

Cl.642 : Offers not to contain certain conditions

1994. Subject to the clarifying measures mentioned below, this clause incorporates the requirements of CASA paras.16(2)(h) and (2)(j).

1995. A takeover offer is not to be made subject to a maximum acceptance condition ie a condition that allows an offer to lapse if more than a specified number or percentage of acceptances are received. To make it clear that minimum acceptance conditions are permitted in takeover offers and are not unintentionally prohibited by a possible interpretation of the current section's wording, sub-cl.642(4) and (5) specifically exclude such conditions from the operation of sub-cl.642(1) and (2).

1996. Sub-cl.642(6) serves the same purpose as CASA sub-s.16(2AE) in declaring the identified Companies and Securities Law Review Committee document as a relevant document for interpretation purposes.

Division 2 - Part A Statements and Takeover OffersCl.643 : Additional matter in Part A statement

1997. This clause is to the same effect as CASA sub-s.16(3).

1998. Such additional information as the offeror thinks fit can be included in a Part A statement (i.e. in addition to that required by cl.750) provided it is not false in a material particular or materially misleading. This provision is in line with cl.704 dealing with liability for mis-statements.

1999. The requirements of CASA para.16(2A)(a) relating to additional matters and reports to be set out in Part A statements in certain prescribed circumstances are now

contained in cl.750 (Part A, cl.18). The requirements of CASA para.16(2A)(b) have not been included in the Bill because they are not consistent with the reform to discontinue detailed pre-registration vetting of Part A statements by the ASC.

Cl.644 : Registration of Part A statements and offers

2000. This clause is based on CASA s.18 but differs in the following significant respects.

2001. CASA required a copy of the Part A statement and of one of the offers to which it relates to be registered by the ASC not later than 21 days before the Part A statement is served on the target company. This requirement is preserved in sub-cl.644(1) but the reference to Part A statement has been amended to refer to a "statement that purports to be a Part A statement". This removes an existing anomaly in the legislation in that a Part A statement was defined (and still is - cl.603) as a written statement that complies with the requirements of the legislation. Accordingly, on a strict literal interpretation, any of the provisions operating on "Part A statements" would not apply in the case of a defective Part A statement. Such an interpretation was rejected in Target Petroleum NL v. Pretroz NL, (1987) 5 ACLC, 687, but the opportunity has been taken to put the matter beyond doubt. This approach also coincides with the treatment of Part A statements in CASA sub-s.44(1).

2002. Where the statement appears to have been duly signed by the offeror and, where reports are included in the statement, notices are signed by the makers of reports consenting to their inclusion in the form and context in which they appear in the statement, the ASC is required to register the copies (sub-cl.644(2)). If these formal requirements are not satisfied, the ASC must refuse registration (sub-cl.644(3)). If by 5.00pm on the day after the copies were lodged the ASC has neither registered nor refused registration the copies shall be deemed to be registered (sub-cl.644(4)).

2003. These provisions reflect a different approach to registration of Part A statements. Under the CASA regime the NCSC was not permitted to register the copies unless it was satisfied that the documents complied with the requirements of the Act and did not contain any false or misleading material. Such a requirement required detailed pre-registration vetting of Part A statements and has proved to be a resource intensive exercise and, in contested bids, has often given rise to litigation against the Commission.

2004. Persons responsible for omissions or false or misleading statements in Part A statements and other offer documents will still be subject to criminal and civil liability (see cl.704). These sanctions and remedies, in conjunction with the general prohibition on misleading or deceptive conduct in cl.995 of the Securities Chapter, are considered sufficient safeguards.

2005. As in CASA sub-s.18(3), an unregistered statement served on a target company shall be deemed not to have been served (sub-cl.644(5)).

Cl.645 : Extension of time for paying consideration

2006. This clause is to the same effect as CASA s.19.

2007. The offeror will continue to be able to apply to the ASC for an extension of time for payment of the consideration which is required by the terms of the offer to be paid (see sub-cl.638(7) which provides a basic maximum of 30 days after acceptance). If the ASC fixes a later time for payment the offeror must ensure that payment is made by that time (sub-cl.645(3)). Any application for an extension must be made before the time specified in the offer has expired.

Cl.646 : Notice of offers to be served

2008. This clause is to the same effect as CASA s.24.

2009. Where takeover offers are sent, the offeror must notify the target company accordingly and, if it is a listed company, its home stock exchange on the day on which the last offer is sent. A copy of that notice must be lodged with the ASC (para.646(1)(c)). The notice and the copy lodged with the ASC must be accompanied by a copy of one of the offers and a copy of every document that accompanied that offer (sub-cl.646(2)).

Division 3 - Part B Statements

Cl.647 ; Part B statement

2010. This clause is to the same effect as CASA s.22.

2011. The target company must respond to a bid under a takeover scheme by preparing a Part B statement which complies with Part B of cl.750. The Part B statement must be given to the offeror:

- either within 14 days of receiving the Part A statement (in which case the offeror has to send copies of the Part B statement out with its offer documents - see cl.639).
- or within 14 days after the day it was advised under cl.646 that the last offer has been sent (in which case the target company must copy the Part B statement to all offeree shareholders).

2012. The details required for a Part B statement are set out in Part B of cl.750.

2013. In addition, the Part B statement:

- (a) must be signed as prescribed (sub-cl.647(2));

- (b) must not refer to an expert's report unless the report is set out in the statement and the expert has given his consent for the inclusion of the report (sub-cl.647(3));
- (c) must be copied to the ASC and to each "notifiable securities exchange" of the company along with a copy of every accompanying document. In addition, the company making the Part B must lodge with the ASC a notice of consent by the author(s) of any accompanying report (sub-cl.647(4)). (Note that the provision refers to a statement that purports to be a Part B statement);
- (d) may contain additional material not required in cl.750 provided it is not false or misleading (sub-cl.647(5)).

2014. (The provisions in cl.647 are similar to those in cl.683 of the Bill which deals with the Part D statement that a target company has to prepare after it has received a Part C statement from an on-market offeror).

Cl.648 : Offeror connected with target company

2015. This clause is the same effect as CASA s.23 (except sub-s.23(2A) discussed below).

2016. Where an offeror holds 30% or more of, or of a class of, voting shares in a target company or the offeror is a director of the target or the offeror and target company have common directors, the Part B statement must be accompanied by a report on the fairness and reasonableness of the offer by an independent expert (sub-cl.648(1)). Particulars must be given in the report of any relationships or interests that might affect the expert's ability to give an unbiased opinion (sub-cl.648(2)). To prevent selective use of reports each

report must be attached to the Part B statement where the target company obtains more than one report (sub-cl.648(3)).

2017. The requirements of CASA sub-s.23(2A) are not contained in the Bill because they are not consistent with the reform to remove the necessity for Commission consent to a profit forecast or asset revaluation (the requirements of CASA ss.37 and 38 are not included in the Bill).

Division 4 - Effect of Offers in Special Circumstances

Cl.649 : Acquisition by third party of shares subject to takeover offer

2018. This clause is to the same effect as CASA s.25.

2019. Takeover offers under full or proportional takeover schemes are extended to all persons registered or entitled to be registered during the offer period as the holder of shares to which the offer relates. This covers the situation where third parties buy shares during a bid or have previously purchased shares but are not yet on the register. The offeror is taken to have made a corresponding offer to the third parties in relation to the purchased shares and a corresponding offer to the original shareholder in relation to any remaining shares that were not sold. The original offers are deemed to have been withdrawn.

Cl.650 : Acceptance of takeover offers by trustees, nominees etc.

2020. Except in relation to the reform noted below, this clause is to the same effect as CASA s.25A.

2021. Amendments were made to CASA in 1986 to ensure that a nominee or trustee could accept or reject a takeover offer under both full and proportional takeover schemes according to

the differing interests of each of the underlying beneficial shareholders. Previously a takeover offer made to a nominee or trustee could only be accepted in relation to the whole of the nominee's or trustee's holding. An offer to a nominee or trustee is deemed by CASA s.25A to be a separate offer in respect of each distinct part of the shareholding. While this provision has been restructured for the purposes of simplification and clarification the effect of cl.650 remains substantially the same.

2022. A trustee will continue to have the capacity to accept offers on behalf of different beneficiaries provided he gives the offeror notice that the shares he holds consist of distinct portions and acceptances relate to a specified number of shares for each portion (sub-cl.650(3)). A trustee will contravene the section if he accepts an offer in relation to shares that do not constitute a distinct portion but this will not affect the validity of the acceptances (sub-cl.650(4)).

2023. An extension has, however, been made to the CASA s.25A provisions. Under that section, a trustee or nominee only has one opportunity in the takeover period to notify the offeror of aggregate acceptances by the beneficial holders. Clause 650 allows a trustee or nominee etc. to accept progressively through the offer period in respect of those distinct portions for which he has instructions. In other words, it is not a one-off opportunity to accept in aggregate.

Cl.651 : Avoidance of odd lots where takeover offer relates to proportion of offeree's shares

2024. This clause is to the same effect as CASA s.25B.

2025. The provision in CASA was introduced to ensure that the acceptance of a proportional takeover offer did not leave a shareholder holding an odd lot of shares. This was achieved

by deeming the percentage specified in the offer to include any odd lot. Clause 651 retains this concept.

Cl.652 : Offeror not entitled to bid for balance where takeover offer relates to proportion of offeree's shares.

2026. This clause is to the same effect as CASA s.25C.

2027. It makes clear that where any offer had been made for a particular proportion of shares held by offerees any further offers for any of the remaining shares by the offeror would be deemed to have been made otherwise than under a takeover scheme.

Division 5 - Withdrawal and Variation of Offers

Cl.653 : Withdrawal of offers

2028. This clause is to the same effect as CASA s.21.

2029. A takeover offer may only be withdrawn with the written consent of the Commission which may be made conditional. This provision guards against discrimination and unfairness associated with withdrawals of offers.

Cl.654 : Circumstances in which offers may be varied.

2030. This clause is to the same effect as CASA sub-ss.27(1), (2) and (3).

2031. An offer can only be varied in accordance with the requirements of the Division, the regulations or with the written consent of, and subject to conditions imposed by, the Commission (sub-cl.654(1)). Variations to one offer under a takeover scheme have to be repeated in every other offer under the scheme (sub-cl.654(2)).



Cl.655 : Variation of consideration

2032. This clause is to the same effect as CASA sub-ss.27(4), (5), (6) and (7).

2033. Consideration specified in an offer may only be varied in accordance with cl.655, which generally ensures that any variation does not disadvantage offerees. The consideration offered may be increased, or a cash sum may be included as an alternative to non-cash consideration previously offered (sub-cl.655(1) and (3)). If consideration in an offer is so varied, the benefits are also to be given to offerees who accepted prior to the variation being made (sub-cl.655(2) and (4)).

Cl.656 : Variation of offer period

2034. This clause is to the same effect as CASA sub-ss.27(8), (8A) and (9).

2035. An offer may be extended by an offeror before the end of an offer period or, if the offer is subject to a "defeating condition" as defined in cl.603, before the publication of a notice under sub-cl.663(4) (sub-cl.656(1)). The offer period including extensions cannot, however, exceed 12 months. A condition specified by the Commission in a consent under cl.653 overrides this provision (sub-cl.656(2)).

Cl.657 : Manner of varying offers

2036. Except in regard to the change effected by sub-cl.657(3), this clause is to the same effect as CASA sub-ss.27(10) and (11).

2037. Sub-clause 657(1) sets out the requirements for the notice of variation to be served on the target company by the offeror when an offer is varied. Each offeree, subject to

sub-cl.657(3) discussed below, must receive a copy of the notice. Where a variation results in an offer exceeding 6 months, the offeror must within the sixth month of the offer serve a notice on the target company indicating any changes necessary to update the information included in the original Part A statement and send a copy of the notice to each offeree and to each "notifiable securities exchange" (see cl.603) of the target (sub-cl.657(2)).

2038. Sub-clause 657(3) provides that notices under 627C(1) and (2) need not be served on those persons who have accepted an offer if the variation relates only to an extension of the offer period and the offers are not subject to a defeating condition when notices are served on the target company i.e. where binding contracts have already resulted. This is a new provision designed to remove an unnecessary requirement.

Cl.658: Effect of variation on offeree who has accepted offer

2039. This clause is to the same effect as CASA sub-s.27(12).

2040. An offeree, who has accepted a takeover offer subject to a defeating condition, may withdraw his acceptance if notified of a variation which allows the offeror to defer payment by more than one month. Para 658(a) prescribes the method of withdrawal by the offeree (notice to the offeror and return of consideration). Upon such withdrawal any documents supplied by the offeree as a result of the previous acceptance of the offer should be returned (para.658(b)).

Cl.659: Registration of notices of variation

2041. Subject to the reform identified below, this clause is based on CASA sub-ss.27(13), (14) and (15).

2042. Notices under cl.657 have to be registered by the ASC before they can be served by an offeror (sub-cl.659(1)) and

the requirements for registration are set out in sub-cl.659(2). Under CASA sub-s.24(14) the NCSC was required, before it could register a variation, to be satisfied that the variation did not contain false or misleading material. The ASC, under sub-cl.659(2), will only need to be satisfied that, in the case of variation in the consideration, the variation is permitted by the section and, in all cases of variation, the notice is properly signed. These changes are consistent with the reform in cl.644 which no longer requires the ASC to engage in detailed vetting of Part A statements before registration.

2043. A statement is to appear on notices under cl.657 that a copy has been registered by the Commission on a specified date and that the Commission takes no responsibility as to the contents of the notice (sub-cl.659(3)).

Cl.660: Acquisition not affected by contravention

2044. This clause is to the same effect as CASA sub-s.27(16).

2045. An acquisition of shares resulting from acceptance of a takeover offer is not invalidated where the offeror has purported to vary the takeover offer but a contravention has occurred.

Cl.661: Section 645 not affected

2046. This clause is to the same effect as CASA sub-s.27(17).

2047. The operation of s.645 is not affected by any provision in Division 5.

Division 6 - Conditional Offers and Contracts

Cl.662: Takeover offers not to be subject to certain terms or conditions.

2048. Sub-cl. 662(1), (3), (4), (5) and (6) are to the same effect as CASA s.20. Subject to the reform identified below, sub-cl.662(2) is based on CASA sub-s.18(2A).

2049. An offeror is prohibited from making a takeover offer that requires the offeree's approval to a payment to an executive of the target or related company as compensation for loss of office and any such requirement is void (sub-cl.662(1)).

2050. Offerors must not include defeating conditions in takeover offers where their fulfilment depends on an opinion, belief or other state of mind of the offeror or an associate or whether an event, within the sole control of the offeror or an associate, happens. Such conditions are void (sub-cl.662(2)). As noted, this sub-clause is based on CASA sub-s.18(2A). However, whereas that provision provided the NCSC with a discretion to refuse registration, sub-cl.662(2) prohibits and voids the offending conditions. This reform is consistent with the reform in cl.644 which no longer requires the Commission to engage in detailed pre-registration vetting of Part A statements and offers.

2051. Minimum acceptance conditions are void unless the particular number or percentage of shares or offers is specified in the offer (sub-cl.662(3) and (5)) and provisions that allow that number or percentage to be varied are void (sub-cl.662(6)).

Cl.663: Declaration where takeover offers are conditional

2052. This clause is to the same effect as CASA s.28.

2053. An offeror cannot declare that a takeover offer subject to a defeating condition is free of the condition unless it is done in accordance with cl.663. It may be done not less than 7 days before the last day of the offer period (where such a term is contained in the offer) provided that, at the same time, all other offers under the takeover scheme are freed from the condition (sub-cl.663(2)). If all offers are freed from a defeating condition the offeror must as soon as practicable publish this fact in a notice that must also specify the offeror's share entitlement in the target company (sub-cl.663(3)). The offeror must also publish, within the second last week of an offer period, a notice indicating whether the offer was free from the condition and whether the condition had at that time been fulfilled (sub-cl.663(4) and (5)), and if so, the offeror's share entitlement should be included in the notice (sub-cl.663(6)).

2054. If, by the end of the offer period, the offeror has not declared the offer unconditional, the offer has not otherwise become free from the condition (see cl.664(2)) and the condition has not been fulfilled, then all acceptances are void (sub-cl.663(9)).

2055. Notices must appear in a newspaper circulating in each State or Territory where the target company is listed (sub-cl.663(7)) and a copy of the notice must be lodged with the ASC and the company's home stock exchange when the notice is lodged for publication (sub-cl.663(8)).

#### Division 7 - Effect of Outside Acquisitions

##### Cl.664: Effect on conditional offers

2056. This clause is to the same effect as CASA s.30.

2057. While an offeror who has made a takeover offer is entitled to buy shares outside his offer (i.e. on-market under

cl.620), if his takeover offer has a minimum acceptance condition and he acquires outside his offer more than 20% of the voting shares in the company to which he was not entitled, the offer is free from that minimum acceptance condition (sub-cl.664(1) and (2)). If the purchases outside the offer are not sufficient to make the offers unconditional (i.e. they don't exceed 20%), they will stand to be counted in determining whether the minimum acceptance condition is fulfilled (sub-cl.664(3)) - though not for the purpose of determining the number of offers that have been accepted (sub-cl.664(4)).

2058. The purpose of the remaining provisions in Division 7 are to ensure that an offeror must pay all offerees, including those who have already accepted at the lower price in the offer, the highest price that he has paid for a permitted share acquisition outside the takeover scheme. This means that persons who accept under a takeover offer get the same benefits as those who sell direct or through the market to the offeror while the offer is open. As associates are not given the right to purchase on the market under cl.620 in circumstances that would otherwise be a breach of cl.615, it is not considered reasonable that the price they pay should affect the price that the offeror is obliged to pay under Division 7.

Cl.665: Effect on offers

2059. This clause is to the same effect as CASA sub-s.31(1).

2060. Where an offer is for cash (alone or as one alternative) and the offeror purchases for cash outside his offer, the offer price is deemed to be varied to the highest price so paid.

Cl.666: Effect on contracts

2061. This clause is to the same effect as CASA sub-s.31(2).

2062. Where an offeree has already accepted the offer, the contract is deemed to be varied so that the offeree is entitled to receive the highest amount paid by the offeror and is entitled to receive immediately the additional consideration resulting from the variation.

Cl.667: Notice to offerees where cash not the sole consideration

2063. This clause is to the same effect as CASA sub-ss.31(3) and (5).

2064. Where the consideration under an offer is not solely cash, the offeror has 14 days after the offer period to notify the offeree of the highest cash price paid outside the offer and that the offeree has the option of accepting, with 28 days, that highest cash price paid or the original consideration under the offer. If the offeree elects to accept the cash offer, he is entitled to receive that amount immediately, or if he has already received the original non-cash consideration, immediately on returning that consideration to the offeror (sub-cl.667(1) and (2)). Where an offeree returns to a company any certificates and any necessary documents of transfer in respect of shares allotted by that company as consideration, the company may cancel the allotment of those shares (sub-cl.667(3)).

Cl.668: Notice to offerees where cash consideration to constitute a loan

2065. This clause is to the same effect as CASA sub-s.31(4).

2066. Similar option provisions to cl.667 apply where offers involving solely a cash sum have been accepted and it is a term of the contract that the offeree use all or part of the cash consideration as a deposit or a loan. The offeree, if he so elects, is entitled to receive the substituted higher amount immediately (which is not subject to the above term) but is required as soon as practicable to return to the offeror any received consideration and any documents evidencing payment of a deposit or loan. Any debts due to the offeree arising from such a deposit or loan are discharged upon payment of the substituted amount to the offeree (sub-cl.667(2)).

#### Division 8 - Takeover Approval Conditions

2067. Amendments to CASA were made in 1986 (ss.31A and 31B were added) to enable a company to have provisions in its constituent documents permitting it to refuse to register shares acquired under a proportional takeover scheme unless a resolution has been passed by the shareholders. These provisions are also contained in the Bill.

#### Cl.669: Definitions

2068. This clause contains the same definitions of "relevant day" and "takeover approval provisions" as are in CASA sub-s.31A(1). The definition of "renew" has been adopted from CASA sub-s.31B(1).

#### Cl.670: Effect of Division

2069. This clause is to the same effect as CASA sub-s.31A(8).

2070. Division 7 applies regardless of any business or listing rules of a securities exchange or anything contained in the constituent documents of a company or in any agreement.



Cl.671: Constitution may contain takeover approval provisions

2071. This clause is to the same effect as CASA s.31A(2)-(7).

2072. The constitution of a company may contain provisions prohibiting registration of a transfer resulting from the acceptance of an offer under a proportional takeover scheme unless and until an approving resolution, on which the offeror or his associates are not entitled to vote, is passed (sub-cl.671(1)).

2073. Other features of cl.671 are as follows:

- (a) Unless the company's constitution otherwise provides, the laws and articles etc. that apply in relation to a general meeting of the company will apply to a meeting of shareholders convened to vote on the resolution (sub-cl.671(2)).
- (b) Where the company's constitution contains takeover approval provisions, the directors are obliged to hold a meeting or postal ballot to vote on the partial bid at least 14 days before the close of the offer period (sub-cl.671(3)).
- (c) Where the company's constituent documents contain takeover approval provisions and no resolution to approve a partial bid has been voted on 14 days before the close of the offer period, a resolution approving the bid will be deemed to have been passed (sub-cl.671(5)).
- (d) Where a resolution is rejected, all offers will be deemed to be withdrawn and the offeror will be required to rescind any accepted offers (sub-cl.671(6)).

Cl.672 : Provisions relating to the inclusion, effect and renewal of takeover approval provisions

2074. This clause is to the same effect as CASA S.31B.

2075. Takeover approval provisions referred to in cl.671 will cease to have effect after 3 years or such lesser time as the company's constitution provides (sub-cl.672(1)).

2076. Other features of cl.672 are as follows:

- (a) Takeover approval provisions will be able to be renewed (sub-cl.672(2)).
- (b) A company will be required to provide an explanatory statement (setting out various matters including the effects, advantages and disadvantages of the provisions) where a resolution to include a takeover approval provision in the company's constituent documents is despatched to shareholders (sub-cl.672(3)).
- (c) 10% of the shareholders will be able to apply to the Court to have a takeover approval provision set aside (sub-cl.672(4) and (5)).
- (d) The Court has a discretion to set aside the takeover approval provision (sub-cl.672(6)).

PART 6.4 - TAKEOVER ANNOUNCEMENTSIntroduction

2077. The second form of takeover permitted by this Chapter is the acquisition of shares in a listed company through announcement to the home exchange of the target company of an unconditional undertaking to stand in the market during a minimum period of one month and to accept all shares tendered at or above the specified minimum cash price.

Division 1 - Offers Constituted by AnnouncementCl.673 : Nature of offers

2078. This clause is to the same effect as CASA sub-s.17(1).

2079. This clause describes the nature of the manner of making takeover announcements under the cl.617 exemption to the prohibition in cl.615. The offers must be made in accordance with the Division, and all requirements of the Division complied with.

Cl.674 : Making of announcement

2080. This clause, except in relation to the reform identified below, is to the same effect as CASA sub-ss.17(2) and (3).

2081. A takeover announcement is made on the offeror's behalf by an "appropriate dealer" (see cl.603) at a "relevant official meeting" of the exchange (also defined in cl.603). Under CASA, takeover announcements could only be made in respect of companies listed on the main board of the Australian Stock Exchange Ltd. Clause 674, by virtue of the definitions of "listed company", "home stock exchange" and "relevant official meeting" in cl.603, extends the takeover announcement alternative to companies listed on the second

board of ASX Ltd subsidiary exchanges and to companies included in the official list of other exchanges.

2082. The announcement provides that the dealer, during the trading period (a minimum of 1 month) will acquire all shares in the offer class at the price specified in the announcement. The trading period commences 14 days after the announcement (sub-cl.674(1)).

2083. Separate announcements are required for each class of share.

2084. Except with the consent of the ASC, this on-market alternative will not be available where the offeror holds 30% or more of the target company. This avoids collusion from common shareholdings (sub-cl.674(2)).

Cl.675E : Acceptance of offers

2085. This clause is to the same effect as CASA sub-ss.17(2A) and 17(5).

2086. A holder of shares will be able to accept an offer under a takeover announcement at a "relevant official meeting" of the exchange or by notice served on the exchange itself (sub-cl.675(1)). This latter alternative ensures that the unconditional nature of the offer is not prejudiced by such events as a dealer not appearing on the floor or suspension of trading in the shares.

2087. The stock exchange must notify the dealer of the acceptances as soon as practicable (sub-cl.675(2)).

Cl.676 : Price to be specified

2088. This clause is to the same effect as CASA sub-ss.17(6) and 17(7).

2089. The price specified in the announcement must not be less than the highest price paid by the offeror (or an associate) in the four months preceding the announcement (sub-cl.676(1)). The price originally specified in a pre-bid agreement is the price payable for the shares for the purposes of sub-cl.676(1), regardless of any variation subsequent to the making of the agreement (sub-cl.676(2)).

Cl.677 : Acquisitions at higher price

2090. This clause is to the same effect as CASA sub-ss.17(8) and (9).

2091. If the offeror has acquired some shares on a stock exchange outside the takeover announcement under cl.620 at a price higher than the announced price, then the higher price paid will be deemed to be the price specified in the announcement for the purposes of any offer that is accepted after the acquisition takes place (sub-cl.677(2)).

2092. The offeror cannot acquire shares at a higher price during the last five trading days that the offer remains open (sub-cl.677(3)). This provision is designed to overcome the problems that could arise from a last minute price rise which, because of the time constraint, would be available to only a limited number of offerees. However, if a rival bid is made in this period the offeror will be able to extend the offer period, and so pay a price higher than that of the rival, to the benefit of the shareholders (see sub-cl.681(3)).

Cl.678 : Offer period

2093. This clause is to the same effect as CASA sub-s.17(4).

2094. There is no right of withdrawal on grounds other than those set out in cl.684. All shares tendered during the trading period of one month or the extended period under sub-cl.681(3) must be accepted.

Cl.679 : Part C statements

2095. This clause is to the same effect as CASA sub-ss.17(10) and (17).

2096. On the day of the announcement, the offeror must provide the target company with a Part C statement and, the target company's home stock exchange and the ASC with a copy of that statement. The Part C statement must be signed in the prescribed manner. This statement contains information similar to that required to be provided in a Part A statement involving cash consideration. Within fourteen days of the announcement copies of the statement must be sent in the approved manner to each shareholder (sub-cl.679(1)).

2097. Information additional to that required in Part C of cl.750 may be included in the statement provided it is not false or misleading (sub-cl.679(2)).

Cl.680 : Service on Commission of copies of documents accompanying offers

2098. This is an additional provision to those contained in CASA.

2099. It provides that all documents sent to shareholders with a Part C statement should be lodged with the ASC. This ensures the ASC is aware of all information given and statements made to shareholders.

Cl.681 - Variation of offers

2100. Subject to the reform identified below in sub-cl.681(3), this clause is to the same effect as CASA sub-ss.17(11), (12) and (13).

2101. The announcement price may be reduced with the consent of the Commission (rather than a fresh offer being made) where the target company allots shares, grants options, issues convertible notes or declares a dividend (sub-cl.681(1)). Any reduced price allowed is deemed to be the price specified in the announcement unless or until the price is increased (sub-cl.681(2)).

2102. The trading period can be extended for a period of up to one month at a time, but so that the total period for which the offer remains open does not exceed six months (sub-cl.681(3)). Whereas CASA did not allow an offeror to increase the price or extend the takeover period during the last 5 trading days of the offer period, para.681(3)(b) provides that an offeror can extend the offer period during the last 5 days ("the closing phase" - see cl.603) if a counter bid is made. This enables the offeror to effectively respond to the counter bid.

2103. Where the price is reduced or the period varied, the offeror must notify the home stock exchange, the company and the Commission (sub-cl.681(4)).

#### Cl.682 : Liability of dealers

2104. This clause is to the same effect as CASA sub-ss.17(15) and (16).

2105. The obligation pursuant to the takeover announcement to acquire shares in respect of which acceptances are received is placed on the dealer actually making the announcement (the dealer is deemed to have contracted as principal with the acceptors). This clause does not, however, affect the rights or obligations as between the dealer and the offeror.

2106. Where the dealer is a member of a dealing partnership, the obligations placed on the dealer are also deemed to be the

obligations of the other members of the partnership  
(sub-cl.682(2)).

Division 2 - Response of Target Company

Cl.683 : Part D statement

2107. This clause is to the same affect as CASA s.32.

2108. Where a target company has received a Part C statement, it must serve on its home stock exchange a Part D statement within 14 days of the making of the takeover announcement (sub-cl.683(1)). The detailed requirements for a Part D statement are set out in Part D of cl.750.

2109. In addition, the Part D statement:

- (a) must be signed in the prescribed manner  
(sub-cl.683(2));
- (b) must not refer to an expert's report unless the report is set out in the statement and the expert has given his consent for the inclusion of the report  
(sub-cl.683(3));
- (c) must be copied, together with any other document accompanying it, to the ASC and the offeror  
(sub-cl.683(4)); and
- (d) may contain additional material to that required by cl.750 provided it is not false or misleading  
(sub-cl.683(5)).



Division 3 - Withdrawal and Suspension of Offers

Cl.684 : Withdrawal of offers

2110. This clause is to the same effect as CASA s.33.

2111. Clause 684 seeks to ensure that on-market offerors are not unduly disadvantaged because of the unconditional nature of the offer to stand in the market for a fixed period by permitting the withdrawal of the on-market offer (in respect of such of the offers as have not at that stage been accepted) in the following circumstances:

- (a) if certain "prescribed occurrences" (defined in cl.603) take place in relation to the target, or one of its subsidiaries, which would make continuation of the takeover intolerable for the on-market offeror. Withdrawal on this basis is not however possible once the offeror has attained a majority (50%) shareholding in the target company (sub-cl.684(2)).
- (b) if the offeror's own position is affected by certain events: bankruptcy, mental incapacity or death in the case of a natural person (sub-cl.684(3)) or official management, winding up or the appointment of a provisional liquidator in the case of a body corporate (sub-cl.684(4)).
- (c) if the dealer's position is affected by any of the following events:
  - (i) bankruptcy;
  - (ii) a direction from the governing body of the dealer's exchange to cease to carry on the business of dealing in securities; and

(iii) in the case of a sole trader: death or mental incapacity.

(sub-cl.684(5)).

(d) if the Commission consents to the offeror or the dealer so doing, in which case an announcement to that effect is made on the relevant exchange  
(sub-cl.684(7)).

Cl.685 : Suspension of acceptance of offers made under take over announcement

2112. This clause is to the same effect as CASA s.34.

2113. Acceptance of offers is suspended if the Commission grants an order, on the application of the offeror or the dealer who made the announcement on behalf of the offeror, declaring that those offers that have not been accepted are not capable of being accepted while the order is in force (sub-cl.685(1)). Such an order does not have the effect of extending the offer period (sub-cl.685(2)).

PART 6.5 - PROVISIONS RELATING TO BOTH TAKEOVER OFFERS AND  
TAKEOVER ANNOUNCEMENTS

Introduction

2114. Part 6.5 of this Chapter contains provisions which apply to both takeover offers under a takeover scheme (cl.634) and takeover announcements (cl.673) conducted under this Chapter.

2115. The provisions of this Part generally follow those in CASA Part V. However, provisions equivalent to CASA ss.37 and 38 have not been included in this Part or elsewhere in the Bill. Accordingly, the particular persons who under CASA had to obtain Commission consent to profit forecasts or asset revaluations in takeover situations will no longer need to obtain that consent. The decision as to whether profit forecasts or asset revaluations are accurate is one best left to the market which will discount any such statements which are inaccurate. Liability will still, however, attach to persons making any such statements which are false or misleading (cl.704). In addition, cl.995 of the Securities Chapter contains a general prohibition on misleading or deceptive conduct which is intended to apply to, amongst other things, takeover-related conduct.

Division 1 Restrictions on Offerors

Cl.686: Restrictions on disposal of shares by offeror

2116. This clause is to the same effect as CASA s.35.

2117. An offeror will be prohibited from disposing of shares, after the offeror's Part A statement has been served or the offeror's takeover announcement has been made, for the duration of the offer, unless a rival bid is made.

Division 2 - Notification of Acquisitions and Disposals of  
Shares in Listed Companies

Introduction

2118. During the course of a takeover of a listed company (defined in cl.603), the offeror will be required to keep each "notifiable securities exchange" (defined in cl.603) of the target company informed on a daily basis of details of any dealings in the shares. Any person who holds 5% or more of the shares of the target company at any time during the relevant period must notify the home securities exchange if the holding is varied by 1% or more. This Division provides for the availability to the market of this relevant information.

Cl.687: Periods in respect of which notification to be given

2119. This clause is to the same effect as CASA para 39(1)(a).

2120. It sets out the periods during which the notification requirements apply. They are the periods in which takeover offers remain, or are required to remain, open.

Cl.688: Persons by whom notification to be given

2121. This clause is to the same effect as CASA para.39(1)(b).

2122. It sets out the persons to whom the notification requirements apply. These are the offeror and any person, apart from the offeror or the offeror's associates, who is entitled to more than 5%, or such lesser amount as prescribed, of the voting shares of the target company.

Cl.689: Notifications by offeror

2123. This clause is to the same effect as CASA sub-s.39(2).

2124. An offeror must give each notifiable securities exchange of the target company, by 9.30am on the day after the commencement of the offer period, a notice indicating any change in entitlement of the offeror since the start of the offer period and whether he is entitled to any shares at the time of the notice. ("Notifiable particulars" are set out cl.693). After this notice, the offeror must give similar daily advice to the notifiable securities exchanges of details of any change in entitlement (para.689(b)).

Cl.690: Notifications by other persons acquiring more than 5% shareholding

2125. This clause is to the same effect as CASA sub-s.39(3).

2126. A person who becomes entitled to more than 5% of the shares during the offer period will also be required to notify the relevant exchange of particulars of the holding and of his entitlement at the time of service of the notice.

Cl.691: Notification by persons ceasing to hold more than 5% shareholding

2127. This clause is to the same effect as CASA sub-s.39(4).

2128. A person who has been required to notify, because that person holds more than 5%, of the company but who reduces that entitlement to below 5% must notify the relevant securities exchange of the target company, again before 9.30 am on the day after the change, of the changes in entitlement which resulted in the reduction of the holding below the 5% level, and of any changes in the entitlement since last giving notice.

Cl.692: Notification of changes in shareholdings exceeding 1% by persons with more than 5% shareholding

2129. This clause is to the same effect as CASA sub-ss.39(5) and (8).

2130. A person entitled to more than 5% of the voting shares in a company must notify the required details of changes in that entitlement only where the nett fluctuation in that entitlement since the last notice is 1% or more of the number of voting shares in the company.

2131. Only one person need give such a notice (sub-cl.692(3)), so associates of the person who notifies need not also notify the relevant securities exchange.

Cl.693: Particulars to be notified

2132. This clause is to the same effect as CASA sub-s.39(9), (10), (11), and (12).

2133. It sets out the "notifiable particulars" of entitlements and changes in entitlements of CASA. These include, where specified, the number of shares involved, the consideration, numbers of shares in each class and any other person the person notifying is aware has a relevant interest in the shares. Notification will also be required of the highest price paid in relation to acquisitions of shares or the highest price obtained with respect to disposals of shares, giving rise to a change in entitlement (sub-cl.693(4)). Other matters may be prescribed.

Cl.694: Person need serve only one notice per day

2134. This clause is to the same effect as CASA sub-s.39(7).

2135. Notification need not be more frequent than one per day.

Cl.695: Defence

2136. This clause is to the same effect as CASA sub-s.39(6).

2137. Ignorance of changes in entitlement will be a defence to prosecutions for failure to notify under this Division. This defence is necessary because of the extensive operation of the provisions dealing with relevant interests and entitlements.

Division 3 - Notification of Acquisition Of Shares In Unlisted CompanyCl.696: Notification of offeror's entitlement

2138. This clause is to the same effect as CASA s.39A and provides a formal mechanism for making available to shareholders of an unlisted target company reasonably current information about an offeror's entitlement. Such information assists directors and shareholders of the target company in assessing the likelihood of success of the offer. An offeror for an unlisted company will be required during the offer period to notify the target company as soon as practical, and in any event before the end of 2 business days, after its entitlement to shares in the target reaches 25%, 50%, 75% and 90% (sub-cl.696(1) and (2)). The company must make the notice available for inspection at its registered office to any member free of charge (sub-cl.696(3)).

Division 4 - Prohibition on Additional Benefits

2139. The Acquisition of Shares Chapter seeks to ensure all shareholders may share in any premium for control of a corporation. This requires all premiums (if any) to be offered under formal takeover bids. This Division prohibits exclusive benefits before an actual or a proposed takeover or during the takeover and is based on CASA s.39B.

Cl.697: Persons selling shares before the making of offers not to be given additional benefits in certain cases.

2140. This clause is to the same effect as CASA s.39B.

2141. It prohibits special arrangements between the offeror (or an associate) and certain shareholders to acquire their shares and to give them additional benefits or for them to give the offeror additional benefits should a takeover occur. This prohibition applies where the benefits are attributable to an acquisition of shares which took place within six months of a takeover (para. 697(1)(b)) or proposed takeover (para. 697(2)(b)).

2142. The benefit must go from the offeror (or an associate) to any person, or to the offeror from any person, who had a relevant interest in any of the shares immediately before the acquisition (paras. 697(1)(c) and (2)(c)). The benefit may be given or received (or offered or agreed to be so) at any time before, at or after the offer period. This prohibition applies to benefits which are attributable to the value of the consideration in the takeover or proposed takeover.

2143. Any agreement in contravention of sub-cl.697(1) or (2) is void to the extent of the benefit conferred (sub-cl.697(3)).

Cl.698: Offerees not to be given benefits except under takeover scheme or takeover announcement

2144. Sub-clauses 640(1), (4) and (7) are to the same effect as CASA s.40. Sub-cl. (2), (3), (5) and (6) represent extensions to that provision.

2145. An offeror (or his associate) are prohibited, during the takeover period, from giving to (or offering or agreeing to give to) any person whose shares may be acquired under the takeover scheme (sub-cl.698(1)) or takeover announcement



(sub-cl.698(4)) any benefit not provided for under the takeover bid. This prohibition applies even if the bid is varied.

2146. Any person who proposes to make a takeover offer or make a takeover announcement within the next 4 months is also prohibited from giving, offering to give, or agreeing to give, benefits to shareholders whose shares may be acquired under the offer or announcement where the person proposes not to include those benefits in the offer or announcement (sub-cl.698(2) and (5)). Because of the difficulties of establishing the requisite intention of the person in such circumstances, sub-cl.698(3) and (6) deem the person to have so proposed where:

- (a) the benefit is given (etc);
- (b) a takeover offer or announcement is made within 4 months of that benefit;
- (c) the offer or announcement did not provide for the benefit; and
- (d) the person to whom the benefit was given held shares, at the time of the benefit, which were the subject of the offer or announcement.

2147. The prohibition does not apply to formal variations, or to acquisitions in the ordinary course of securities exchange trading (sub-cl.698(7)).

#### Division 5 - Obligations of Target Company

##### Cl.699: Obligations of target company to provide information

2148. This clause is to the same effect as CASA s.36.

2149. If requested, a target company which has received a Part A or Part C statement must provide the offeror with a list of shareholders (and holders of renounceable options and convertible notes) as at the time of service of the statement, together with details of the holdings (sub-cl.699(1)). This must be sent within seven days of receiving the request or of receiving the fee, if required. This list will provide the offeror with the information required to send the formal offers and accompanying materials, and to make offers under the common law to holders of non-voting shares, convertible notes and renounceable options.

Cl.700: Expenses of directors of target company

2150. This clause is to the same effect as CASA s.41.

2151. To avoid difficulties of resolving conflicts in the duties of directors so as to facilitate appropriate conduct by the directors of a target company, directors will be entitled to be recompensed for reasonable expenses they incur in relation to a bid.

Division 6 Rights of Offerors and Shareholders

Cl.701: Provisions relating to dissenting shareholders

2152. Subject to the different test applied in para.701(2)(c) and clarification in relation to allotments during the offer period, this clause is to the same effect as CASA s.42.

2153. A person who makes offers for all the shares in a company will be able compulsorily to acquire the interests of the minority shareholders after the offer period, provided appropriate notice is given and the appropriate number of shares are first acquired. If the offerer was entitled to not more than 10% of the shares before the commencement of the offer period, but at the end of that period become entitled to

not less than 90% of all those shares (subsequent allotments being disregarded), the offeror will be able compulsorily to acquire the interests of the remaining shareholders (para.701(2)(b)).

2154. If the offeror began with more than 10% of the shares of the target company, then acquisition of the interests of the minority shareholders will not be permitted unless the offeror becomes entitled to at least 90% of all shares, as above (para 701(2)(b)) and, one of:

- (a) during the offer period the offeror becomes entitled to three-quarters of the number of shares to which the offeror was not entitled before the offer period began (sub-para 701(2)(c)(i)); or
- (b) one month after the end of the offer period, at least three-quarters of the shareholders registered as at the commencement of the takeover period are not so registered (sub-para 701(2)(c)(ii)).

2155. These alternative requirements applicable to the case of an offeror beginning with more than 10% of the shares in the target company improve upon similar provisions in CASA (para.(b) of sub-ss.42(2) and (3)) by introducing greater certainty as to when the test is satisfied, by avoiding doubts as to what constitutes an "offeree" and by avoiding undesirable exploitation of these standards through the practice of share-splitting. \*

2156. In contrast to the one month period in CASA s.42, the offeror has two months to send the appropriate notices indicating a desire to acquire the outstanding shares. This is due to satisfaction of the test in sub-para.701(2)(c)(ii) being dependent on the state of the target register one month after the end of the offer period. The giving of this notice entitles and binds the offeror to acquire the shares

(sub-cl.701(5)) subject to a dissenting shareholder successfully applying to the Court to have the offeror's notice declared to be of no effect in respect of that dissenting shareholder's shares (sub-cl.701(6)).

2157. Other provisions set out procedures for the compulsory acquisition and safeguard the interests of the parties involved in this process of compulsory acquisition (sub-cl.642(7) to (12)).

Cl.702: Money or property unclaimed by dissenting shareholders

2158. Consideration received by the target company in respect of the shares compulsorily acquired under cl.701 is held on trust (sub-cl.701(11)) and if money, in a separate bank account (sub-cl. 701(12)). Cl 702 provides a regime for dealing with and disposing of any unclaimed consideration. This regime differs from that imposed by CASA sub-ss.42(12) to (18) CASA.

2159. Where a company holds unclaimed property at the end of a year, the company has until the end of the following January to compile a register of such property (sub-cl.702(2)), and another calendar month to give a copy of that register to the Minister for publication in the Gazette (sub-cl.702(5)). Sub-cl.702(3) provides a right of inspection of the register for a fee, if required. If the property remains unclaimed for a period of twelve months following publication in the Gazette, the company must within 28 days after that period of twelve months transfer the unclaimed property to the Minister to be dealt with under Part 9.7 (sub-cl. 702(6)). Other provisions safeguard property owners, the company and the Minister (sub-cl.702(7) to (11)).

Cl.703: Rights of remaining shareholders and holders of options and notes

2160. This clause is to the same effect as CASA s.43.

2161. Where a person makes a takeover offer under a takeover scheme or a takeover announcement and becomes entitled to more than 90% of the voting shares in the target company, then the offeror is required, within one month of the end of the offer to:

- (a) notify the remaining shareholders of his entitlement to more than 90% of the voting shares. Such a shareholder then has 3 months in which to require the offeror to acquire the shares held on the same terms as applied in relation to the takeover scheme or takeover announcement and to elect, in the case of alternative terms, which term to accept (sub-cl.703(2)); and
- (b) give a similar notice to the holders of non-voting shares, convertible notes and renounceable options (sub-cl.703(4)). If this notice proposes terms for acquisition, it must be accompanied by an expert's report stating whether in the expert's opinion the terms are fair and reasonable (sub-cl.703(5)).

2162. The expert who prepares the report must not be associated with the target company or the offeror and will be required to set out the reasons for forming the opinion whether or not the terms proposed in the notice are fair and reasonable.

2163. Where there are 2 or more experts' reports, a copy of each report will be required to accompany the notice (sub-cl.703(6)). The purpose of this requirement is to ensure that an offeror or on-market offeror does not make selective use of experts' reports.

2164. The expert will be required to set out in the report:

- (a) particulars of any relationship of the expert with the offeror, the target company or any of their associates;
- (b) particulars of any pecuniary or other interest of the expert that could reasonably be regarded as being capable of affecting the experts' ability to give an unbiased opinion in relation to the proposed terms; and
- (c) particulars of any fee and any benefit that the expert has received, or will or may receive, in connection with the making of the report (sub-cl.703(7))

2165. This requirement enables shareholders to take into account, in assessing the expert's report, any factor which might be considered to influence the expert's independence.

2166. Where a notice under sub-cl.703(4) is given to a non-voting shareholder, option or note holder, that person can, within 3 months of the notice, require the offeror to acquire the holding on such terms as are agreed or as the Court, on application, determines (sub-cl.703(8)).

PART 6.6 - LIABILITY FOR MIS-STATEMENTSIntroduction

2167. Criminal and civil liability was imposed by CASA s.44 on certain specified persons for false or misleading material (or omissions) in documents and statements issued in relation to takeovers or proposed takeovers. Various defences were provided to ensure that the provisions only applied in cases of wilful mis-statement. While the substance of the provisions has been predominantly retained the provisions have been restructured so as to draw together related provisions in a logical sequence for the purpose of improving clarity and ease of reference.

2168. These provisions are supplemented by a new provision in the Securities Chapter which prohibits misleading or deceptive conduct in relation to a number of securities related matters including takeovers (cl.995).

Cl.704: Mis-statements in Part 6.12 statements etc.

2169. This clause is to the same effect as CASA sub-ss.44(1)-(4), (9), (11), (12), (15), (16) and (18).

2170. It is an offence to include materially false or materially misleading matter in, or to omit material matter from:

- (a) purported Part A or Part C statements, purported takeover offers or notices under cl.657 (varying a takeover offer), sub-cl.701(2) (notifying dissenting shareholders of desire to compulsorily acquire), and sub-cl.703(1) or (4) (notifying dissenting shareholders and holders of non-voting shares, options and notes of offerors holding)

(sub-cl.704(1)). The persons to whom sub-cl.704(1) applies are identified in sub-cl.704(2) ie the offeror, certain directors of the offeror and any expert who consented to his report being included (but only in respect of matter in the report - (sub-cl.704(9))).

(b) purported Part B or Part D statements - sub-cl.704(3). The persons to whom this clause applies are set out in sub-cl.704(4) ie the target company, certain directors of that company or liquidators or official managers who signed the statement.

(c) certain experts' reports permitted or required under the Bill (sub-cl.704(5) - applies to the author of the report).

2171. A defence to a prosecution under cl.704 is available where the person responsible for the offending statement can show that he reasonably believed that the relevant matter was not false or misleading or, in the case of an omission, reasonably believed that no material matter had been omitted or did not know that omitted matter was material. (If such a belief or knowledge is not maintained at the date of commencement of the prosecution, timely corrective notice is a prerequisite for a defence to be made out (sub-cl.704(6))).

2172. Persons guilty of an offence under cl.704 are liable to compensate persons who suffer loss, either because they acted or failed to act because of the false or misleading matter or the omission that constitutes the offence (sub-cl.704(7)). A defence, based on similar grounds to those available in prosecution cases (see sub-cl.704(6) above), is provided in relation to actions for compensation (sub-cl.704(8)).



Cl.705: Mis-statements in public statements, advertisements etc.

2173. This clause is to the same effect as CASA sub-ss.44(5)-(8), (10), (14), (17) and (19).

2174. It is an offence to include materially false or materially misleading matter in statements, advertisements or documents (widely defined in para.705(5)(a)) relating to the affairs of, or to marketable securities of, the target company or a related corporation or of the bidder or rival bidder (referred to in the clause as "prescribed matters" and defined in para.705(5)(b)) where:

- (a) a person (or persons) propose to make a takeover bid (sub-cl.705(1)).
- (b) directors of a company believe it will be subjected to a bid (sub-cl.705(2))
- (c) takeover offers have been dispatched or an on-market announcement is made (sub-cl.705(3)).

2175. In respect of sub.cls.705(1) and (2) the person who made or issued the statement, published the advertisement or sent the document is guilty of an offence. Sub-cl.705(4) sets out those persons to whom sub-cl.705(3) is applicable - basically the offeror, the target company and their officers and associates.

2176. Provisions relating to a defence to a prosecution based on reasonable belief in the truth of a matter (sub-cl.705(6)), liability to actions for compensation (sub-cl.705(7)) and an appropriate civil defence (sub-cl.705(8)) are included and are consistent with the treatment of like offences under cl.704.

Cl.706: Existing causes of action not affected.

2177. This clause is to the same effect as CASA sub-s.44(21).

2178. The availability of other remedies is expressly preserved.

PART 6.7 - SUBSTANTIAL SHAREHOLDINGS

2179. Part 6.7 of the Acquisition of Shares Chapter, is based on CA Part IV, Division 4. It deals with the notification of substantial shareholdings in listed companies and companies other than listed companies that have been declared by the Minister for the purposes of the Part.

2180. As a consequence of the removal of the capacity of the company and shareholders to issue notices under the tracing provisions (see Part 6.8 of this Chapter), added reliance will be placed upon the shareholder notification provisions. In order to ensure that appropriate levels of public disclosure are maintained, the threshold for a shareholding will be reduced from 10% to 5%.

2181. The notification procedures have also been simplified to the extent that there is no longer a need to provide notification in accordance with a prescribed form.

2182. Where a person fails to comply with the substantial shareholding requirements, the Court has the powers set out in cl.741.

Cl.707 : Companies in relation to which Part 6.7 applies

2183. This provision is based on CA sub-ss.134(2) and (3).

2184. For the purposes of Part 6.7 references to the word "company" will mean:

- . a listed company (see definition of "listed company" in cl.603); or

- . a company that has been declared by the Minister to be a company for the purposes of Part 6.7 (see definition of "company" in cl.9).

(sub-cl.707(1) - based on CA sub-s.134(2).)

Cl.708 : Substantial shareholdings and substantial shareholders

2185. This provision is based on CA s.136.

2186. A person entitled to no less than the prescribed percentage of voting shares in a body corporate or the prescribed percentage of a class of voting shares in a body corporate will be deemed to have a substantial shareholding in that body corporate (sub-cl.708(1) - based on CA sub-s.136(1)).

2187. The shares to which a person is "entitled" will include:

- (a) shares in which the person has a relevant interest (para.609(1)(a) - based on CA para.136(2)(a)); and
- (b) the shares in which an associate of that person has a relevant interest except for:
  - (i) a nominee body corporate which has been issued a certificate by the ASC under sub-cl.609(3) (based on CA para.136(2)(b)); or
  - (ii) shares in respect of which the associate has obtained a certificate from the ASC under Bill sub-cl.708(3)(cl.708(2) - based on CA sub-s.136(2)).

2188. The term "associate" is defined in Part 1.2, Division 2 and the term "relevant interest" is defined in Part 1.2, Division 5.

2189. In accordance with the amendments referred to in the introduction to this Part, a reference in cl.708 to "prescribed percentage" is a reference to 5% instead of 10%, or if a lesser percentage has been prescribed by regulation that lesser percentage (sub-cl.708(5)).

Cl.709 : Substantial shareholder to notify company of interests

2190. This provision is based on CA s.137.

2191. A substantial shareholder in a company that is a corporation (see definition of "corporation" in cl.9) will be required to give the company a substantial shareholding notice (sub-cl.709(1) - based on CA sub-s.137(1)).

2192. A corporation that is a substantial shareholder in a company will be required to give the company a substantial shareholding notice (sub-cl.709(2)).

2193. It is no longer necessary for the form to be in a 'prescribed form' but the following matters must be included in the notice:

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

(sub-cl.709(3) - based on CA sub-s.137(1).)

2194. Similar notices will be required of a substantial shareholder whose interest changes by at least 1% (cl.710) or who ceases to be a substantial shareholder( cl.711).

2195. The period within which a substantial shareholder will be required to give the company notice will be 2 business days after the day on which the person became aware of the relevant interests by virtue of which he is a substantial shareholder (sub-cl.709(4) - based on CA sub-s.137(2)).

Cl.710 : Substantial shareholder to notify company of changes in interests

2196. This provision is based on CA s.138.

2197. A substantial shareholder in a company that is a corporation will be required to give the company written notice of any changes in interest of more than 1% (sub-cl.710(1) - based on CA sub-s.138(1)).

2198. A corporation that is a substantial shareholder in a company will be required to give the company written notice of any changes in its interest of more than 1% (sub-cl.710(2)).

Cl.711 : Person who ceases to be a substantial shareholder to notify company

2199. This provision is based on CA s.139.

2200. A substantial shareholder in a company that is a corporation will be required to give written notice to the company if it ceases to be a substantial shareholder (sub-cl.711(1) - based on CA sub-s.139(1)).

2201. A corporation that ceases to be a substantial shareholder in a company will be required to give the company written notice of the fact that it has ceased to be a substantial shareholder (sub-cl.711(2)).

Cl.712 : References to operation of Division 5 of Part 1.2

2202. This provision is based on CA s.140.

2203. The circumstances under which a person has a relevant interest, changes a relevant interest or ceases to have a relevant interest by virtue of Division 5 of Part 1.2 of the Bill are circumstances which will be required to be stated in any notice under cls.709, 710 and 711.

Cl.713 : Copy of notice to be served on securities exchanges

2204. This provision is based on CA sub-s.141(1).

2205. A person who gives notice of a substantial shareholding, or a change in or cessation of that substantial shareholder to a listed company, will also be required to serve a copy of such notice on the company's home stock exchange (see definition of "home stock exchange" in cl.603).

Cl.714 : Commission may extend period for giving notice under this Part

2206. This provision is based on CA s.142.

2207. The ASC will be able to extend the period for giving notice under cls.709, 710 and 712. Such an extension may be granted even after the notification period has expired.

Cl.715 : Company to keep register of substantial shareholders

2208. This provision is based on CA s.143.

2209. A company will be required to keep a register of all information relating to substantial shareholders. Such a register is to be open for inspection by any person.

Cl.716 : Civil remedy where Part contravened

2210. This provision is based on CA s.144A.

2211. A person who contravenes the notification requirements in cls.709, 710 or 711 will be liable to pay damages to a person who suffers loss or damage as a result of that contravention unless the contravention was unintentional (sub-cl.716(1) - based on CA sub-s.144A(1)).

2212. A person who contravenes cl.715 (which requires a company to keep a register of substantial shareholders) will be liable to pay damages to a person who suffers loss or damage as a result of that failure (sub-cl.716(2) and (3) - based on CA sub-s.144A(2)).

PART 6.8 - POWER OF COMMISSION TO OBTAIN INFORMATION AS TO BENEFICIAL OWNERSHIP OF SHARES

2213. This Part contains new provisions. The ASC is to have power to require information from persons holding voting shares in the company or a relevant interest in those shares, as to any beneficial ownership of the company's shares. The information received may, but need not, be given to the company. The provisions differ from the tracing provisions of the CA (ie s.261) in that the capacity for a company, or a shareholder of the company with not less than 5% of the voting shares of the company to trace the beneficial ownership of shares has been removed.

2214. The corollary of removing this capacity is that under the shareholder notification requirements of cl.708, the previous CA 'prescribed percentage' of 10% has been lowered to 5%.

2215. The powers of the Court contained in CA s.261A have been absorbed into the General Powers of the Court (Part 6.10, more specifically cl.742).



2216. Under the CA, the tracing provisions have been open to abuse by members and companies seeking to obtain strategically important information. The actual search is often deliberately circuitous and extremely vulnerable to legal imperfections. The potential for non-productive deploying of resources in the search for information beneficial only to a board seeking to entrench itself or to a small group of members may be at the expense of the other shareholders' interests in the proper functioning of the company.

2217. It is for these reasons that the power to initiate and pursue an inquiry is to be left with the ASC, as the least partial and most expert possible participant in the inquiry.

2218. This Part will only apply to listed companies and other prescribed companies.

Cl.717 : Definitions

2219. This clause contains definitions including those of 'primary notice' and 'secondary notice' which correspond to sub-section (2) and sub-section (3) notices respectively (see CA sub-s.261(1)).

2220. Both primary and secondary notices require the giving of notice to the ASC in the form of a written statement setting out relevant interests in shares and details and particulars relating to the relevant interests which other persons are known to have.

2221. The corresponding provision of the CA (s.261(1)) required notification to the company rather than the ASC.

2222. "Company" is defined by reference to Part 6.7, which in sub-cl.707(1) refers to listed and prescribed companies, in contrast with the far wider definition in CA sub-s.261(1)).

Cl.718 : Primary notice

2223. This clause deals with the issue of a primary notice. The ASC may give a notice to a holder of voting shares at any time. The corresponding provision of the CA (sub-s.261(2)) allowed the company to initiate an inquiry itself at any time or at the request of either the ASC or a member or members entitled to not less than 5% of the total voting rights.

Cl.719 : Secondary notice

2224. A secondary notice may be given by the ASC to a person on the basis of information received by it in response to a primary notice i.e. it has been advised that another person has a relevant interest in any of the shares or has given relevant instructions in relation to them ('Relevant instructions' is defined in cl.717). This provision differs from CA sub-ss.261(3) and (4) in that it is the ASC and not the company which gives the secondary notice in relation to information received.

Cl.720 : Commission may give notice to the company

2225. The ASC has power to provide to a company, the voting shares of which are the subject of a notice, any information given pursuant to a primary or secondary notice.

Cl.721 : Request by person to whom notice given

2226. This clause is based on CA sub-ss.261(5) and (6).

2227. A person who receives a primary or secondary notice may request of the ASC, a full exemption from compliance with a notice, or a partial exemption to the extent that the information is only passed on to the company in a particular form. The ASC may comply with the request if satisfied that there are special reasons why particular information should not be given to a company.

2228. This request must be made within 2 business days of receipt of a notice.

Cl.722 : Compliance with notices

2229. This clause is based on CA sub-s.261(7).

2230. It requires compliance with a notice within 2 business days after receipt of the notice unless within that time an application has been made under sub-cl.721(1).

Cl.723 : Consequences of decision by Commission on a request

2231. This clause is based on CA sub-s.261(8) in providing for the consequences of the different decisions the ASC could make in response to a request that the information should not be given. In contrast with CA, the applicant is not required to inform the company of the request.

Cl.724 : Register of notices

2232. This clause is based on CA sub-ss.261(9), (10), (11) and (12) but has been modified to the extent that the company will not receive the information directly from the shareholders.

2233. A company shall keep a register of the information provided to it by the ASC pursuant to this Part or provisions corresponding with this Part such as CA s.261. That register shall contain particulars of the relevant interest and the person who holds it. The register shall be open to inspection by members of the company. Members of the public may also inspect subject to the payment of any charge not exceeding the prescribed amount. Copies will also be made available on request on the same conditions relating to payment.

Cl.725 : No notice of rights

2234. This clause is based on CA sub-s.261(12A).

2235. A company is not, by reason of any information received pursuant to this part, to be taken to have notice of, or to be put on inquiry as to, a right of a person in relation to a share in the company.

Cl.726 : Civil liability

2236. This clause is based on CA sub-s.261(16), (17) and (18).

2237. Damages are payable to any person who suffers loss or damage as a result of contraventions of cls.722, 723 and 724 by the person who has contravened the provision. A defence of inadvertance, mistake or lack of awareness of a relevant fact or occurrence is available in respect of a contravention of cls.722 and 723. Joint and several liability is provided for if two or more persons are involved in the same contravention.

Cl.727 : Exceptions to criminal or civil liability

2238. This clause is based upon CA sub-s.261(19).

2239. There are exceptions to civil and criminal liability in cases where the information required to be given in a notice is already kept by the company on a register kept pursuant to cls.715 or 724 or if the giving of the notice was for any reason frivolous or vexatious.

PART 6.9 - POWERS OF COMMISSION AND ANCILLARY POWERS OF COURT

2240. This Part sets out the powers of the ASC in relation to this Chapter. Powers of the Court ancillary to the exercise of powers of the ASC are also set out.

Cl. 728 - Power of Commission to exempt from compliance with this Chapter.

2241. This clause represents a significant extension of the exemption powers under CASA s.57. Whereas under that provision the NCSC could only grant an exemption to a particular person in a particular case, under sub-cl.728(1) the ASC will also be able to exempt classes of persons generally, and in particular cases or classes of cases from any or all of the provisions of the Chapter. All exemptions must be published in the Gazette (sub-cl.728(2)). A person is not permitted to contravene a condition attached to the exemption (sub-cl.728(3)). Note that in exercising its exemption powers the ASC must take account of certain matters set out in cl.731.

Cl.729 - Power of Court to enforce exemption condition

2242. This clause is to the same effect as CASA sub-s.57(4). Upon a contravention of a condition to which an exemption is subject, the Commission may apply to the Court to order the person to comply with that condition.

Cl.730 - Power of Commission to modify operation of this Chapter

2243. This clause represents a significant extension of the modification powers under CASA s.58. Under that provision, the NCSC could modify or vary the provisions of CASA in their application to a particular person in a particular case. The ASC, under sub-cl.730(1) will also be able, so far as the Commonwealth Constitution permits, to modify or vary the provisions in their application to classes of persons either generally or in particular cases or classes of case. All declarations modifying or varying the provisions must be published in the Gazette (sub-cl.730(2)).

Cl.731 - Commission to take account of certain matters

2244. This clause is to the same effect as CASA s.59.

2245. In exercising its exemption or modification powers, the Commission must take account of, and have regard to, a number of matters set out in the clause.

2246. These include the desirability of ensuring that an acquisition of shares takes place in an efficient, competitive and informed market, and the need to ensure:

- (a) the identity of a person proposing to acquire a substantial interest is known to the shareholders and directors of the company concerned;
- (b) the shareholders and directors have sufficient time to consider any proposal for a person to acquire a substantial interest;
- (c) that shareholders and directors have sufficient information to enable them to assess the merits of any proposal to acquire a substantial interest; and
- (d) that as far as is practicable, all shareholders have equal opportunities to participate in the benefits of the acquisition.

2247. (These principles derive from the report of the Eggleston Committee.)

Cl.732 - Power of Commission to declare acquisition or other conduct to be unacceptable

2248. This clause is based on CASA sub-ss.60(1), (3), (6) and (7).

2249. The ASC will be able to declare that, for the purposes of this Chapter, a specified acquisition is an unacceptable acquisition, and that specified conduct is unacceptable conduct. Such declarations will enable the Court (cl.733) and the ASC (cl.734) to make a wide range of orders to protect the rights of persons affected by the acquisition or conduct. This declaration power is designed to discourage activities which would frustrate the basic aims of this Chapter.

2250. The ASC can make a declaration that an acquisition was an unacceptable acquisition or that certain conduct was unacceptable conduct where it is satisfied that "unacceptable circumstances" (defined in sub-cl.732(1)) occurred in relation to the acquisition or conduct. Such declarations must be made within 90 days of the acquisition or conduct and in the case of an unacceptable acquisition declaration, the person who acquired the shares is deemed, for the purposes of the Court making certain orders under cl.737, to have contravened cl.615 (sub-cl.732(2) and (3)).

2251. The "unacceptable circumstances" identified in sub-cl.732(1) are that the shareholders (and directors in the case of (a), (b) and (c)) of a company):

- (a) did not know the identity of a person acquiring a substantial interest in the company;
- (b) did not have a reasonable time to consider a proposal for such an acquisition;
- (c) were not supplied with enough information to assess the proposal's merits; or
- (d) did not have a reasonable opportunity to participate in any benefits accruing to any shareholder or associate of the shareholder in connection with the acquisition.

2252. In all such circumstances either the target company or the acquirer must be a corporation.

2253. After making either declaration, the ASC must, as soon as possible, give a copy of the declaration to the person to whom it relates and must publish a copy in the Gazette (sub-cl.732(4)). Failure to comply with that sub-clause doesn't however affect the validity of the declaration.

Cl.733 - Powers of Court where Commission declares acquisition or conduct unacceptable

2254. This clause is based on CASA sub-ss.60(2), (4) and (5).

2255. Where an application is made to the Court for orders under cl.737 as a result of an unacceptable acquisition declaration, the Court in deciding whether to grant the orders can have regard to findings of fact made by the ASC or can make its own findings. Instead of making any such orders, it can declare that the acquisition was not unacceptable in which case the declaration no longer has any effect (sub-cl.733(1)).

2256. If the ASC has declared conduct to have been unacceptable, the Court, on the application of the ASC, the company or a member of the company, may make any order it thinks necessary to protect the rights of any person affected by the conduct including a "remedial order" (defined in cl.603) or a direction to supply shareholders in the relevant company with information. The Court may on the other hand declare that the conduct is not unacceptable and the declaration by the Commission will cease to have effect (sub-cl.733(2)).

2257. A person in respect of whose conduct or acquisition a declaration has been made may apply to the Court for a declaration that the acquisition or conduct was not unacceptable (sub-cl.733(3)).



Cl.734 - Power of Commission to make certain orders

2258. This clause is to the same effect as CASA s.60A (except sub-s.60A(4) dealt with in cl.735).

2259. Where the ASC has declared certain conduct or acquisitions to be unacceptable, this clause confers power on the ASC to make certain "freezing" orders by written instrument published in the Gazette. The orders may be one or more of those set out in sub-cl.734(1) e.g. orders restraining particular persons from acquiring or disposing of certain shares or from exercising voting rights attached to certain shares. The ASC will be able to vary or revoke an order (sub-cl.734(2)). A person is not permitted to contravene such an order (sub-cl.734(4)). The fact that the ASC has previously made an order in respect of a particular declaration does not prevent it from making further orders (sub-cl.734(1)).

2260. An order under the clause ceases to operate after 30 days, or on the day specified in the order, whichever is the earlier (sub-cl.734(5)). Such an order cannot be made unless the person to whom it is directed has had an opportunity to be heard and to make submissions (sub-cl.734(6)). Under sub-cl.734(7), the ASC may not make an order in reliance on a declaration made by it, if:

- (a) an application has been made to the Court for an order under cl.737;
- (b) an application has been made to the Court under sub-cl.733(2); or
- (c) the Court has revoked an order made in reliance on the declaration under cl.735.

Cl.735 - Power of Court to vary or revoke orders of Commission

2261. This clause is to the same effect as CASA sub-s.60A(4).

2262. If the ASC makes an order under cl.734, a person aggrieved by the order will be able to apply to the Court for its variation or revocation and the Court will be able to do either if satisfied it is just and reasonable to do so.

Cl.736 - Power of Commission to intervene in proceedings

2263. This clause is to the same effect as CASA s.61.

2264. The ASC will be able to intervene in any proceedings under this Chapter (sub-cl.736(1)). If it does intervene, it will be deemed to be a party to the proceedings with all rights, duties and liabilities of such a party (sub-cl.736(2)).

PART 6.10 - POWERS OF COURT

2265. This Part sets out the powers of the Court in respect of this Chapter. These powers relate to the acquisition of shares, substantial shareholdings and notification of beneficial interests.

Cl.737: Orders where prohibited acquisitions take place

2266. This clause is to the same effect as CASA s.45.

2267. Wide powers are conferred on the Court to make orders where prohibited acquisitions take place. These include a "remedial order" (defined in cl.613) and, for the purpose of securing compliance with an order, a direction to a person to do or not to do a certain act (sub-cl.737(1)). Examples of some of the orders available include orders directing divestiture or restraining the exercise of voting rights.

2268. In certain circumstances the Court will be able to have regard to associations formed after the acquisition takes place (sub-cl.737(2)). Where two persons are "associated" (see Division 2 Part 1.2) at the time when an application under sub-cl.737(1) is considered by the Court, and one of them acquired all or any of his shares in the preceding six months, and those matters are proved to the satisfaction of the Court, then that proof constitutes prima face evidence that those persons were associated at the time when those shares were acquired. This sub-clause has the effect that each of the two persons is to be treated as having been entitled at that time to the shares of the other. Therefore, in determining whether the acquisition breached cl.615 by increasing a person's entitlement to shares beyond the permitted level, the Court may look not only that person's actual entitlement at the time of the acquisition, but also at the person's entitlement as increased by virtue of that person

having been associated with another person at that time. This provision has effect only for the purpose of the making of orders by the Court and does not operate to make a person retrospectively guilty of an offence.

Cl.738: Orders where offers not sent pursuant to Part A statement

2269. This clause is to the same effect as CASA s.46.

2270. Where an offeror serves a Part A statement on the target company and subsequently acquires shares which would, but for the enabling provision in sub-cl.620(1) - (see para. above), have contravened cl.611, but then does not dispatch offers to shareholders, the ASC will be able to apply to the Court for a "remedial order" (defined in cl.613) and an order directing the offeror to send an offer in an approved manner to each holder of shares (sub-cl.738(1)). Where the latter order is made, the Court can also order the person to send additional information in a notice to shareholders and to serve a copy of that notice on the target company and any notifiable securities exchange of the target and lodge a copy with the ASC (sub-cl.738(2)). Offers dispatched under an order of the Court will be deemed to be made under a takeover scheme (sub-cl.738(3)).

Cl.739: Orders to protect rights under takeover schemes or announcements

2271. This clause is to the same effect as CASA s.47.

2272. The Court will be able to make a wide range of orders (including "remedial orders") to protect the interests of a person affected by a takeover scheme or announcement where a provision of this Chapter has been contravened (sub-cl.739(1)). Where an offeror contravenes a condition specified in a consent by the ASC to withdrawal of an offer

given under cl.653, the Court will be able to make any orders necessary to protect persons affected by the contravention (sub-cl.739(2)). The right to seek relief is given to offerors, the Commission, the target company and, in the case of sub-cl.739(1), a person who holds shares in the target company and, in the case of sub-cl.739(2), a person affected by the contravention.

2273. The provision applies to non-voting shares, convertible notes and renounceable options (sub-cl.739(4)).

Cl.740: Powers of Court in relation to unfair or unconscionable agreements, payments or benefits

2274. This clause is based on CASA s.50.

2275. The Court will be able to make certain orders where it is satisfied that the provision of a benefit for management was unfair or unconscionable having regard to the interests of the body corporate concerned.

2276. The clause applies to a benefit given by a body corporate to its management or that of a related body corporate where the benefit is provided:

- (a) within 12 months after a takeover offer or announcement is made for the body corporate or a related body corporate; or
- (b) at a time when the directors of the body corporate have reason to believe such a bid will be made for the body corporate or a related body corporate.

2277. For the provision to operate either the body corporate above giving the benefit must be a corporation (sub-cl.740(1)) or the takeover bid must have been made for a corporation, or be contemplated in respect of a corporation, that is related to the body corporate providing the benefit (sub-cl.740(2)).

2278. This provision is directed at service agreements used by target companies as a defence tactic or to confer unfair benefits on management. The provision applies only to those officers who take part in the management of the target company, and does not affect contracts between companies and employees.

2279. If the agreement, payment or benefit is made by the target company (or a company related to the target company) it will be capable of approval by ordinary resolution at a general meeting of the target company, provided that the beneficiary and associates of the beneficiary do not vote on the resolution (sub-cl.740(4)).

2280. An application to the Court for any of the orders described in sub-cl.740(5) must be made within 12 months of the payment, benefit or agreement (unless the Court thinks a longer period is just in the circumstances). The application may be made by the body corporate, the Commission or persons who hold not less than 10% of the total of the nominal value of the shares in the body corporate.

Cl.741: Powers of Court with respect to defaulting substantial shareholder

2281. This clause is based on CA s.146.

2282. This clause sets out the powers of the Court specifically with respect to substantial shareholders who breach provisions setting out their obligations (see cls.709, 710 and 711). The Court has the power to make a wide variety of orders including "remedial orders" (defined in Cl.613). In some cases, the Court may have regard to associations formed after an acquisition giving rise to a substantial shareholding (sub-cl.741(2)).

Cl.742 Powers of Court where beneficial ownership of shares not disclosed.

2283. This clause is based on CA s261A.

2284. This clause sets out the powers of the Court upon a failure to comply with the provisions requiring disclosure of beneficial interests (see cls.722 and 723). If a recipient of a notice given under cl.718 or 719 has replied that he does not know particular information in relation to the shares or know of anyone with a relevant interest in, or anyone who has given relevant instructions in relation to, shares the subject of the notice, then, on the application of the company, a member or members of the company holding 5% or more of total voting rights, or the Commission, the Court may make an unlimited variety of orders (sub-cl.742(1) and (2) and see cl.613).

2285. The Court shall not make an order if the information required to be given to the company already appears on a register kept for that purpose (see cls 715 and 724) or that giving of the notice was for any reason frivolous or vexatious (sub-cl.742(3) and see CA sub-s.261A(9)). Nothing the company does under this clause is to be taken as putting the company on notice of or putting upon enquiry as to the right of any person in relation to shares (sub-cl.742(4)).

Cl.743: Contravention due to inadvertence, etc.

2286. This clause is based on CASA s.48 and sub-s.45(3) and CA sub-s.261A(10).

2287. The Court will be able to validate any acts or matters not in compliance with this Chapter if it is satisfied that, in all the circumstances, the contravention ought to be excused (sub-cl.743(1)). Where the Court is satisfied that a contravention of cl.615 (prohibited acquisition), cls.709,

710, and 711 (substantial shareholder provisions) or cls.722 and 723 (notification of beneficial interests) ought to be excused it is not able to make orders under cls.737, 741 or 742 except those specified in sub-cl.743(2) relating to voting rights. The circumstances justifying such an order include the contravention having been due to the person's inadvertence or mistake, and to the person not having been aware of a relevant fact or occurrence and to circumstances beyond the control of the person (sub-cl.743(3)). This clause has effect notwithstanding anything contained in any other provision of this Chapter (sub-cl.743(4)).

Cl.744: Miscellaneous provisions relating to orders

2288. This clause is based on CASA s.49 and CA ss.146 and 261A.

2289. This clause brings together a number of provisions relating to the whole range of orders a Court can make in respect of contraventions of the acquisition of shares and substantial shareholder provisions.

2290. Aspects of this clause include:

- (a) Before making an order under relevant provisions (defined in sub-cl.744(1)) the Court must satisfy itself that the order would not unfairly prejudice any person (sub-cl.744(2)).
- (b) The Court will be able to direct that notice of the relevant application be given or given or published (sub-cl.744(3)).
- (c) The Court will be able to give interim orders (sub-cl.744(4)).



- (d) Undertakings as to damages in connection with the making of an interim order are not required (sub-cl.744(5)).
- (e) The Court will be able to include ancillary or consequential provisions in such orders (sub-cl.744(6)).
- (f) An order for disposal of an interest in a share can be subject to any conditions the Court thinks fit (sub-cl.744(7)).
- (g) If an interest is not disposed of in accordance with the order of the Court, it will be able to vest it in ASC (sub-cl.744(8)). The disposal procedure is set out in sub-cl.744(9).
- (h) The Court will be able to rescind, vary, discharge or suspend its order (sub-cl.744(10)).
- (i) The powers of the Court in relation to contempt of court are expressly reserved (sub-cl.744(12)).

PART 6.11 - MISCELLANEOUS

2291. This Part contains a number of miscellaneous provisions.

Cl.745: Recording of resolutions

2292. This clause is to the same effect as CASA s.51.

2293. The minutes of a directors' resolution for the purposes of this Chapter must record the names of absent directors and the names of directors who vote against, or abstain from voting on, such a resolution.

Cl.746: Announcements of proposed takeover bids

2294. This clause is to the same effect as CASA s.52.

2295. Bluffing notices or announcements of takeovers are prohibited by this clause.

2296. A person will be prohibited from making a public announcement that the person proposes to make a takeover offer or announcement if the person:

- (a) knows the announcement is false, or is recklessly indifferent to whether it is true or false; or
- (b) has no reasonable grounds for believing that the person's obligations arising under the takeover bid will be fulfilled if there are a substantial number of acceptances (sub-cl.746(2)).

2297. This prohibition applies if the person making the announcement is, or the proposed offer or announcement relates to, a corporation (sub-cl.746(3)).

2298. A person will also be prohibited from making an announcement proposing a takeover if a bid is not commenced within two months (or such further period or the Commission permits) (sub-cl.746(4)). This bid must be on terms the same as the terms of the original announcement (sub-cl.746(1)). This prohibition applies to any announcement in relation to which a corporation is involved (sub-cl.746(5)).

2299. A person who has contravened both sub-cl.746(2) and (4) will only be liable to be convicted in respect of one of those offences (sub-cl.746(6)). A person who has contravened either provision will be liable to pay compensation to any person who has suffered loss as a result of that contravention (sub-cl.746(8) and (9)).

2300. A person will not be guilty of an offence for contravening sub-cl.746(4) and will not be liable to pay compensation under sub-cl.746(8) if it can be established that the person could not reasonably have been expected to proceed with the takeover bid:

- (a) as a result of circumstances existing at the time of the announcement but of which the person had no knowledge and could not reasonably have been expected to know about; or
- (b) as a result of a change in circumstances after the making of the announcement not being a change in circumstances caused by the person (sub-cl.746(10)).

2301. The right to apply for any injunction under cl.1324 will not be available in respect of a failure to make a takeover bid in accordance with an announcement. Cl.1314, dealing with "continuing offences", will also not apply (sub-cl.746(11)).

Cl.747: Service of documents and publication of notices

2302. This clause is to the same effect as CASA s.56.

2303. The following provisions will apply to the service of documents:

- (a) Any document which is not required to be signed will be able to be served on a securities exchange by a telex, facsimile service etc. message to the effect of the document (sub-cl.747(1)).
- (b) A document that has to be given to a securities exchange or lodged with the ASC on a particular day when the exchange or ASC office is closed will be able to be given on the next day when the body is open (sub-cl.747(2)).
- (c) A copy of a notice that is required to be given to the Commission or to a securities exchange need not specify the individual to whom it was sent (sub-cl.747(3)).
- (d) Where a provision requires a person to publish a notice in a newspaper and due to circumstances beyond the person's control the notice is not published, the person is deemed to have complied with that provision:
  - if the person's actions would have resulted in the publication of the notice, except for those circumstances, and
  - the person has caused the notice to be published as soon as practicable after those circumstances ceased to exist (sub-cl.747(4)).

Cl.748: Regulations

2304. The Governor-General will be able to make regulations, not inconsistent with the Chapter, on matters required or permitted to be prescribed or necessary or convenient for the

purposes of the Chapter. Among other things, these regulations will be able to:

- (a) vary the requirements contained in Part 6.12;
- (b) require the securities exchanges and the Commission to be given signed copies of documents or prescribed notices; and
- (c) make provision as to what constitutes a class of shares for the purposes of this Chapter.

PART 6.12 - STATEMENTS

2305. This Part provides the same function as the schedule to CASA.

Cl.749 : Interpretation of certain clauses in s.750

2306. This clause is based on cl.3 of Parts B and D of the Schedule to CASA.

2307. Certain interpretation provisions in cl.237 relating to benefits for loss of, or retirement from, office are applied to clauses in statements dealing with the requirement for disclosure of benefits proposed in connection with a takeover offer to be given to officers of a target company.

Cl.750 : Part A, B, C, and D Statements

2308. This clause sets out the detailed requirements in relation to four different statements required under this Chapter:

- Part A: Statement to be given by an offeror under a takeover scheme.
- Part B: Statement to be given by the target company to which the takeover scheme relates.
- Part C: Statement to be given by the offeror under the takeover announcement.
- Part D: Statement to be given by the target company to which the takeover announcement relates.

Part A : Statement to be given by the offeror under takeover scheme

2309. The information required to be set out in a Part A statement is substantially similar to that required to be given under Part A of the Schedule to CASA.

2310. These details relate to the offer period, the offeror, funding arrangements, the activities of the offeror and associates, relevant acquisitions and disposals of shares, agreements made in connection with the offer, other material information known to the offeror and any other matter required by regulations. Cl.18 dealing with information required by regulations is based on CASA sub-s.16(2A). The requirement to set out particulars of the offeror's intentions (cl. 20) is different to the requirement found in cl. 5A of Part A to the schedule of CASA in that it provides that, where a relevant intention has not been finalised but the offeror is considering possible courses of action, those possibilities are to be specified (sub-cl. 20(2)).

2311. The provisions in Part A and C statements in relation to proposed benefits for officers of target companies (cl.12 of Part A and cl.9 of Part C) have been altered to bring them into line with the corresponding Parts B and D provisions and with the general benefits provisions in cl.237.

Part B - Statement to be given by target company to which takeover scheme relates

2312. The details required to be set out in a Part B statement are substantially similar to those required to be set out in Part B of the schedule to CASA.

2313. Amongst other things, the Part B must include:

- (a) each director's reasons for making a recommendation, or not, as the case may be.
- (b) a statement as to whether there have been any known material changes to the financial position of the target company since the date of the last accounts of the company; and
- (e) any other material information.

2314. Copies of relevant experts' reports have to be attached (see cl. 647).

Part C - Statement to be given by offeror under takeover announcement

2315. Details required in a Part C statement under this Chapter are substantially similar to those required under Part C of the schedule to CASA.

2316. The Part C statement must include the same information as would be included in a Part A statement which involves only a cash consideration (including details of the offeror's intentions or possible courses of action).

Part D - Statement to be given by target company to which takeover announcement relates

2317. This Part sets out the requirements which must be complied with by a listed target company the subject of a bid under a takeover announcement. These requirements are substantially similar to those set out in Part B of the schedule to CASA and are the same as those set out in Part B of this clause with the exception of cl. 11 of Part B which is not relevant.



PART 6.13 - TRANSITIONAL

2318. A number of provisions necessary for orderly transition from co-operative scheme regulation of takeovers to regulation under the national scheme provided for by this Bill are included in this Part.

Cl.751 : Application

2319. The provisions in this Part override any other provision in the Chapter.

Cl.752 : Definition

2320. A definition of "State or Territory Acquisition of Shares Law" is included for the purposes of Part 6.13. These comprise the various Companies (Acquisition of Shares) Codes and Act under the co-operative scheme.

Cl.753 - Acquisitions pursuant to Part A statements served before commencement of Chapter

2321. Where a Part A statement has been served in accordance with a relevant State or Territory law before the commencement of this Chapter, the Chapter will not apply to any subsequent acquisitions pursuant to the statement or other related matters that are permitted under the State or Territory law.

Cl.754 : Acquisitions pursuant to takeover announcements made before commencement of Chapter

2322. This is a similar provision to cl.753 excluding the Chapters' application to acquisitions pursuant to takeover announcements made prior to the commencement of the Chapter under a relevant State or Territory law.

Cl.755 : Application of State or Territory laws to excluded acquisitions not affected

2323. State or Territory laws will continue to operate in respect of acquisitions or related matters to which the Chapter does not apply.

Cl.756 : Acts of NCSC deemed to be acts of Commission

2324. Acts done by the NCSC or its delegates under a corresponding State or Territory law will, after the Chapters' commencement, be taken to have been done by the ASC (provided the Chapter applies to the matter to which the action relates).

Cl.757 : Acts done before commencement of Chapter

2325. A reference in the Chapter to an act or thing having been done will include reference to acts or things done before the Chapters' commencement other than the making of a takeover offer.

Cl.758 : Notices of substantial shareholdings

2326. Substantial shareholders who have already given notice to a company under a corresponding State or Territory law will not be required to give further notice to the company under cl.709.

Cl.759 : Information as to beneficial ownership of shares

2327. A State or Territory law corresponding to Part 6.8 will continue to apply to any matters occurring before the Chapters' commencement.