

1988

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CORPORATIONS BILL 1988

CORPORATIONS (FEES) BILL 1988

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

SECURITIES EXCHANGES (MEMBERSHIP) FIDELITY FUNDS
CONTRIBUTION BILL 1988

SECURITIES EXCHANGES FIDELITY FUNDS BILL 1988

NATIONAL GUARANTEE FUND (REPORTABLE TRANSACTIONS)
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FUTURES ORGANISATIONS FIDELITY FUNDS LEVY BILL 1988

EXPLANATORY MEMORANDUM

VOLUME 2

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

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CHAPTER 4 - VARIOUS CORPORATIONS

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

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

1219. This Chapter consists of the following Parts :

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

Part 4.1 - Registration of Certain Bodies

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

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

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

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

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

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

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

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

Division 1 - Registrable Australian Corporations

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

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

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

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

Cl.341 : Application for registration

1230. This is a new provision.

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

- . the certificate of incorporation
- . constitution

- . directors
- . charges.

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

Cl.342 : Cessation of business etc.

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

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

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

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

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

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

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

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

Division 2 - Foreign Companies

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

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

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

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

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

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

(c) an unincorporated body that:

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

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

Cl.344 : Application for registration

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

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

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

Cl.345 : Appointment of local agent

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

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

Cl.346 : Local agent : how appointed

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

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

Cl.347 : Local agent : how removed

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

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

Cl.348 : Liability of local agent

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

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

Cl.349 : Balance sheets and other documents

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

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

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

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

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

Cl.350 : Cessation of business

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

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

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

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

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

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

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

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

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

(Bill sub-cl.350(14))

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

Cl.351 : Principal Australian register of foreign company

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

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

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

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

Cl.352 : Branch registers in Australia

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

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

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

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

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

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

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

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

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

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

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

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

Cl.355 : Effect of right to acquire shares compulsorily

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

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

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

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

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

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

Cl.357 : Certificate as to shareholding

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

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

Division 3 : Bodies Registered under this Part

Cl.358 : Names

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

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

Cl.359 : Registered Office

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

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

Cl.360 : Certificate of Registration

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

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

Cl.361 : Notice of certain changes

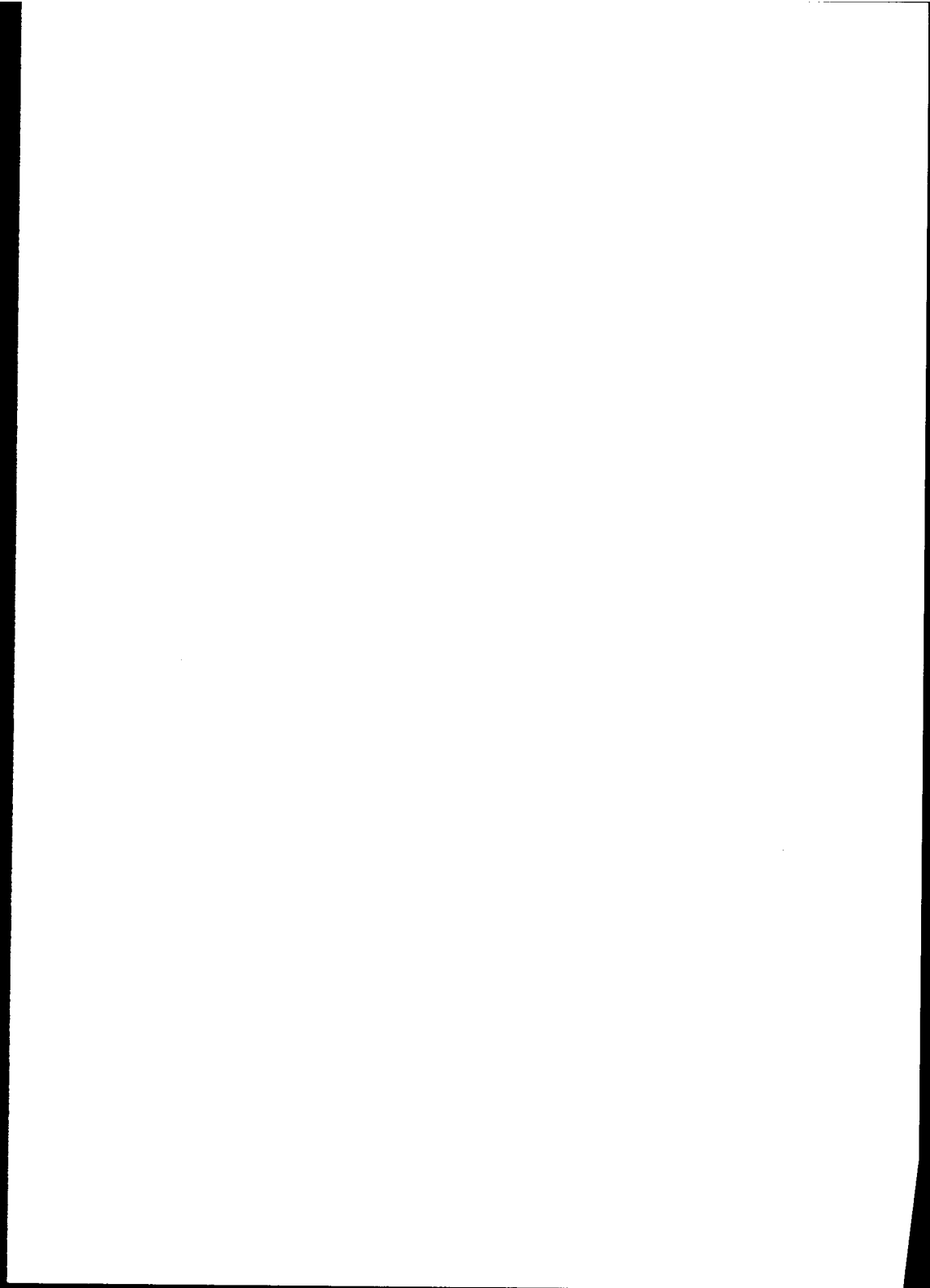
1293. This clause is based on CA s.515.

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

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

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

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



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

Cl.362 : Publication of name

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

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

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

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

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

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

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

Cl.363 : Service of documents on registered body

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

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

Cl.364 : Power to hold land

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

1303. A registered Australian corporation that is a

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

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

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

Cl.365 : Application of certain State and Territory laws

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

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

PART 4.2 : NAMES

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

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

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

- (c) It will be possible for a company to incorporate without a verbal name and be known by the registration number allocated to it by the ASC (see Bill cl.372).
- (d) All names are to be available provided that there are no identical names already reserved or registered and that no names declared by the Regulations to be unacceptable are used (see Bill cl.367).

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

Cl.366 : Interpretation

1310. This provision is new.

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

Cl.367 : Available names

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

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

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

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

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

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

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

Cl.368 : Names of particular classes of companies

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

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

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

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

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

Cl.370 : Use of word "Proprietary"

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

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

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

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

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

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

Cl.372 : Company with registration number as name

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

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

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

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

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

Cl.373 : Name of intended Division 1 company

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

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

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

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

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

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

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

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

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

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

Cl.375 : Proposed new name of company

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

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

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

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

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

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

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

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

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

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

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

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

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

Cl.378 : Applications under sections 373 to 382

1349. This provision is new.

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

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

Cl.379 : Extension of reservation

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

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

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

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

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

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

Cl.381 : Registration remains in force until cancelled

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

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

Cl.382 : Change of name

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

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

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

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

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

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

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

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

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

Division 2 of Part 2.2 as if the licence had been granted to that company by the ASC under Bill cl.383 (Bill sub-cl.383(1)).

PART 4.3 : NO LIABILITY COMPANIES

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

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

Cl.384 : Application of Act to no liability companies

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

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

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

Cl.385 : Shareholder not liable to calls or contributions

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

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

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

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

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

Cl.387 : Calls : when due

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

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

Cl.388 : Forfeiture of shares

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

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

Cl.389 : Provisions as to sale of forfeited shares

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

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

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

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

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

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

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

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

Cl.392 : Postponement of sale

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

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

Cl.393 : Redemption of forfeited shares

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cl.398 : Restrictions on tribute arrangements

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

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

PART 4.4 : INVESTMENT COMPANIES

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

Cl.399 : Interpretation

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

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

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

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

Cl.400 : Restriction on borrowing by investment companies

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

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

Cl.401 : Restriction on investments of investment companies

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

1408. An investment company will be prohibited from:-

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

Cl.402 : Restriction on underwriting by investment companies

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

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

Cl.403 : Special requirements as to articles and prospectus

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

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

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

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

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

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

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

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

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

Cl.405 : Investment company not to speculate in commodities

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

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

Cl.406 : Balance-sheets and accounts

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

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

Cl.407 : Investment fluctuation reserve

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

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

Cl.408 : Contraventions

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

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

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

Cl.409 : Australian banks and life insurance corporations

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

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

CHAPTER 5 - EXTERNAL ADMINISTRATIONPART 5.1 - ARRANGEMENTS AND RECONSTRUCTIONS

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

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

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

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

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

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

Cl.410 : Interpretation

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

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

Cl.411 : Power to compromise with creditors and members

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

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

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

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

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

1435. The draft explanatory statement will be required to:

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

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

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

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

(b) it is approved by the Court.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1449. This provision is based on s.317.

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

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

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

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

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

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

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

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

PART 5.2 : RECEIVERS AND MANAGERS

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

Cl.416 : Interpretation

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

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

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

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

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

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

Cl.417 : Application of Part

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

Cl.418 : Persons not to act as Receivers

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

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

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

Cl.419 : Liability of Receiver

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

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

Cl.420 : Powers of Receiver

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

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

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

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

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

Cl.422 : Reports by Receiver

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

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

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

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

Cl.423 : Supervision of Receiver

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

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

Cl.424 : Receiver may apply to Court

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

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

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

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

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

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

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

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

Cl.427 : Notification of Appointment of Receiver

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

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

Cl.428 : Statement that Receiver Appointed

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

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

Cl.429 : Provisions as to Information Where Receiver Appointed

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

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

Cl.430 : Receiver may Require Reports

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

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

Cl.431 : Receiver May Inspect Books

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

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

Cl.432 : Lodging of Accounts of Receiver

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

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

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

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

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

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

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

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

PART 5.3 : OFFICIAL MANAGEMENT

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

Cl.435 : Interpretation

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

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

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

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

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

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

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

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

Cl.438 : Power to adjourn meeting

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

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

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

1508. This clause is based on CA s.338

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

Cl.440 : Appointment of Committee of Management

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

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

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

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

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

Cl.442 : Effect of Resolution

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

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

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

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

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

Cl.444 : Stay of Proceedings

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

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

Cl.445 : Power to Extend Period of Official Management

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

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

Cl.446 : Extension of Period of Official Management

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

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

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

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

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

Cl.448 : Duties of Official Manager

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

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

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

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

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

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

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

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

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

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

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

Cl.452 : Certain Provisions Applicable to Official Management

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

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

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

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

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

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

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

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

Cl.455 : Lodgement of office copy of Court Order

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

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

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

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

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

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

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

Cl.457 : Notification that Company is under Official Management

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

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

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

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

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

PART 5.4 - WINDING UP BY THE COURT

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

Division 1 - Order for winding up

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

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

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

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

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

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

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

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

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

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

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

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

Cl.462 : Standing to apply for winding up

1559. This clause is based on CA 363.

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

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

(a) the ASC;

(b) the Minister;

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

(d) the company.

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

(a) the company;

(b) a creditor;

(c) a contributory

(d) a liquidator of the company;

(e) the ASC;

(f) an official manager of the company;

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

(h) the Insurance and Superannuation Commissioner.

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

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

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

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

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

Cl.465 : Commencement of Winding Up by the Court

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

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

Cl.466 : Payment of preliminary costs etc.

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

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

Cl.467 : Powers of Court on Hearing Application

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

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

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

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

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

Cl.469 : Application to be Lis Pendens

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

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

Cl.470 : Certain Notices to be Lodged

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

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

Cl.471 : Effect of Winding Up Order

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

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

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

Division 2 - Court-appointed Liquidators

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

Cl.472 : Power of Court to Appoint Official Liquidator

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

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

Cl.473 : General Provisions about Liquidators

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

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

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

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

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

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

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

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

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

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

Cl.476 : Preliminary Report by Liquidator

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

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

Cl.477 : Powers of Liquidator

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

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

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

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

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

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

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

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

Cl.480 : Release of Liquidators and Dissolution of Company

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

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

Cl.481 : Orders for Release or Dissolution

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

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

Division 3 - General Powers of Court

Cl.482 : Power to Stay or terminate Winding Up

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

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

Cl.483 : Delivery of Property to Liquidator

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

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

Cl.484 : Appointment of Special Manager

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

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

Cl.485 : Claims of Creditors and Distribution of Property

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

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

Cl.486 : Inspection of Books by Creditors and Contributories

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

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

Cl.487 : Power to Arrest Absconding Contributory

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

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

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

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

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