

Cl.61 : Discretionary accounts

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

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

Cl.62 : Dormant bodies corporate

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

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

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

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

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

Cl.63 : Eligible circumstances

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

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

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

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

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

Cl.65 : Excluded corporations

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

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

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

Cl.66 : Excluded issues, offers and invitations

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

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

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

- (a) where the minimum subscription by any one person is at least \$500,000.
- (b) to persons whose ordinary business it is to buy or sell securities, whether as principal or agent (based on CA para.5(4)(b));
- (c) pursuant to the entering into of an underwriting agreement (based on CA para.5(4)(a));

- (d) in respect of share issues to existing members of a company in connection with a cl.507 proposal (based on CA para.5(4)(d)) or bonus issues of shares;
- (e) in the case of an issue of debentures, where the issue is made to existing debenture holders of a corporation and relates to debentures of that corporation; or it is made by an excluded corporation and relates to debentures of that corporation.

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

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

Cl.67 : Exempt brokers and exempt futures advisers

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

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

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

Cl.68 : Exempt dealers and exempt investment advisers

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

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

Cl.69 : Exempt proprietary companies

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

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

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

Cl.70 : Extension of period for doing an act

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

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

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

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

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

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

- (b) The definition has been extended to cover an eligible futures advice business.
- (c) Certain acts of various categories of persons are to be disregarded in determining whether or not that person carries on a futures advice business or an eligible futures advice business.

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

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

- (a) The acts of a solicitor or accountant in public practice, being acts merely incidental to the practice (Bill sub-cl.71(4)).
- (b) The circumstances of giving advice in:
  - (i) a publically available newspaper or periodical of a publisher;
  - (ii) a transmission of a public information service; or
  - (iii) a publically available sound, video or data recording.

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

- (c) The fact that the person holds himself herself or itself out as advising other persons or publishing futures reports as mentioned in Bill sub-cl.71(5) (Bill sub-cl.71(7)).
- (d) The act of an employee or person acting for another person in connection with a futures advice business carried on by the other person (Bill sub-cl.71(8)).

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

#### Cl.72 : Futures contracts

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

#### Cl.73 : Futures representatives

362. This is a new provision.

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

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



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

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

Cl.74 : Group holding companies

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

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

Cl.75 : Inclusion in official list

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

Cl.76 : Incorporated in Australia

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

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

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

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

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

Cl.78 : Invitations, offers and forms of applications

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

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

Cl.79 : Involvement in contraventions

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

- (a) aid, abet, counsel or procure the contravention;
- (b) induce the contravention;
- (c) are in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
- (d) conspire with others to effect the contravention

will be involved in a contravention.

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

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

Cl.81 : New companies

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

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

- (a) where an activities statement lodged under Bill cl.153 and states the subscribers intend the company will commence activities, of the kind set out in Bill sub-cl.153(3) and (4) - 3 months beginning on the day:
  - (i) where it is stated the subscribers intend the company to be dormant for a substantial period after incorporation - when the company ceases to be dormant; or
  - (ii) otherwise - of the company's incorporation;
- (b) where the activities statement states that subscribers intend, within 21 days after incorporation or within the substantial period of dormancy after incorporation, persons other than subscribers will obtain a controlling interest in the company and a further activities statement is lodged under Bill cl.155 and
  - (i) where the latter statement states whether or not the company intends to commence activities of the kind set out in Bill sub-cl.155(4) and (5) - 3 months beginning on the day specified under Bill para.155(3)(c); or
  - (ii) otherwise - the day on which the latter statement is lodged;
- (c) where the activities statement states that persons other than subscribers will obtain a controlling interest in the periods mentioned in paragraph (b) above and the company contravenes Bill cl.155 - the period within which the company is required to comply with Bill cl.155; or

(d) otherwise - the day of incorporation.

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

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

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

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

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

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

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

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

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

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

Cl.82 : Offers and invitations to the public

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

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

Cl.83 : Officers and other persons in default

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

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

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

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

- (a) a provision of Bill sub-cl.217 requiring the registered office of a company to be open for certain hours on business days;
- (b) any provision of the Bill cl.242 (register of directors, principal executive officers and secretary) or Bill cl.335(annual return) requiring the lodgment of a document with the ASC.

Cl.84 : Own account dealings and transactions: securities

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

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

Cl.85 : Participation interests

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

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

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

Cl.86 : Possession

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

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

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

391. This is a new provision.

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

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



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

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

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

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

Cl.89 : Qualified privilege

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

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

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

Cl.90 : Receivers and managers

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

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

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

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

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

- (b) a Bill cl.230 order - where the person is or becomes prohibited by virtue of Bill cl.230 or a corresponding law of a State or Territory from being a director, promoter of or concerned with the management of a corporation (Bill sub-cl.91(2)).
- (c) a Bill cl.599 order - where the person is or becomes prohibited by virtue of Bill cl.599 or a corresponding previous law of the Territory or a corresponding law or previous law of a State or another Territory from acting or being a director, promoter of or concerned with the management of a company or other corporation (Bill sub-cl.599 (3)); and
- (d) a Bill cl.600 notice - where the person is or becomes by virtue of Bill cl.600 or a corresponding provision of a law of a participating State or Territory from being a director promoter of or concerned with the management of a corporation.

Cl.92 : Securities of a body corporate

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

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

Cl.93 : Securities business and eligible securities business

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

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

Cl.94 : Securities representatives

405. This is a new provision.

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

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

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

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

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

Cl.95 : Signing of certain documents by bodies corporate

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

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

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

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

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

Cl.96 : Statement in a prospectus

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

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

Cl.97 : Stock market not to include futures market

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

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

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

Cl.98 : Transfer days for bodies corporate

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

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

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

Cl.99 : Underlying securities

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

Division 8 - Miscellaneous interpretation rules

Cl.100 : Address of registered office etc

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

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

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

Cl.102 : Applications to be in writing

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

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

Cl.103 : Effect of certain contraventions of this Act

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

- (a) a contravention of
  - (i) Bill cl.112 - formation of an outsized partnership or association than otherwise allowed under the Bill;
  - (ii) Bill cl.113 - formation of a trading body corporate under a State or Territory law;
  - (iii) Bill cl.126 - State or Territorial bodies corporate carrying on business than otherwise allowed under the Bill;
  - (iv) Bill cl.340 - registrable Australian company (defined in Bill cl.5) carrying on an interstate business while unregistered under the Bill;
  - (v) Bill cl.343 - foreign company (defined in Bill cl.9) carrying on business while unregistered under Bill;
  - (vi) Chapter 8; or
- (b) a failure to comply with a provision requiring the publishing of a notice or document.

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

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



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

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

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

Cl.105 : Calculation of time

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

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

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

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

Cl.106 : Performance of functions by Commission delegate

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

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

Cl.107 : Headings to Chapters

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

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

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

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

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

Cl.109 : Reference to persons, things and matters

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

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

BILL PART 1.3 - APPLICATION

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

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

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

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

CHAPTER 2 - CONSTITUTION OF COMPANIES

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

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

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

- (a) certain companies which incorporate under this Bill will not need to register a copy of their memorandum and articles of association (Bill cl.118);
- (b) provision is made for a close corporation formed under the Close Corporations Bill to register as a company under this Bill (Bill cls.142-147); and
- (c) a company will not be obliged to maintain a branch register of members at the request of a member resident in a particular State or Territory (Bill cl.214).

445. This Chapter consists of the following Parts:

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

PART 2.1 : RESTRICTIONS ON FORMING CERTAIN ENTITIES

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

Cl.112 : Outsize partnerships and associations

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

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

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

449. This is a new clause.

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

#### PART 2.2 - REGISTRATION OF COMPANIES

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

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

#### Division 1 - Incorporation by registration

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

Cl.114 : Formation of companies

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

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

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

Cl.115 : Classes of companies

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

Cl.116 : Proprietary companies

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

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

Cl.117 : Requirements as to memorandum

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

Cl.118 : Registration application

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

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

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

Cl.119 : Power to require production of unlodged memorandum

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

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

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



Cl.120 : Registration

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

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

Cl.121 : Certificate of registration

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

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

Cl.122 : Effect of certificate

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

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

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

Cl.123 : Incorporation

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

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

Cl.124 : Members

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

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

Cl.125 : Articles of association

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

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

Division 2 - Registering certain State and Territory companies as companies

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

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

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

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

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

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

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

Cl.128 : Determination of application

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

Cl.129 : Registration of applicant as a company

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

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

Cl.130 : Constitution of a Division 2 company

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

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

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

487. This is a new clause.

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

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

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

Division 3 - Registering foreign companies as companies

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

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

Cl.133 : Foreign company may apply for registration

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

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

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

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

Cl.135 : Prerequisites to eligibility

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

Cl.136 : Form and content of application

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

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

Cl.137 : Registration of applicant as a company

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

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

Cl.138 : Registered foreign company

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

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

Cl.139 : Constitution of Division 3 company

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

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

Cl.140 : Alterations of constitution

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

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

Cl.141 : Share warrants

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

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

Division 4 : Registering Close Corporations as Companies

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



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

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

Cl.143 : Requirements as to memorandum

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

Cl.144 : Registration application

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

Cl.145 : Power to require production of unlodged memorandum

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

Cl.146 : Registration

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

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

Cl.147 : Articles of association

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

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

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

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

Cl.148 : Certificate of registration

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

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

- (a) the fact of registration;
- (b) the fact of incorporation;
- (c) the day of commencement of registration;
- (d) the class of the company; and
- (e) whether the company is a proprietary or a public company (a new provision).

Cl.149 : Effect of certificate

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

- (a) compliance with the requirements of this Bill;
- (b) registration under this Bill; and
- (c) the day of commencement of the registration of the company (a new provision).

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

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

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

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

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

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

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

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

Cl.152 : Establishment of registers and minute books

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

Division 6 : Activities statements

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

Cl.153 : Division 1 company

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

- (a) the date of signing the statement (para.153(1)(c) and (d)); and
- (b) one of a number of intentions (sub-cl.153(3), (4) or (5)),

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

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

- (a) that within three months from incorporation trading activities will be the whole or a substantial part of the company's activities (sub-cl.153(3));
- (b) that within three months from incorporation the business of banking will be the sole or principal business of the corporation (sub-cl.153(4)); and
- (c) that within 21 days after incorporation (or within the period of dormancy, if stated under sub-cl.153(2)), new members will control the company (sub-cl.153(5)). These new members need not be known (sub-cl.153(6)). If this intention is stated, further obligations will be imposed by cl.155.

Cl.154 : Division 2, 3 or 4 company

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

- (a) the date of signing the statement (paras.154(1)(c) and (d)); and
- (b) one of, or a particular combination of, facts, intentions or an expectation (see para.154(1)(e) for the combinations).

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

- (a) the fact that existing trading activities form the whole or a substantial part of the activities of the body (para.154(2)(a)), and that it is the intention that this will be so during a period from incorporation ending at least three months later (sub-cl.154(2));
- (b) the fact that existing banking business is being carried on by the company as its sole or principal business and that it is the intention that this will be so during a period from incorporation ending at least three months later (sub-cl.154(3));
- (c) that it is the intention that the company will be dormant throughout a substantial period (sub-cl.154(4));
- (d) that it is the intention that within three months after registration or the period of dormancy (see (c) above - sub-cl.154(4)), trading activities will be the whole or a substantial part of the activities of the company (sub-cl.154(5));
- (e) that it is the intention that within three months after registration or the period of dormancy (see (c) above - sub-cl.154(4)), banking will be the sole or principal business of the company (sub-cl.154(6)); and

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

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

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

Division 7 : Companies ceasing to be trading or banking corporations

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

Cl.156 : Commission to take action

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

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

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

Cl.158 : Company to take action

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

PART 2.3 - LEGAL CAPACITY, POWERS AND STATUS

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

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

Division 1 - Legal capacity and powers

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

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

Cl.159 : Interpretation

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

Cl.160 : Object of clauses 161 and 162

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

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



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

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

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

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

Cl.161 : Legal capacity

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

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

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

- (a) any express or implied restriction on, or prohibition of, the exercise by the company of any of its powers;
- (b) the fact the company has stated objects;
- (c) the fact that a company will contravene the Bill if it acts contrary to an express restriction on, or prohibition of, the exercise of a power of the company;
- (d) the fact that an act of the company may not be in the best interests of the company.

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

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

Cl.162 : Restrictions on companies

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

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

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

- (a) a company exercises a power contrary to an express restriction on, or an express prohibition of, the exercise of that power, being a restriction or prohibition contained in the company's constitution; or
- (b) the memorandum of a company contains a provision stating the objects of the company and the company does an act otherwise than in pursuance of those objects,

the company will contravene this sub-clause.

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

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

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

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

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

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

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

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

Cl.163 : Application of certain State and Territory laws

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

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

Cl.164 : Persons having dealings with companies, etc

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

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

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

- (a) who may make and rely upon the assumptions set out in Bill sub-cl.164(3); and
- (b) that a company will not be able to deny the validity of an assumption made under Bill sub-cl.164(3).

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

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

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

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

570. The purpose of this provision is to:

- (i) restate the common law rule that the protection afforded to persons under the "indoor management rule" is not affected merely because the directors etc. have not been properly appointed (Mahoney v East Holyford Mining Co (1875) L.R. 7 H.L. 869). This extends the protection afforded by Bill sub-cl.226(1). In a decision on the equivalent provision in the UK Companies Act 1948, s.180, the House of Lords drew a distinction between defective appointments to which the provision applied and non-existent appointments to which it did not: Morriss v Knassen (1946) AC 459.
- (ii) provide that a person dealing with an officer of the company (either actual or assumed) may assume that the officer is able to exercise the customary powers belonging to that type of office. It is believed that this also is in accordance with existing case law and normal

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

- (c) that a person held by a company to be an officer or agent of the company has been duly appointed with authority to exercise the powers normally exercised by such an officer or agent. Bill para.164(3)(c) refers only to a person "held out by the company to be an officer or agent of the company". (The purpose of this provision is to achieve the same effect in relation to officers and agents as Bill para.164(3)(b) is intended to achieve in relation to directors, principal executive officers and secretaries (see (b) above).
- (d) that an officer or agent with authority to issue documents, or certified copies of documents, on behalf of the company, has authority to warrant that the document or copy is genuine. The purpose of this provision is to make it clear that a company will not be able to escape liability for false documents issued by an officer or agent if it has authorised the officer or agent to issue true documents.
- (e) that a document has been duly sealed by the company if it bears what appears to be the seal of the company attested by two persons, one of whom may be assumed to be a director, and the other a director or a secretary of the company.

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

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

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

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

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

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

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



Cl.166 : Effect of fraud

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

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

- (i) the dealings, or acquisition or purported acquisition of title to property concerned; or
- (ii) the forgery of a document that appears to have the company seal,

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

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

Division 2 - Changes of Status

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

Cl.167 : Change of status

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

- (a) The ASC will issue a certificate of registration, not of incorporation.
- (b) The application documents referred to in Bill sub-cl.167(2) will not be prescribed and are enumerated in Bill sub-cl.167(3).
- (c) The Bill will require a company applying to change its liability status to make such alterations to its memorandum and articles (if any) as will make the memorandum or articles conform with the requirements set out in Part 2.2 of the Bill relating to the memorandum and articles of a Division 1 company of the status sought.
- (d) A Table A proprietary company will be required to lodge a printed copy of its articles even if the articles of the company are not altered, nor any articles adopted, by the special resolution referred to in Bill para.167(3)(a).

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

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

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

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

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

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

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

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

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

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

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

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

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

Division 3 - Memorandum and articles

Cl.171 : General provisions as to alteration of memorandum

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

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

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

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

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

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

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

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

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

Cl.172 : Alterations of memorandum

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cl.175 : Articles adopting Table A or B

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

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



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

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

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

#### Cl.176 : Alteration of articles

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

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

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

Cl.177 : Deemed proprietary company provisions

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

Cl.178 : Alteration of proprietary company provisions

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

Cl.179 : Constitution of companies limited by guarantee

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

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

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

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

Cl.180 : Operation of memorandum and articles

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

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

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

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

Cl.181 : Copies of memorandum and articles

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

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

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

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

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

Division 4 : Transactions on a company's behalf

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

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

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

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

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

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

643. Bill cl.182 will not apply to the making, variation or discharging of a contract by a Division 2, 3 or 4 company before the company's registration day; however, the clause will otherwise apply from that time regardless of when a company gave its authority (Bill sub-cl.182(5)).

644. Bill sub-cl.182(7) will provide that a document or proceeding requiring authentication by a company will be able to be authenticated by the signature of an officer of the company and will not need to be authenticated under the common seal of the company.

645. Bill sub-cl.182(8) will enable a company to empower a person to execute deeds on its behalf as its agent or attorney, and a deed signed by the agent or attorney on behalf the company under an appropriate official seal of the company will bind the company and have the same effect as if it were under the common seal of the company.

646. Bill sub-cl.182(9) will provide that the authority of an agent or attorney will continue for the period mentioned in the instrument of authority, and if no period is mentioned, until notice of revocation or termination of the agent's or attorney's authority has been given to the person dealing with the agent or attorney.

647. Bill sub-cl.182(10) will provide that a company will, if authorised by its articles, be able to use in place of its common seal outside the State or Territory where the common seal is kept, one or more official seals, which will be required to be facsimiles of the common seal and which will be required to have on their face the names of the places where they are to be used.

648. Bill sub-cl.182(11) and (12) will provide that a person affixing an official seal will be required to certify in writing on the instrument to which the seal is affixed, the

date on which and the place at which the seal is affixed. A document sealed with such an official seal will be deemed to have been sealed with the common seal of the company.

Cl.183 : Ratification of contracts made before formation of company

649. Bill cl.183 is based on CA s.81.

650. Bill sub-cl.183(1) sets out the meaning of a reference throughout the clause to a non-existent company.

651. Bill sub-cl.183(2) and (3) will provide that where a non-existent company (by a person, agent or trustee) purports to contract and the company is then formed within a reasonable time, the company will then, within a reasonable time, be able to ratify the contract and will be entitled to the benefit of the contract as if the company had been formed and had been a party to the contract.

652. Bill sub-cl.183(4) will provide that where a non-existent company purports to contract, and either the company is not formed within a reasonable time thereafter or the contract is not ratified within a reasonable time after formation, any other party to the contract will be able to recover damages from the person who purported to execute the contract on behalf of the non-existent company. Those damages will be equivalent to damages which would have been obtainable if the company had been formed and had ratified the contract and the contract had been discharged by a breach constituted by the refusal or failure of the company to perform any obligations under the contract.

653. Bill sub-cl.183(5) will provide that where proceedings for damages are brought under Bill sub-cl.183(4) and the company has been formed, the Court will be able to order the company to give up property or pay for any benefit received as

a result of the contract and, (or as an alternative) the court will be able to order the company to pay all or some of the damages for which the defendant may be found liable under Bill sub-cl.183(4).

654. Bill sub-cl.183(6) will provide that where proceedings are brought under Bill sub-cl.81(4) and the Court orders the company to give up property or pay for any benefit received, the Court will be able to refuse to award damages or to award lesser damages.

655. Bill sub-cl.183(7) will provide that where the contract is ratified but a breach of contract occurs due to a refusal or failure to perform, and proceedings are brought against the company, the Court will be able, if it thinks it just and equitable, to order the person executing the contract on behalf of the company to pay part or all of the damages.

656. Bill sub-cl.183(8) will provide that a person will be able to be released from liability in relation to a pre-incorporation contract where the other party or parties consent in writing to that person being released.

657. Bill sub-cl.183(9) will provide that Bill sub-cl.183(4) and 183(7) will not apply to allow a party to recover damages from a person in relation to a pre-incorporation contract where that party has consented to the person being released from liability under Bill sub-cl.183(8).

658. Bill sub-cl.183(10) will provide that if the company is formed and it and the other party or parties to the contract substitute another contract for the first contract, the person who executed the first contract on behalf of the company will be discharged from all liabilities in relation to it.

659. Bill sub-cl.183(11) will provide that rights and liabilities under Bill cl.183 in relation to a contract are in substitution for rights and liabilities in relation to the contract accruing apart from that clause.

660. For the purpose of Bill cl.183, a trustee for a proposed company who purports to enter into a contract on its behalf will not have any right of indemnity against the company in respect of the contract, where the company is formed within a reasonable time after the purported entry into the contract, but the company does not ratify the contract within a reasonable time after it is formed. The purpose of Bill sub-cl.183(12) is to prevent the operation of equitable principles by which the trustee might be able to avoid liability for statutory damages under Bill sub-cl.183(4).

661. Bill sub-cl.183(13) will provide that a contract will be able to be ratified by a company under Bill cl.183 in the same manner as a contract will be able to be made by a company under Bill cl.182. The provisions of Bill sub-cl.182(3) relating to non-invalidity of contracts because an interested person attested the affixing of the common seal will also apply.

#### PART 2.4 - MEMBERSHIP AND SHARE CAPITAL

##### Division 1 - Membership generally

##### Cl.184 : Membership of company

662. Bill cl.184 is based on CA s.35(8) and will provide that a person who agrees to become a member of a company and whose name is entered in the company's register of members will become a member of the company.



Cl.185 : Membership of holding company

663. Bill cl.185 is based on CA s.36 and will provide that except in certain circumstances, a body corporate that is a subsidiary of a company will not be able to be a member of the company that is its holding company, nor to hold a beneficial interest in shares of that company.

664. Thus Bill sub-cl.185(3) and (4) will provide that an allotment or transfer to the subsidiary of shares in the holding company will be void, as will a purported acquisition of units of shares in the holding company by the subsidiary company.

665. A unit is defined in the Cl.9 of the Bill as meaning in relation to a share, a right or interest, whether legal or equitable, in the share, and such a unit will include an option to acquire such a right or interest in the share.

666. Bill sub-cl.185(2), (3) and (4) will not apply where the subsidiary is concerned as a personal representative, or as a trustee in the circumstances set out in Bill sub-cl.185(6).

667. Bill sub-cl.185(7) will not prevent a subsidiary referred to in Bill sub-cl.185(7) from continuing to be a member of a holding company referred to in Bill sub-cl.185(7), but subject to sub-cl.185(5) and (6), the subsidiary will not be entitled to vote at meetings of the holding company or of a class of member of the holding company.

668. Where Bill sub-cl.185(7) does not apply but a subsidiary already held shares in a holding company at the time it became a subsidiary of the holding company, the subsidiary will be able to remain a member of the holding company but, subject to sub-cl.185(5) and (6), the subsidiary will not be entitled to vote at meetings of the holding company or of a class of members of the holding company, and, within a period of 12

months of becoming a subsidiary of a holding company or within an extension of that period as allowed by a Court, will be required to dispose of all its shares in the holding company (Bill sub-cl.185(8)).

669. Except where a subsidiary is concerned as a personal representative or as a trustee as provided in Bill sub-cl.185(5) and (6), the subsidiary referred to in Bill sub-cl.185(2), (3), (4), (7) and (8) will include its nominee (Bill sub-cl.185(9)).

670. A reference to shares in this clause will include, where the holding company is a company limited by guarantee or is an unlimited company, and whether or not the holding company has a share capital, a reference to the interest of a member of the holding company as a member, whatever the form of that interest (Bill sub-cl.185(10)).

Cl.186 : Prohibition on carrying on business with fewer than statutory minimum number of members

671. Bill cl.186 is based on CA s.82.

672. It will provide that a member of a company (other than a wholly-owned subsidiary of a holding company) that carries on business for more than 6 months with the number of members of the company reduced below 2 in the case of a proprietary company, or below 5 members in the case of any other company, will contravene Bill sub-cl.186(1), if the member is aware that the company is carrying on business with fewer than the statutory minimum of members, and will be generally liable for any debt contracted by the company at that time. Bill sub-cl.186(1) will not apply to a company where the whole of its issued shares are held by a holding company that is a company (Bill sub-cl.186(2)).

Division 2 - Shares generally

673. The provisions of Division 3 of Part 2.4 of the Bill set out the requirements of the legislation with regard to shares generally. In this respect the Bill follows the provisions of CA Part IV, Division 3, except that the provisions equivalent to CA ss.124-128 have been formed into a new Division dealing with class rights (see Bill Part 2.4 - Division 3) and CA ss.116, 117, 129, and 130 have been extracted from this Division and incorporated with other relevant provisions into a new Division dealing with the maintenance of capital (see Bill Part 2.4 - Division 4).

Cl.187 : Return as to allotments

674. This clause is based on CA s.113.

675. Within one month of making an allotment of its shares, a company will have to lodge with the ASC a return setting out particulars of the allotment.

Cl.188 : Differences in calls and payments, reserve liability, &c.

676. This clause is based on CA s.114.

677. If authorised by its articles, a company will be able:

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

678. A limited company will be able by special resolution to determine that any portion of its share capital that has not been called up cannot be called up except in the event of the company being wound up.

Cl.189 : Share warrants

679. This clause is based on CA s.115.

680. Companies will be prohibited from issuing share warrants. Under the Victorian Companies Act of 1928, and comparable legislation in other jurisdictions, companies could issue share warrants, ie, certificates that the bearer was entitled to the shares represented by them. These certificates were negotiable instruments.

Cl.190 : Power to issue shares at a discount

681. This clause is based on CA s.118.

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

Cl.191 : Issue of shares at premium

683. This clause is based on CA s.119.

684. A company that issues shares at a premium will have to transfer a sum equal to the value of the premiums to a "share premium account" which is subject to the provisions of the Bill relating to reduction of capital (except s-cl.195(6) which specifies some of the information to be included in the order) as if the share premium account were paid up capital. The share premium account may be applied only for certain specified purposes.

Cl.192 : Redeemable preference shares

685. This clause is based on CA s.120.

686. If authorised by its articles, a company will be able to issue preference shares that can be redeemed by the company out of profits or out of the proceeds of a fresh issue of shares made for the purposes of the redemption. Where a premium is payable on redemption it will have to be paid out of profits or the share premium account.

687. Where redeemable preference shares are redeemed otherwise than out of the proceeds of a fresh issue of shares, a sum equal to the nominal value of the shares redeemed will have to be transferred from profits otherwise available for dividend to a "capital redemption reserve" which is subject to the provisions relating to the reduction of share capital (except Bill sub-cl.195(6)) as if the reserve were paid up share capital. The capital redemption reserve may be used to pay up unissued shares of the company to be issued to members as bonus shares.

688. Where a company redeems any preference shares it will be able to issue shares to the nominal value of the redeemed shares as if the preference shares had never been issued. Shares will be considered redeemed despite the fact that the redemption payment is by a cheque which has not been presented for payment.

Cl.193 : Power of company to alter its share capital

689. This clause is based on CA s.121.

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

- (a) increasing share capital by the creation of new shares;

- (b) consolidating and dividing its share capital into shares of larger amounts;
- (c) converting paid up shares into stock, or stock into shares;
- (d) sub-dividing its shares into shares of smaller amounts; or
- (e) cancelling shares that have not been taken up and reducing the share capital by that amount. Such a cancellation shall not be a reduction of share capital in accordance with this Act.

Cl.194 : Validation of shares improperly issued

691. This clause is based on CA s.122.

692. Where a company has purported to issue or allot shares in a manner that was invalid or unauthorised, the Court will be able, upon the application of the company, a holder or mortgagee of those shares, or a creditor of the company, to make an order validating the issue or allotment of those shares and confirming the terms of issue or allotment.

Cl.195 : Special resolution for reduction of share capital

693. This clause is based on CA s.123.

694. Subject to confirmation by the Court, a company will be able, if authorised by its articles, to reduce its paid up share capital in any way, including the manners specified. There are procedures to safeguard the interests of creditors who do not consent to the reduction.

Division 3 - Class Rights

Cl.196 : Commission to be informed of special rights carried by, or division or conversion of, shares

695. This clause is based on CA s.124.

696. Where a company allots shares carrying rights that are not contained in the memorandum or articles, the company will have to lodge within one month of the allotment, a statement in the prescribed form relating to those rights. The ASC will also have to be notified of details relating to the division or conversion of shares.

Cl.197 : Rights of holders of classes of shares

697. This clause is based on CA s.125.

698. It deals with the variation of rights attached to classes of shares. There are separate provisions dealing with the variation of the rights

- attached to shares where the share capital is not divided into classes (see Bill cl.198)
- of members of a company which does not have a share capital (see Bill cl.199).

699. Where there is nothing to the contrary in the memorandum or articles of a company, the rights attached to the holders of a class of shares will be able to be varied with the consent of the holders of 75% of those shares or with the sanction of a special resolution passed at a meeting of the holders of those shares.

700. To protect the rights of the holders of a particular class of shares, 10% of the members of that class will be able to apply to the Court to set aside the variation or abrogation of their rights. In order to avoid problems that may be caused to nominees, a person who has assented to a variation will not be prevented from applying to the Court. This right to apply to the Court also applies where the memorandum or articles are altered by the insertion of a provision authorizing the variation or abrogation of those rights (Bill para.197(4)(b)).

701. The allotment of additional preference shares ranking pari passu with existing preference shares is deemed to be a variation or abrogation of those rights unless the further allotment was authorised by the original allotment or by the memorandum or articles. The operation of this clause is not affected by the provisions relating to alteration of memorandum or alteration of articles.

Cl.198 : Rights of holders of shares

702. This clause is based on CA s.126.

703. It deals with the rights of holders of shares where the share capital is not divided into classes of shares.

704. These provisions are similar to those in Bill cl.197 (rights of holders of classes of shares) and although that part of the clause which deals with planned variation of rights is different in form it still ensures that the rights of existing shareholders are not prejudiced by subsequent action which is not provided for by the memorandum or the articles.



Cl.199 : Rights of classes of members

705. This clause is based on CA s.127.

706. It deals with the variation of the rights of members of a company which does not have a share capital.

707. These provisions are similar to those in Bill cl.197 except that there is no equivalent to Bill sub-cl.197(8) which provides for deemed variation of rights.

Cl.200 : Rights of holders of preference shares to be set out in memorandum or articles

708. This clause is based on CA s.128.

709. A company will not be able to allot preference shares nor convert issued shares into preference shares unless the rights of the holders of those shares are set out in the memorandum or articles of the company.

Division 4 - Maintenance of Capital

Cl.201 : Dividends to be paid from profits only

710. This provision is based on CA s.565.

711. It will impose both criminal and civil liability on a director or an executive officer who wilfully pays or permits to be paid a dividend to shareholders otherwise than out of profits or from the share premium account.

712. Bill sub-cl.201(2) will provide for civil proceedings for recovery of debts owed to creditors of the company to the extent that dividends paid out, exceed profits.

713. Such proceedings will be able to be brought by creditors of the company or by the liquidator suing on their behalf, whether or not a director or executive officer of a company has been convicted of an offence under this provision.

714. The civil standard of proof will apply in proceedings for recovery of an amount under Bill sub-cl.201(2).

Cl.202 : Power of company to pay interest out of capital in certain cases

715. This clause is based on CA s.133.

716. Where shares are issued to raise capital for construction work or the provision of plant that cannot be made profitable for a long period, a company will be able to pay interest on the paid up share capital, charging the interest to capital, provided that the payment is authorized by the articles or by a special resolution, is approved by the Court and does not exceed 8% or the prescribed rate.

Cl.203 : Restriction on application of capital of company

717. This clause is based on CA s.116.

718. This provision imposes restrictions on the application of the capital of the company and is intended to strengthen the provisions relating to the making of certain payments (see Bill cl.204).

719. The main provisions are as follows:

- (a) Except as provided by Bill cl.204, a company will not be able to apply any shares or capital to make a payment to a person in consideration of his subscribing or procuring subscriptions for shares in the company. (See also Ooregum Gold Mining v Roper [1892] AC 125.)

- (b) A company is prohibited from issuing shares at a discount other than in accordance with Bill cl.190.
- (c) If a company contravenes this provision, the company will not be guilty of an offence but each officer of the company who is involved in the contravention contravenes this sub-section.
- (d) The court may, in addition to imposing a penalty, order that a person guilty of an offence under this provision pay compensation to the company.
- (e) Where this provision has been contravened, the company may recover from any person who has knowingly made a profit from the contravention, an amount equal to that profit, or, where it has suffered a loss or damage, the company may recover from any person involved in the contravention, the amount of that loss or damage.

Cl.204 : Power to make certain payments

720. This clause is based on CA s.117.

721. Provided that certain conditions are met, and that the total amount of the proposed payment and any other such payments does not exceed 10% of the amount payable on shares upon their allotment or such lesser amount as authorised by the articles, a company will be able to make a payment by way of brokerage or commission to a person in consideration of his subscribing or procuring subscriptions for shares.

Cl.205 : Company financing dealings in its shares etc.

722. This clause is based on CA s.129.

723. A company is prohibited from giving financial assistance for or in connection with the acquisition by any person of shares in the company or its holding company, or from acquiring or lending money on the security of shares in the company or its holding company.

724. The prohibition extends to acquisitions of "units" of shares which is defined to include beneficial interests (see cl.9) and covers financial assistance given either before or after the acquisition.

725. Included within the provision is a prohibition of direct or indirect acquisition by a company of shares in itself or in a holding company of itself.

726. The meaning of "financial assistance" in Bill sub-cl.205(1) includes the giving a loan, guarantee, or security, releasing an obligation, or forgiving a debt, or any other form of financial assistance. This provision is an inclusory definition and is not intended to be exhaustive of the methods of giving financial assistance which are to be prohibited.

727. The inclusion of the words "the release of an obligation or the forgiving of a debt" make it clear that more than the giving of specie is to be prohibited throughout Bill cl.205 .

728. There is a definition of "relevant purpose" in relation to the giving of financial assistance for the purposes of cl.205. The relevant purpose may be one of a number of purposes for which the company gave the financial assistance, or may be a substantial purpose of the assistance (Bill sub-cl.205(3) - based on TPA s.4F).

729. There is also a definition of "in connection with" for the purposes of Bill cl.205. A company gives financial assistance in connection with an acquisition of shares where it is aware that it will financially assist a person to

acquire shares in the company, or will assist the person who has already acquired shares in the company to pay any unpaid amount for subscriptions or calls.

730. If there is a contravention of Bill sub-cl.205(1), the company will not be guilty of an offence but rather each officer in default will be guilty of an offence. The rationale for the provision is that, if the company is penalised under this section, it is the members and creditors who will suffer.

731. The Court will have power, unless it decides to relieve a convicted officer from liability under Bill sub-cl.205(7), to order that officer to pay compensation to the company or other person suffering loss or damage as a result of the contravention. It is noted that in sub-cl.205(6) the reference in the equivalent CA provision to the C & S Interpretation Act has been replaced by the equivalent Crimes Act 1914 provision (i.e. section 5).

732. Nothing will prohibit a company:

- (a) paying a bona fide dividend in the ordinary course of commercial dealing;
- (b) making a payment pursuant to a reduction of capital under Bill cl.195;
- (c) discharging a liability resulting from a bona fide commercial transaction;
- (d) giving a bona fide guarantee or security in the ordinary course of commercial dealing to a borrowing corporation of which it is a subsidiary company;
- (e) acquiring its own shares -
  - (i) where no consideration is provided for the acquisition by the company or a related corporation;

- (ii) through a purchase ordered by a court;
- (f) creating or acquiring a bona fide lien on its shares in the ordinary course of commercial dealing;
- (g) making a bona fide agreement in the ordinary course of commercial dealing with a subscriber for the payment of shares by installment;

733. This is not intended to be construed as an exhaustive list of the activities for which companies may be exempt from in respect of the prohibition contained in Bill sub-cl.205(1). The effect of the common law rules allowing a company in particular circumstances to give financial assistance in relation to its own shares will be preserved.

734. A particular act of a company will also be exempt from the prohibition in Bill sub-cl.205(1) where it consists of -

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

735. Bill sub-cl.205(9)(b) requires that, in the case of employee benefits, the scheme for financial assistance in Bill sub-cl.205(9)(b) must have been approved at a general meeting of the company and, where the company is a subsidiary company, the listed corporation or corporations, or its ultimate holding company.

736. A validation procedures exists whereby a company may be exempted from the prohibition in Bill-sub-cl.205 relating to the giving of financial assistance for the acquisition of shares.

737. Major features of this procedure are:

- (a) the steps to be taken by a company in relation to the passing of a special resolution to give the financial assistance which are -
  - (i) The company will have to resolve, by a special resolution, to give the financial assistance;
  - (ii) where the company is a subsidiary of a listed corporation or where its ultimate holding company is incorporated in Australia (including the external territories), that listed corporation or ultimate holding company will also be required to resolve to give the financial assistance;
  - (iii) the notice of intention of the company to propose the resolution will have to give particulars of the financial assistance and its effect on the company or, where relevant, the group of corporations, and will have to include a statement of the directors, stating whether, in their opinion, the assistance would be likely to materially prejudice the interests of the creditors or members;

- (iv) this notice and the auditor's report or directors' statement will also have to accompany the notice of intention of the listed corporation or ultimate holding company to propose the resolution;
- (v) a copy of the notice of intention of the company and of the auditor's report or directors' statement will have to be lodged with the ASC;
- (vi) the notice of intention of the company must be given to all members, trustees for debenture holders, and all known debenture holders where there are not trustees;
- (vii) a similar provision to the above also exists in relation to the listed corporation and the ultimate holding company;
- (viii) within 21 days of the meeting of the company, or of the listed corporation or ultimate holding company, at which the resolution is passed, a notice setting out the terms of the resolution and mentioning the possibility of an application to the Court to oppose the assistance will have to be published in a local daily newspaper;
- (ix) there must be no outstanding applications opposing the giving of financial assistance and the financial assistance must not be given either before the period allowed for applications to oppose the assistance expires, or before such applications have been withdrawn or dealt with by a court;



- (b) Sub-cl.205(11) provides that the Court on application by a company will be able to consider substantial compliance with Bill sub-cl.205(10) to be sufficient compliance;
- (c) Where a special resolution to give financial assistance has been passed by the company, or if appropriate, by the listed corporation or ultimate holding company, an application to the Court opposing the resolution will be able to be made within 21 days by members, trustees for debenture holders or creditors of the company, of a subsidiary company, or of the listed corporation or ultimate holding company (as the case may be ), or by the ASC;
- (d) Where a resolution to give financial assistance has been opposed, the Court will be required to have regard to the rights and interests of the members and creditors of the company and will not be able to approve the resolution unless it is satisfied that the company has disclosed all material matters and that the financial assistance would not unduly prejudice the interests of creditors or shareholders. The Court will be able to approve or disapprove the resolution and, if it thinks fit, make an order for the purchases by the company of the interests of dissentient members.

Cl.206 : Consequences of a company financing dealings in its own shares

738. This clause is based on CA s.130.

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

- (a) Bill para.205(1)(a);
- (b) Bill para.205(1)(b) unless the contract or transaction brings into being the acquisition or loan that constitutes the contravention;
- (c) Bill para.205(1)(c) unless the contract or transaction effects the loan that constitutes the contravention.

740. Where a company would, but for Bill sub-cl.206(1), have contravened Bill cl.205, the contract or transaction, or any related contract or transaction will be voidable at the option of the company by a notice in writing to the other party. This option will be subject to the remaining provisions of Bill cl.206.

741. Where the Court is satisfied on the application of the company or of any other person, that the company or that person has suffered, or is likely to suffer, damage as a consequence of the contract or transaction or any related contract or transaction being void by reason of Bill cl.206 or having become void or becoming void under Bill cl.206, the Court will be able to make such orders as it thinks just and equitable (including the orders for return of money or property, compensation or indemnification set out in Bill sub-cl.206(5) against any party to the contract, transaction, or related contract or transaction, or against any person who knowingly aided, was concerned in or party to the contravention. This provision will allow a party to apply to the Court before the company is able to avoid the contract or transaction under Bill sub-cl.206(2).

742. Bill sub-cl.206(6) to (13) deal with the giving to a person of a certificate of directors stating that Bill sub-cl.205(10) has been complied with in relation to an acquisition of shares. If this certificate is given to a person who relies on it, he is protected from an order of the

Court under Bill sub-cl.206(4) and the contract or transaction is not voidable under Bill sub-cl.206(2). However, the person is not protected by the certificate if he was aware prior to the contract or transaction that Bill sub-cl.205(10) had not been complied with. For the purposes of Bill sub-cl.206(7) a person is deemed to be aware of any matter of which his employee or agent having duties in relation to the contract or transaction is aware, unless that person can prove that he did not have personal knowledge of that matter. A person who signs a certificate which falsely states (as at the time the certificate was signed) that Bill sub-cl.205(10) has been complied with has committed an offence.

#### Division 5 - Register of Members

743. This Division of the Bill deals with the register of members and is based on CA Division 4 of Part V.

#### Cl.207 : Division not to apply to mutual life assurance companies.

744. This clause is the same as CA s.255.

745. Apart from the right given to members to inspect the register of members (Bill sub-cl.210(5)), the provisions of this Division relating to the register of members will not apply to a mutual life assurance company which complies with the requirements of s.140 of the Life Insurance Act 1945.

#### Cl.208 : Notices relating to non-beneficial and beneficial ownership of shares.

746. This clause is based on CA s.255A.

747. A shareholder will be required to disclose to the company details of the shares that he holds in a non-beneficial capacity. A non-beneficial capacity will include the situation where a person holds the shares as trustee or

nominee for, or otherwise on account of, another person (Bill sub-cl.208(9)). However, it will not be necessary to provide full details of the particular nature of the non-beneficial capacity in which the shares are held. All that is required in this respect is a statement that at the relevant time the shares were held non-beneficially.

748. The information will be required to be stated in all new transfers lodged for registration (Bill sub-cl.208(1)). Failure to include an appropriate notice in the transfer will constitute a contravention but will not affect the validity of the registration of the transfer (Bill sub-cl.208(2)).

749. Special provision will be made for further notice to be given within 14 days of the registration of the transfer, where a change in the non-beneficial shareholding notified in the transfer occurs after the transfer is lodged but before it is registered. This will occur where any share previously notified as being held in a non-beneficial capacity, becomes beneficially owned (Bill sub-cl.208(3)), or where more of the shares being transferred become held non-beneficially (Bill sub-cl.208(4)).

750. Notice will also have to be given where, at any other time a change occurs in the capacity in which particular shares are held, either from a beneficial to a non-beneficial capacity or vice versa (Bill sub-cl.208(5) and (6)). In such a case the notification of the change will have to be given to the company within 14 days of the change occurring.

751. In proceedings brought under this clause knowledge of an employee or agent acting in relation to the transfer or ownership of the shares will be imputed to the transferee or shareholder (Bill sub-cl.208(7)).

Cl.209 : Register and index of members

752. This clause is based on CA s.256.

753. A company will be required to keep a register of its members containing certain information relating to the shareholdings in the company (Bill sub-cl.209(1)). An unlisted company with a share capital will be required to state which shares are held in a non-beneficial capacity (Bill sub-cl.209(1)(b)).

754. Where an unlisted company notifies the ASC of the conversion of any of its shares into stock, it will be required to state in the register the stock which is held non-beneficially by a member (Bill sub-cl.209(3)(a)).

755. For the purposes of these provisions the joint ownership of shares by 2 or more persons will be deemed to constitute a single membership of the company (Bill sub-cl.209(4)).

756. The question of whether a member of an unlisted company holds shares beneficially or non-beneficially will be determined by having regard only to the information provided in respect of companies by the notification on transfer of shares of change of capacity required under Bill cl.208 or in a statement as to the beneficial ownership of shares furnished to the ASC under Bill Part 6.8 (Bill sub-cl.209(5), (6) and (7)).

757. A company with more than 50 members will be required to keep an index of the names of its members (Bill sub-cl.209(10) and (11)).

Cl.210 : Inspection and closing of register

758. This clause is based on CA s.257.

759. A company will be able to close the whole or part of its register of members for a limited period each year (Bill sub-cl.210(1)). The register will be required to be open for inspection by any member and by any other person on payment of a fee (Bill sub-cl.210(2)).

760. Copies of certain parts of the register will also have to be made available on payment of a fee (Bill sub-cl.210(3)).

Cl.211 : Consequences of default by agent

761. This clause is based on CA s.258.

762. An agent of the company who causes the company to contravene the requirements of the Bill in regard to the register of members will be liable to the same penalties as if he were an officer of the company.

Cl.212 : Power of Court to rectify register

763. This clause is based on CA s.259.

764. If there is an error in the register of members, the Court will be able, on the application of an aggrieved person, any member or the company, to order the rectification of the register of members.

Cl.213 : Trustee, etc, may be registered as owner of shares

765. This clause is based on CA s.260.

766. A trustee, executor or administrator of the estate of a dead or bankrupt person or of a person who is incapable, through physical or mental infirmity, of managing his affairs, will be able to be registered in that capacity as the holder of any legal or equitable interest in a company's shares held by that person (Bill sub-cl.213(1), (3), (4), (5), (6) and (7)). The trustees' etc. will be subjected to the same liabilities as those of the person on whose behalf he holds the shares (Bill sub-cl.213(8)).