

Cl.864 : Securities exchange may impose additional obligations on members

2618. This clause is to the same effect as SIA s.82.

2619. Nothing in Part 7.5 or Part 7.6 of the Bill will prevent a securities exchange from imposing on members any obligations dealing with auditing of accounts, furnishing information in auditors' reports or the keeping of books provided they are not inconsistent with this Chapter or a licence condition.

PART 7.6 - MONEY AND SCRIP OF DEALERS' CLIENTSDivision 1 - Trust Money

2620. This Part (cls.865 - 878) regulates, primarily by the imposition of licence conditions, the conduct of holders of dealers licences in relation to money and scrip received from or on account of, or by way of loan from, clients. The Part also provides certain powers to the Court in respect of breach of conditions and other matters giving rise to concern about the security of clients' money or scrip held by the licence holder (these are based on SIA ss.83-86). The conditions and their obligations imposed are largely based on the requirements under SIA ss.67, 72, 73 and 74.

Cl.865 : Interpretation and application

2621. The Part, except cl.872 which relates to money lent to a dealer, applies to the holder of a dealer's licence and in relation to a securities business carried on by the licensee.

Cl.866 : Dealer to keep trust account

2622. Subject to the obligations being recast as a licence condition, this clause is based on SIA sub-ss.73(1) and (8).

2623. It is a condition of a dealer's licence that the holder open and maintain at least one trust account with an Australian bank (sub-cl.866(1)).

2624. A dealer will not be required to comply with the condition imposed by sub-cl.867(1) where (another) licence condition prevents him from holding moneys in trust for his clients (sub-cl.866(2)).

Cl.867 : What is to be paid into dealer's trust account

2625. Subject to the obligation being recast as a licence condition, sub-cl.867(1) is based on part of SIA sub-s.73(2) and on SIA sub-s.73(4). Sub-cl.867(2) is based on SIA sub-s.73(5) and has been simplified with the new definition of "payment order" (see cl.9).

2626. It is a condition of a dealer's licence that the dealer pay the following moneys into a trust account:

- (a) money held by the dealer in trust for a client (para.867(1)(a)); and
- (b) money received by a dealer from a client other than brokerage fees etc, payment for securities delivered to the dealer before money is received or money to which para.872 applies (para.867(1)(b)).

2627. A payment order that is payable to, or to the order of, a specified person or bearer (not being a cheque etc. in which the payee is the dealer, a partner of the dealer or the dealer's firm) received from a client with instructions to deliver it to the person to whom it is payable, will not have to be paid into a trust account (sub-cl.867(2)).

Cl.868 : When money to be paid into trust account

2628. Subject to the obligation being recast as a licence condition, this clause is based on SIA sub-s.73(2).

2629. It is a condition of a dealer's licence that the dealer pay into the trust account any money held by him in trust for a client no later than the next business day after receipt.

Cl.869 : Withdrawals from trust account

2630. Subject to the restrictions being recast as licence conditions this clause is based on SIA sub-s.74(1) and (4).

2631. This clause sets out the purposes for which the dealer can use moneys from the trust account. It is a condition of a dealer's licence that the dealer not withdraw money from a trust account except to:

- (a) make a payment to or in accordance with the written directions of a person entitled to the money;
- (b) make a payment to a stock exchange in accordance with cl.889;
- (c) defray brokerage and proper charges;
- (d) pay to the dealer moneys to which he is entitled (being moneys that were paid, but were not required to be paid, into the trust account); and
- (e) make a payment that is otherwise authorised by law.

(sub-cl.869(1)).

2632. Lawful claims or liens will not be affected (sub-cl.869(2)).

Cl.870 : Withdrawal against uncleared cheque

2633. Subject to the obligation being recast as a licence condition, this clause is based on SIA sub-ss.74(5) and (6).

2634. A dealer may withdraw from a trust account an amount which is the whole or part of a cheque that has not been cleared if it has not been refused payment (sub-cl.870(1) and (2)). However, it is a condition of a dealer's licence that the dealer must pay this back if clearance of the cheque is subsequently refused within 1 business day of notification of the refusal (sub-cl.870(3)).

Cl.871 : Trust money not available in respect of dealer's own debts

2635. This clause is based on SIA sub-s.74(3).

2636. Money in a dealer's trust account is not available to satisfy a liability of the dealer.

Cl.872 : Money lent to dealer

2637. Except to the extent that this clause is slightly more limited in coverage, it is based on SIA s.67.

2638. This section applies where a person lends money to a dealer in connection with either the dealer's securities business, if the dealer or the person is a corporation, or the dealer's "eligible securities business" (see cl.93) where neither is a corporation (sub-cl.872(1)).

2639. Where a client lends money to a dealer in such circumstances, the dealer must:

- (a) pay that money into an Australian bank account which contains only money lent to the dealer (sub-cl.872(2));
- (b) give the client a document in the prescribed form setting out terms and conditions on which the loan is made and accepted and its purpose (sub-cl.872(3));
- (c) keep the moneys in the account until the client has given written acknowledgement that the disclosure document has been received (sub-cl.872(4)); and

- (d) use the moneys only for the purpose set out in the disclosure document or for another purpose agreed to by the client subsequently and in writing (sub-cl.872(5)).

Cl.873 : Scrip in dealer's custody

2640. Subject to the obligations being recast as licence conditions, this clause is based on SIA s.72.

2641. This section applies where a licenced dealer receives, for safe custody, scrip which is the property of the client (sub-cl.873(1)).

2642. A brief outline of cl.873 is as follows:

- (a) Where the client requests that the documents be registered in the name of a nominee or that they be deposited with a bank it is a condition of the licence that the dealer do so (sub-cl.873(2) and (3)). If no such request is made, it is a condition of the licence that the dealer register the documents in the name of the client if this has not been done (sub-cl.873(4)).
- (b) It is a condition of a licence that the dealer not deposit documents as security with his creditors unless an amount is owed by the client and the dealer gives a written notice to the client identifying the documents and stating that he or she intends to deposit them as a security (sub-cl.873(5)). Where the money owed to the dealer is paid it is a licence condition that the dealer withdraw the documents from deposit within 1 business day (para.873(6)(a)).

- (c) If the documents are maintained as security for more than 3 months it is a licence condition that the dealer give the client written notice of this fact, and at 3 monthly intervals thereafter (para.873(6)(b)).

Cl.874 : Court may freeze certain bank accounts of dealers and former dealers

2643. This clause is based on SIA sub-s.83(1).

2644. The Court will be able to make an order restraining dealing in relation to any of the dealer's bank accounts (sub-cl.874(3)) where the ASC shows, to the satisfaction of the Court, that:

- (a) there are reasonable grounds for believing there is a deficiency in a trust account or loan account (see sub-cl.872(2));
- (b) there has been undue delay or unreasonable refusal by a dealer in paying or accounting for trust moneys as required by a licence condition or the securities exchange's business rules;
- (c) a licence condition imposed by cl.868 has been contravened or sub-cl.872(2) has been contravened;

(sub-cl.874(1))

or

- (d) where a person, pursuant to an existing or past dealers licence, is or last carried on a securities business otherwise than in partnership - that the licence of that person has been revoked or suspended, that he is mentally or physically incapable of managing his affairs, that he has ceased to carry on a securities business or that he has died. (sub-cl.874(2)).

Cl.875 : Interim order freezing bank accounts

2645. This clause is based on SIA sub-ss.83(2) and (3).

2646. The Court may grant an interim order (e.g. restraining dealing in bank accounts) pending the determination of an application under cl.874 (sub-cl.875(1)). The Court will not require any undertaking as to damages as a condition of granting an order (sub-cl.875(2)).

Cl.876 : Duty of banker to make full disclosure

2647. This clause is to the same effect as SIA s.84.

2648. Where an order made under cl.874 is directed to a banker, the banker must make full disclosure to the ASC in respect of any accounts kept or reasonably suspected of being kept by the dealer the subject of the order. The banker must also permit the ASC to take copies of and extracts of such accounts.

Cl.877 : Further orders and directions

2649. This clause is based on SIA s.85.

2650. The ASC or a person affected by a restraining order may apply to the Court which will be able to make further orders dealing with ancillary matters, directing payment from a bank account affected by an order to the ASC or its nominee or varying or discharging an order.

Cl.878 : Power of Court to make order relating to payment of money

2651. This clause is based on SIA s.86.

2652. The Court, in making an order under cl.877 which provides for payment to the ASC or a nominee, will be able to direct the person to whom the money is to be paid:

- (a) to pay the moneys into a separate trust account;
- (b) to prepare a scheme for distributing the moneys; or
- (c) to apportion the moneys among the claimants in proportion to their proved claims where the moneys received are insufficient (this is despite any rule of law or equity to the contrary e.g. the rule in Claytons case).

(sub-cl.878(1)).

2653. A scheme prepared pursuant to sub-cl.878(1) must be approved by the Court (sub-cl.878(2)). The Court will be able to give such directions as it thinks fit in relation to moneys held in a separate trust account under sub-cl.878(1) (sub-cl.878(3)).

PART 7.7 - REGISTERS OF INTERESTS IN SECURITIES

2654. Part 7.7 of this Chapter (cls.879 to 887) deals with the establishment and maintenance of a register of interests in securities by licence holders and by financial journalists.

Cl.879 : Interpretation

2655. Subject to the extended definition of "financial journalist" outlined below, this clause is based on SIA s.87.

2656. Cl. 879 of the Bill contains a number of interpretative provisions:

- (a) 'Financial journalist' is defined for the purposes of the Part (sub-cl.879(1)). In contrast to the corresponding definition in SIA sub-s.87(1), this definition extends to persons preparing analysis or reports for the electronic media.
- (b) A member of a securities exchange certified by the exchange as specialising in odd lots is exempted from the operation of this Part in relation to any relevant interest he acquires as a result of an odd lot transaction (sub-cl.879(2)).

Cl.880 : Application of Part

2657. This clause is based on SIA s.88 and sub-s.87(2).

2658. Part 7.7 applies to the holders of licences, representatives of licence holders holding proper authorities and financial journalists (sub-cl.880(1)).

2659. The Part only applies to eligible securities (see cl.9) of a public company or a securities exchange listed company (sub-cl.880(2)).

Cl.881 : Register to be maintained

2660. This clause is based on SIA s.89 with no differences of substance.

2661. A financial journalist and a licence holder (and representatives holding proper authorities from him) must maintain a Register in the prescribed form and manner and must keep it in Australia (sub-cl.881(1)).

2662. Particulars of securities and the nature of the relevant interest (see Division 5 of Part 1.2 cls.30-45) must be entered in the Register within 7 days by a person who is or who becomes a person with a relevant interest (sub-cls.881(2) and (3)). Particulars of any change must also be entered within 7 days (sub-cl.881(4)). The particulars to be entered include:

- (a) the date on which a person to whom this Part applies began or ceased to have the relevant interest or on which the change occurred;
- (b) the number of securities to which the relevant interest related;
- (c) the amount of any consideration for which the relevant interest was acquired or disposed of; or
- (d) if the securities are not registered in the name of the person to whom this Part applies - the name of the person who is registered as the holder of the securities or the name of any other person entitled to become registered as the holder of the securities.

(sub-cl.881(6)).

2663. The register may now also include particulars of matters relating to other securities to which the Part does not relate (sub-cl.881(7)).

Cl.882 : Commission to be notified of certain matters on establishment of Register

2664. This clause is based on SIA sub-ss.90(1) and (2).

2665. An applicant for a licence must give notice in writing to the ASC of the place at which he intends to keep the Register (sub-cl.882(1)). Within 14 days of commencing to keep the Register, a person who holds a proper authority from a licensee must give written notice to the ASC stating where the Register is kept and the name and business address of the licence holder (sub-cl.882(2)). Within 14 days after beginning to keep a Register, a financial journalist must give a similar notice which includes the name and business address of his employer and the publications to which he or she contributes (sub-cl.882(3)).

Cl.883 : Commission to be notified of changes in certain matters

2666. This clause is more extensive than SIA sub-s.90(3) which referred only to a change in the place at which the Register was kept. (This requirement is now included in sub-cl.883(1)).

2667. Notification to the ASC is also required when a person to whom the Part applies:

- (a) begins or ceases to hold a proper authority from a particular licensee (sub-cl.883(2)); or
- (b) begins or ceases to be employed as a financial journalist by a particular employer (para.883(3)(a)); or to contribute as a financial journalist to a particular publication (para. 883(3)(b)).

2668. Notification is also required of the new name or business address when the name or business address of the licensee or employer or the name of the publication which has been notified ceases to be correct (sub-cl.883(4)).

Cl.884 : Defences

2669. This clause is based on SIA s.91.

2670. In a prosecution under cls.881, 882 or 883, there will be a defence based on ignorance of relevant facts or occurrences and on timely rectification of the failure to comply with the relevant section (sub-cl.884(1)). The awareness of an employee or agent will be imputed to his employer or principal unless proved to the contrary (sub-cl.884(2)).

Cl.885 : Power of Commission to require production of Register

2671. This clause is based on SIA s.92.

2672. The ASC will be able to require a person to whom this Part applies to produce the Register at a specified place and within a specified time for inspection by a person authorised by the ASC (who may make further requirements).

Cl.886 : Power of Commission to require certain information

2673. This clause is based on SIA s.93.

2674. The ASC will be able, by written notice, to require the proprietor or publisher of a newspaper or periodical and the owner or provider of an electronic media service to supply the name and address of a person who contributed to or prepared any article, analysis or report (or contributed during a specified period to any article etc) concerning eligible securities - see cl.9 (sub-cl.886(1)).

Cl.887 : Power of Commission to supply copy of Register

2675. This clause is the same as SIA s.94.

2676. The ASC will be able to supply a copy of an extract from a Register to any person who in its opinion should in the public interest be informed of the matters disclosed.

PART 7.8 - DEPOSITS WITH STOCK EXCHANGES

2677. Part 7.8 of this Chapter (Cls.888 to 893) deals with the deposits that each member and member organisation are required to lodge with the stock exchanges. (See para.869(1)(b) which permits a dealer to withdraw money from a trust account to lodge and maintain the deposit required by this Part).

Cl.888 : Interpretation

2678. This clause is based on SIA para.94A(a).

2679. In effect it exempts ASX Ltd subsidiaries from the requirements of Part 7.8. This is done because those subsidiaries do not have broker members - by amendments to the SIA in 1987 all members of the capital city exchanges were transferred to ASX Ltd. Accordingly, deposits are lodged with ASX Ltd.

Cl.889 : Deposits to be lodged by member organisations

2680. Except to the extent that the obligations are recast as licence conditions, this clause is based on SIA s.95.

2681. It is a condition of a dealer's licence held by, or held by a partner of, a member organisation (see cl.9) of a stock exchange that the member organisation lodge and maintain a deposit with a nominated stock exchange (sub-cl.889(1) and (2)). It is also a licence condition that a licensee member organisation or partnership comprising a licensed partner that becomes a member of more than one exchange, or ceases to be a member of a particular exchange (but remains a member of 2 or more exchanges), must inform each relevant stock exchange where the deposit is to be lodged (sub-cl.889(3)).

2682. This deposit is payable out of moneys in a trust account (sub-cl.889(5)). Money lodged as a deposit from a trust account continues to be money in that trust account even though it is lodged (sub-cl.889(6)).

2683. A contravention of a condition under sub-cl.889(2) is to be disregarded if it was attributable to the making of a payment out of the trust account authorised by paras. 869(1)(a), (c), (d) or (e) that would not have been able to be made if the obligation under sub-cl.889(2) had been met.

Cl.890 : Deposit to be proportion of trust account balance

2684. Except to the extent that the obligations are recast as licence conditions, this clause is based on SIA s.96.

2685. It is a licence condition that the deposit required to be lodged under cl.889 be two-thirds of the lowest balance in the trust account during the three months period ending on the previous quarter day (defined in cl.9) or such lesser proportion as is prescribed (sub-cl.889(1)). Where there are two or more trust accounts, the amount of deposit will be determined on the basis of the total of the balances (sub-cl.889(1)). No deposit will have to be lodged where the amount is less than \$3,000 (sub-cl.889(2)).

2686. It is also a licence condition that where a licensee member organisation, or partnership (a partner of which is licensed) is required to increase the amount lodged with an exchange, it must lodge the additional amount within 5 trading days of that stock exchange after the relevant quarter day (sub-cl.890(3)).

Cl.891 : Deposits to be invested by stock exchange

2687. This clause is based on SIA s.97.

2688. It sets out what a stock exchange is to do when it receives a deposit under cl.889. A brief outline is as follows:

- (a) Deposits received by a stock exchange must be held on trust for the person lodging it and must be invested:
 - (i) on interest-bearing term deposit with an Australian bank; or
 - (ii) on deposit with an eligible money market dealer (defined in cl.9).

(sub-cl.891(1)).
- (b) Interest received from deposits must be paid into the National Guarantee Fund in the case of participating exchanges (defined in cl.761) and into the exchange's fidelity fund in the case of other exchanges (sub-cl.891(2) and (3)).
- (c) The amount deposited with the stock exchange under cl.889 will be repayable by it on demand (sub-cl.891(4)) but this will not affect a condition existing under cl.889 (sub-cl.891(5)). It is a licence condition that the amount repaid by a stock exchange (under sub-cl.891(4)) must be paid into a trust account maintained under cl. 866 (sub-cl.891(6)).
- (d) The National Guarantee Fund and the fidelity fund of a stock exchange will guarantee repayment of a deposit (sub-cl.891(7) and (8)).

Cl.892 : Accounts in respect of deposits

2689. This clause is based on SIA s.98.

2690. A stock exchange must establish and keep proper accounts of all deposits received under this Part and is required, within 1 month after each quarter day, to cause a balance-sheet to be made out as at that day (sub-cl.892(1)).

2691. Accounts must be audited by a registered company auditor (sub-cl.892(2)) who must give a report on the accounts and balance sheet to the board of the stock exchange within one month after the balance sheet is made out (sub-cl.892(3)). A stock exchange must give the ASC a copy of each report and of the balance sheet to which it relates within 14 days after the report has been given to the board (sub-cl.892(4)).

Cl.893 : Claims not affected by this Part

2692. This clause is based on SIA s.99.

2693. No claims or liens of a member of a stock exchange or rights of other persons are affected by anything done under this Part.

PART 7.9 - FIDELITY FUNDS

2694. Part 7.9 of this Chapter (cls.894-919) deals with conduct of the fidelity funds required to be kept by exchanges which are not participating in the Securities Exchange Guarantee Corporation (see Part 7.10).

Cl.894 : Interpretation

2695. This clause is based on SIA s.99A.

2696. This defines "participating exchange" as either a participating exchange under Part 7.10 i.e. an eligible exchange which is a member of the Securities Exchange Guarantee Corporation (see sub-cl.925(1)) or an Exchange subsidiary (a subsidiary of ASX Ltd).

Cl.895 : Fidelity funds

2697. This clause is to the same effect as SIA s.100 with the addition of a transition provision (sub-cl.895(3)).

2698. A securities exchange, other than a "participating exchange", must keep a fidelity fund which is administered by its board (sub-cl.895(1)). The assets of the fund will be the property of the securities exchange, but must be kept separately from other property and must be held in trust for the purposes of this Part (sub-cl.895(2)).

Cl.896 : Money constituting fidelity fund

2699. This clause is based on SIA s.101.

2700. The fidelity fund will consist of:

- (a) any amount paid to the credit of the fund by the securities exchange on its establishment;

- (b) moneys paid to the exchange under sub-cl.902(5) and 904(5));
- (c) the interest on moneys invested by the exchange under Part 7.8;
- (d) the interest and profits accruing from the investment of the fidelity fund;
- (e) moneys paid into the fund by the exchange;
- (f) moneys recovered by or on behalf of the exchange in the exercise of a right of action conferred by the Part;
- (g) moneys paid by an insurer pursuant to an insurance or indemnity contract entered into by the securities exchange under cl.917; and
- (h) all other moneys lawfully paid into the fund.

Cl.897 : Fund to be kept in separate bank account

2701. This clause is based on SIA s.102 but now requires that fidelity fund money be kept in a separate bank account in an Australian bank (until invested or applied).

Cl.898 : Payments out of fund

2702. This clause is based on SIA s.103.

2703. The following payments will be payable out of the fidelity fund in such order as the board determines:

- (a) claims allowed by the board or established against the securities exchange under this Part;

- (b) legal and other expenses incurred in investigating or defending claims or in the exercise by the securities exchange or board of rights, powers and authorities under this Part;
- (c) premiums payable in respect of insurance or indemnity contracts entered into under cl. 917;
- (d) expenses incurred in administering the fund, including wages and salaries; and
- (e) all other money payable out of the fund in accordance with the Part.

Cl.899 : Payment to the credit of the fidelity fund of a futures exchange or futures association

2704. This clause is based on SIA s.103A except that the Minister has the power previously held by the Ministerial Council, and a transitional provision has been inserted (sub-cl.899(2)).

2705. The Minister may approve a payment from a fidelity fund kept under this Part to the fidelity fund of a securities exchange or related body corporate that becomes a futures exchange or futures association (sub-cl.899(1)).

2706. Any approval given by the Ministerial Council under the corresponding SIA s.103 is deemed to be an approval given by the Minister under this Part (sub-cl.899(2)).

Cl.900 : Accounts of Fund

2707. This clause is to the same effect as SIA s.104.

2708. A securities exchange must establish and keep proper accounts of its fidelity fund and prepare a balance sheet (sub-cl.900(1)).

2709. It must appoint a registered company auditor (sub-cl.900(2)) who is to audit the accounts and give a report and balance sheet to the board of the securities exchange not later than one month after the balance sheet is made out (sub-cl.900(3)). The securities exchange must give the ASC a copy of the report and balance sheet within 14 days of receipt (sub-cl.900(4)).

Cl.901 : Management sub-committee

2710. This clause is based on SIA s.105 to which has been added transitional provisions (sub-cl.901(6) and (7)).

2711. The board of a securities exchange may, by resolution, appoint a management sub-committee of not more than 5 nor less than 3 members one of whom is a member of the board (sub-cl.901(1)).

2712. Other provisions relating to this management sub-committee are as follows:

- (a) The securities exchange board will be able to delegate its powers etc under Part 7.9 other than:
 - this power of delegation;
 - cl.904 (imposition of a levy)';
 - sub-cl.907(8), (10) or (11) (payment out of fund of amounts in excess of those authorised by cl. 907); or
 - cl.909 (recompense of an innocent partner).

(sub-cl.901(2)).
- (b) A delegation by the board of a securities exchange will be able to be varied or revoked at any time by resolution of the board (sub-cl.901(4)).

- (c) The board may, by resolution, remove a member or fill a vacancy in a sub-committee appointed by it (sub-cl.901(5)).
- (d) Any existing management sub-committees remain in existence and their delegated powers continue (sub-cl.901(6) and (7)).

Cl.902 : Contributions to fund

2713. With the exception of sub-cl.902(3)-(6), this clause is based on SIA s.106.

2714. A person must not be admitted to membership of a securities exchange (or to partnership in a member firm) unless he has paid a contribution to the fidelity fund (sub-cl.902(1)). An annual fidelity fund contribution must also be made on or before 31 March each year (sub-cl.902(2)).

2715. Such fidelity fund contributions are payable to the Secretary of the Department on behalf of the Commonwealth (sub-cl.902(3)) who pays it into the Consolidated Revenue Fund and an equivalent amount is then appropriated out of the Consolidated Revenue Fund to the securities exchange (sub-cl.902(4)). On receipt of this amount the exchange must pay it into the fidelity fund (sub-cl.902(5)). A person is not liable to pay any contribution under this Part unless the obligation is imposed by an Act other than this Bill (cl.902(6) and see cl.919). In this regard see the explanatory memoranda below relating to the Securities Exchanges (Membership) Fidelity Funds Contribution Bill 1988 and the Securities Exchanges (Application for Membership) Fidelity Funds Contribution Bill 1988.

Cl.903 : Provisions where fund exceeds \$2,000,000

2716. This clause is to the same effect as SIA s.107.

2717. This clause deals with the situation where the amount in a fidelity fund exceeds \$2,000,000 or such lesser amount as is prescribed.

2718. A brief outline of the provisions is as follows:

- (a) Where the amount in a fidelity fund exceeds \$2,000,000 (or a prescribed lesser amount):
 - (i) a natural member who, or a corporate member which, has made 20 or more annual contributions and in respect of whom a payment from the fund has not been made (or if made has been repaid) will not be required to make further contributions (sub-cl.903(1) and (2));
 - (ii) if a body corporate or natural person ceases to be a securities exchange member, the board may pay it or him (or his personal representative or his dependents) all or part of its total annual contributions, either with or without interest (sub-cl.903(3)-(5)).
- (b) The securities exchange will be able to suspend the operation of paras. 903(3)(a) or (b) (but not both) by notice in the Gazette, or revoke the suspension (sub-cl.903(7)).
- (c) The board will be able to require a member referred to in sub-cl.903(2) to recommence annual contributions if the fund is less than \$1,000,000 or a prescribed lesser amount and such a member will be liable to contribute accordingly (sub-cl.903(8)).

Cl.904 : Levy in addition to annual contributions

2719. With the exception of sub-cl.904(3) to (6) this clause is based on SIA s.108.

2720. A securities exchange will be able to determine that a levy be paid by each contributor if the fidelity fund is insufficient to pay all amounts required to be paid under cl.898. Such a levy is payable by each member (sub-cl.904(1)). A person will not be required to pay more than \$5,000 in total or more than \$1,000 in any 12 month period (sub-cl.904(2)).

2721. Such a levy is payable to the Secretary of the Department on behalf of the Commonwealth in the prescribed period and manner (sub-cl.904(3)) who pays it into the Consolidated Revenue Fund and an equivalent amount is then appropriated out of that fund to the exchange (sub-cl.904(4)). On receipt of this amount the exchange must pay it into the fidelity fund. A person is not liable to pay such a levy unless the obligation is imposed by another Act (cl.904(6) and see cl.919). In this regard, see the explanatory memorandum below relating to the Securities Exchanges Fidelity Funds Levy Bill 1988.

Cl.905 : Power of securities exchange to make advances to fund

2722. This clause is to the same effect as SIA s.109.

2723. A securities exchange will be able to give or advance money to its fidelity fund (sub-cl.905(1)) which may be repaid at any time (sub-cl.905(2)).

Cl.906 : Investment of fund

2724. This clause is to the same effect SIA s.110.

2725. Money in a fidelity fund not immediately required may be invested in any manner in which trust funds may lawfully be invested or on deposit with an eligible money market dealer (see cl.9).

Cl.907 : Application of fund

2726. This clause is to the same effect as SIA s.111 with the insertion of a transitional provision (sub-cl.907(9)).

2727. This clause deals with the payment of moneys out of the fidelity fund where a person has suffered pecuniary loss because of defalcation or fraudulent misuse of securities etc.

2728. A brief outline of cl.907 is as follows:

- (a) The fund will be applied to compensate persons who suffer loss, whether before or after the commencement of this Part, because of defalcation or fraudulent misuse of money, securities or documents of title to securities by a member of the securities exchange who, when the loss is suffered, is a sole trader or partner in a member firm who is liable to contribute to the fidelity fund, or an employee of that sole trader or firm, again whether before or after the commencement of this Part (sub-cl.907(1)).
- (b) If there is no right to compensation under sub-cl.907(1) a payment from the fund will be able to be made to an official receiver or trustee in bankruptcy. The amount of such a payment will be limited to the amount the official receiver or trustee certifies is required to make up or reduce the deficiency in the bankrupt member's estate to satisfy debts arising from dealing in securities (sub-cl.907(2)).
- (c) This provision for payment where the defaulter is bankrupt will also apply where a member or a partner in a member firm of a stock exchange has made a composition with his creditors or has executed a deed of assignment or deed of arrangement under Part X of the Bankruptcy Act (sub-cl.907(3) and (4)).

- (d) The fidelity fund will be able to be applied to pay a liquidator of a corporate member that is being wound up. The amount of such a payment will be limited to the amount that the liquidator certifies is required to make up or reduce the deficiency arising by reason of the available assets being insufficient to satisfy proved debts arising from dealings in securities (sub-cl.907(5)).
- (e) The total liability of a stock exchange in relation to the defalcations etc of one member or one firm is \$500,000 (sub-cl.907(6)).
- (f) The stock exchange will be able to increase the amount of this total liability by notice in the Gazette (sub-cl.907(8)). Existing notices will continue in force (sub-cl.907(9)). This notice may be revoked or varied (sub-cl.907(10)).
- (g) The exchange will also be able to apply out of the fidelity fund such sums in excess of the amount limited by this clause as it thinks fit in the compensation of persons who have suffered loss, or in payment to a trustee or official receiver (sub-cl.907(11)).
- (h) Where money, securities, documents of title to securities or other property have been entrusted to or received by a former member of a securities exchange or his employee who defalcated or fraudulently misused them and the person who entrusted them had reasonable grounds for believing (and did believe) that the former member was a member of the securities exchange and subsequently

suffered loss, then the reference in this clause to a member of a stock exchange includes a reference to that former member (sub-cl.907(12)).

Cl.908 : Claims against the fund

2729. This clause is to the same effect as SIA s.112 with the addition of a transitional provision.

2730. A person who suffers pecuniary loss whether before or after commencement of the Part will be entitled to claim compensation from the fidelity fund and to take Court proceedings to establish his claim (sub-cl.908(1)).

2731. Other provisions of cl.908 are as follows:

(a) A person will not have a claim against the fund if:

(i) the pecuniary loss was suffered before 1 July 1981 or when the securities exchange was a participating exchange i.e. a member of the Securities Exchanges Guarantee Corporation (see cl.9); or

(ii) the pecuniary loss was suffered after the money or property had, in due course of administration of a trust, ceased to be under the sole control of a member or partner in a member firm.

(sub-cl.908(2)).

(b) The claimant will be able to claim the actual pecuniary loss suffered by him including the reasonable costs in making and proving his claim less any benefit received by him from any other source in reduction of the loss (sub-cl.908(3)).

- (c) Interest will be payable on the amount of the compensation at the rate of 5% per annum or such rate as is prescribed (sub-cl.908(4)).
- (d) Claims outstanding at the commencement of this Part will be deemed to have been made under this section (sub-cl.908(5)).

Cl.909 : Rights of innocent partner in relation to fund

2732. This clause is to the same effect as SIA s.113.

2733. An innocent partner who has made payments to persons who have suffered loss will be able to make a claim against the fidelity fund in certain circumstances.

2734. A brief outline of cl.909 is as follows:

- (a) Where all claimants have been fully compensated for loss suffered in relation to money or other property entrusted to or received by a partner in a member firm, any other partner in that firm who has made a payment to a person in relation to that compensation will be subrogated to the rights and remedies of that person against the fund. This will occur only if the board determines that the partner was in no way a party to the loss and acted honestly and reasonably in the matter (sub-cl.909(1)).
- (b) A partner aggrieved by the board's decision may appeal to the Court within 28 days. The partner must also lodge a copy of the appeal notice with the securities exchange (sub-cl.909(2) and (3)).
- (c) The Court is not limited in its powers of inquiry and will be able, if it is of the relevant opinion, to direct that the partner be subrogated to the rights and remedies against the fund of the person to whom he made the payment (sub-cl.909(4) and (5)).

Cl.910 : Notice calling for claims against fund

2735. This clause is to the same effect as SIA s.114 with the insertion of a transitional provision.

2736. A brief outline of cl.910 is as follows:

- (a) A securities exchange will be able to publish in a daily newspaper a notice specifying a date (not earlier than 3 months after the date of the notice) by which compensation claims must be made (sub-cl.910(1)).
- (b) A claim must be made in writing before the specified date or, where there is no notice, within 6 months of the claimant becoming aware of the loss; other claims are barred unless the securities exchange determines otherwise (sub-cl.910(2)).
- (c) The exchange, a member or employee has qualified privilege (see cl.9) in respect of a notice published under sub-cl.910(1) (sub-cl.910(3)).
- (d) Notices already published will be deemed to have been made under this clause (sub-cl.910(4)).

Cl.911 : Power of board to settle claims

2737. This clause is to the same effect as SIA s.115.

2738. This clause sets out the procedure for the settlement of claims for compensation by the board of the securities exchange.

2739. A brief outline is as follows:

- (a) The exchange board will be able to allow and settle a compensation claim against the fund (sub-cl.911(1)).
- (b) A claimant is barred from commencing proceedings against a securities exchange without leave of the board unless his claim has been disallowed and he has exhausted other remedies (sub-cl.911(2)). A person refused leave may apply to the Court for leave to commence proceedings (sub-cl.911(3)).
- (c) Notice of disallowance of a claim must be served on the claimant (sub-cl.911(4)), and proceedings against the securities exchange must be commenced within 3 months of this notice (sub-cl.911(5)).
- (d) The admissibility of certain evidence is dealt with in sub-cl.911(6).
- (e) The board or the Court will be able to allow a claim if satisfied there was defalcation or fraudulent misuse even though the person against whom the allegation is made was not convicted or prosecuted or the evidence would not be sufficient to establish the guilt of that person on a criminal trial (sub-cl.911(7)).

Cl.912 : Form of order of Court establishing claim

2740. This clause is to the same effect as SIA s.116.

2741. Where the Court is satisfied that there was a defalcation or fraudulent misuse of property and the claimant has a valid claim it will be able, by order, to declare this and the date it occurred and to direct the board to allow that claim (sub-cl.912(1)). Costs are at the Court's discretion (sub-cl.912(2)).

Cl.913 : Power of securities exchange to require production of securities

2742. This clause is to the same effect as SIA s.117.

2743. The securities exchange will be able to require any person to produce any securities, documents or statements of evidence necessary to support a claim, to enable criminal proceedings to be taken or to enable the exchange to exercise its rights against a member or partner in a member firm. In default of delivery, the board may disallow the claim.

Cl.914 : Subrogation of securities exchange to rights etc. of claimant on payment from fund

2744. This clause is to the same effect as SIA s.118.

2745. The securities exchange will be deemed to be subrogated to the rights and remedies of a claimant on payment being made out of the fund.

Cl.915 : Payment of claims only from fund

2746. This clause is to the same effect as SIA s.119.

2747. Money or other property of the securities exchange, other than the fidelity fund, will not be available for the payment of a claim under this Part.

Cl.916 : Provision where fund insufficient to meet claims or where claims exceed total amount payable

2748. This clause is to the same effect as SIA s.120.

2749. Where the amount of the fund is insufficient to satisfy all claims allowed, the amount of the fund will be apportioned among the claimants in such manner as the board thinks

equitable and the remaining unpaid amount will be a charge against future receipts to be paid when available (sub-cl.916(1)). Where, however, the total of claims in respect of a sole trader or member firm's defalcation or fraud exceeds \$500,000 (the maximum amount under sub-cl.907(6)), the total amount will be apportioned among the claimants and after this apportionment all such claims are discharged (sub-cl.916(2)).

Cl.917 : Power of securities exchange to enter into contracts of insurance or indemnity

2750. This clause is to the same effect as SIA s.121.

2751. A securities exchange will be able to insure itself against liability in respect of claims under this Part (sub-cl.917(1)).

2752. Premiums payable in respect of contracts of insurance or indemnity entered into by the securities exchange under cl.917 may be paid out of the fidelity fund (see para.898(c)).

2753. The exchange, its members and employees and the board and its members have qualified privilege (see cl.89) for publication of a statement that the insurance contract doesn't apply to a particular member (sub-cl.917(3)).

Cl.918 : Application of insurance money

2754. This clause is to the same effect as SIA s.122.

2755. A claimant against a fidelity fund has no right of action against a person with whom a contract of insurance is taken out in respect of the contract or any money paid by the insurer under such a contract.

Cl.919 : Contributions and levies not payable unless imposed
by another Act

2756. A contribution under cl.902 or levy under cl.904 does not impose a liability on a person unless they are imposed by a separate Act. In this regard, see the explanatory memoranda below dealing with those separate Acts.

PART 7.10 - THE NATIONAL GUARANTEE FUND

2757. Part 7.10 has provisions giving protection to clients of members of participating exchanges when dealings are conducted with or through those members or money or other property is entrusted to them. The Part is based on SIA Part IXA with the following modifications;

- . access to the National Guarantee Fund is to be extended to cover unauthorised executions of security transfers (See Division 7). Dealers are to be permitted to execute transfers on behalf of transferors as a result of proposed changes to provisions relating to the transfer of marketable securities and marketable rights (see cl.1105) and this measure is considered necessary to properly protect the interest of transferors and transferees who may suffer loss in the possible event of transfers occurring without the owner's authority.
- . the Board of the Securities Exchanges Guarantee Corporation (SEGC) is to be able to appoint, and delegate certain functions (including the power to determine and allow a claim) to, a management sub-committee (see cl.927).
- . the SEGC may appoint a fund manager to exercise its power of investment provided the manager meets certain eligibility requirements (see sub-cl.934(3)-(5)).
- . the Board will be able to open a separate bank account for administrative expenses (see cl.931).
- . an Exchange subsidiary will be entitled to make a claim on behalf of a claimant dealer if its business rules authorise such a claim (see sub-cl.949(4)).

- . a dealer will be entitled to make one claim in relation to all sales transactions with a defaulting dealer for the net amount outstanding (see sub-cl.949(2)) and an Exchange subsidiary will be entitled to make a single claim on behalf of several selling dealers for the aggregate net amount outstanding (see sub-cl.949(4)).
- . each client will be able to make one claim against the NGF in respect of all unfulfilled obligations of a defaulting selling dealer (see sub-cl.951(2)) and one claim in respect of all unfulfilled obligations of a defaulting buying dealer (see sub-cl.952(2)).
- . a client will be able to make a claim in certain circumstances where his dealer who has entered into a transaction on his behalf has been suspended by the exchange (see cl.951).
- . the only limit on compensation for dealer insolvency will be an overall limit of 14% of the minimum amount of the Fund for the total amount paid out in respect of one dealer insolvency. The individual claim limit of \$50,000 in SIA sub-s.122W(1) has been removed (see cl.968).

Division 1 - Interpretation

2758. This Division is based on SIA Division 1 Part IXA.

Cl.920 : Interpretation

2759. This clause is based on SIA s.122AA.

2760. It inserts a number of interpretation provisions for the purposes of this Part.

2761. Some of the more important provisions are as follows:

- 'eligible exchange' means ASX Ltd, or a securities exchange other than an ASX Ltd subsidiary (see also definition of "participating exchange").
- 'minimum amount' refers to the amount which the SEGC determines, with Ministerial approval, to be the minimum amount maintained in the Fund. This will continue to be \$15 million but provision is made for this to be increased or decreased.
- 'participating exchange' is an eligible exchange that is a member of the corporation (SEGC) running the NGF.
- 'property' is defined to include money and scrip.
- 'reportable transaction' means a sale or purchase of securities quoted on an exchange that according to the exchange's business rules is to be reported to the exchange by a member organisation.
- 'settlement documents' means documents (i.e. appropriate transfer forms and certificates) sufficient to discharge the obligations of the seller under a particular transaction.

Cl.921 : Excluded persons

2762. This clause is to the same effect as SIA s.122AB.

2763. This clause identifies the categories of person who may not make a claim under cl.963 in respect of property entrusted to, or received by, a dealer which subsequently becomes insolvent or under cl.958 in respect of unauthorised transfers of securities. Sub-clause 921(2) provides that the term "relative of a person" in sub-cl.921(1) includes a relative of

the spouse of the person. Ordinary employees of body corporates do not fall within the excluded person definition (sub-cl.921(3)).

Cl.922 : Becoming insolvent

2764. This clause is to the same effect as SIA s.122AC and sets out the circumstances in which a corporation (sub-cl.922(1)), a body corporate other than a corporation (sub-cl.922(2)) and a natural person (sub-cl.922(3)) will be taken to be insolvent for the purposes of Part 7.10. The situation where a dealer becomes insolvent triggers the right to a claim under cl.963.

Cl.923 : Permitted investments

2765. This clause is to the same effect as SIA s.122AD.

2766. Money in the NGF or in a development account (under Division 5) not immediately required for the purposes set out will be able to be invested in a 'permitted manner'. Clause 923 defines these as investments in authorised trustee investments or deposits with an eligible money market dealer (defined in cl.9).

Cl.924 : Additional operation of certain provisions

2767. Provisions of Part 7.10 requiring the SEGC, the Board or a management sub-committee to do something or prohibiting an act require each corporation that is a member of the SEGC to ensure that this is done.

Division 2 - Securities Exchanges Guarantee Corporation (SEGC)

2768. This Division is based on SIA Division 2 Part IXA.

Cl.925 : Minister to nominate

2769. Subject to the addition of a transitional provision (sub-cl.925(4)), this clause is based on SIA 122BA.

2770. The Minister is empowered to nominate a company limited by guarantee as the Securities Exchanges Guarantee Corporation (SEGC). SEGC is responsible for the operation of the NGF. Included in the criteria for nomination are the ability of the body corporate to perform its functions under the Fund provisions having regard to the interests of the public, the sufficiency of indemnity insurance and the suitability of the business rules in respect of ensuring safety of property and protection of the interests of the public. Membership of the corporation is to be limited to the ASX Ltd and any other eligible exchanges (sub-cl.925(3)).

2771. The National Securities Exchanges Guarantee Corporation Ltd, which had been nominated as the SEGC by the Ministerial Council under the corresponding section of the co-operative scheme, will be deemed to have been nominated as the SEGC by the Minister under this clause (sub-cl.925(4)).

Cl.926 : Functions and powers under Fund provisions

2772. This clause is based on SIA 122BB.

2773. The SEGC has, in addition to general corporate powers and capacities, functions and powers conferred on it by Part 7.10 (sub-cl.926(1)).

2774. The provision in cl.162 which provides that a company can restrict or prohibit certain exercises of power by the company will not apply to the above mentioned functions and powers (sub-cl.926(2)).

Cl.927 : Management sub-committee

2775. This provision represents a reform to the SIA Part IXA provisions that will enable the Board which is to administer the National Guarantee Fund on behalf of SEGC (see cl.927) to appoint, and to delegate the majority of its functions under Part 7.10 (including the power to determine and allow a claim) to, a management sub-committee in much the same way as can a committee of a securities exchange (other than the ASX) under cl.901. The sub-committee must consist of between 3 and 5 persons, one of whom is a member of the Board (sub-cl.927(1)). The only powers, authorities and discretions not allowed to be delegated are:

- . the power of sub-delegation under the section.
- . determinations as to payments into a participating exchange's securities industry development account under cl.s.944.
- . determinations that claims are not time-barred under sub-cl.s.s.954(5) and s.969(3)

(sub-cl.927(2)).

2776. A delegation by the Board under this clause can be varied or revoked by it (sub-cl.927(4)) and a member appointed by it can be replaced by it (sub-cl.927(5)).

Cl.928 : Commission to be notified of amendments to business rules

2777. Subject to the addition of a transitional provision, this clause is based on SIA s.122BC.

2778. Where an amendment is made to the business rules of SEGC, it must, as soon as practicable, give notice of it

including its text, date and purpose to the ASC (sub-cl.928(1) and (2)). If that notice is not given within 21 days after the amendment is made, the amendment ceases to have effect (sub-cl.928(3)). The ASC will then be required to notify the Minister who may, within 28 days, disallow the amendment. Where the Minister disallows an amendment, the ASC is required to notify the SEGC and the disallowance takes effect upon that notification (sub-cl.928(6)). Where an amendment notified to the NCSC under SIA sub-s.122BC(1) has not been disallowed and the 28 days under SIA sub-s.122BC(5) has not elapsed as at the commencement of this Act, the amendment will be treated as if it had been made on commencement day (sub-cl.928(7)).

Division 3 - The National Guarantee Fund

2779. This Division is based on SIA Division 3 Part IXA.

Cl.929 : Establishment

2780. Subject to the addition of a transitional provision, this clause is based on SIA s.122CA.

2781. SEGC will establish and maintain the NGF which will be administered by the Board on behalf of SEGC (sub-cl.929(1)). Although the assets of the NGF will be the property of SEGC, it will only be able to use the NGF for the purposes set out in this legislation and not mingle it with its own property or operating funds (sub-cl.929(2)). Assets will include assets of the previous Fund under SIA, Part IXA (sub-cl.929(3)).

Cl.930 : Property constituting Fund

2782. This clause is based on SIA s.122CB.

2783. The NGF will consist of money from a number of sources referred to in cl.930 including the money and property before commencement that formed part of the previous Fund under Part IXA SIA (para.930(a)).

Cl.931 : Fund to be kept in separate bank account

2784. This clause is partly based on SIA s.122CC.

2785. Money in the existing NGF is currently required to be kept in one separate Australian bank account. As a means of improving the efficiency in administering the NGF the the Board will be given the discretion of establishing a second account that could be used, for example, for the payment of day to day administrative expenses associated with the NGF's operation.

Cl.932 : Payments out of Fund

2786. This clause is to the same effect as SIA s.122CD.

2787. SEGC will only be permitted to use the NGF for the purposes set out in Part 7.10. Sub-clause 932(1) specifies the types of payments that may be made out of the Fund.

2788. Payments in respect of contract guarantees and unauthorised security transfers will have priority over payments in respect of a member's insolvency regardless of the order in which claims are made (sub-cl.932(3)).

Cl.s.933 : Accounts of Fund

2789. Subject to the insertion of an appropriate transitional provision, this clause is based on SIA s.122DA.

2790. As the body responsible for the NGF, SEGC will be required to keep proper accounts of the NGF and make out an annual balance sheet of those accounts, to appoint an auditor to audit those accounts and to give to the ASC and participating exchanges a copy of the auditor's report.

2791. A person appointed as an auditor under the corresponding provision of SIA Part IXA whose appointment is current at

commencement of this Act is deemed to have been appointed under this clause (sub-cl.933(6)).

Cl.934 : Investment of Fund

2792. This clause is partly based on SIA s.122DB.

2793. SEGC is able to invest money in the NGF which, in the Board's opinion, is not immediately required for its purposes, in a "permitted manner" (see cl.923 above). A new provision will enable the Board, with ASC's approval, to appoint a professional fund manager to exercise its power of investment (sub-cl.934(3)). Before granting approval, the ASC must be satisfied that a proposed appointee has appropriate qualifications and adequate indemnity insurance (sub-cl.934(4)). An appointed fund manager will be required to act in accordance with the Board's directions and subject to any conditions imposed by the Board (sub-cl.934(5)).

Cl.935 : Interest and profits from investment of Fund

2794. This clause is to the same effect as SIA s.122DC.

2795. Moneys earned from investment of the NGF must be applied by SEGC to pay administration expenses of the NGF and premiums payable in respect of contracts of insurance or indemnity. Any excess must be paid into the NGF.

Cl.936 : Minimum amount of Fund

2796. This clause is based on SIA s.122DD.

2797. SEGC will be empowered, subject to ministerial approval, to determine the minimum amount of the Fund (sub-cl.936(1)). This gives SEGC the flexibility to maintain the NGF at a viable level while the Minister will retain overall responsibility for the level of the NGF.

2798. Any approval given by the Ministerial Council under the corresponding SIA provision is deemed to be an approval under this clause (sub-cl.936(2)).

Division 4 - Levies Where Fund Less Than Minimum Amount

2799. Division 4 is based on SIA Division 4 Part IXA except in relation to the procedures in respect of payment of levies imposed by SEGC where the NGF falls below the minimum. The various levies provided for in this Division will actually be imposed by separate Acts. These are identified in the relevant clauses below. Explanatory memoranda for these Bills are included at the end of this explanatory memorandum.

Cl.937 : Definition

2800. This clause is the same as SIA s.122EA and defines "dealer" as a member organisation of a participating exchange for the purposes of Division 4.

Cl.938 : Levy on reportable transactions

2801. This clause is to the same effect as SIA ss.122EB and 122EC.

2802. The NGF may fall below the minimum amount if there are large sums paid out or the minimum amount is increased under cl.936. To maintain the minimum amount, the SEGC may impose a levy on sale or purchase of securities i.e. "reportable transactions" (sub-cl.938(2)). This transaction levy is imposed at a rate and on a class or classes of transactions determined by the SEGC (sub-cl.938(3)).

2803. Where such a levy is made or varied, the SEGC must give notice to each participating exchange - defined in sub-cl.938(1) (sub-cl.938(4)). Levies can also be imposed by the SEGC on a participating exchange (see cl.940).

2804. Where a transaction levy is imposed by SEGC in respect of a reportable transaction, payment of the levy will be required to be made to a participating exchange as agent for the Commonwealth (para.938(5)(a)) which must also be supplied with transaction particulars sufficient to ascertain the amount of the levy (para.938(5)(b)). The exchange will in turn be required to pay that amount to the Secretary to the Department on behalf of the Commonwealth (sub-cl.(7)). That amount or the amount of the levy payable by member organisations of participating exchanges which is allocated to payment of the levy under this clause (see cl.940) is then paid into the Consolidated Revenue Fund. An equivalent amount is then appropriated out of that fund and paid to the SEGC which must then pay it into the Fund (sub-cl.(8), (9)). By virtue of cl.942 a person is not liable to pay such a levy unless it is imposed by a separate Act (sub-cl.(10) and see explanatory memorandum below relating to the National Guarantee Fund (Reportable Transactions) Levy Bill 1988).

Cl.939 : Revocation of levy on reportable transactions

2805. This clause is based on SIA s.122FA.

2806. Revocation of a levy imposed under cl.938(2) does not affect a liability to pay an amount of levy that became payable before the revocation.

Cl.940 : Levy on participating exchanges

2807. This clause is partly based on SIA s.122FB.

2808. SEGC may, in addition to, or instead of, a levy on reportable transactions under cl.938(2), impose a levy on a securities exchange in order to rectify a deficiency in the Fund (sub-cl.940(1)). The exchange levied must pay the levy to the Secretary to the Department on behalf of the Commonwealth (sub-cl.940(2)) and notify each participating

exchange levied the amount of the levy (sub-cl.940(3)). An exchange may borrow money to pay the levy (sub-cl.940(4)). The levy is payable into the Consolidated Revenue Fund and an equivalent amount is then appropriated to SEGC. The amount is then to be paid into the Fund (sub-cl.940(6)).

2809. By virtue of cl.942 an exchange is not liable to pay such a levy unless it is imposed by a separate Act (sub-cl.940(7)) and see explanatory memorandum below relating to the National Guarantee Fund (Participating Exchanges) Levy Bill 1988).

Cl.941 : Levy by participating exchange on members or member organisations

2810. This clause is partly based on SIA s.122FC.

2811. Where a levy is imposed on a participating exchange under cl.940, it will be able to raise the levy by imposing a levy on members or member organisations (sub-cl.941(1)). Such a levy is payable by a member who, at the time of the levy, is a dealer in securities and within a particular class of members subject to the levy (sub-cl.941(2)). Different rates may apply to different classes of members and payment is to be made to the Secretary of the Department on behalf of the Commonwealth within the period and in the manner specified by the participating exchange (sub-cl.941(3)). The amount is payable into the Consolidated Revenue Fund and the Secretary will apply that amount towards payment of the levy under cl.940. If there is an excess after that application that excess is paid to SEGC (sub-cl.941(4)). The SEGC must then pay it into the Fund (sub-cl.941(5)). Again by virtue of cl.942, a member is not liable to pay such a levy unless it is imposed by a separate Act (sub-cl.941(6) and see explanatory memorandum below relating to the National Guarantee Fund (Members of Participating Exchanges) Levy Bill 1988).

Cl.942 : Levies not payable unless imposed by another Act

2812. Clauses 938, 940 and 941 do not impose a liability on any person to pay a levy unless the levy is imposed by a separate Act. In this regard see explanatory memoranda below dealing with those separate Acts.

Division 5 - Securities Industry Development Accounts

2813. This Division is based on SIA Division 5 Part IXA.

Cl.943 : Interpretation

2814. This clause is based on SIA s.122GA and defines "development account" as an account kept for the purposes of sub-cl.945(1).

Cl.944 : Payments where Fund exceeds minimum amount

2815. This clause is based on SIA s.122GB.

2816. If at any time the amount in the NGF exceeds the minimum amount, the Board will have the discretion to distribute the excess in part or in full to the participating exchanges for industry development purposes. Where an apportionment of the excess is made between participating exchanges or where the Board decides to pay it to only one exchange, it must be fair and equitable having regard to contributions made by, and amounts paid out in respect of, particular exchanges. This, however, is not intended to require payments to be strictly in proportion to contributions or pay-outs made i.e. flexibility is necessary to allow the SEGC to operate efficiently.

Cl.945 : Payments into and out of development account

2817. This clause is based on SIA s.122GC.

2818. The funds distributed to the exchanges under cl.944 are to be kept in a separate account and shall only be applied towards Australian securities industry development purposes approved by the Minister. Such approval may be subject to conditions (sub-cl.945(4)). Where a participating exchange pays out for other than approved purposes or fails to comply with a condition of the approval, it is required to reimburse the development account from its own funds (sub-cl.945(5) and (6)).

Cl.946 : Investment

2819. This clause is the same as SIA s.122GD.

2820. Money in development accounts not immediately required for development purposes can be invested in a 'permitted manner' (defined in cl.923). Interests and profits from such investments must be paid into the development account.

Cl.947 : Accounts

2821. This clause is based on SIA s.122GE.

2822. A participating exchange will be required to lodge with the ASC an annual statement in respect of expenditure from its development account.

Division 6 - Contract Guarantees

2823. This Division is based on SIA Division 6 Part IXA.

Cl.948 : Definitions

2824. This clause is based on SIA s.122H.

2825. The more important definitions are:

- 'completion period' is the period contained in the business rules of a participating exchange, or, if there is no period specified in the business rules, a reasonable period, within which a transaction between dealers should be completed. The expiration of this period is used in cls.949 and 950 to designate the time at which claims may be made.
- 'dealer' means a person who, or partnership that, is or has been a member organisation of a participating exchange.
- 'prescribed period' is the period contained in the business rules of a participating exchange, or, if there is no period specified in the business rules, a reasonable period, within which a dealer must fully settle with its client in respect of a transaction. The expiration of this period is used in cls.951 and 952 to designate the time at which claims by a client may be made.
- 'purchase price' means the cost of purchasing securities and any other fees, charges and taxes payable by the purchaser.
- 'reportable transaction' means a transaction defined in sub-cl.920(1) which relates to "eligible securities" (see cl.9).

Cl.949 : Claim by selling dealer in respect of default by buying dealer

2826. Subject to the modifications outlined below, this clause is to the same effect as SIA s.122J.

2827. Where, at the end of the 'completion period', a buying dealer has not fulfilled his obligations in respect of settlement of the transaction in securities (i.e. supplied the consideration) and the selling dealer has fulfilled his obligations (i.e. supplied settlement documents) or is in an immediate position to do so in relation to that transaction, the selling dealer is able to make a claim against SEGC (sub-cl.s.949(1)).

2828. Provisions additional to those contained in SIA s.122J will enable a dealer to make a single claim in respect of a number of sales (sub-cl.949(2)). In addition, an Exchange subsidiary will be able to make a claim on behalf of a claimant dealer and a single claim will be sufficient where the Exchange subsidiary is entitled to make claims in respect of a number of dealers (sub-cl.s.949(3) and (4)).

2829. Where the SEGC is satisfied that sub-cl.s.949(1) and (3) found a claim, that the claim is in respect of "eligible securities" and that the claimant has supplied settlement documents to it (or has already supplied them to the buying dealer), it will be required to pay the claimant, out of the Fund, the amount of the consideration due (sub-cl.949(5)).

2830. In this way cl.949 provides a contract guarantee to a selling dealer (as does cl.950 to a buying dealer) that SEGC will complete the defaulting dealer's obligations in the transactions.

Cl.950 : Claim by buying dealer in respect of default by selling dealer

2831. Subject to it only applying in respect of "eligible securities", this clause is to the same effect as SIA s.122K.

2832. In the same way that cl.949 provides a contract guarantee to selling dealers, cl.950 provides a contract guarantee to buying dealers in respect of a selling dealer's

failure to meet his settlement obligations (i.e. to provide settlement documents) in respect of "eligible securities" (see cl.9) within the completion period.

2833. Where a successful claim is made by the buying dealer, SEGC will be able to either supply settlement documents to the dealer or supply a cash equivalent if settlement documents are unobtainable (see cl.953).

Cl.951 : Claim by selling client in respect of default by selling dealer

2834. Subject to the modifications outlined below, this clause is to the same effect as SIA s.122L.

2835. This clause and cl.952 represent the other category of contract guarantees provided by Division 6. Where the client of the selling dealer has completed (or is willing to complete) his obligations in respect of a transaction in relation to "eligible securities" (see cl.9) entered into on his behalf by the selling dealer and the selling dealer has not, within the 'prescribed period' supplied to the client the consideration received for the sale or has not dealt with that consideration in accordance with the client's instructions, the client may claim against the SEGC.

2836. A provision (sub-para.951(1)(a)(ii)) additional to that contained in SIA s.122L has been inserted to allow a claim by a client of a suspended selling dealer where the dealer (before suspension) entered into a reportable transaction on behalf of the client and the client has supplied, or is ready willing and able to supply, the scrip to the dealer.

2837. In addition, a person will be able to make a single claim in respect of multiple sales by the selling dealer but each sale will be treated separately by the Board when deciding whether to allow or disallow payment to the claimant

(sub-cl.951(2)). Where SEGC is satisfied that the claimant is entitled to claim and the claimant has supplied the scrip to the dealer or to SEGC, it will be required to pay the claimant the consideration less any unpaid brokerage or other charges (sub-cl.951(3)).

Cl.952 : Claim by buying client in respect of default by buying dealer

2838. Subject to the modifications outlined below, this clause is to the same effect as SIA s.122M.

2839. In the same way that cl.951 provides a guarantee to selling clients in respect of failure by the selling dealer to meet his obligations, cl.952 provides a guarantee to a buying client where the buying dealer fails, within the 'prescribed period' (cl.948) to meet his obligations to the client in respect of a purchase on the client's behalf of "eligible securities" (see cl.9) i.e. where the dealer has not obtained the settlement documents or has obtained them but dealt with them otherwise than in accordance with instructions.

2840. A provision (sub-para.952(1)(a)(ii)) additional to that contained in SIA s.122M has been inserted to allow a claim by a client of a suspended buying dealer in respect of a purchase transaction entered into on the client's behalf (before suspension) where the client is ready willing and able to supply the consideration to the dealer. Another provision, (sub-cl.952(2)) additional to that contained in SIA s.122M, has been inserted to allow a person to make a single claim in respect of multiple purchases by the dealer on the client's behalf.

2841. Where SEGC is satisfied that the client is entitled to make the claim and the client has supplied the consideration to the dealer or, in the case of a suspended dealer, has supplied the consideration to the SEGC, it is required to

supply settlement documents to the client or, if those settlement documents are unobtainable, to pay cash compensation under cl.953 (sub-cl.952(3)).

Cl.953 : Cash settlement of claim where settlement documents unobtainable

2842. This clause is based on SIA s.122N.

2843. Where SEGC allows a claim made by a buying dealer or a buying client under sub-cl.950(2) or 952(3) respectively, the Board will be able to pay an amount equal to the pecuniary loss suffered by that claimant where it is not reasonably practicable for the the Board to provide settlement documents.

2844. Such a situation may arise where:

- (a) an orderly market does not exist in the relevant securities; or
- (b) a "market corner" exists in the securities (i.e. there is insufficient scrip for whatever reason to satisfy demand).

Cl.954 : Making of claims

2845. This clause is based on SIA s.122P.

2846. Claims under the contract guarantee provisions will only be available, in the case of cls.949 and 950, where both persons in the eligible securities transaction are dealers and the claimant dealer carried on a securities business (sub-cl.954(1)). In the case of cls.951 and 952, the person making the sale or purchase of eligible securities on the client's behalf must be a dealer carrying on a securities business (sub-cl.954(2)).

2847. Claims against the NGF must be in writing and, unless served on the SEGC within 6 months after the day on which the claim arises, will be barred (unless the Board determines otherwise) (sub-cl.954(4) and (5)).

Division 7 - Unauthorised Transfer

2848. This Division is additional to those contained in SIA Part IXA and deals with claims on the NGF by owners of securities or by transferees who have suffered loss arising from unauthorised execution of transfers of those securities by transferor dealers. Under changes to the transfer of marketable securities provisions of the Bill (see Division 3 Part 7.13), transferor dealers will be able to execute security transfer forms on behalf of the transferor. Access to the NGF will be available where unauthorised transfers occur.

Cl.955 : Interpretation

2849. This provision has no equivalent in SIA.

2850. Meanings are given for the terms "claim", "dealer" and "securities" for the purpose of the Division (sub-cl.955(1)). A dealer will be deemed to have executed a transfer document on behalf of a person as transferor if the transfer states that the person is transferor and the transfer is purportedly stamped by the dealer as transferor broker.

Cl.956 : Unauthorised execution of transfer of securities

2851. This provision has no equivalent in SIA.

2852. The Division will apply where a dealer executes a transfer of securities on behalf of the owner without the owner's authority i.e. without having received selling instructions from the owner.

Cl.957 : Claim by transferor

2853. This provision has no equivalent in SIA.

2854. An owner of securities who suffers loss as a result of an unauthorised execution of a transfer of those securities by a dealer will be able to make a claim against the NGF.

Cl.958 : Claim by transferee or sub-transferee

2855. The original transferee in a transfer of securities not authorised by the owner, and subsequent transferees, will be able to claim against the NGF in respect to any loss suffered as a result of the unauthorised transfer (sub-cl.958(1)). For example, because an unauthorised transfer will not be sufficient to pass title to the securities, the transferee may suffer loss as a result of rectification of the register to re-instate the true owner.

2856. Transferees will not be able to claim against the Fund where they knew the transfer was unauthorised or where they are "excluded persons" under cl.921 in relation to the dealer executing the unauthorised transfer (sub-cl.958(2)).

Cl.959 : How and when claim may be made

2857. This provision has no equivalent in SIA.

2858. Claims must be in writing and claims not served on SEGC within 6 months of the claimant first becoming aware that he suffered loss as a result of the unauthorised execution will be barred unless the Board otherwise determines.

Cl.960 : How claim is to be satisfied

2859. This provision has no equivalent in SIA.

2860. Where the Board is satisfied that the owner or a transferee is entitled to make a claim under cls.957 or 958 respectively the SEGC must allow the claim (sub-cl.960(1)). If replacement securities of the kind and number the owner originally held (or transferee subsequently held) are available and can be obtained within a reasonable time, then the SEGC will supply those securities to the claimant (para.960(2)(a)).

2861. If the SEGC is satisfied that equivalent securities cannot be purchased, then the claimant will receive an amount from SEGC representing the value of the securities as at the time the SEGC is so satisfied together with any loss as a result of failure to receive (or retain in the case of a transferee claimant) the entitlements described above (para.960(2)(b)).

2862. In addition, the SEGC will pay the claimant the amount of any pecuniary loss suffered up to the date of allowance of the claim as a result of the claimant not receiving, or being deprived of, any entitlements e.g. dividends, which would have otherwise accrued to him as registered owner (sub-cl.960(3)).

Cl.961 : Discretionary further compensation to transferor

2863. This clause provides the SEGC with a discretion to provide additional compensation to an owner of securities which have been the subject of an unauthorised "transfer", in respect of any gains (e.g. rights issues or other opportunities) the owner may have made had he remained on the register.

Division 8 - Claims In Respect Of Insolvent Members

2864. This Division is based on SIA Division 7 Part IXA.

2865. The third way in which the NGF is be used to provide investor protection is in the event of a dealer's insolvency. Division 8 will provide for the use of the NGF to pay compensation or to purchase replacement property, including securities, to clients of a dealer (except "excluded persons" - see cl.921) who suffer loss in the event of the dealer's insolvency.

Cl.962 : Interpretation

2866. This clause is based on SIA s.122Q.

2867. Definitions of "claim", "dealer" and "member organisation" appearing in Division 8 are provided (sub-cl.962(1)). Property entrusted to a person both inside and outside Australia will be subject to the provisions (sub-cl.962(2)).

Cl.963 : Claim in respect of property entrusted to, or received by, dealer before dealer became insolvent

2868. This clause is to the same effect as SIA s.122R.

2869. A person who entrusts property to a dealer (or the specified persons connected with the dealer) in connection with the dealer's securities business may make a claim if the dealer subsequently becomes insolvent and at that time has not discharged his obligations to the person. Property is defined in sub-cl.920(1) to include money and scrip. A person who is an "excluded person" in relation to the dealer (see cl.921) is not entitled to claim (sub-cl.963(1)).

2870. Where the SEGC is satisfied that the above criteria are met the SEGC must allow the claim and pay to the claimant the money entrusted and any property involved (sub-cl.963(2)). If the property includes scrip and that particular scrip is not recoverable from the dealer, the SEGC will provide replacement scrip (sub-cl.963(3)).

Cl.964 : Cash settlement of claims where property unobtainable

2871. This clause is to the same effect as SIA s.122S.

2872. SEGC may compensate claimants by way of cash settlement where it is not reasonably practical for it to obtain the property in question (whether it be scrip or other property). Such a situation may arise in relation to scrip where an orderly market for the securities does not exist or a 'market corner' exists. The amount of the pecuniary loss in respect of which the client will receive cash compensation is assessed as at the time of the SEGC's determination to make the cash settlement.

Cl.965 : Ordering of alternative claims and prevention of double recovery

2873. This clause is based on SIA s.122T.

2874. Sub-clauses 965(1) and (2) provide that, in general, where a client is entitled to make a claim under cl.951 or cl.952 for settlement documents or the sale consideration in the event of dealer default, then no claim can be made under the insolvency provision for those documents or the consideration. This is the case unless, before the insolvency, the dealer satisfied his obligations to the client and the property was re-entrusted to the dealer.

2875. Sub-clause 965(3) addresses the potential problem of a number of partners in a member firm to which the client has entrusted property becoming insolvent at different times. In such a case the client may attempt to choose to his own advantage which insolvency he bases his claim on (e.g. if there are likely to be fewer claimants in respect of a later insolvency then there may be more money available per claimant for satisfaction of claims). Sub-clause 965(3) in effect prevents a client choosing the insolvency on which a claim is

based. It does this by providing that the SEGC will not allow a claim for property where a claim could have been made for that property on the occasion of the first insolvency i.e. if the client knew of this insolvency and it was reasonably practicable for the client to make the first claim. If, however, the first claim was disallowed or, would if made, have been disallowed, then the client is entitled to claim in respect of the later insolvency.

2876. Sub-clause 965(4) will prevent a client making more than one successful claim in respect of particular property.

Cl.966 : No claim in respect of money lent to dealer

2877. This clause is to the same effect as SIA s.122U.

2878. The loss must be suffered in respect of money, securities, documents of title to securities or other property entrusted to or received by a dealer in the course of, or in connection with, the dealer's securities business. No claim will be allowed in respect of money lent to a dealer.

Cl.967 : No claim in certain other cases

2879. This clause is to the same effect as SIA sub-s.122V(2).

2880. Claims will not be allowed if:

- (i) before the dealer's insolvency trust property had ceased to be under the dealer's sole control; or
- (ii) the claimant, in the view of the Board or the Court, materially contributed to the dealer becoming insolvent.

Cl.968 : Limits of compensation

2881. This clause is based on SIA s.122W except that the limit of \$50,000 on an individual claim has been deleted.

2882. The only limit will be that the aggregate compensation payable out of the Fund in respect of a dealer's insolvency or the insolvency on the same day of partners in a member organisation is not to exceed 14% of the prescribed minimum level of the NGF at the date that the dealer or partners become insolvent (sub-cl.968(1)).

2883. For the purpose of calculating the aggregate compensation, an amount that is paid by the SEGC shall, to the extent to which that amount is repaid to it or is recovered pursuant to the SEGC's subrogation rights under cl.980, be disregarded (sub-cl.968(2)).

2884. By imposing a statutory limitation on payments from the NGF, the possibility arises that claims may exceed the statutory maximum. This will mean that the SEGC must consider and either validate or reject all claims for compensation due to insolvency before distribution is made to the claimants. If the claim total exceeds the statutory maximum, a pro-rata distribution will be made to the claimants.

2885. In determining the pro-rata distribution, the Board will be required to take into account the fact that some claimants have received partial satisfaction of their claims from other sources (sub-cl.968(3)). The Board will be permitted to use whatever calculations are appropriate to achieve the objective of all claimants receiving similar payments of their total claim.

Cl.969 : Making of Claims

2886. This clause is to the same effect as SIA s.122X.

2887. As there is to be a maximum limit on payments from the NGF in respect of any one insolvent dealer, all claims will have to be made within a specified period to allow finalisation of a pro-rata distribution to occur within a determinable period.

2888. Claims must be made within either:

- (a) the three month limit specified by SEGC in a notice published in a daily newspaper in each State or Territory; or
- (b) if no such notice is published, six months after a person becomes aware of the dealer becoming insolvent.

2889. Claims not made within this time will be barred unless the Board determines otherwise.

2890. SEGC, its Board members and employees are to have qualified privilege (see cl.89) in respect of a notice published under this clause.

Division 9 - Claims under Divisions 6, 7 and 8

2891. This Division is based on SIA Division 7 and it deals with matters ancillary to Divisions 6, 7 and 8.

Cl.970 : Power of SEGC to allow and settle claim

2892. This clause is to the same effect as SIA s.122YA.

2893. SEGC will be entitled to allow and settle claims at any time after a person becomes entitled to make a claim.

Cl.971 : Successful claimant entitled to costs and disbursements

2894. This clause is to the same effect as SIA s.122YB.

2895. A successful claimant will be entitled to reasonable costs and disbursements incidental to the making of a claim.

Cl.972 : Interest

2896. This clause is to the same effect as SIA s.122YC.

2897. Interest at 5% per annum, or such other rate as is prescribed, is payable on the value of the claim from the day it arose until the claim is paid. Interest is not payable on costs and disbursements incidental to the claim (sub-cl.972(1)). It is also payable, at the prescribed rate, in respect of any entitlement to a claim plus interest which is not paid on the day which the entitlement accrues (sub-cl.972(2)).

Cl.973 : Application of Fund in respect of certain claims

2898. This clause is to the same effect as SIA s.122YD.

2899. SEGC will be able to purchase securities from Fund monies under those provisions where it is required to compensate claimants by the supply of securities (sub-cl.973(1)). Such securities purchased form part of the NGF until supplied to the claimant (sub-cl.973(2)). If SEGC decides to purchase securities but for some reason, such as being unable to purchase sufficient to meet the claim, a cash settlement is later made to the client, SEGC will be required to sell the securities purchased and pay the proceeds into the Fund (sub-cl.973(3)).

Cl.974 : Allowing of claim not to constitute admission

2900. This clause is to the same effect as SIA s.122YE.

2901. The allowance of a claim by SEGC will not constitute an admission by any person of any liability. This is intended to include any stockbroker master policy of professional indemnity insurance.

Cl.975 : SEGC to notify claimant where claim disallowed

2902. This clause is to the same effect as SIA s.122YF.

2903. SEGC will be required to notify a claimant of the disallowance of a claim.

Cl.976 : Proceedings in the Court

2904. This clause is to the same effect as SIA s.122YG.

2905. Within three months of notice of disallowance of a claim, a claimant may commence proceedings in the Court to establish the claim (sub-cl.976(1)). If SEGC has not allowed, or disallowed, a claim within a reasonable period, the claimant may similarly commence proceedings (sub-cl.976(2)).

Cl.977 : Arbitration of amount of cash settlement of certain claims

2906. Subject to the insertion of transitional provisions, this clause is to the same effect as SIA s.122YH.

2907. Where SEGC decides to make a cash payment to a claimant in respect of a purchase of securities and SEGC and the claimant are unable to agree to a settlement price, the matter is to be referred to arbitration (sub-cl.977(1)). The arbitration is to be conducted by a special committee of three persons appointed by participating exchanges, a majority of whom must be independent of SEGC and the participating exchanges and must be approved in writing by the Minister.

2908. Where arbitration had been commenced under SIA s.122YH but is not completed before commencement of this Bill, the arbitration shall continue as if it were under this clause. Any amount determined by an arbitration under that previous law but not paid before commencement will be paid out of the Fund by SEGC (sub-cl.977(4) and (5)).

2909. Approval of a person under the previous co-operative scheme provision as an arbitrator will be deemed to have been made by the Minister under this clause (sub-cl.977(5)).

Cl.978 : Form of order of Court establishing claim

2910. This clause is to the same effect as SIA s.122YJ.

2911. Where the Court is satisfied that a claim should be allowed it will be required to make by order, a declaration accordingly, and to direct SEGC to allow the claim. The Court is to be given a wide discretion to make such directions as it thinks just and reasonable in relation to a claim.

Cl.979 : Power of Board to require production of securities etc.

2912. This clause is to the same effect as SIA. s.122YK.

2913. As SEGC will determine any claims upon the NGF, it will be given power to require the production of documents necessary to establish a claim or to exercise its subrogation rights. This will extend to enabling criminal proceedings to be taken against a person. Failure to comply with a requirement to produce may lead to disallowance of a claim.

Cl.980 : Subrogation of SEGC to claimant's rights etc.

2914. This clause is based on SIA s.122ZA and has been extended to cover claims in respect of unauthorised execution of transfers under Division 7.

2915. Where a claim is made under Division 6, 7 or 8 and SEGC has satisfied the claim, SEGC is subrogated to the rights the claimant has against the defaulting etc. dealer (sub-cl.980(1), (2) and (3)). At the time that it satisfies a claim, the SEGC is to notify the defaulting dealer's

professional indemnity insurer, which may elect to be joined as a party to any proceedings between the SEGC and the defaulting dealer. Any judgement obtained against the defaulting dealer by the SEGC may be enforced against the insurer unless the insurer has proved that the insurance policy does not cover the factual circumstances giving rise to the judgment (sub-cl.980(4)).

Cl.981 : Payments of claims only from fund

2916. This clause is to the same effect as SIA s.122ZB.

2917. No property of the SEGC other than the NGF, will be able to be used to meet a claim allowed by the SEGC.

Cl.982 : SEGC may enter into contacts of insurance or indemnity

2918. This clause is to the same effect as SIA s.122ZC.

2919. SEGC will be able to enter into an insurance policy which may insure or indemnify the NGF against losses arising from meeting its obligations in guaranteeing performance of contracts and in meeting claims arising from a dealer's insolvency or unauthorised transfer of securities. A claimant against the NGF will not have any claims against the SEGC's insurer, nor any specific right to claim any moneys paid under the insurance policy (sub-cl.982(4)).

2920. SEGC, an exchange, a Board member or any employee of SEGC have qualified privilege (see cl.89) in respect of a statement that the insurance policy does not apply to a particular person (sub-cl.982(3)).

Cl.983 : Instalment payments

2921. This clause is to the same effect as SIA s.122ZD.

2922. Where claims against the NGF are of such magnitude that they are likely to substantially deplete the NGF, SEGC will be able to make instalment payments to claimants pending recovery of the NGF through the imposition of levies.

Division 10 - Transitional

2923. This Division is based on SIA Division 9 Part IXA with the insertion of a number of provisions necessary to ensure transition from the co-operative scheme.

Cl.984 : Definitions

2924. This clause is partly based on SIA s.122ZE.

2925. The definitions are as follows:

- 'joining day' means the day when a joining exchange became an ASX subsidiary or a member of SEGC.
- 'joining exchange' means an exchange which becomes a member of the SEGC or an ASX subsidiary after the commencement of Part 7.10.
- 'liability provisions' are ss.907 to 916 which deal with claims against the fidelity funds under Part 7.9 of the Bill.
- 'transferred claim' means an outstanding claim against a fidelity fund of an exchange arising before the exchange becomes a joining exchange.

Cl.985 : Assets and liabilities of joining exchange's fidelity fund

2926. This clause is to the same effect as SIA s.122ZF.

2927. A joining exchange will be required to transfer all money in its fidelity fund to the NGF (sub-cl.985(1)). All investments and property of the fidelity fund and rights in connection with the administration of the fidelity fund vest in SEGC and become part of the NGF. SEGC also becomes liable for the fidelity fund's debts and other obligations in connection with the administration of the fidelity fund (sub-cl.985(2)). SEGC is also substituted for the joining exchange in respect of agreements still in force entered into by the exchange (sub-cl.985(5)) and in respect of Court or Tribunal proceedings which relate to administration of the fidelity fund (sub-cl.985(7)).

Cl.986 : Final accounts in respect of joining exchange's fidelity fund

2928. This clause is to the same effect as SIA s.122ZG.

2929. Within 2 months of becoming a member of SEGC or becoming an ASX subsidiary, a joining exchange will be required to arrange for a statement of assets and liabilities to be prepared for its fidelity fund and appoint an auditor to audit the statement (sub-cl.986(1)). The auditor will be required to audit the statement within a month of the statement being prepared and provide a report to the Board and a copy to the board of the joining exchange (sub-cl.986(3)). The Board will be required to give the ASC a copy of the report within 14 days of receipt of the report.

Cl.987 : Application of liability provisions in relation to transferred claims

2930. This clause is to the same effect as SIA s.122ZH.

2931. It provides that the SEGC will take over the responsibilities of the joining exchange and satisfy claims out of the NGF in relation to claims which arose before the

exchange became a joining exchange but which have not been considered or satisfied under the fidelity fund provisions. Claims will be assessed and paid out in accordance with cls.907 to 916 of Part 7.9.

Cl.988 : Claims under corresponding law

2932. This provision has no equivalent in SIA.

2933. Claims under a corresponding SIA provision that have not been disallowed on the commencement of Part 7.10 will be deemed to be claims under that Part. Actions by NSEGC under a corresponding law will on the commencement of Part 7.10 be deemed to have been done by SEGC under a provision of this Part which corresponds to the relevant SIA provision.

Cl.989 : Expenses incurred under corresponding law

2934. This provision has no equivalent in SIA.

2935. Legal, administrative and other expenses relating to the operation of the previous Fund incurred under a corresponding SIA provision will, on the commencement of this Part, be included as expenses under this Part.

Cl.990 : Money payable under corresponding law

2936. This provision has no equivalent in SIA.

2937. Moneys payable under SIA s.122GB (development account payments) immediately before the commencement of Part 7.10 will be deemed to be payable under cl.944 (sub-cl.990(1)).

2938. Any money payable before commencement to NSEGC under a corresponding SIA provision must be paid to SEGC, and if it was to have been paid to the previous Fund, must be paid by SEGC to the Fund (sub-cl.990(2)).

Cl.991 : Contracts made under corresponding law

2939. This provision has no equivalent in SIA.

2940. Contracts of insurance and indemnity entered into by NSEGC prior to the commencement of Part 7.10 will be deemed to have been entered into by SEGC.

Cl.992 : Periods prescribed by business rules of exchange for purposes of corresponding law

2941. This provision has no equivalent in SIA.

2942. Periods prescribed by a participating exchange's business rules for the purposes of a corresponding law in relation to "completion" or "prescribed" periods will be deemed to be also prescribed for the purposes of the relevant provisions of this Part.

Cl.993 : Court proceedings and orders

2943. This provision has no equivalent in SIA.

2944. Court proceedings under a corresponding SIA law will be continued under the appropriate provision of this Part. Court orders made under a corresponding law and directed to NSEGC will be deemed to have been made under the equivalent provision of this Part and directed to SEGC.

2945. Court proceedings under a corresponding SIA law will be continued under the appropriate provision of this Part. Court orders made under a corresponding law and directed to NSEGC will be deemed to have been made under the equivalent provision of this Part and directed to SEGC.

PART 7.11 - CONDUCT IN RELATION TO SECURITIES

2946. Part 7.11 (cls.944 to 1015) regulates conduct in relation to securities.

2947. A person who engages in a variety of forms of 'wrongful' conduct in the securities industry (as listed in this Part) will be liable according to this Part.

2948. A new clause prohibiting a person from engaging in misleading or deceptive conduct is included. This clause is followed by specific provisions dealing with both criminal and civil liability for false or misleading statements in prospectuses (previously found in CA ss.108 and 107 respectively) and provisions dealing with liability in respect of unlawful market activity (previously found in SIA ss.123-131). Penalties in respect of all offences under this Part are found in Schedule 3 to the Bill.

2949. Interpretations of the words buy-back arrangements, corresponding law, debenture, expert, management company, promoter, prospectus, prescribed interest, participation interest, share and securities are found in Chapter 1. Specific definitions relevant to the Securities Chapter are also found in this Chapter. Interpretations for the terms 'engaging in conduct' misleading representations and 'statements in a prospectus' are found in cls.762, 765 and 96 respectively.

2950. It should also be noted that a number of other provisions relevant to this Part are contained elsewhere in the Bill. They are clauses 1323-1326 inclusive which deal with the freezing of assets of a person, injunctions and other orders that a Court may make. Clause 1324 (injunctions) enables the ASC to bring representative actions in certain cases and clause 1325 (other orders) lists a range of orders that a Court may make in respect of a Contravention of Part 7.11 or 7.12.

Division 1 - Additional Operation of Part

Cl.994 : Holding companies

2951. This provision is new.

2952. It seeks to apply this Part, so far as possible to holding companies. The provision is severable.

2953. The following holding companies are referred to, holding companies of:

- (a) a foreign corporation
- (b) a trading corporation formed within the limits of the Commonwealth;
- (c) a body corporate that is incorporated in a Territory or an external Territory;
- (d) a banking corporation;
- (e) an insurance corporation; or
- (f) a company.

2954. The aim of extending this Part to holding companies is to provide a full range of investor protection in the securities market. Holding companies exist and are capable of exerting important influences in the securities market. Accordingly, it has been sought to apply the relevant regulatory provisions in the Bill to them.

2955. A similar provision in respect of Part 7.12 is found in cl.1016.

Division 2 - Prohibited ConductCl.995 : Misleading or Deceptive Conduct

2956. This a new provision. It finds a parallel in TPA s.52.

2957. Clause 995 is a general 'catch all' provision prohibiting the engaging in of misleading and deceptive conduct or conduct that is likely to mislead or deceive in any dealing in securities. The provision applies to securities in relation to a corporation and to eligible securities in relation to a person. Both 'securities' and 'eligible securities' are defined in Chapter 1. Corporations and other persons are dealt with separately in this provision in order to indicate more clearly the linkages with constitutional heads of power.

2958. This clause is drafted along the lines of TPA s.52 and will operate in addition to the specific prohibitions found in the Bill. Without limiting the generality of para.995(1)(a), para.995(1)(b) specifies some instances of conduct where this clause may apply, namely: in the allotment or issue of securities; in the issue of a prospectus; in the making of a takeover offer or announcement; or in the carrying on of any negotiations preparatory to the above activities. Contravention of the provision will not be an offence under the Bill (sub-cl.995(3)) but will give rise to civil liability.

2959. Clause 995 operates in addition to the provisions found in Parts 7.11 and 7.12 of the Bill.

2960. The provision is considered to be important in maintaining integrity in the securities market. While supporting deregulatory, moves in general, the Government is concerned that investors be protected from unscrupulous activity in the securities market. This clause emphasises that persons, in their dealings in the securities industry, should not engage in misleading or deceptive conduct (cl.762 gives a guide to what constitutes the relevant conduct).

2961. A guide to what type of conduct is misleading or deceptive can be gained from the many cases decided under TPA s.52. The Courts have tended to give a broad meaning to the terms. It can also be noted that TPA s.52 may itself apply in some cases of securities dealing. In order to stress the undesirability of the conduct in question it was considered important to include a similar provision to s.52 in the Bill. Persons who engage in misleading and deceptive conduct thus run, at the very least, the risk of civil liability.

2962. Specific liabilities for specified circumstances are provided in the remaining provisions in Part 7.11.

Cl.996 : False or misleading statement in, or omission from prospectus

2963. This clause is based on CA s.108.

2964. Section 108 CA provided a broad base for criminal liability and it has been retained in the CB. The reference to false or misleading statements in cl.996 picks up the broader scope given to CA s.108 by the deeming provision contained in CA sub-s.94(1).

2965. A person will be guilty of an offence for authorising or causing the issue of a prospectus containing a false or misleading statement or from which there is a material omission (CB sub-cl.996(1)). Defences are provided in sub-cl.996(2) and (3).

Cl.997 : Stock market manipulation

2966. Subject to the changes to the provision's coverage outlined below, this clause is based on SIA s.123.

2967. A brief outline of cl.997 is as follows:

- (a) a person will be prohibited from entering or carrying out 2 or more transactions -
- (i) in securities of a corporation that have the effect of increasing (sub-cl.997(1)), reducing (sub-cl.997(4)) or maintaining (sub-cl.997(7)) the price of the securities of the corporation on a stock market with intent to induce others to buy or subscribe for (sub-cl.(1)), sell (sub-cl.(4)), or to buy, sell or subscribe (sub-cl.(7)) for securities of the corporation or of a related body corporate.
 - (ii) in securities of a body corporate that is not a corporation that have the effect of increasing (sub-cl.997(3)), reducing (sub-cl.997(6)) or maintaining (sub-cl.997(9)), the price of securities of the body corporate on a stock market with intent to induce other persons to buy or subscribe for (sub-cl.(3)), sell (sub-cl.(6)), or to buy, sell or subscribe for (sub-cl.(9)), securities of a corporation that is related to the body corporate.
- (b) a corporation will be prohibited from entering or carrying out 2 or more transactions in securities of a body corporate that is not a corporation that have the effect of increasing (sub-cl.997(2)), reducing (sub-cl.997(5)) or maintaining (sub-cl.997(8)) the price of securities of the body corporate on a stock market with intent to induce others to buy or subscribe for (sub-cl.(2)), sell (sub-cl.(5)), or to sell, buy or subscribe for (sub-cl.(8)), securities of the body corporate or of a corporation or of a related body corporate.

Cl.998 : False trading and market rigging transactions

2968. Subject to the changes to the provision's coverage outlined below, this clause is based on SIA s.124.

2969. False trading and market rigging are prohibited.

2970. A brief outline of this clause is as follows:

- (a) A person will be prohibited from creating a false or misleading appearance of active trading in, or creating a false or misleading appearance with respect to the market for any "eligible securities" - defined in cl.9 ('false trading' : sub-cl.998(1)).
- (b) A corporation is prohibited from creating such an appearance for any securities (excluding eligible securities) (sub-cl.998(2)).
- (c) A person will be prohibited from maintaining, increasing, reducing or causing fluctuations in the market price of any eligible securities by:
 - (i) buying or selling any securities where no change in the beneficial ownership occurs; or
 - (ii) any fictitious transactions or devices. (sub-cl.998(3)).
- (d) A corporation is prohibited from engaging in the conduct described in (c) in respect of the market price of any securities other than "eligible securities" (sub-cl.998(4));
- (e) "False trading" under (a) and (b) above will include:
 - (i) being concerned either directly or indirectly in a transaction involving any securities where there is no change in the beneficial ownership ("wash sales");