar to ICAC CAs para 39(1)(h) except that the prohibition on naming certain persons without a prescribed consent has been extended to any person performing any function in a professional, advisory or other capacity for the corporation or in relation to the issue. These additional persons will not, for

that reason alone, have any civil liability based on the authorizing of the issue of the prospectus (see CB para 107(3)(c)).

- (g) Para (k) deals with material contracts and incorporates requirements at present set out in para. 15 of Part I of the Fifth Schedule.
- (h) Para (l) is new. This requires a prospectus to disclose whether or not it is intended to have securities listed for quotation. (See also CB cl. 105).
- (i) Para (m) deals with the disclosure of certain interests and incorporates requirements at present set out in para. 17 of Part I of the Fifth Schedule.
- (j) Paras (n) and (o) are similar to ICAC CAs paras 39(1), (i) and (j).

267. The date of issue of a prospectus will be taken to be the date of the prospectus, unless the contrary is proved (CB s-cl. 98(2) - based on ICAC CAs para. 39(1)(b)).

268. The NCSC will be able to require observance in the investigating accountant's report of whatever requirements set out in the regulations pursuant to CB s-cl. 269(8) which it considers appropriate (CB cl. 98(4) - new provision).

269. CB s-cl. 98(5) to (10) are based on ICAC CAs s-secs. 39(2) to (7).

Cl. 99 : Certain notices, &c., not to be published

270. The publication of certain notices amounting to an invitation to the public to subscribe for shares or to purchase debentures will be prohibited unless the conditions set out in the clause are satisfied (CB cl. 99 - based on ICAC CAs s. 40).

Cl. 100 : Certain reports referring to prospectuses not to be published

271. The publication of certain reports referring to prospectuses will be prohibited except in specified circumstances (CB cl. 100 - based on ICAC CAs s. 40A).

Cl. 101 : Evidentiary provisions &c.

272. Evidentiary provisions for the two preceding provisions are contained in cl. 101 (based on ICAC CAs s. 40B).

Cl. 102 : Retention of over-subscriptions in debenture issues

273. The retention of over-subscriptions will be prohibited unless the corporation specifies in the prospectus -

- (a) that it reserves the right to retain over-subscriptions; and

- (b) a limit on the amount of over-subscriptions that may be retained.

(CB cl. 102 - based on ICAC CAs s. 41).

Cl. 103 : Registration of prospectuses

274. The issue of a prospectus will be prohibited unless a copy has been registered by the NCSC: registration will not be effected unless certain conditions as to form and content are complied with (CB cl 103 - based on ICAC CAs s. 42).

275. Note s-cl. 14(1) of the C(TP)B which deals with a prospectus that has been registered under the ACT CO within the period of 6 months before the commencement of the CB.

Cl. 104 : Document containing offer of shares for sale deemed to be prospectus

276. Any document that directly or indirectly offers securities for sale to the public will be deemed to be a prospectus and all provisions relating to prospectuses and offering shares to the public will apply to such a document (CB cl 104).

276A. CB cl. 104 is based on ICAC CAs s. 43 except that new para 104(1)(b) has been added to broaden the range of enactments and rules of law applicable.

Cl. 105 : Allotment or issue of shares or debentures where prospectus indicates application for quotation on stock market

277. Application moneys must be repaid if the prospectus indicates that an application has been, or is proposed to be made for listing of the shares or debentures, and the listing is not achieved within the specified time (CB cl 105 - based on ICAC CAs s. 44).

278. Note s-cl. 13(6) of the C(TP)B which deals with an exemption given under sub-s. 44(3) of the ACT CO.

Cl. 106 : Expert's consent to issue of prospectus containing statement by him

279. A prospectus that contains a statement by an expert must not be issued unless the expert has given and not withdrawn written consent to the issue of the prospectus with the statement included in the form and context in which it is included (CB cl. 106 - based on ICAC CAs s. 45).

Cl. 107 : Civil liability for untrue statement or non-disclosure in prospectus

280. Any person who is named in or who knowingly authorized or caused the issue of a propsectus that contains an untrue statement or that fails to disclose a material matter is liable to compensate subscribers who, as a consequence, suffer loss or damage (CB cl. 107 - based on ICAC s. 46).

281. A statement is deemed to be included in a prospectus if it is contained in any report or memorandum appearing on the fact of, issued with or incorporated by reference in the prospectus, whether the reference occurs in the prospectus or in any other document (CB s-cl. 107(4) - an identical provision is in CB s-cl. 108(2)).

Cl. 108 : Criminal liability for untrue statement or non-disclosure in prospectus

282. A person will be guilty of an indictable offence for authorizing or causing the issue of a prospectus containing an untrue statement or wilful non-disclosure (CB cl. 108).

283. This provision is based on ICAC CA s.47 except that:

- (a) Para 108(1)(c) is new and provides an additional defence; and
- (b) S-cl. 108(2) which deems certain statements to be included in prospectuses is new (see s-cl. 107(4) para 281 of the ex memo).

Cl. 109 : Power to exempt from compliance with Division or to declare that Division applies as if modified

284. CB cl. 109, will allow the NCSC to grant exemptions from compliance with the fund raising provisions in Division

1 of Part IV and to modify the operation of the provisions to suit particular circumstances.

285. These provisions will give the NCSC greater flexibility, for example, in dealing with the fund raising activities of borrowing corporations.

286. The NCSC will be able to grant exemptions from compliance with any provision of Division 1 (CB s-cl. 109(1)). Persons must comply with any conditions attaching to an exemption (CB s-cl. 109(2)) and the Supreme Court, on the application of the NCSC, will be able to order a person to comply with the conditions (CB s-cl. 109(3)).

287. The NCSC will be able, by instrument in writing, to declare that provisions of Division 1 apply in a particular case as if modified or varied, and where such a declaration is made, the provisions have effect accordingly (CB s-cl. 109(4)). All instruments executed under CB cl. 109 must be published in the Commonwealth Gazette (CB s-cl. 109(5)).

DIVISION 2 : RESTRICTIONS ON ALLOTMENT AND VARIATION OF
CONTRACTS

288. Division 2 of Part IV of the CB (cls. 110 to 112) places restrictions on the allotment of shares and the variation of contracts.

289. Ss. 50 to 52 of the ICAC CAs, which deal with statements in lieu of prospectuses, have been omitted from the Bill as a result of recommendations by the Jenkins Committee (UK) and the Eggleston Committee (Fifth Interim Report - paras 16 to 84).

Cl. 110 : Prohibition of allotment unless minimum subscription
received

290. Shares that have been offered to the public will not be able to be allotted until the appropriate minimum subscription and the sum payable on application have been received (CB cl. 110 - based on ICAC CAs s. 48).

Cl. 111 : Application moneys to be held in trust until allotment

291. All moneys received from an applicant pursuant to a prospectus must be held in trust until securities have been allotted to that applicant (CB cl. 111 - based on ICAC CAs s. 49).

Cl. 112 : Restriction on varying contracts referred to in
prospectus

292. The terms of a contract referred to in a prospectus cannot be varied before the statutory meeting unless the variation is made subject to the approval of the statutory meeting (CB cl. 112 - based on ICAC CAs s. 53).

DIVISION 3 : SHARES

293. The provisions of Division 3 of Part IV of the CB (cls. 113 to 133) set out the requirements of the legislation with regard to shares. They follow closely ss 56 to 69 of the ICAC CAs. The major changes from the existing legislation are found in CB cl. 129 (company financing dealings in its shares) and in three new provisions:

- (a) CB cl. 116, which restricts the application of the capital of a company;
- (b) CB cl. 130, which deals with the consequences of a contravention of the prohibitions on a company financing dealings in its shares (see CB cl. 129); and
- (c) CB cl. 131, which requires the creation of a register of options over unissued shares.

Cl. 113 : Return as to allotments

294. Within one month of making an allotment of its shares, a company will have to lodge with the NCSC a return setting out particulars of the allotment (CB cl. 113 - based on ICAC CAs s. 54).

Cl. 114 : Differences in calls and payments, reserve liability,
&c.

295. If authorized by its articles, a company will be able:

- (a) to vary the amounts and times of payment of calls as between shareholders;
- (b) to accept from a member the whole or part of the amount unpaid on shares, although no call has been made;
- (c) to pay dividends in proportion to the amount paid on each share, except in the case of a no liability company.

(CB s-cl. 114(1) - based on ICAC CAs s. 55).

296. A limited company will be able by special resolution to determine that any portion of its share capital that has not been called up cannot be called up except in the event of the company being wound up (CB s-cl. 114(2) - based on ICAC CAs s.56).

Cl. 115 : Share warrants

297. Companies will be prohibited from issuing share warrants (CB cl. 115 - based on ICAC CAs s. 57). Under the VIC CA of 1928, and comparable legislation in other jurisdictions, companies could issue share warrants, i.e., certificates that the bearer was entitled to the shares represented by them. These certificates were negotiable instruments.

Cl. 116 : Restriction on application of capital of company

298. There will be provisions imposing restrictions on the application of the capital of the company. These provisions are intended to strengthen the provisions relating to:

- (a) the making of certain payments (see CB cl. 117 - cf ICAC CAs s. 58); and
- (b) the issue of shares at a discount (see CB cl. 118 - cf ICAC CAs s. 59).

299. These restrictions are based on ICAC CAs s-sec 58(2) but expanded to include certain provisions based on cls 129 and 229 of the NCB. See also D.E. Harding (SULS sem) and ss. 20 to 31 of the U.K. Companies Act 1980 which made extensive modifications to the existing U.K. law.

300. The main provisions are as follows:

- (a) Except as provided by CB cls. 117 or 118, a company will not be able to apply any shares or capital to make a payment to a person in consideration of his subscribing or procuring subscriptions for shares in the company (CB s-cl. 116(1) - based on ICAC CAs s-sec 58(2)). See also Ooregum Gold Mining v. Roper [1892] A.C. 125.

- (b) If a company contravenes this provision, the company will not be guilty of an offence but each officer in default will be guilty of an offence (CB s-cl. 116(3) - cf. CB s-cl. 129(2) which contains a similar provision in relation to the prohibition on a company financing dealings in its shares.)
- (c) The court may, in addition to imposing a penalty, order that a person guilty of an offence under this provision pay compensation to the company (CB s-cl. 116(4) - based on ICAC CAs s-para. 124(3)(a)(ii) - cf. CB s-cl. 129(3)) and 229(5)).
- (d) Where this provision has been contravened, the company may recover from any person who has made a profit from the contravention, or, where it has suffered a loss, the company may recover from an officer in default (CB-cl. 116(5) - cf. ICAC CAs s-sec. 67(3) and CB s-cl. 229(6)).

Cl. 117 : Power to make certain payments

301. Provided that certain conditions are met, and that the payment does not exceed 10% of the amount payable on shares upon their allotment or such lesser amount as authorized by the articles, a company will be able to make a payment to a person in consideration of his subscribing or procuring subscriptions for shares (CB cl. 117).

302. This provision deals, in effect, with the payment of commissions and brokerage. It is based on ICAC CAs s. 58 except that:-

- (a) it has been amended to cover all payments - cf. Fifth Interim Report of Eggleston Committee, para. 87, and cl. 167 of NCB; and
- (b) it now refers to payments which are "not prohibited by the memorandum or articles" in recognition of the fact that there is now power in the Third Schedule to make these payments.

Cl. 118 : Power to issue shares at a discount

303. A no liability company will be able to issue shares at a discount. Any other company may issue shares at a discount provided that certain conditions are met and that the issue is confirmed by an order of the Court (CB cl. 118).

304. This provision is based on ICAC CAs s. 59 except that:-

- (a) The CB does not contain the restriction that the date of the issues must be not less than one year since the date on which the company was entitled to carry on business (see ICAC CAs para 59(1)(c)).
- (b) The provision has been re-organized (e.g. ICAC CAs s-sec. 59(4) is now in CB para 118(1)(d)).

Cl. 119 : Issue of shares at premium

305. A company that issues shares at a premium will have to transfer a sum equal to the value of the premiums to a "share premium account" which is subject to the provisions of the CB relating to reduction of capital (except s-cl. 123(6) which specifies some of the information to be included in the order) as if the share premium account were paid up capital (CB s-cl. 119(1) - based on ICA CAs s-sec. 60(1)). The share premium account may be applied only for certain specified purposes (CB-cl. 119(2) -based on ICAC CAs s-sec. 60(2)).

Cl. 120 : Redeemable preference shares

306. If authorized by its articles, a company will be able to issue preference shares that can be redeemed by the company out of profits or out of the proceeds of a fresh issue of shares made for the purposes of the redemption (CB s-cl. 120(1)(2) and (3) - based on ICAC CAs s-secs. 61(1) and (2)). Where a premium is payable on redemption it will have to be paid out of profits or the share premium account (CB s-cl. 120(4) - cf. s-sec. 61(4) ICAC CAs).

307. Where redeemable preference shares are redeemed otherwise than out of the proceeds of a fresh issue of shares, a sum equal to the nominal value of the shares redeemed will have to be transferred from profits otherwise available for dividend to a "capital redemption reserve" which is subject to the provisions of the Act relating to the reduction of share

capital (except CB s-cl. 123 (6)) as if the reserve were paid up share capital (CB s-cl. 120(5) - based on ICAC CAs s-sec. 61(5)). The capital redemption reserve may be used to pay up unissued shares of the company to be issued to members as bonus shares (CB s-cl. 120(7) - same as ICAC CAs s-sec. 61(7)).

308. Where a company redeems any preference shares it will be able to issue shares to the nominal value of the redeemed shares as if the preference shares had never been issued (CB s-cl. 120(6) - cf. ICAC CAs s-sec. 61(6)). Shares will be considered redeemed despite the fact that the redemption payment is by a cheque which has not been presented for payment (CB s-cl. 120(9) - no equivalent provision in ICAC s. 61).

Cl. 121 : Power of company to alter its share capital

309. If authorized by its articles, a company will be able to pass an ordinary resolution altering its memorandum by:

- (a) increasing share capital by the creation of new shares;
- (b) consolidating and dividing its share capital into shares of larger amounts;
- (c) converting paid up shares into stock, or stock into shares;

(d) sub-dividing its shares into shares of smaller amounts or

(e) cancelling shares that have not been taken up and reducing the share capital by that amount.

(CB cl. 121 - based on ICAC CAs s. 62).

Cl. 122 : Validation of shares improperly issued

310. Where a company has purported to issue or allot shares in a manner that was invalid or unauthorized, the Supreme Court will be able, upon the application of the company, a holder or mortgagee of those shares, or a creditor of the company, to make an order validating the issue or allotment of those shares and confirming the terms of issue or allotment (CB cl. 122 - based on ICAC CAs s. 63).

Cl. 123 : Special resolution for reduction of share capital

311. Subject to confirmation by the Supreme Court, a company will be able, if authorized by its articles, to reduce its paid up share capital in any way, including the manners specified (CB s-cl. 123 (1) and (2)). There are procedures to safeguard the interests of creditors who do not consent to the reduction (CB s-cl. 123(3) to (10)).

312. These provisions are based on ICAC CAs s.64 but differ from it as follows:

- (a) S-cl. 123(2) clarifies the existing law by providing that a reduction in the paid up share capital does not of itself reduce the nominal share capital.
- (b) Though a company will not be able to act on a resolution until copies of the resolution and Court order have been registered by the NCSC, the resolution may have retrospective effect provided that the date specified in the resolution is not earlier than the date of the resolution (CB s-cl. 123(7)).
- (c) S-cl. 123(13) and (14) (based on ICAC CAs s-secs 64(12) and (13)) dealing with the granting of rights of occupancy of land or building to a member have been extensively redrafted.

Cl. 124 : Commission to be informed of special rights carried by, or division or conversion of, shares

313. Where a company allots shares carrying rights that are not contained in the memorandum or articles, the company will have to notify the NCSC within one month of the allotment (CB s-cl. 124(1)). This is a new provision based on cl. 23 of the UK Companies Bill 1973.

314. The NCSC will also have to be notified of details relating to the division or conversion of shares (CB s-cl. 124(2)). This provision is based on ICAC CAs s-sec. 64A(1) (ICAC CAs s-sec. 64A(2) is a penalty provision which is covered by the general penalty provisions: see CB s-cl. 570(1) and (6)).

Cl. 125 : Rights of holders of classes of shares

315. There are provisions dealing with the variation of rights attached to classes of shares (CB cl. 125). These provisions are based on NCB cl. 179 rather than ICAC CAs s. 65. (See also JRF Lepane SULS sem pp. 66 to 69). There are separate provisions dealing with the variation of the rights:

- attached to shares where the share capital is not divided into classes (see CB cl. 126);
- of members of a company which does not have a share capital (see CB cl. 127).

316. Where there is nothing to the contrary in the memorandum or articles of a company, the rights attached to the holders of a class of shares will be able to be varied with the consent of the holders of 75% of those shares or with the sanction of a special resolution passed at a meeting of the holders of those shares (CB s-cl. 125(2) - recommended by Eggleston Committee, Fifth Interim Report para. 91).

317. To protect the rights of the holders of a particular class of shares, 10% of the members of that class will be able to apply to the Supreme Court to set aside the variation or abrogation of their rights (s-cl. 125(4)). The percentage of members who may apply is the same as in ICAC CAs s-sec. 65(1)

rather than the 5% in NCB s-cl. 179 (cf. also Jenkins Committee Report para. 193). In order to avoid problems that may be caused to nominees, a person who has assented to a variation will not be prevented from applying to the Court (recommended in the Jenkins Committee Report para. 193; cf. however ICAC CAs s-sec. 65(1)). This right to apply to the Court also applies where the memorandum or articles are altered by the insertion of a provision authorizing the variation or abrogation of those rights (CB para 125(4)(b) - based on NCB para 179(4)(b) which in turn was based on Eggleston Committee, Fifth Interim Report para. 91 and Jenkins Committee Report para 191).

318. The allotment of additional preference shares ranking pari passu with existing preference shares is deemed to be a variation or abrogation of those rights unless the further allotment was authorized by the original allotment or by the memorandum or articles (CB s-cl. 125(8) - based on NCB s-cl. 179(7) and ICAC CAs s-sec 65(6)).

319. There are new provisions dealing with the variation of rights attached to shares where the share capital is not divided into classes (CB cl 126).

Cl. 126 : Rights of holders of shares

320. There are also new provisions dealing with the rights of holders of shares where the share capital is not divided into classes of shares.

321. These provisions are similar to those in CB cl. 125 (rights of holders of classes of shares). However, 126(8) differs from s-cl. 125(8).

Cl. 127 : Rights of classes of members

322. There are also new provisions dealing with the variation of the rights of members of a company which does not have a share capital (CB cl. 127).

323. These provisions are similar to those in CB cl. 125 except that there is no equivalent to CB s-cl. 125(8).

Cl. 128 : Rights of holders of preference shares to be set out in memorandum or articles

324. A company will not be able to allot preference shares nor convert issued shares into preference shares unless the rights of the holders of those shares are set out in the memorandum or articles of the company (CB cl. 128 - based on ICAC CAs s. 66).

Cl. 129 : Company financing dealing in its shares &c

Cl. 130 : Consequences of company financing dealings in its shares &c

325. The provisions relating to the financing by a company of dealings in its shares are based generally on s. 67 of the ICAC CAs, but have been extensively redrafted following a detailed consideration of this matter by the Interstate Corporate Affairs Commission, and in the light of submissions received from the public. CB cl. 130 is new. See also R. Baxt (1980 A.B.L.R. 274 to 280 and 410 to 412); R.I. Barrett (54 A.L.J. 552 and 602); D.E. Harding (SULS sem); GFK Santow (SULS sem) UK Companies Act 1980 s. 35; 'the purchase by a company of its own shares' (Cmnd 7944 - presented June 1980).

Clause 129

326. A company will be prohibited from giving financial assistance for or in connection with the acquisition by any person of shares in the company or its holding company, or from acquiring or lending money on the security of shares in the company or its holding company (CB s-cl. 129(1)).

327. This prohibition differs from ICAC CAs s-sec. 67(1) as follows:

- (a) The expression "directly and indirectly" has been extended and made to apply to the acquisition of shares ("acquisition" being broader than "purchase").

- (b) The provision will apply to "units" of shares which has been defined in the CB to include beneficial interests (see also CB s-cl. 5(1)).
- (c) It is made clear that the prohibition covers financial assistance given before or after the acquisition.
- (d) The prohibition on acquiring (formerly "purchasing") shares will be extended to the (actual or purported) acquisition of, and lending money on the security of, shares or units of shares in the holding company.

328. The meaning of "financial assistance" in CB s-cl. 129(1) includes the giving a loan, guarantee, or security, releasing an obligation, or forgiving a debt, or any other form of financial assistance. This provision is an inclusory definition and is not intended to be exhaustive of the methods of giving financial assistance which are to be prohibited (CB s-cl. 129(2) - no equivalent provision in ICAC CAs s.67). The inclusion of the words "the release of an obligation or the forgiving of a debt" make it clear that more than the giving of specie is to be prohibited throughout CB cl. 129.

329. There is a definition of "purpose" in relation to the giving of financial assistance in CB para 129(2). The relevant purpose may be one of a number of purposes for which the company gave the financial assistance, or may be a substantial purpose of the assistance (CB s-cl. 129(3) - based on s. 4F of the Trade Practices Act 1974 - no equivalent provision in ICAC CAs s. 67).

330. There is also a definition of "in connection with" for the purposes of CB s-cl. 129(2). A company gives financial assistance in connection with an acquisition of shares where it is aware that it will financially assist a person to acquire shares in the company, or will assist the person who has already acquired shares in the company to pay any unpaid amount for subscriptions or calls (CB s-cl. 129(4) - no equivalent provision in ICAC CAs s. 67).

331. If there is a contravention of CB s-cl. 129(1), the company will not be guilty of an offence but rather each officer in default will be guilty of an offence (CB s-cl. 129(5)). This is a new provision : the rationale for the provision is that, if the company is penalized under this section, it is the members and creditors who will suffer (see also CB s-cl. 116(4) which contains a similar provision in relation to the restrictions on the application of the capital of a company).

332. The Supreme Court will have power, unless it decides to relieve a convicted officer from liability under CB s-cl. 129(7), to order that officer to pay compensation to the company or other person suffering loss or damage as a result of the contravention (CB s-cl. 129(6)).

333. Nothing will prohibit a company:

- (a) paying a bona fide dividend in the ordinary course of commercial dealing (CB para. 129(8)(a));

- (b) making a payment pursuant to a reduction of capital under CB cl. 123 (CB para. 129(8)(b));
- (c) discharging a liability resulting from a bona fide commercial transaction (CB para. 129(8)(c));
- (d) giving a bona fide guarantee or security in the ordinary course of commercial dealing to a borrowing corporation of which it is a subsidiary company (CB para. 129(8)(d));
- (e) acquiring its own shares -
 - (i) where no consideration is provided for the acquisition by the company or a related corporation (CB para. 129(8)(e));
 - (ii) through a purchase ordered by a court (CB para 129(8)(f));
- (f) creating or acquiring a bona fide lien on its shares in the ordinary course of commercial dealing (CB para 129(8)(g));
- (g) making a bona fide agreement in the ordinary course of commercial dealing with a subscriber for the payment of shares by instalment (CB para 129(8)(h));

334. CB s-cl. 129(8) is a new provision and is not intended to be construed as an exhaustive list of the activities for which companies may be exempt from the prohibition under CB s-cl. 129(1) (CB para 129(j)). The effect of the common law rules allowing a company in particular circumstances to give financial assistance in relation to its own shares will be preserved (CB para 129(8)(k)).

335. A particular act of a company will also be exempt from the prohibition in CB s-cl. 129(1) where it consists of -

- (a) the lending of money, the giving of guarantees or securities in the ordinary course of the company's ordinary business where its business includes those activities and they are carried out on ordinary commercial terms (CB para 129(9)(a));
- (b) the giving of financial assistance for the acquisition of shares in the company or related corporation to be held by or for the benefit of employees (including salaried directors) of the company or related corporation provided that the scheme for financial assistance has been approved at a general meeting of the company, and, if it is a subsidiary of a listed corporation or corporations, or its ultimate holding company is incorporated in Australia (including the external territories), has been approved at a general meeting of the listed company or ultimate holding company (CB para 129(9)(b)).

336. CB s-cl 129(9) is based on s-sec 67(2) of the ICAC CAs but has been extended by the requirement that, in the case of employee benefits, the scheme for financial assistance in CB s-cl. 129(9) must have been approved at a general meeting of the company and, where appropriate, the listed corporation or corporations, or its ultimate holding company.

337. There is a new procedure in CB s-cl. 129(10) to (15) whereby a company may be exempted from the prohibition in CB s-cl. 129(1) relating to the giving of financial assistance for the acquisition of shares.

338. Major features of this new procedure are:

(a) The steps to be taken by a company in relation to the passing of a special resolution to give the financial assistance (CB s-cl. 129(10)) are as follows -

(i) the company will have to resolve, by a special resolution, to give the financial assistance (CB para 129(10)(a));

(ii) where the company is a subsidiary of a listed corporation or where its ultimate holding company is incorporated in Australia (including the external territories), that listed corporation or ultimate holding company will also be required to resolve to give the financial assistance (CB para 129(10)(b));

- (iii) the notice of intention of the company to propose the resolution will have to give particulars of the financial assistance and its effect on the company or, where relevant, the group of corporations, and will have to include a statement of the directors, stating whether, in their opinion, the assistance would be likely to materially prejudice the interests of the creditors or members (CB para 129(10)(c));
- (iv) this notice and the auditor's report or directors' statement will also have to accompany the notice of intention of the listed corporation or ultimate holding company to propose the resolution (CB para 129(10)(d)).
- (v) a copy of the notice of intention of the company and of the auditor's report or directors' statement will have to be lodged with the NCSC (CB para 129(10)(e));
- (vi) the notice of intention of the company must be given to all members, trustees for debenture holders, and all known debenture holders where there are not trustees (CB para 129(10)(f));
- (vii) a similar provision to the above also exists in relation to the listed corporation and the ultimate holding holding company (CB para 129(10)(g));

- (viii) within 21 days of the meeting of the company, or of the listed corporation or ultimate holding company, at which the resolution is passed, a notice setting out the terms of the resolution and mentioning the possibility of an application to the Court to oppose the assistance will have to be published in a daily newspaper (CB para 129(10)(h));
- (ix) there must be no outstanding applications opposing the giving of financial assistance (para 129(10)(j)) and the financial assistance must not be given either before the period allowed for applications to oppose the assistance expires, or before such applications have been withdrawn or dealt with by a court (CB para. 129(10)(k));
- (b) The Supreme Court on application by a company will be able to consider substantial compliance with CB s-cl. 129(10) to be sufficient compliance (CB s-cl. 129(11));
- (c) Where a special resolution to give financial assistance has been passed by the company, or if appropriate, by the listed corporation or ultimate holding company, an application to the Supreme Court opposing the resolution will be able to be made within 21 days by

members, trustees for debenture holders or creditors of the company, of a subsidiary company, or of the listed corporation or ultimate holding company (as the case may be), or by the NCSC (CB s-cl. 129(12)).

- (d) Where a resolution to give financial assistance has been opposed, the Court will be required to have regard to the rights and interests of the members and creditors of the company (CB para. 129(13)(a) and will not be able to approve the resolution unless it is satisfied that the company has disclosed all material matters and that the financial assistance would not unduly prejudice the interests of creditors or shareholders (CB para. 129(13)(b)). The Supreme Court will be able to approve or disapprove the resolution (CB para. 129(13)(f) and, if it thinks fit, make an order for the purchase by the company of the interests of dissentient members (CB para 129(13)(c)).

339. Except as provided by this clause, the validity of a contract or transaction will not be affected by reason of a contravention of:-

- (a) CB para 129(1)(a);
- (b) CB para 129(1)(b) unless the contract or transaction brings into being the acquisition or loan that constitutes the contravention (CB s-cl. 130(1));

- (c) CB para 129(1)(c) unless the contract or transaction effects the loan that constitutes the contravention.

340. Where a company would, but for CB s-cl. 130(1), have contravened CB cl. 129, the contract or transaction, or any related contract or transaction will be voidable at the option of the company by a notice in writing to the other party (CB s-cl. 130(2)). This option will be subject to the remaining provisions of CB cl. 130 (see particularly CB s-cl. 130(6)).

341. Where the Supreme Court is satisfied on the application of the company or of any other person, that the company or that person has suffered, or is likely to suffer, damage as a consequence of the contract or transaction or any related contract or transaction being void by reason of CB cl. 129 or having become void or becoming void under CB cl. 130, the Court will be able to make such orders as it thinks just and equitable (including the orders for return of money or property, compensation or indemnification set out in CB s-cl. 130(5)) against any party to the contract, transaction, or related contract or transaction, or against any person who knowingly aided, was concerned in or party to the contravention (s-cl. 130(4)). This provision will allow a party to apply to the Court before the company is able to avoid the contract or transaction under CB s-cl. 130(2).

342. CB s-cl. 130(6) to (13) deal with the giving to a person of a certificate of directors stating that CB s-cl. 129(10) has been complied with in relation to an acquisition of shares. If this certificate is given to a person who relies on it, he is protected from an order of the Court under CB s-cl. 130(4) and the contract or transaction is not voidable under CB s-cl. 130(2) (CB s-cl. 130(6)). However, the person is not protected by the certificate if he was aware prior to the contract or transaction that CB s-cl. 129(10) had not been complied with (CB s-cl. 130(7)). For the purposes of CB s-cl. 130(7) a person is deemed to be aware of any matter of which his servant or agent having duties in relation to the contract or transaction is aware, unless that person can prove that he did not have personal knowledge of that matter (CB s-cl. 130(8)). A person who signs a certificate which falsely states (as at the time the certificate was signed) that CB s-cl. 129(10) has been complied with has committed an offence (CB s-cl. 130(11)).

Cl. 131 : Register of options

343. There is a new provision for a register of options to take up unissued shares (CB cl. 131). This provision is intended to support the operation of the CASA. A similar provision appeared in the NCB but covered all securities (NCB cl. 204).

344. A company will have to keep a register of options to take up unissued shares (CB s-cl. 131(1)). (Note that CB cl. 547

deals with the location of registers). The register will have to contain the particulars set out in CB s-cl. 131(2). The register is prima facie evidence in matters inserted in the register (CB s-cl. 131(3)) and must be open for inspection to members without charge and to any other person on the payment of a fee (CB s-cl. 131(4)). Subject to payment of a fee, the company will have to send a person a copy of the register if so requested (CB s-cl. 131(5)).

Cl. 132 : Options over unissued shares

345. Except where holders of debentures of a company have an option to take up shares by way of redemption of the debentures, an option that enables a person to take up unissued shares in a company more than five years after the option is granted is void (CB cl. 132 - based on ICAC CAs s. 68).

Cl. 133 : Power of company to pay interest out of capital in certain cases

346. Where shares are issued to raise capital for construction work or the provision of plant that cannot be made profitable for a long period, a company will be able to pay interest on the paid up share capital, charging the interest to capital, provided that the payment is authorized by the articles or by a special resolution, is approved by the Supreme Court and does not exceed 8% or the prescribed rate (CB cl. 133 - based on ICAC CAs s. 69)

DIVISION 4 : SUBSTANTIAL SHAREHOLDINGS

347. Division 4 of Part IV of the CB (cls. 134 to 146) deals with the notification of substantial shareholdings in listed companies and declared companies and bodies.

Cl. 134 : Application and interpretation

348. All listed companies and declared companies or bodies will be subject to the provisions of this Division (CB cl. 134 - based on ICAC CAs s.69A). (Note s-cl. 13(7) of the C(TP)B which deals with a declaration made by the Minister under para. 69A(2)(b) or (c) of the ACT CO.)

Cl. 135 : Persons obliged to comply with Division

349. This Division will apply to all natural persons, and to incorporated and unincorporated bodies (CB s-cl. 135(1)) and will extend to acts done or omitted to be done outside the Territory (CB s-cl. 135(2)) - based on ICAC CAs s.69B. - cf CASA s-sec 10(1)).

Cl. 136 : Substantial shareholdings and substantial shareholders

350. A person entitled to the prescribed percentage of the voting shares in a company or the prescribed percentage of a class of voting shares in a company will be deemed to have a substantial shareholding in that company (CB s-cl. 136(1) - based on ICAC CAs s.69C). The shares to which a person is "entitled" will include:

- (a) the voting shares in which the person has a relevant interest; and
- (b) the voting shares in which an associate of that person has a relevant interest except for:
 - (a) a nominee corporation in respect of which the NCS has issued a certificate under s-cl. 136(6); or
 - (b) voting shares in respect of which the associate has obtained a certificate from the NCSC under s-cl. 136(7).

(CB s-cl. 136(2) - note "associate" is defined in s-cl. 136(3) to (5) and "relevant interest" is defined in cl. 8).

351. "Entitled" has a similar meaning in CASA s-sec. 7(3). However, instead of disregarding certain voting shares of an associate by virtue of a certificate from the NCSC, the CASA contains exemption provisions for, inter alia, particular acquisitions (see CASA para 12(o)).

351A. A reference in CB cl. 136 to the prescribed percentage is a reference to 10%, or if a lesser percentage is presented by regulation that lesser percentage (CB s-cl. 136(9)).

Cl. 137 : Substantial shareholder to notify company of his interests

352. A substantial shareholder will be required to give the company written notice of the following matters:-

- (a) his name and address;
- (b) prescribed particulars of the voting shares in which he or an associate has a relevant interest (including, unless the interest cannot be related to particular shares, the name of the registered holder);
- (c) prescribed particulars of each such interest; and
- (d) prescribed particulars of any contract etc by reason of which he or an associate acquired that interest.

(CB cl. 137(1) - based on ICAC CAs s-sec. 69D(1)).

352A. Similar notices will be required by a substantial shareholder whose interest changes or ceases (CB cls. 138 and 139).

353. The period for notification will be reduced to 2 business days in order to ensure that there is no delay in notification during which time there may be substantial increases in shareholding (CB s-cl. 137(2) - cf. ICAC CAs s-sec. 69D(2) which specifies a period of 14 days).

Cl. 138 : Substantial shareholder to notify company of change in his interests

354. Written notice of a change in the relevant interest(s) of a substantial shareholder or his associates will have to be given to the company by the substantial shareholder (CB cl. 138

- based on ICAC CAs s.69E except that a change in an associate relevant interest(s) will have to be included and the period for notification has been reduced to 2 business days).

Cl. 139 : Person who ceases to be substantial shareholder to notify company

355. Written notice will be required from a person who ceases to be a substantial shareholder (CB cl. 139 - based on ICAC CAs s.69F except that the period for notification has been reduced to 2 business days).

Cl. 140 : References to operation of section 8

356. The circumstances under which a person has a relevant interest, changes his relevant interest or ceases to have a relevant interest by virtue of CB cl. 8 are circumstances which will be required to be stated in any notice under CB cls. 137, 138 and 139 (CB cl. 140 - based on ICAC CAs s. 69G).

Cl. 141 : Copy of notice to be served on stock exchange

357. If a person gives a notice of a substantial interest or a change in or cessation of that interest (under CB cls. 137, 138 or 139) to a company which is a listed company, the notice will have to be copied to the company's home exchange (CB cl. 141).

358. This is a new provision designed to ensure that the stock exchange is kept informed.

Cl. 142 : Commission may extend period for giving notice under this Division

359. The NCSC will have a discretion to extend the period for giving notice under CB cls. 137, 138 and 139. The extension will be able to be granted even after the period has expired (CB cl. 142 - based on ICAC CAs s. 69).

Cl. 143 : Company to keep register of substantial shareholders

360. A company will have to keep a register of all information relating to substantial shareholders and the register will have to be kept open for inspection by any person (CB cl. 143 - based on ICAC CAs s.69K).

Cl. 144 : Offences against certain sections

361. Failure to comply with the obligations relating to notice (see CB cl. 137, 138 or 139) will constitute an offence (CB cl. 144 - based on ICAC CAs s.69L).

Cl. 145 : Knowledge of servant or agent imputed to master or principal

362. Duties or actions of a servant or agent may constitute an offence by the master or principal. The burden of proof will lie on the principal to show that he was not aware of the actions of his servant or agent (CB cl. 145 - based on ICAC CAs s.69M).

Cl. 146 : Powers of court with respect to defaulting substantial shareholder

363. The Supreme Court will be able to make certain orders in respect of a failure to comply with the obligations relating to notice (see CB cls. 137, 138 or 139 (CB cl. 146 - based on ICAC CAs s.69N)).

DIVISION 5 : DEBENTURES

364. Division 5 of Part IV of the CB (cls. 147 to 163) deals with debentures.

Cl. 147 : Register of debenture holders and copies of trust deed

365. Companies that issue debentures will be required to keep a register of debenture holders. (CB s-cl. 147(1)). (Note that CB cl. 547 deals with the location of registers).

365A. This provision is based on ICAC CAs s. 70 except that the requirement to maintain a register will be extended to:-

- (a) a foreign company (incorporated overseas) registered as a foreign company under the CB that issues debentures to an applicant whose application has an address in the ACT or issues debentures following an application made pursuant to a prospectus registered under the CB; (CB s-cl. 147(2) - new provision); and
- (b) a foreign company formed in a non-participating Australian jurisdiction that issues debentures in the ACT or issues debentures following an application made pursuant to a prospectus registered under the CB (CB s-cl. 147(3) - new provision).

366. A registered holder of debentures will be entitled to a copy of the register and a copy of any trust deed relating to the issue of those debentures (CB s-cl. 147(6) and (7)).

367. For the purpose of this provision, "debenture" will be defined to exclude:-

- (a) a cheque, order for payment of money or bill of exchange;
- (b) a promissory note having a face value of not less than \$50,000; or
- (c) an acknowledgement issued by a banking corporation of the receipt of money deposited with that banking corporation (CB s-cl. 147(11)).

Cl. 148 : Branch registers

368. A local company or a registered foreign company that is formed outside Australia and its external Territories and that issues debentures with a specified Australian nexus will be able to keep a branch register of debenture holders outside the Territory (CB s-cl. 148(1)). The branch register must be kept in the same manner as the principal register is kept under CB cl. 147 (CB s-cl. 148(4)).

367. A debenture holder who is a resident of a participating State or Territory may make a written request to the company or relevant foreign company to register his debentures in a branch register in that State or Territory. The company or relevant foreign company must comply with that request forthwith; or, where it does not keep a branch register in that State or Territory and is carrying on business in that State or Territory, it shall within one month after receipt of the

request, cause a branch register to be so kept and shall register the debentures held by the person who made the request in that branch register (CB s-cl. 148(2)).

368. The branch register may be discontinued in certain circumstances (CB s-cl. 148(7) and (8)).

369. A branch register will be prima facie evidence of matters directed or authorized to be inserted in the register (CB s-cl. 148(9)).

370. It will be an offence to fail to comply with these provisions (CB s-cl. 148(10)).

371. The definition of debenture will be the same as in CB cl. 147 (see ex. memo. para 323A)(CB s-cl. 148(11)).

372. The clause relating to branch registers (cl 148) is a new provision.

Cl. 149 : Specific performance of contracts

373. A contract to take up and pay for debentures will be able to be enforced by an order for specific performance (CB cl. 149 - based on to ICAC CAs s.71).

Cl. 150 : Perpetual debentures

374. A condition contained in any debenture will not be invalid by reason only that the debenture is thereby made irredeemable or redeemable only on the happening of a contingency however remote or on the expiration of a period however long (CB cl. 150 - based on to ICAC CAs s.72).

Cl. 151 : Re-issue of redeemed debentures

375. A company will be able to re-issue redeemed debenture provided that :

- (a) its articles do not contain any provision to the contrary; or
- (b) it has not passed a resolution or acted to cancel those debentures.

(CB s-cl 151(1)).

376 After re-issue the new holder is deemed always to have had the same priorities that would have applied if the debenture had never been redeemed (CB s-cl. 151(2)).

377. This provision is based on ICAC CAs s.73. See also Palmer's Company Law (22nd edition) p. 463.

Cl. 152 : Qualifications of trustee for debenture holders

378. Only a Public Trustee, a company entitled to take a grant of probate of the will or letters of administration of the estate of a deceased person, a company registered under the Life Insurance Act 1945, a banking corporation and certain approved corporations will be qualified to act as a trustee for debenture holders (CB cl. 152 - based on ICAC CAs. s.74).

379. Note s-cl. 13(8) of the C(TP)B which deals with an approval given by the Minister under para. 74(1)(e) of the ACT CO and in force immediately before the commencement of the CB.

Cl. 153 : Retirement of trustees

380. A trustee for debenture holders will only be able to retire upon the appointment of a suitably qualified replacement (CB cl. 153 - based on ICAC CAs s.74A).

Cl. 154 : Contents of trust deed

381. If a corporation offers debentures to the public, or offers debentures pursuant to a takeover scheme (within the meaning of the CASA) for the acquisition of shares, the relevant trust deeds will be required to contain certain particulars as to the maximum amount that can be borrowed. Also, if a trust deed or the relevant debentures do not expressly contain certain covenants by each borrowing corporation, then either of them will be deemed to contain covenants to the effect that the borrowing corporation will:

- (a) use its best endeavours to carry on and conduct its business in a proper and efficient manner;
- (b) make available for inspection by the trustee or any registered company auditor appointed by the trustee the whole of its accounting and other records;
- (c) give all such information relating to its accounting and other records as the trustee requires; and
- (d) convene a meeting of debenture holders to which the covenant relates, upon application by persons holding not less than 10% of the nominal value of issued debentures, to consider the accounts etc., or give directions to the trustee.

(CB s-cl 154(1))

382. Similar provisions to those specified in (a) to (c) will also apply to guarantor corporations (CB s-cl. 154(2)) which, for the purposes of the application of those covenants will be deemed to be a party to the trust deed (CB s-cl. 154(3)).

383. This clause is based on ICAC CAs s.74B except that two new provisions, dealing with guarantor corporations, have been included (see ex. memo para 382).

Cl. 155 : Power of Court in relation to certain irredeemable debentures

384. In certain circumstances the Supreme Court will be able to order that the security for debentures be enforced (CB cl. 155 - based on ICAC CAs s.74C).

Cl. 156 : Duties of trustees

385. A trustee for debenture holders will be bound to exercise reasonable diligence etc. in protecting the interests of debenture holders (CB cl. 156 - based on ICAC CAs s.74D).

386. Note s-cl. 13(9) of the C(TP)B which deals with an order made by the Minister under s-sec. 74D(2) of the ACT CO and in force immediately before the commencement of the CB and s-cl. 13(10) of the C(TP)B which deals with a direction given under s-sec. 74D(4) of the ACT CO).

Cl. 157 : Powers of trustee to apply to the Court for directions, &c.

387. The trustee for debenture holders will be able to apply for and receive directions from the Supreme Court regarding any matter or question concerning the performance of his functions as trustee or the interests of debenture holders (CB cl. 157 - based on ICAC CAs s.74E).

Cl. 158 : Obligations of borrowing corporation

388. The borrowing corporation must submit periodical three monthly reports to the trustee for debenture holders and copies of those reports to the NCSC (CB s-cl. 158(1)). Matters to be included in these reports are set out in CB s-cl. 158(2) and (3). Particulars of any charge created by the borrowing corporation or any guarantor corporation must be furnished to the trustee for debenture holders (CB s-cl. 158(4)).

389. Also the borrowing corporation and every relevant guarantor corporation must lodge with the NCSC and the trustee a profit and loss account and balance sheet:

- (a) in relation to each financial year of the corporation
- within six months after the end of that financial year; and
- (b) in relation to the six month period after the end of each financial year of the corporation - within ten months after the end of that financial year

(CB s-cl. 158(5)).

390. A borrowing corporation that is a holding company must submit a set of consolidated accounts for itself and each of its subsidiaries that is a guarantor corporation, for the same periods, and within the same time periods stated in CB s-cl.

158(5) (CB s-cl. 158(6)). However, the trustee will be able to require guarantor subsidiary companies to also lodge accounts required under CB s-cl. 158(5) (CB s-cl. 158(7)). A copy of the notice under CB s-cl. 158(7) must be lodged with the NCSC (CB s-cl. 158(8)).

391. Nothing in CB s-cl. 158(5), (6) or (7) will apply to a pastoral company which has an exemption under s. 11 of the Banking Act and is declared by the NCSC to be a prescribed corporation for the purposes of this provision (CB s-cl. 158(9) and (10)).

392. In general, accounts prepared for the purposes of these three monthly reports must comply with certain accounts and audit provisions of the CB (s-cl. 158(13), (14), (15) and (16)).

393. The trustee will have certain powers and obligations regarding accounts prepared by borrowing corporations and guarantor corporations (s-cl. 158(18) to (21)).

394. CB cl. 158 is based on ICAC CAs 74F except that the provisions dealing with a borrowing corporation that is a holding company and guarantor subsidiary companies are new.

395. Note s-cl. 13(11) and (12) of the C(TP)B which deal respectively with declarations made and notices published under s-secs. 74F(7) and (8) respectively of the ACT CO.

Cl. 159 : Obligation of guarantor corporation to furnish information

396. A borrowing corporation will be able to require any of its guarantor corporations to furnish information for inclusion in three-monthly reports of the borrowing corporations (under CB cl. 158) (CB cl. 159 - based on ICAC CAs s.74G)

Cl. 160 : Loans and deposits to be immediately repayable on certain events

397. A borrowing corporation will be bound to repay loans and deposits received where the trustee for debenture holders considers that reports submitted by the company indicate that the purpose or project for which the moneys were raised has not been achieved or completed within the appropriate time (CB cl. 160 - based on ICAC CAs. s74H).

Cl. 161 : Invitations or offers by prescribed corporations

398. An invitation by a prescribed corporation (under CB cl. 97 - banking corporations, authorized dealers in short term money market, and declared corporations) will be deemed not to be an invitation or offer to the public for the purposes of Division 5 (CB cl. 161 - based on ICAC CAs s.74I).

Cl. 162 : Compliance with laws of State or other Territory
sufficient compliance for certain companies

399. A recognized (borrowing) company or its guarantor corporation will be deemed to have complied with Division 5 if it has complied with corresponding laws of its State or Territory of incorporation (CB cl. 162 based on ICAC CAs s.74J).

Cl. 163 : Liability of trustees for debenture holders

400. Any trust deed provision that exempts the trustee from a breach of trust where the trustee fails to show the required degree of care and diligence will be void (CB cl. 163 - based on ICAC CAs s.75).

DIVISION 6 : PRESCRIBED INTERESTS

Background

401. The provisions of Division 6 of Part IV of the CB (c 164 to 177 - based on Division 5 of the ICAC CAs) are designed to protect the public in relation to forms of investment other than company securities. This is done by regulating the public offering of "prescribed interests". These are defined in cl. 164 in such a fashion as to include almost any profit making scheme which does not fit within an exclusion relating to other interests (e.g. interests arising out of life insurance policies which are regulated under other Commonwealth legislation, interests under certain partnership agreements, or interests which are declared by regulation to be exempt interests) which are already regulated under the CB.

402. The CB restricts the right to issue prescribed interests to public companies or agents of public companies authorized for that purpose. The public can only be issued prescribed interests or invited to purchase such interests if the company has issued a statement in writing setting out the matters specified in cl. 170. There must also be in force a deed which has been approved by the NCSC.

Cl. 164 : Interpretation

403. There is an interpretative provision that sets out the meaning of "company", "declared State", "declared Territory", "financial year" and "management company" (CB cl. 164 - based on ICAC CAs s.76). The definition of "investment contract", which is also relevant to this Division, appears in CB s-cl. 5(1).

Cl. 165 : Approved deeds

404. Deeds will be regarded as approved deeds if approved under the CB in respect of a company, or, in the case of a recognized foreign company, if approved under the corresponding law of the participating State or Territory in which the recognized company is incorporated or the recognized foreign company is registered (CB cl. 165 - based on ICAC CAs s. 77).

Cl. 166 : Approval of deeds

405. The NCSC will be able to grant its approval of a deed if the deed makes provision for the appointment of a company as trustee for the holders of prescribed interests (CB s-cl. 166(1)); but it shall not do so unless the deed complies with all the requirements set out in the CB or the regulations (CB s-cl. 166(2)). The deed must be lodged with the NCSC within 7 days of approval being given to the deed (CB s-cl. 166(3)).

406. These provisions are based on ICAC CAs s. 8.

Cl. 167 : Approval of trustees

407. The NCSC will be able to grant approval, on such terms and conditions as it thinks fit, to a company acting as trustee for the purposes of the deed (CB s-cl. 167(1)). The NCSC will also be able to revoke the approval if terms or conditions subject to which the approval was granted have been breached (CB s-cl. 167(2)).

408. These provisions are based on ICAC CAs s.79 but with the power to grant and revoke approvals being conferred on the NCSC rather than the individual Minister.

Cl. 168 : Covenants to be included in deeds

409. The covenants to be contained in the deed which will bind the company issuing the prescribed interest (the management company) and the trustee are set out in this provision (CB cl. 168 - based on ICAC CAs s. 80).

410. The management company will be required to covenant that:

(i) it will conduct its business in a proper and efficient manner (CB para. 168(1)(a));

(ii) it will, within 30 days of receiving moneys payable to the trustee under the deed, pay the money to the trustee (CB s-para. 168(1)(b)(i));

- (iii) sales or issues of prescribed interest will only be made or permitted to be made at a price calculated in accordance with the deed (CB s-para.168(1)(b)(ii));
- (iv) if requested by holders of prescribed interests, it will re-purchase or cause to be re-purchased those interests at a price calculated in accordance with the deed (CB s-para. 168(1)(b)(iii));
- (v) it will advertise the sale price of prescribed interests or their yield only with the approval of the trustee (CB s-para. 168(1)(b)(iv));
- (vi) money available for investment will not be invested in or lent to the management company or the trustee or to a company related to any of them (CB para. 168(1)(d));
- (vii) it will make its books available for inspection by the trustee or its auditor and give them such information as they require relating to the scheme of the company or any property of the company (CB para. 168(1)(e)); and
- (viii) it will summon a meeting of prescribed interest holders on the application of 50 of them or of one-tenth of their number for the purpose of laying before the meeting the accounts that were laid before the last

annual general meeting of the management company, or the accounts of the trustee, and for the purpose of giving directions to the trustee (CB para. 168(1)(h)).

411. The trustee will be required to covenant that:

- (i) it will, with all due diligence, watch the rights and interests of the holders of prescribed interests (CB s-para. 168(1)(c)(i));
- (ii) it will keep proper books of account which it will have audited annually and that it will have statements of account and copies of the auditor's report sent to each holder of a prescribed interest (CB s-para. 168(1)(c)(ii) to (iv)); and
- (iii) money available for investment will not be invested in or lent to the management company or trustee or a company related to either of them (CB para. 168(1)(d)).

412. Both the management company and the trustee will also be required to covenant that they will not vote in an election of directors without the consent of the majority of the holders of the prescribed interests (CB para. 168(1)(g)).

413. The NCSC will be able by notice in the Gazette, to declare that certain of the above covenants need not appear in a particular deed (CB s-cl. 168(2)).

Cl. 169 : Prescribed interests to be issued by companies only

414. Persons other than a company or an agent of a company authorized for that purpose will be prohibited from issuing prescribed interests (CB cl 169).

415. This clause differs from the ICAC CAs s.81 only in that a saving provision has been omitted (ICAC CAs s-sec. 81(2)). The saving provision will be contained in the State application legislation but is not necessary for the CB since it does not appear in the equivalent provision in the ACT CO.

Cl. 170 : Statement to be issued

416. Prior to any issue, offer or invitation for subscription or purchase of any prescribed interest, a company or its agent will be required to issue a statement in connection with the issue, offer or invitation which is deemed for all purposes to be a prospectus. (CB cl 170 - based on ICAC CAs s. 82 although now split into 2 sub-sections).

417. Note s-cl. 16(2) of the C(TP)B which deals with a statement under s. 82 of the ACT CO that was registered as a prospectus under the ACT CO within a period of 6 months before the commencement of the CB.

Cl. 171 : No issue without approved deed

418. Persons will be prohibited from issuing or offering to the public for subscription or purchase any prescribed

interest unless an approved deed is in force. They will also be prohibited from referring to the approval of a deed or of a trustee in other documents (CB cl. 171 - based on ICAC CAs s. 83).

Cl. 172 : Register of holders of prescribed interests

419. The management company will be required to keep, at its registered office, its principal place of business in the ACT or at another place in the ACT approved by the NCSC (see ex memo para 611) a register of holders of prescribed interests in respect of each deed with which the company is concerned. The register will have to contain details of the names of holders of prescribed interests, the extent of their holdings and the dates during which time the interests were held (CB s-cl. 172(1)).

419A. A company which provides such a register in a declared State or Territory or in a participating State or Territory and keeps within the A.C.T. a register of holders of prescribed interests who are resident in the Territory will be deemed to comply with CB s-cl. 172(1) but it must make available for inspection to prescribed interest holders resident in the Territory a copy of the register kept under the law of the participating State or Territory or of the declared State or Territory (CB s-cl. 172(3)).

420. The provisions of Division 4 of Part V (except CB cl. 262) concerning inspection and rectification etc. of registers of members of a company will also apply to registers of

prescribed interest holders (CB s-cl. 172(4)). The NCSC will be able to exempt specified companies from total compliance with the section (CB s-cl. 172(6)).

421. This clause is based on ICAC CAs s.84.

422. Note sub-cl. 13(13) of the C(TP)B which deals with a direction given by the Minister under s-sec. 84(3) of the ACT CO.

Cl. 173 : Returns, information, &c., relating to prescribed interests

423. A management company will be required to lodge a return within 2 months after the end of each financial year applicable to a deed containing a list of interest holders and such other particulars as are prescribed (CB s-cl. 173(1) and 173(5)).

424. These provisions are based on s.85 of the ICAC CAs except that it has been made clear that a return setting out the above information must be lodged with the NCSC if the deed ceases to be in force. It must be lodged within 2 months of the deed ceasing to be in force (CB s-cl. 173(1)).

Cl. 174 : Penalty for breach of certain provisions or covenants

425. There are specific penalties for contravention of certain provisions relating to prescribed interests and for

failing to comply with a covenant contained in a deed. (CB cl 174 - based on ICAC CAs s.86).

Cl. 175 : Winding up of schemes, &c.

426. Where the management company goes into liquidation or, in the opinion of the trustee, it has ceased to carry on business or has failed to comply with a provision of the deed to the prejudice of holders of prescribed interests, the trustee will be required to convene a meeting of the holders (CB cl 175 - based on ICAC CAs s.87).

Cl. 176 : Power to exempt from compliance with Division and non-application of Division in certain circumstances

427. The NCSC will be empowered to exempt any company from complying with any or all of the provisions of the Division in relation to any prescribed interests (CB s-cl. 176(1)). The Division will not apply in the case of the sale of any prescribed interest by a personal representative, liquidator, receiver or trustee in bankruptcy in the normal course of realization of property (CB s-cl. 176(2)).

428. This clause is based on ICAC CAs s.88.

429. Note s-cl. 13(14) of the C(TP)B which deals with an exemption given under s.88 of the ACT CO that was in force immediately before the commencement of the CB.

Cl. 177 : Liability of trustees

430. With certain limited exceptions, a provision contained in an approved deed or in any contract with the holders of prescribed interests to which such a deed relates will be void in so far as it would have the effect of exempting a trustee under the deed from liability for breach of trust where the trustee fails to show the required care and diligence (CB cl 177 - based on ICAC CAs s.89).

DIVISION 7 : TITLE TO AND TRANSFER OF SECURITIES

431. Division 7 of Part IV of the CB (cls 178 to 188) deals with the title to and transfer of securities.

Cl. 178 : Nature of shares

432. A share will be:-

- (a) personal property;
- (b) transferable or transmissible as provided by the articles; and
- (c) subject to the articles, is capable of devolution by will or by operation of law

(CB s-cl. 178(1)).

433. Subject to the above, the laws applicable to ownership of and dealing with personal property will apply to shares or other interests of a member in a company, including equitable interests in respect of a share or other interest (CB s-cl. 178(2)).

434. For the purpose of any law, a share or other interest of a member in a company will be taken to be situated in the State or Territory in which the register of members of the company is kept. If the name of the member is entered on a

branch register, the interest will be taken to be situated in the State, Territory or country other than Australia in which that branch register is kept (CB s-cl 178(3)).

435. This clause is an expanded version of ICAC CAs s.90 (see also cl. 241 of NCB).

Cl. 179 : Numbering of shares

436. Each share in a company will be distinguished by an appropriate number (CB cl. 179 - based on ICAC CAs s.91).

Cl. 180 : Certificate to be evidence of title

437. A certificate issued in accordance with this clause specifying any shares held by a member of the company will be prima facie evidence of the title of the member of the shares. Such a certificate will be required to be under the common seal of the company and to state:

- (a) the name of the company and the authority under which the company is constituted;
- (b) the class of shares; and
- (c) the nominal value of the shares and the extent to which the shares are paid up.

(CB cl. 180 - based on ICAC CAs s.92).

Cl. 181 : Company may have duplicate common seal

438. A company will be able, if authorized by its articles, to have a duplicate common seal, which must be a facsimile of the original with the addition on its face of the words "Share Seal" or "Certificate Seal" (CB cl 181).

438A. This provision is based on ICAC CAs s. 93 except that it has been expanded to allow the use of a duplicate seal on documents relating to securities of a company other than share certificates.

Cl. 182 : Loss or destruction of certificates

439. Where a certificate of title to shares, debentures or prescribed interests is lost or destroyed, the company will be required, on application by its owner, to issue a duplicate certificate to the owner (CB cl 182 - based on ICAC CAs s.94).

Cl. 183 : Instrument of transfer

440. A company will not be able to register a transfer of shares, debentures or interests unless a proper instrument of transfer has been delivered to the company. However, this will not prejudice the power of the company to register as a shareholder, debenture holder or interest holder a person to whom a right has devolved by will or by operation of law. (CB cl. 183).

441. This provision is based on ICAC CAs s.95 except that the one month period for the validity of a statutory declaration for the purposes of ICAC CAs para. 95(3)(b) has been extended to 3 months for the validity of a statement in writing (para. 183(4)(b)).

CL. 184 : Registration of transfer at request of transferor.

442. On the request in writing of a transferor of any share, debenture or interest in a company, the company will be required to enter the name of the transferee in the register in the same manner as if the application for entry were made by the transferee (CB cl 184 - based on ICAC CAs s.96).

CL. 185 : Notice of refusal to register transfer

443. If a company refuses to register a transfer of any share, debenture or interest in the company, it will have to, within 2 months of the date of lodgement of the transfer, send the transferee notice of the refusal (CB cl 185 - based on ICAC CAs s.97).

CL. 186 : Remedy for refusal to register transfer or transmission

444. Where directors refuse to register a transfer without just cause the Supreme Court will be able to order the transfer

to be registered or may make such other order as it considers proper for the purchase of the shares.

445. This provision is based on NCB cl. 251 which in turn is based on the General Revision Bill para. 19(a). (Cf. also NCB s-para. 136(4)(b)(iv) giving a similar power to order a purchase of shares in oppression cases).

Cl. 187 : Certification of transfers

446. The certification by a company of any instrument of transfer in relation to any shares, debentures or interests made available by the company will be taken as a representation by the company that there have been produced to the company such documents as on the face of them show prima facie title to the shares, debentures or interests in the transferor named in the instrument of transfer (CB cl 187 - based on ICAC CAs s.98).

Cl. 188 : Duties of company with respect to issue of certificates

447. Within 2 months after the allotment of any shares etc. and within 1 month after the date on which a transfer of shares etc. is lodged with the company, the company will be required to complete and have ready for delivery all the appropriate certificates, debentures or other documents in connection with the allotment (CB cl 188).

448. This provision is based on ICAC CAs s.99, except that:

- (1) The Court now has the power when making an order pursuant to an application made under CB s-cl 188(4), to make provision for payment of the costs of the applicant by the company or a defaulting officer (CB s-cl 188(4)).
- (2) ICAC CAs s-sec 99(4) which was a transitional provision only for the ICAC CAs, has been deleted.

DIVISION 8 : TRANSFER OF MARKETABLE SECURITIES

449. Division 8 of Part IV of the CB (cls 189 to 198) contains provisions designed to facilitate the processing of stock exchange securities. Once the co-operative scheme is brought into operation, this Division will replace the existing State and Territory marketable securities legislation. Like the existing legislation, the Division does not apply to foreign corporations.

450. The main provisions of the existing marketable securities legislation which have been adopted are as follows:

- (a) The legislation provides simplified forms of transfers of securities when these are effected by brokers of Australian stock exchanges. The transferee's signature is rendered unnecessary in certain circumstances (see CB cl. 193), and the transferor's broker, when selling the securities to more than one buyer, can 'split' the original transfer by using a separate form for each transferee, thus eliminating the need for separate instruments signed by the transferor. Likewise a stock exchange will be able to expedite onward transfers from an initial purchaser to one or more subsequent buyers, before the registration of the initial purchase, by 'splitting' transfers in the same way as the transferor's broker.

- (b) The stamping of the instruments by the brokers for the parties to the transaction carries with it certain warranties and indemnities by the brokers that are necessary for the protection of the parties and the company concerned (see CB cl. 194).
- (c) Simplified forms are prescribed in Schedule 4. When used in accordance with the provisions of this Division, these are valid notwithstanding anything to the contrary contained in the rules of the company (see CB cls. 190 and 193).
- (d) This Division extends to transfers from authorized trustee corporations to the beneficial owners of securities held by those trustee corporations.

451. This Division is based on the VIC Marketable Securities Act 1970.

Cl. 189 : Interpretation

452. There will be an interpretation provision for the purposes of the Division which will set out the meaning of various expressions appearing in the Division (CB cl. 189).

453. This provision is based on VIC MSA s.3 with the following modifications:

- (a) The definition of "beneficial owner" has been changed to include a reference to an authorized trustee corporation holding shares for the beneficial owner either alone or with another person/s.
- (b) The definitions of "broker" and "corresponding law" have been changed (CB s-cl. 189(1)).
- (c) The definitions of "brokers agent", "prescribed corporation", "prescribed security", "prescribed stock exchange", "right to a marketable security" and "transfer" are all new.
- (d) There will now be a provision dealing with references in Division 8 of Part IV, to a form by number (CB s-cl.189(3) - not in the VIC MSA but based on NCB s-cl.255(2))).
- (e) A reference to the full name of a transferor in the forms in Schedule 4 to the CB will now include a reference to the holder of the shares as shown in the company's records (CB s-cl. 189(4) - not in VIC MSA but based on NCB s-cl. 255(3))).
- (f) With the exception of CB cl. 198, an instrument will now have to be stamped in ink. More flexibility is given to the type of stamps which may be used on documents stamped pursuant to CB cl. 198 (CB s-cl.s.

189(5) and (6). This change was made to ensure that stamps on documents were capable of being reproduced on microfilm.

3) Cl. 190 : Sufficient instrument of transfer

454. A sufficient instrument of transfer for Division 8 of Part IV purposes will be able to be used as an instrument of transfer for the purposes of CB cl. 183 and also for the requirements of any law other than the CB (CB cl. 190 - based on VIC MSA s. 4 and NCB cl. 256).

Cl. 191 : Transfer of marketable securities

455. A document will only be regarded as a sufficient instrument of transfer of marketable securities if the conditions set out in CB cl. 191 are complied with (CB cl. 191 - based on VIC MSA s. 5 and NCB cl. 257).

Cl. 192 : Transfers by authorized trustee corporations

456. Special rules will apply to deem a document a sufficient instrument of transfer where the transfer is by an authorized trustee corporation either by itself or with other persons and is to the beneficial owner of the marketable securities and the transfer is not a sale, gift or exchange of the securities. (CB s-cl. 192(1)). If the transfer is a sale, gift or exchange then the provisions of CB s-cl. 192(2) will apply.

457. CB cl. 192 is based on VIC MSA s.6 and NCB cl. 258 except that both CB s-cl. 192(1) and (2) now also apply where transfers are by authorized trustee corporations in combination with other persons.

Cl. 193 : Execution of transfer by transferee

458. The effects of the execution of a sufficient instrument of transfer on a transferee's rights and obligations in respect of the company whose shares have been transferred are set out in CB cl. 193.

459. CB cl. 193 is based on VIC MSA s.7 and NCB cl. 259 except that CB para 193 (4)(a) has been amended to take account of the new requirement that instruments of transfer be stamped with an ink stamp rather than one which makes an impression (see CB s-cl. 189 (5) and (6)).

Cl. 194 : Effect of certain stamps on prescribed instruments

460. Where an instrument of transfer is stamped by a broker or a prescribed stock exchange, the broker and his associates will:

- (a) be deemed to have warranted the accuracy of any statements in the instrument, and the right of the transferor to sell or dispose of the marketable securities.

- (b) be liable to indemnify the corporation that has, or proposes to issue, the securities to which the instrument relates, and the transferee and his broker against any loss or damage arising from a forged or unauthorized signature of the transferor.
- (c) be jointly and severally liable to indemnify a stock exchange which has stamped an instrument of transfer where another instrument of transfer relating to the same securities bears a stamp that purports to be that of the broker.

(CB cl. 194)

461. CB cl. 194 is based on VIC MSA s. 8 but with the following modifications:

- (a) Minor drafting changes have been made to take account of the new requirement that an instrument of transfer be stamped with an ink stamp. (see CB s-cl. 189 (5) and (6)).
- (b) The liability referred to in s-para 460(c) above is now joint and several.

Cl. 195 : Registration of prescribed instruments

462. A company or prescribed corporation will be entitled to assume, in the absence of contrary knowledge:

- (a) that a stamp on an instrument of transfer is what it purports to be. ie that of a transferee's or transferor's broker or that of a prescribed stock exchange (see CB cl. 191); and
- (b) that where a transfer is executed by an authorized trustee corporation, the corporation was authorized to do so and that the transfer was not by way of sale, gift or exchange of the securities (see CB cl. 192)

(CB cl. 195)

463. CB cl. 195 is based on VIC MSA s. 9 except that minor drafting changes have been made to CB s-cl. 195(1) to take account of the new requirement that the instrument of transfer be stamped with an ink stamp.

Cl. 196 : Operation of Division

464. There are provisions to ensure that the provisions relating to the transfer of marketable securities in Division 8 of Part IV will:

- (a) apply notwithstanding any provision to the contrary in the CB or in any other law or in a company's memorandum, articles, trust deed or other instrument (CB s-cl. 196(1) and (4));

- (b) not affect the terms and conditions on which marketable securities or rights thereto are sold (CB s-cl. 196(2));
- (c) not affect a company's rights to refuse to register a person as the holder of shares or to allot shares to him except that such an objection will not be valid if it relates only to the form of the instrument of transfer. (CB s-cl. 196(3);
- (d) not prevent the use of forms of transfer that are prescribed by laws other than the CB (CB s-cl. 196(5));
- (e) apply to transfers of marketable securities by or to a trustee or legal representative (CB s-cl. 196(6);

465. CB cl. 196 - based on VIC MSA s. 10.

Cl. 197 : Occupation need not appear in register, instrument, &c.

466. The omission from any document relating to marketable securities of the occupation of the person who is, or is entitled to be, registered as the holder of any marketable securities will not be treated as a breach of any law, memorandum, articles, trust deed or any other instrument (CB s-cl. 197(1) - based on VIC MSA s.11).

467. It will not be necessary in an instrument of transfer of marketable securities to state the occupation of the transferee or transferor or to have their signatures witnessed (CB s-cl. 197(2) - based on VIC MSA s.12).

Cl. 198 : Offences

468. It will be an offence for a broker to stamp an instrument of transfer unless the instrument relates to a sale or purchase made in the ordinary course of business of the broker for a consideration of not less than the unencumbered market value of the marketable securities. This provision also applies to a prescribed stock exchange, an authorized trustee corporation or any person (CB cl. 198 - based on VIC MSA s.13).

DIVISION 9 : REGISTRATION OF CHARGES

INTRODUCTION

469. Division 9 of Part IV of the CB (cls. 199 to 215) will require the registration of certain charges over the property of bodies corporate and will determine the priorities to be accorded to these registrable charges as against each other.

470. There are two major differences between this Division and the corresponding provisions in Division 7 of Part IV of the ICAC CAs (ss. 100 to 110).

471. Firstly, a system of priorities will be substituted for the current ICAC provisions making registrable charges invalid if not registered within 30 days after creation. The basic rationale for a priority system was outlined in paras 47 and 48 of the Seventh Interim Report of the Eggleston Committee:-

"47. As stated above, we have come to the conclusion that the best solution for the problems created by the form of the present legislation is to substitute a system of priorities for the present system of partial invalidity. The present system, although stated in terms of validity, is itself really a system of priorities, since the invalidity is stated to operate only as against the liquidator and any creditor of the company. The consequence of failure to register, therefore, is not to destroy the security absolutely but to destroy the preferential rights of the holder of the charge as against creditors and liquidators, but not (as pointed out by Professor Gower) as against persons who purchase the property from the company. The effect of non-registration therefore is to alter the priorities attaching to a charge. But it is apparent that the method of alteration of priorities set out in section 100 is unsatisfactory for several reasons.

48. In the first place, as we have already pointed out, the protection of a person registering a charge is imperfect in that such a person may register the charge at a time when the register is clear, only to find that an earlier charge which was not registered at the time of search or at the time of registration is registered within thirty days of its creation, and so takes priority over the second charge. In the second place, charges which have not been perfected by registration ought to be postponed, not only to the claims of creditors, but also to the claims of persons who, having searched and found no relevant charges on the register, have purchased the property subject to the charge from the company. Thirdly, under the present system, if the charge is not registered in time it becomes void as a security to the extent stated in section 100, and the situation can only be cured by an application to the Court under section 106. If a suitable system of priorities were laid down, there would be no need to impose a time limit on registration except insofar as failure to register might involve penalties for non-compliance with the Act. Late registration might result in the postponement of the charge as against interests created after the charge was registered. It would follow that sub-section (10) of section 100, and section 106, could be omitted from the Act. The power to extend the time for filing (section 108) would only affect the question of penalties, and could be made to apply generally, and not merely in the case of out-of-State documents."

472. Secondly, in relation to companies incorporated in participating Australian States and Territories and companies formed overseas which carry on business in Australia, a charge will only have to be registered in the "home" jurisdiction of the body corporate concerned (the "home" jurisdiction for an overseas company being the State or Territory in which it registers as a foreign company). The basic rationale for this change lies in the nature of the co-operative companies and securities scheme (see, particularly, paras 40 to 42 of this ex memo) and in the particular matters canvassed in para 20 of the Seventh Interim Report of the Eggleston Committee:-

"20. From the point of view of convenience, there is much to be said for the State of incorporation as the sole place of registration. In the normal course of events, a search for charges will be made in that State, wherever else it might be made. If such a scheme were adopted, a person wishing to search would know that he must search in that State and need not search anywhere else. He would have no concern with the location of the property the subject of the charge, and all problems as to changing location of movable chattels such as aircraft and motor vehicles would disappear. If failure to register in a second State in which property were situated were to involve invalidity, there would always be problems arising out of the failure of the company to inform the creditor that it had moved the property to another State. Moreover, under the existing provisions, if the property is moved to another State without the company commencing business or establishing a place of business in that State, the charge is not invalidated by the Companies Act, though it may require registration under the Instruments Act. But if the company has set up a place of business, or commenced to carry on business, the charge may be invalid unless registered."

473. The brief history of the preparation of the provisions in Division 9 of Part IV of the CB is as follows:-

(a) In July 1972 the Eggleston Committee presented its seventh interim report entitled 'registration of charges'. Three of the more significant changes proposed in that report to the existing ICAC provisions were as follows:-

(i) A system of priorities should be substituted for the provisions making registrable charges invalid if not registered within 30 days after creation (Seventh Report para. 45).

- (ii) A charge should only have to be registered in the jurisdiction of incorporation in Australia of the body corporate concerned (Seventh Report paras 20 and 21).
 - (iii) A charge on shares in a subsidiary company or on certain shares in other corporations should be subject to the registration requirements (Seventh Report para. 42).
- (b) The recommendations contained in the Seventh Report were picked up, with modifications, in the NCB provisions relating to charges (NCB cls. 214 to 277).
- (c) The registration of charges provisions contained in the exposure draft were based on the NCB provisions modified to take into account:
- (i) recommendations contained in Sir Richard Eggleston's Supplementary Report that had not already been covered (Sir Richard Eggleston's Supplementary Report was furnished at the request of the ICAC Ministerial Council and dealt with the question of what, if any, exemptions should be granted from the registration of charges requirements in relation to securities given by dealers in the money market);

- (ii) comments received from outside commercial lawyers on the NCB; and
 - (iii) the fundamental differences between a single NCB and the proposed co-operative companies legislation.
- (d) Additional changes were made in the August CB in the light of public comments, and further modifications have been made to in the present CB to take account of public comments on the August CB. Principal changes have been to:
- (i) the classes of charges requiring registration (see CB cl. 202); and
 - (ii) the reach of the priorities provisions (see CB cl. 206 and Schedule 5 which sets out the order of priorities of charges).

Cl. 199 : Interpretation

474. The terms "document of title", registrable charge" and "Register" (see CB cls. 200 and 205) have been defined for the purposes of this Division and Schedule 5. The definitions of "present liability" and "prospective liability" are relevant to CB cl. 206 and cl. 3 of schedule 5.

475. The term "document of title" is used in CB paras 200(1)(g), and (2)(c), s-cl. 200(5). The definition of "document of title" is based on the corresponding definition in NCB cl. 214, except that reference has been made in CB para. 199(1) (f) to a "warrant or order for the delivery of goods" (see definition of "bill of sale" in s. 32 VIC Instruments Act 1958).

476. Charges over property held by a company as trustee will be required to be registered (CB s-cl. 199(2)) except charges on property held by a trustee company as a legal personal representative or as a trustee under a will (CB s-cl. 200(9)).

477. A charge existing when property is acquired will be treated as if it were not registrable until the charge is registered. The rationale is that the new chargee cannot control what happens to the property of the company. Similarly, charges over property of a corporation which are not required to be registered when created but are subsequently required to be registered when the corporation transfers its incorporation or registers as a foreign company in the Territory (see CB s-cl. 85(4) and s-cl. 512(2)) will be treated as if it were not registrable until the charge is registered. When any of these charges are registered they have the priority accorded to a registered charge as from the time of registration. However, if they have an earlier priority at general law this priority remains, so that the new chargee is not prejudiced (CB s-cl. 199(3) and (4), based generally on cl. 8 of the Priorities Schedule to the Eggleston Committee's redraft - See also CB s-cl. 203(10) and (11)).

478. The time when a document will be deemed to be lodged is defined in CB s-cl. 199(2).

479. The provisions of the CB relating to the registration of charges (Division 9 and Schedule 5) will apply to charges on all property of locally incorporated companies (CB s-cl. 199(7)) but only to property within Australia of registered foreign companies formed overseas (CB s-cl. 199(9)), and only to property within the A.C.T. of registered foreign companies formed in a non-participating Australian jurisdiction (CB s-cl. 199(8)).

Cl. 200 : Charges required to be registered

480. The types of charges that are required to be registered under Division 9 are set out in CB cl. 200.

481. This provision:-

- (a) is based on NCB cl. 216 which was based generally on s-sec. 100(3) of the ICAC CAs, modified in the light of recommendations made in the Eggleston Committee Report;
- (b) incorporates a number of further modifications based on recommendations contained in the Supplementary Report (referred to in para 484(a) of this ex memo) and public comments on the two exposure drafts of the CB.

482. The main differences between CB s-cl. 200(1) and s-sec 100(3) of the ICAC CAs are set out below.

(a) Charges created in equity: It will be clear that the provisions relating to the registration of charges apply to charges created in equity as well as at law (see introductory words to CB s-cl. 200(1)). A charge on property held by a trustee company as a legal personal representative or as a trustee under a will will not require registration (see CB s-cl. 200(9)).

(b) Charges to secure debentures: Para 100(3)(a) of the ICAC CAs ('a charge (other than a charge solely on land) to secure any issue of debentures') will be omitted. This omission is recommended in para. 43 of the Eggleston Committee Report:

"The other paragraphs of the section deal with charges over specific kinds of property, rather than charges defined in terms of the kind of debt for which security is given, and in our opinion no harm will be done, and a source of uncertainty will be removed, if paragraph (a) is omitted altogether."

(c) Paras 100(3)(b) and 3(e) of the ICAC CAs require the registration of charges on uncalled share capital and unpaid calls respectively. In the light of the distinction drawn in Re South Australian Barytes (1977) 3 A.C.L.R. 52 between uncalled share capital and uncalled share premiums, reference is now made in the CB to uncalled share premiums (see CB paras 200(1)(b) and (c)).

(d) Charge on personal chattels: Para 100(3)(c) of the ICAC CAs requires the registration of certain charges which, if created by an individual, would be invalid or of limited effect if not registered under State or Territory bills of sale legislation. As recommended by the Eggleston Committee Report, this paragraph has been replaced by a provision in CB para. 200(1)(d) that will require the registration of charges on personal chattels (defined in CB s-cl. 200(3) - and see CB s-cl. 200(2) for additional exclusions). This provision specifies the kind of charges that should be registered (rather than identifying them by reference to State or Territory legislation). CB para 200(1)(d) and s-cl. 200(3) are based on para. 100(3)(c) and s-cl. 100(11) of the Eggleston Committee's redraft. (The exclusions contained in paras 100(3)(c)(i) and (ii) in the Eggleston Committee's redraft above are covered in CB s-cl. 200(2)). A charge on 'personal chattels' will have to be registered whether or not it was "created" by an instrument in writing.

(e) Charges on ships: Charges on ships registered in an official register kept under a law relating to title to ships will now be now excluded from the charges requiring registration (CB para. 200(1)(d)). This omission was recommended by the Eggleston Committee in para. 38 of the Seventh Interim Report:

'.....A problem also arises in respect of shipping, for which a system of registration and priorities already exists. There are some difficulties in relation to the registration of shipping, but once a ship is registered the priorities of mortgages are determined by entry on the register. We do not see how a separate and different system of priorities could operate in respect of registered ships, and we recommend that the reference to ships appearing in section 100(3) be modified by excluding ships entered on an official register.'

Questions as to whether or not ship fittings such as tackle etc. are comprehended in the exemption will depend on the laws relating to title to ships.

- (f) Charge on service marks: It will be made clear that the provisions relating to registration of trade marks extend also to service marks and other registered designs (CB para. 200(1)(e)). See also CB s-cl. 204(5) which will ensure that the CB does not override Commonwealth legislation relating to trade marks etc which have their own provisions as to title validity and priority for charges.
- (g) A charge on a book debt The registration requirements will apply to charges on book debts (including future book debts and particular book debts) owed to a company. The requirement for the registration of a charge on a book debt has no counterpart in the ICAC CAs - it is bas _____ Eggleston Committee (see _____ on Committee's Rep _____ equently

be a marketable security and vice versa, and charges on marketable securities are required to be registered (see CB para 200(1)(g)), the provision has been drafted to ensure that the exemptions applicable to one category of charge are also applicable to the other. Accordingly, a charge on a book debt which is also a marketable security, will not be required to be registered if the charge is created by the deposit of a document of title to the marketable security (see CB para 200(1)(g) and s-cl. 200(4)).

- (h) A charge on a marketable security: CB para 200(1)(g) will require the registration of certain charges on marketable securities. The term 'marketable securities' is defined in CB s-cl. 5(1). The extension to 'marketable securities' will cover 2 specific extensions recommended by the Eggleston Committee:
 - (i) a charge over shares in a subsidiary This was recommended by both the Jenkins Committee (para 301) and the Seventh Interim Report of the (para 39) Eggleston Committee to overcome the anomaly that 'if the company carried on business through branches, it could not charge the assets of the branches without registration, but if it carries on business through subsidiary companies, it can charge the shares in the subsidiaries without registering the charge'.

- (ii) a charge over shares in another corporation, not being a charge in favour of a stockbroker or a charge by delivery of documents This extension was recommended by the Eggleston Committee (para. 39 of Seventh Interim Report). Sub-para 200(1)(g)(i) differs from the corresponding provision in the NCB (s-para. 216(1)(j)(i)) which made reference to the deposit "in the ordinary course of business" of a document of title to the marketable security. This gives partial effect to a recommendation contained in para 7 of the Eggleston Supplementary Report on the use of the expression "in the ordinary course of business".

- (i) A charge on a negotiable instrument other than a marketable security: Charges created over negotiable instruments will be required to be registered (CB para. 200(1)(j)) unless the charge is created by way of deposit etc. (CB para. 200(2)(c)).

483. Certain dealings will be specifically exempted from the registration requirements (CB s-cl. 200(2)). The following points are noted:

- (a) CB para 200(2)(a) will exclude a charge or a lien over property arising by operation of law. This provision may only be a statement of the existing law but stating it explicitly will serve to warn that such liens and charges are not covered.

- (b) CB para 200(2)(b) will exempt pledges from the registration requirements, consistent with Bills of Sale legislation, as the pledgee would have actual or constructive possession of the property.
- (c) CB para 200(2)(d) deals with transfers in the ordinary course of business - cf. s.32 of the VIC Instruments Act: "'Bill of sale' does not include transfers of goods in the ordinary course of business of any trade or calling"
- (d) CB para 200(2)(e) covers dealings outside Australia-cf. s.32 of VIC Instruments Act: "'Bill of Sale' does not include bills of sale of goods in foreign parts or at sea"

484. Attention is also directed to the following provisions of CB cl. 200:

- (a) The definition of book debt in CB s-cl. 200(4) will exclude marketable securities and negotiable instruments to avoid overlap with CB paras 200(1)(f) and (j) (see ex memo at para 480(g)). The definition of book debt will exclude charges on debts owing in respect of mortgages of land to avoid dual registration of sub-mortgages of land which would generally be registered in land title registers. A mortgage of the reversion of a lease will also be excluded. There is a new provision which is designed to cover the cases

considered in the Eggleston Supplementary Report (see pp 8-10) where documents evidencing or representing a thing in action (documents of title) are in the hands of a third party when the transaction is consummated or where the documents have not yet been issued, but the lender is nevertheless entitled to be protected (CB s-cl. 200(5)).

- (b) The registration of charges provisions will apply to an instrument of charge that charges both property falling within CB s-cl. 200(1) and other property of the company (CB s-cl. 200(6) - based on NCB s-cl. 216(5)).
- (c) The provisions will not apply to charges on land (CB s-cl. 200(7)) - see also CB s-cl. 204(2) which ensures that the provisions of Schedule 5 do not apply so as to effect the priority of a charge on land or other unregistrable property if a charge exists which applies to that property as well as to registrable property.
- (d) CB s-cl. 200(1) will not apply to a charge on fixtures given by a charge on the land to which they are affixed (CB s-cl. 200(8) - based on NCB s-cl. 216(6)). There is no equivalent provision in the ICAC CAs but cf. s-sec. 109A(1) of the NSW Conveyancing Act 1919.

- (e) Charges by a trustee corporation will be dealt with in CB s-cl. 200(9) (based on NCB s-cl. 216(7)).
- (f) A charge on property of a company will not be invalid by reason only of the failure to lodge with the NCSC or to give to the company or some other person a notice or other document that is required to be lodged or given under this Division (CB s-cl. 200(10) - based on NCB s-cl. 216(8)). However, the general penalty (\$500) will apply (CB s-cl. 208(2) and (3)).

Cl. 201 : Lodgment of notice of charge and copy of instrument

485. A company will have to lodge a notice of a charge with the NCSC within 45 days after the creation of the charge together with a copy of the instrument (if any) creating or evidencing the charge, or where a series of debentures has been issued and the charge is evidenced only by the resolution or resolutions and the debentures, a copy of the resolution or each of the resolutions and a copy of the first debenture issued in the series (CB cl. 201 based on NCB cl. 217 although the approach in the NCB of requiring only a notice of charge to be lodged will not be followed - also the 28 day period in the NCB will be extended to 45 days).

486. As a consequence of the decision to require a copy of any instrument creating or evidencing a charge to be lodged,

it has been necessary to include new provisions (CB para 201(1)(b) and s-cl. 201(2)) to cover cases where a company by resolution creates a series of debentures each containing its own charge clause and not supported by a separate trust deed - see para. 61 of the Eggleston Committee Report and cf. s-cl. 100(5) and (6) of the Eggleston Committee's re-draft which read as follows:

"(5) When a resolution is passed by a company authorising the issue of a series of debentures conferring on the holders thereof a charge to the benefit of which the debenture holders of that series are entitled equally, and there is no instrument creating or evidencing the charge other than that resolution or those debentures, it shall be sufficient if there are lodged with the Registrar for registration within thirty days after the execution of the first debenture of the series, a statement containing the following particulars -

- (a) the total amount (if any) secured by the whole series;
- (b) the date of the resolution authorising the issue of the series;
- (c) a general description of the property charged; and
- (d) the names of the trustee (if any) for the debenture holders -

together with a copy of the resolution authorising the issue of the series and a copy of the first of such debentures, and an affidavit verifying its execution and verifying the copies to be true copies; and save as aforesaid it shall not be necessary to register any debenture forming part of that series.

(6) For the purposes of sub-section (5) of this section where more than one resolution is passed authorising the issue of debentures in the series a copy of each subsequent resolution after the first shall be lodged within thirty days after the passing thereof."

487. Provision has been made for foreign companies which transfer their incorporation to the Territory or register as a foreign company in the Territory to lodge with the NCSC notice and a copy of charges in respect of property of the foreign company which was charged prior to it becoming registered as a local company under Division 4 of Part III or as a foreign company under Division 5 of Part XIII (CB s-cl. 201(3) - (5), Cf. sub-cl. 102(2) of the Eggleston Committee's redraft.)

Cl. 202 : Acquisition of property subject to charge

488. A company that acquires property subject to an existing charge will be required to lodge a notice of that charge with the NCSC and, if the charge was created or evidenced as mentioned in para. 201(1)(b) or (c), the instruments or copies of such instruments etc. required to be lodged under those provisions (CB cl. 202).

489. This provision is based on NCB cl. 218 - cf. also para. 102(1)(a) of the ICAC CAs and s-cl. 102(1) of the Eggleston Committee's redraft.

490. The 45 day period will also be adopted in this provision.

Cl. 203 : Registration of documents relating to charges

491. The NCSC will have to keep a register to be known as the Register of Company Charges and enter in the register certain

particulars in relation to charges (CB cl. 205). Persons wishing to lodge documents promptly to gain the benefits of the priority system will not be prejudiced by the existence of provisions in various Stamp Duties Acts preventing the Commission from accepting documents on which stamp duty is payable before the stamp duty has been paid (CB s-cl. 203(4) and (5) and cf. Eggleston Report para. 49). The provisions are similar to those relating to defective notices (CB s-cl. 203(6) - (9)).

492. The procedures involved where a purported notice of charge is defective will be as follows:

- (a) Where a notice is lodged that is defective, provided the notice contains the name of the company concerned and the particulars referred to in CB s-para. 201(1)(a) (iv) or (v), the NCSC will be required to enter the charge in the register and include the word 'provisional' alongside the entry (CB para. 203(6)(a)). The NCSC will then have to direct the person who lodged the document to ensure that on or before a specified date the requirements in relation to the notice will be complied with (CB para. 203(6)(b)).
- (b) Where a company complies with a direction by the NCSC (under CB s-cl. 203(6)) on or before the date specified

in the notice, the NCSC will have to delete the word 'provisional' from the entry in the Register and enter any required particulars that had not previously been entered (CB para. 203(7)(a)). However, if a company fails to comply with a direction before the date specified the NCSC will be obliged to delete all the particulars that were entered in relation to the charge (CB para. 203(7)(b)). Where a company complies with a direction after the date specified in the notice, the NCSC will have to then make an entry in the Register in relation to the charge of the time and date on which the direction was complied with together with the other required particulars (CB para. 203(3)(c)).

- (c) If the word 'provisional' is entered in the Register specifying a time and date in relation to a charge, the charge will not be deemed to have been registered, (CB s-cl. 203(3)), but if the company complies with the direction within the required time and the word 'provisional' is deleted and the entry specifying that time and date remains, the charge will be deemed to be registered and to have been registered from and including the time originally specified in the register. If the direction is only complied with after the required time, the charge will be deemed to be registered from the time of compliance. (CB s-cl. 203(9)).

493. If there is more than 1 charge on the property of a corporation of the type which does not become registrable at the time when the charge is created but only when the corporation subsequently becomes subject to the provisions of this Act, then the Commission is required to insert details of those charges in its register in such a manner that as against other registrable charges they are all accorded the same priority by Schedule 5 (CB s-cl. 203(10) - (13)). If a corporation fails to comply with its obligation to lodge particulars of all relevant charges at the same time, and instead lodges details of some pre-existing charges at a later time, the corporation will be liable to penalties but the charges will not be disadvantaged: these pre-existing charges will still be given the same priority time for the purposes of Schedule 5. However, as between themselves, these charges will retain their priorities under the general law. There are 3 categories of pre-existing charges to which these provisions apply:

- (a) charges over property of a foreign company which only become registrable under the Act when the foreign company transfers its place of incorporation to the Territory (CB s-cl. 203(10) and (11), and see also CB s-cl. 201(3));
- (b) charges over property of a foreign company which only become registrable when the foreign company commences carrying on business in the Territory and is thereby required to register as a foreign company in the Territory (CB s-cl. 203(10) and (11) and see also CB s-cl. 201(4)); and

- (c) charges over property of an individual or unregistered foreign company which only become registrable under the Act when the property is acquired by a local member or a registered foreign company (CB s-cl. 203(12) and (13), and see also CB cl. 202).

Cl. 204 : Priorities of charges

494. This clause provides that the priorities of registrable charges in relation to each other are as set out in Schedule 5 (CB cl. 204).

495. This provision is based on NCB cl. 221 with 3 exceptions:

- (a) Unlike the NCB and the Eggleston Committee proposals, the Priorities Schedule will not purport to determine the priorities between registrable charges and other unregistrable interests - this matter is left to the general law.
- (b) The provision for chargees to be able to consent to a waiver or variation of the priority to which their registrable charges would otherwise be entitled, is contained in CB s-cl. 204(2) rather than in the priorities schedule as in the N.C.B. - cf cl. 1 of the Priorities Schedule to the Eggleston Committee's redraft.

- (c) A chargee of a floating charge will be deemed to have consented to a subsequently registered fixed charge created before the floating charge crystallises taking priority unless the company, under the terms of the floating charge, had limited its power to create subsequent fixed charges and this fact had been notified to the NCSC by the holder of the floating charge (cf. N.C.B. where a comparable provision was included in the priorities schedule).

Cl. 205 : Certain charges void against liquidator or official manager

496. If liquidation or official management occurs then a registrable charge will be void as a security on the property of the company as against the liquidator or official manager unless notice is lodged with the NCSC within the specified time (see CB s-cl. 205(1) and (2) or at least six months before the commencement of the winding-up or official management. However, the charge will not be void as a security if the 45 day or other period has not elapsed when the winding up or official management commences CB s-cl. 205(1) of ICAC CAs s. 100(1)).

497. Subject to any extensions of time which may have been granted (CB s-cl. 205(3)), the periods of time within which the notice in respect of the charge must have been lodged will be:-

- (a) 45 days from creation of the charge, in the case of a charge created by a company or registered foreign company (CB para 205(2)(a));
- (b) 45 days after the chargee becomes aware that:
 - (1) the foreign company which has given the charge has transferred its incorporation to the Territory or registered as a foreign company in the Territory (CB para 205(2)(a)) or
 - (ii) that the relevant property has been acquired by a company or registered foreign company (CB para 205(2)(c)) - this period will operate rather than the time within which the corporation is required to ensure that details of the charge are lodged with the Commission, on the basis that it would be inequitable for the charge to become void as a security without the chargee being aware that it had become registrable, and
- (c) 45 days after the variation occurs, in the terms of a registrable charge on property of a company which has the effect of increasing the amount of the debt increasing the liabilities or restricting the creation of subsequent charges on the property (CB para 205(2)(d)).

498. The provision is broadly based on para 2(e) of the Priorities Schedule to the Eggleston Committee's redraft. The Eggleston Committee explained the reasons for this provision in para 53 of its report which was in the following terms:

"53. So far as liquidators are concerned, we think that an unregistered charge should not confer any priority in a liquidation. This accords with the present position. But in the case of a registered charge, we think there should be a provision that the person entitled to a registered charge shall not be entitled to the benefit of the charge unless it is registered within thirty days of its creation, or at least six months prior to the liquidation. Otherwise a person might avoid disclosure of the existence of the charge until just before the company was about to go into liquidation, and then by a last-minute registration obtain the benefit of the charge."

499. A somewhat comparable provision has been inserted in Division 9 of Part 4 (CB s-cl. 205(1)) rather than in Schedule 5 on the basis that this is more appropriate for resolution as a question of validity rather than as a question of priority and postponement of charges. The effect of this provision is a question order of an unregistered charge will rank alongside non-preferential unsecured creditors, whereas the effect of the Eggleston Priorities Schedule (see para 5(e)) would have been to rank the holder of an unregistered charge behind all unsecured creditors. (See also CB cls. 446, 451 and 452 as to the priorities and validity of charges in a liquidation).

500. Interested parties will be able to apply to the Supreme Court for an extension of time within which to lodge notices of charges and the Court will grant the extension if the failure to lodge the notice within the required time is accidental, or if it does not prejudice the position of creditors or

shareholders or if the granting of an extension on any other grounds would be just and equitable (CB s-cl. 205(3)). The provision is based on ICAC CAs s. 106 which also dealt with rectification of omissions or mis-statement in the register of charges. This matter is now covered in CB cl. 212.

501. As this Division retains some aspects of a partial invalidity system it has been considered appropriate to ensure that companies creating charges do not avoid the consequences of failure to register charges within the required time by creating new charges as security for the same debt just prior to expiry of the time limits, thereby achieving a contrived extension of time (CB s-cl. 205(4) - based on ICAC CAs sub-s. 100(10)).

502. The rights of a purchaser for value from a chargee or a receiver appointed by him of company property will be protected where the purchaser acts in good faith and without notice of the commencement of official management or winding up (CB s-cl. 205(5) - based on proposals mentioned in Eggleston Committee Report para 45).

Cl. 206 : Assignment and variation of charges

503. Where registrable charges are assigned, the new chargee will have to notify the NCSC and the company within 45 days (CB s-cl. 206(1)).

504. Where certain variations of registered charges are effected particulars will have to be lodged with the NCSC accompanied by the instrument effecting the variation or a certified copy thereof (CB s-cl. 206(2) - based generally on NCB cl. 222). See the definition of "priority time" in CB Schedule 5 cl. 7 as to the priority to be accorded to such variations.

505. Where a charge secures a debt of an unspecified amount or a debt of a specified amount and further advances, a payment or advance made by the chargee to the company in accordance with the terms of the charge will not be required to be notified to the Commission (CB s-cl. 206(3) - not in N.C.B.). This does not mean, however, in the case of a charge which provides for the possibility of further advances being made but the lender is not obliged to make those advances, that the priority accorded to the charge will necessarily extend to those further advances - see CB Schedule 5, cl. 3 and definitions of "priority time" (CB Schedule 5, cl. 7), "present liability" and "prospective liability" (CB s-cl. 199(1)). Furthermore, if the charge is varied by including additional items within the property charged then this would be treated as the creation of a new charge requiring fresh particulars to be lodged under CB cl. 201.

Cl. 207 : Satisfaction of, and release of property from, charges

506. The satisfaction of, and release of property from, charges is dealt with in cl. 207.

507. This provision is based on NCB cl. 223 which in turn is based generally on s.105 of the ICAC CAs which was examined in paras 65 and 66 of the Eggleston Committee's Report and accepted without change.

Cl. 208 : Lodgment of notices, offences, etc.

508. Particulars of a charge will be able to be lodged by the company creating it or by any other person (CB cl. 208).

509. The provision is based on NCB cl. 225 which, in turn, was based on s. 101 of the ICAC CAs and cl. 101 of the Eggleston Committee's redraft.

Cl. 209 : Company to keep documents relating to charges and register of charges

510. A company will be required to keep a copy of documents relating to registrable charges over its property and a register in which particulars of all charges (whether registrable or not) are entered (CB cl. 209).

511. This provision is based on NCB cl. 226 which, in turn, was based on s. 107 of the ICAC CAs except that:

- (a) copies of the instruments created will not be required to be available for public inspection;

(b) persons will be able to request that the company provide them with a copy of its register or a part thereof;

(c) a penalty provision has now been included.

512. For provision as to the location at which the register is to be kept see CB cl. 547.

Cl. 210 : Certificates

513. A certificate issued by the NCSC setting out particulars of a registered charge which are entered in the register of company charges will be prima facie evidence of the matters stated in the certificate (CB s-cl. 211(1) and (2) - based on N.C.B. cl. 227).

514. A certificate issued by the NCSC merely stating that particulars of the charge have been entered in the register will be conclusive evidence that the registration requirements have been complied with (based on ICAC CA's sub-s 103(2) except that with the change to a priority system, it has been made clear that such a certificate is not conclusive evidence that a notice has been lodged within 45 days of the creation of the charge).

Cl. 211 : Registration under Instruments Ordinance 1933

515. Where a company, a recognized company or a recognized foreign company transfers, assigns or gives security over a

personal chattel or book debt within the meaning of the A.C.T. Instruments Ordinance 1933, and those charges are subject to the registration requirements of the CB or of the companies legislation of another jurisdiction covered by the scheme, it will not be required to register under the provisions of the Ordinance that transfer, assignment or giving of security unless it is made or given jointly with one or more persons who is or are not a company, a recognized company, or a recognized foreign company (CB s-cl. 212(1) based on s-cl. 100(9) of the Eggleston Committee's redraft).

516. Failure to register in accordance with these exempting provisions (in CB s-cl. 211(1)) will not affect the validity or limit the effect of the transfer, assignment or giving of security nor result in any loss of priority which would otherwise be accorded if the charge were registered under the Instruments Ordinance (CB s-cl. 211(2)).

517. The laws of each other jurisdiction will contain similar provisions in relation to their bills of sale legislation.

Cl. 212 : Power of Court to rectify Register &c.

518. The Supreme Court will have the power to rectify omissions or mis-statements in the Register of Charges if it is satisfied of certain matters (CB cl. 212 - based on ICAC CAs s. 106; see also CB s-cl. 205(3) in relation to the power of the Supreme Court, if satisfied of those same matters, to extend

the time for lodging notice of charges. The matter was also covered in ICAC CAs s. 106)).

Cl. 213 : Charges on property of recognized companies or recognized foreign companies

519. The priorities system of each participating jurisdiction will be given effect throughout all participating jurisdictions (CB cl. 213). The provision gives the force of law in one jurisdiction to the law of another participating jurisdiction such that a company incorporated in one State carries its law with it no matter where the property is situated or where the charge is executed. Similarly, an overseas company registered as a foreign company in a participating jurisdiction carries with it the law of that jurisdiction no matter where the charge over property within Australia is executed.

Cl. 214 : Provisions applying when incorporation transferred

519A. There will be provision for the entry in the NCSC register of charges (which are not already registered under this Division) on property of recognized and foreign companies which transfer their place of incorporation (CB cl. 214).

Charges created before commencement of Act

519B. Charges that were created by a company prior to the commencement of the CB and property subject to a charge that was acquired by a company before the commencement of the CB are dealt with in cl. 17 of the C(TP)B.

CL. 215 : Power to exempt from compliance with certain requirements of Division

519C. The NCSC will be able to exempt a person from certain of the requirements in CB cls 201, 202 and 206 subject to such conditions as it thinks fit (CB cl. 215).