

- (ii) offering to sell securities at a specified price where he or a person associated with him offers to buy substantially the same number at substantially the same price; or
- (iii) offers to buy securities at a specified price where he or a person associated with him offers to sell substantially the same number at substantially the same price (sub-cl.998(5)).
- (f) It will be a defence to a prosecution under sub-cl.998(1) or (2) constituted by an act referred to in sub-cl.998(5) if the defendant establishes that his purpose was not to create a false or misleading appearance of active trading (sub-cl.998(6)).
- (g) No change occurs in beneficial ownership, for the purposes of these prohibitions, if a person who had an interest in the securities before the purchase or sale (or a person associated with him) has an interest after the purchase or sale (sub-cl.998(7)).
- (h) A defendant has a defence in a prosecution for contravention of sub-cl.998(3) or (4) in relation to a purchase or sale that did not involve a change in beneficial ownership if he establishes that his actions were not intended to create a false or misleading market (sub-cl.998(8)).
- (i) Transactions for the purpose of the prohibition on 'wash sales' in para. 998(5)(a) will include an offer or invitation (sub-cl.998(9)).

Cl.999 : False or misleading statements in relation to securities

2971. Subject to the changes to the provision's coverage outlined below, this clause is based on SIA s.125.

2972. A person is prohibited from making a false or misleading statement that is likely to induce the sale or purchase of "eligible securities" (defined in cl.9) or affect their market price if, when he makes the statement, he does not care whether it is true or false or he knows or ought reasonably to have known that it is false or misleading (sub-cl.999(1)).

2973. A corporation is subject to the same prohibition with regard to statements likely to induce the sale or purchase of any securities (sub-cl.999(2)).

Cl.1000 : Fraudulently inducing persons to deal in securities

2974. Subject to the changes to the provision's coverage outlined below, this clause is based on SIA s.126.

2975. A person is prohibited from inducing or attempting to induce another person to deal in "eligible securities" (defined in cl.9) by making a statement, promise or forecast he knows to be misleading, false or deceptive by recklessly making such a statement, by dishonestly concealing material facts, or by recording any information that the person knows to be false or misleading (sub-cl.1000(1)).

2976. A corporation is prohibited from so inducing or attempting to induce a person to deal in any securities (sub-cl.1000(2)).

2977. It is a defence to a prosecution based on recording or storing false or misleading information that the defendant had no reasonable grounds for expecting that the information would be available to any other person (sub-cl.1000(3)).

Cl.1001 : Dissemination of information about illegal transactions

2978. Subject to the changes to the provision's coverage outlined below, this clause is based on SIA s.127.

2979. A person is prohibited from disseminating information to the effect that the price of securities of a corporation is likely to rise or fall or be maintained by reason of transactions or other things done in relation to that corporation or a related body corporate where the transaction or thing is entered into or done by the person or an associate OR where the person benefits from the dissemination of the information. The transactions or other things done must also have been in contravention of the prohibition against:

- stock market manipulation (see cl.997);
- false trading or market rigging (see cl.998);
- false or misleading statements (see cl.999); or
- fraudulently inducing persons to deal in securities (see cl.1000).

2980. A corporation is prohibited from disseminating information to the effect that the price of any securities of a body corporate is likely to rise or fall in the same circumstances as sub-cl.1001(1) (sub-cl.1001(2)).

Cl.1002 : Insider trading

2981. Subject to the changes to the provision's coverage outlined below, this clause is based on SIA s.128.

2982. Insider trading is prohibited. Compensation will be payable in certain circumstances to persons who suffer loss as a result of insider trading (see cls.1005 and 1013)).

2983. A brief outline of cl.1002 is as follows:

- (a) A person will be prohibited from dealing in securities in three sets of circumstances:
 - (i) if he is or has been in the past 6 months, connected with a corporation and has price sensitive information in relation to that corporation as a result of his connection he must not deal in its securities (sub-cl.1002(1));
 - (ii) if he is or has been in the past 6 months connected with a body corporate that is a corporation and, as a result of his connection, has price sensitive information (or information concerning certain transactions) in relation to any body corporate, he must not deal in securities of the latter body corporate (sub-cl.1002(2));
 - (iii) he must not deal in securities where he has the price sensitive information about them referred to in sub-cl.1002(1) and (2) if:
 - he obtained the inside information from another person and is aware or ought to be aware that that person is prohibited from dealing under sub-cl.1002(1) and (2); and
 - when the information was obtained he was associated with the other person or had an arrangement with him for the communication of such information with a view to dealing by him and/or the other person.

(sub-cl.1002(3)).

- (b) A person who is prohibited, because of inside information, from dealing in securities must not:
- (i) cause or procure any other person to deal in those securities (sub-cl.1002(4)); or
 - (ii) communicate his relevant inside information to another person if:
 - the securities in question can be traded on a stock market; and
 - the first-mentioned person knows, or ought reasonably to know that the other person will make use of the information for the purpose of dealing himself in the securities or causing another person to deal in them.
- (sub-cl.1002(5)).
- (c) A body corporate will be prohibited from dealing in securities if one of its officers would be so prohibited because of inside information (s-cl.1002(6)) unless:
- (i) the decision to enter the transaction was taken by someone other than that officer;
 - (ii) arrangements were in place to ensure that the information was not communicated to that person and that no advice with respect to the transaction was given to him by a person in possession of the information; and
 - (iii) the information was not communicated and such advice was not given.
- (sub-cl.1002(7)).

- (d) Sub-clause 1002(6) does not preclude a body corporate from dealing in securities of another merely because an officer of the first body corporate has information obtained in the course of his duties about proposed dealings by the first body corporate in securities of the second (sub-cl.1002(8)).
- (e) A person will be connected with a body corporate for the purpose of the provisions relating to insider trading if, being an individual -
- (i) he is an officer of that body corporate or a related body corporate;
 - (ii) he is a substantial shareholder (within the meaning of Part 6.7) in that body corporate or a related body corporate; or
 - (iii) he occupies a position that may reasonably be expected to give him, by virtue of a professional or business relationship or by virtue of being an officer of a substantial shareholder, access to information of a kind to which sub-cl.1002(1) and (2) apply.
- (sub-cl.1002(9)).
- (Note: for the purposes of sub-cl.1002(9) "officer" includes a receiver, official manager, liquidator and body corporate, and a trustee or other person administering a compromise or arrangement made between the body corporate and its creditors (sub-cl.1002(12)).
- (f) A licensed dealer will be able to enter into a transaction relating to listed securities as agent for, and on the specific instruction of, a person

with whom he is not associated if he has not given advice to that other person in relation to the dealing (sub-cl.1002(10)).

- (g) There will be a defence to prosecutions under these provisions that the other party to the transaction knew or ought reasonably to have known of the information before entering the transaction (sub-cl.1002(11)).

Division 3 - Powers of Court

Cl.1003 : Provisions relating to Prosecutions

2984. This clause finds a parallel in TPA sub-ss.79(4) and (6).

2985. The joining of a criminal action with an action for a civil remedy - such as an injunction (under cl.1324) or corrective advertising order (CB sub-cl.1004(1)) is made possible by this clause.

Cl.1004 : Order to disclose information or publish advertisements

2986. This is a new provision. It finds a parallel in TPA s.80A.

2987. The Court, in addition to its powers under clause 1324 is empowered to make orders for affirmative disclosure or corrective advertising in the event of a contravention of this Part or Part 7.12.

Division 4 - Civil Liability

Subdivision A - General

Cl.1005 : Civil Liability for contravention of this Part or Part 7.12

2988. This provision finds a parallel in TPA s.82 and sub-s.85(3).

2989. Cl.1005 is a general damages clause. While damages were available under the previous legislation this provision adopts a new format (based on TPA s.82). The clause operates to provide a remedy in addition to any other remedy available at law (sub-clause 1005(3)) but is subject to the specific CB provisions found in cls.1006 to 1015.

2990. A person who suffers loss or damage by conduct of another person that was engaged in in contravention of a provision of this Part or Part 7.12 may recover the amount of the loss or damage by action against that person or any person involved in the contravention whether or not the other person or any person involved in the contravention has been convicted of an offence in respect of the contravention.

2991. An action under this provision or under para.1013(1)(d) may be commenced at any time within 3 years after the date on which the cause of action arose.

2992. Sub-cl.1005(4) (based on TPA sub-s.85(3)) provides a defence for publishers. It compliments cl.1027 and establishes a defence where it is proved that the defendant is a person whose business it is to publish or arrange for the publication of advertisements and that the person received the advertisements for publication in the ordinary course of business and did not not know nor have reason to suspect that its publication would amount to a contravention of a provision of this Part or Part 7.12.

Subdivision B - Liability in Respect of Prospectuses

Cl.1006 : Civil Liability for false or misleading statement in, or omission from, prospectus

2993. This clause is based on CA s.107.

2994. Any person who is named in or authorises or causes the issue of a prospectus that contains a false or misleading statement or an omission will be liable to compensate subscribers who as a consequence suffer loss or damage. Defences are provided for each of the categories of persons who may be liable under this provision. The defences in respect of directors and experts mirror those found in the CA with the addition of a due diligence requirement on their part. Named persons and the corporation have defences based on reasonable mistake, reasonable reliance on others and the exercise of due diligence.

2995. Actions may be brought against any or all of the following persons for false or misleading statements in or omissions from a prospectus:

- . those persons presently specified in CA para.107(1)(a)-(d) and the following additional persons:
- . the corporation;
- . experts for their statements;
- . persons named, with their consent, in a prospectus as an auditor, banker, solicitor, stockbroker, sharebroker or underwriter of the corporation or for or in relation to the issue or proposed issue of securities;
- . other persons named with their consent in a prospectus.

2996. By expanding the range of persons who may be held liable for 'defective' prospectuses it is sought to provide another means in the Bill of ensuring prospectus integrity. The Bill aims to make all persons involved in the preparation of a

prospectus responsible for the prospectus. At the same time it can be noted that the provision does not act indiscriminately or unfairly. Each of the persons who may be liable under cl.1005 is provided with a defence and in general will only be liable if they have not exercised due diligence. A person who is named as a trustee for the holders of debentures or prescribed interests will not for that reason alone be taken to have authorised or caused the issue of a prospectus (sub-cl.1006(3)).

2997. Specific defences in relations to actions, concerning prospectuses, under cl.1005 are found in Bill cls.1007-1012.

Cl.1007 : No liability to person with knowledge of relevant matters

2998. A general exclusion from liability is found in cl.1007. A person referred to in sub-cl.1006(2) will not be liable if the person who suffered loss or damage knew that the statement was false or misleading or was aware of the omitted matter.

Cl.1008 : Directors not liable in certain circumstances

2999. This clause is based on CA paras.107(5)(a), (b), (c) and (d).

3000. Clause 1008 provides specific defences for directors who would otherwise be liable under cl.1005.

3001. A director or a person who authorised or caused himself or herself to be named and is named in the prospectus as a director is not liable in an action under cl.1005 if one of the defences listed in cl.1008 is proved. However, in regard to the defences in sub-paras.1008(5)(a) and 1008(5)(b)(ii) it is made clear that a director is required to make such reasonable inquiries as are necessary to justify his or her belief.

Cl.1009 : Liability of experts

3002. This clause is based on CA sub-s.107(7).

3003. Clause 1009 provides defences for an expert who would otherwise be liable under cl.1005.

3004. The expert like the director is also required to exercise diligence in the formation of his or her opinions - he or she must believe and have had reasonable grounds to believe that statement they make for the purposes of inclusion in a prospectus are true and not misleading para.1009(3)(c).

Cl.1010 : Liability of persons named in prospectus etc

3005. This clause limits the liability of named persons and any other person who authorised or caused the issue of part only of the prospectus, to misstatements and omissions in that part and only if that part is included in, or substantially in, the form and context to which the person agreed.

3006. A person will be taken to be named in part only of a prospectus if there is an express statement in the prospectus to that effect (sub-cl.1010(2)). Where there is no such statement then a named person's liability will extend to the contents of the entire prospectus.

Cl.1011 : No liability for mistake etc. if reasonable precautions taken

3007. Clause 1001 provides a general defence for the corporation, the promoter, named persons and persons who authorised or caused the issue of the prospectus.

3008. The defence is that that any false or misleading statement made or omission:

- (a) was due to a reasonable mistake;

- (b) was due to reasonable reliance on information supplied by another person; or
- (c) was due to the act or default of another person, to an accident or to some other cause beyond the defendant's control provided the defendant took reasonable precautions and exercised due diligence to ensure that all statements made were true and not misleading and there were no material omissions from the prospectus.

3009. Sub-cl.1011(2) excludes servants or agents of the defendant when the prospectus was issued from being 'another person' for the purposes this clause.

Cl.1012 : Indemnity

3010. This provision is based on CA s.107(8).

3011. It provides an indemnity to directors and experts who are named without their consent in a prospectus. The indemnity does not extend to named persons due to their different treatment (from directors and experts) in the liability provisions.

Subdivision C : Liability in respect of unlawful market activity

3012. This subdivision contains provisions dealing with compensation to victims of insider trading - cl.1002 (cl.1013) and of contraventions of cls.997-1001 (cl.1014) and related clauses.

Cl.1013 : Liability for insider trading

3013. This clause is based on SIA sub-ss.130(1) and (8).

3014. Provisions equivalent to the following SIA sub-sections are located as follows:

- SIA sub-s.130(2) : cl.1013
- SIA sub-ss.130(3) and (4) : cl.1014
- SIA sub-s.130(7) : sub-cl.1005(3).

3015. The time limit for actions (previously 2 years under SIA sub-s.130(5)) is now 3 years - sub-cl.1005(2).

3016. Compensation will be payable in certain circumstances to persons who suffer losses from some of the contraventions of the basic prohibitions in relation to trading in securities.

3017. A person who deals, or procures another person to deal, in securities in contravention of the prohibitions on insider trading (see cl.1002 - other than the prohibition in sub-cl.1002(5) on the communication of insider information) will be liable (whether the person has been convicted of an offence in relation to the contravention or not):

- (a) to compensate the other party to the transaction for any loss sustained, being the difference between the price at which the securities were transacted and that at which they would have been transacted had the inside information been generally known; and
- (b) to account to the body corporate that issued the securities for any profit accruing to the insider.

(sub-cl.1013(1)).

3018. "Officer" in relation to a body corporate for the purposes of para.1013(1)(b) is given a wide meaning (sub-cl.1013(2))

NB : Cl.1013 is complementary to the general compensation provision in cl.1005 and does not in any way limit that provision.

Cl.1014 : Liability for other unlawful activity

3019. This clause is to the same effect as SIA sub-s.130(2).

3020. A person who contravenes cls.997-1001 (whether convicted of an offence or not) is liable to pay compensation to any other person who suffers loss in a transaction entered into with the person. The loss recoverable is the difference between the price at which the securities were transacted and that at which they would have been transacted had the contravention not taken place.

3021. This clause is also complementary to the general compensation provision in cl.1005 and does not in any way limit that provision.

Cl.1015 : Amount Recoverable

3022. This clause is to the same effect as SIA sub-ss.130(3) and (4).

3023. The amount of compensation or profit for which a person is liable (under cls.1013 or 1014) will be reduced by any award made under this Part or sub-cl.232(6) by reason of the same act or transaction (sub-cl.1015(1)). The onus will lie on the person liable to pay the amount to prove that the liability arose from the same act or transaction (sub-cl.1015(2)).

PART 7.12 : OFFERING SECURITIES FOR SUBSCRIPTION OR PURCHASE

Division 1 - Additional Operation of Part

Cl.1016 : Holding Companies etc

3024. This provision is new.

3025. It seeks to apply this Part, so far as possible to holding companies. The provision is severable (note also cl.994).

3026. Sub-cl.1016(2) provides for a reference to a corporation to include a reference to a holding company of any of the listed constitutional corporations. The aim of extending these provisions is to provide a full range of investor protection in the securities market. Holding companies exist in the market and are capable of exerting important influences in the issue of securities. Accordingly, it has been sought to apply the relevant regulatory provisions in the Bill to them.

3027. Sub-cl.1016(3) operates in addition to sub-cl.1016(2). It is based upon the use by a person of an eligible communications service (defined in Chapter 1). A person will be prohibited from issuing, by the use of an eligible communications service, securities of a body corporate being a holding company unless the requirements of the Prospectus Division are satisfied.

Division 2 : Prospectuses

3028. Division 2 of Bill Part 7.12 regulates the issue of securities and the use of prospectuses. The provisions are based on Division 1 of Part IV CA but reflect substantial reforms. The new provisions seek to ensure that the public is informed fairly about any invitation or offer of securities

and is given all information relevant and necessary to the making of an informed investment decision in respect of that invitation or offer. Provisions (found in Part 7.11) also address the issues of responsibility and liability for false or misleading statements or omissions from a prospectus and impose liability on all persons involved in the preparation of the prospectus for failings in the prospectus (cls.1006 to 1012, Part 7.11).

3029. The provisions in this Part complement other laws which regulate the securities industry.

3030. Prospectuses will be required for all offers, invitations and issues of securities except for excluded offers, invitations and issues. Excluded offers, issues and invitations of securities are defined in the Bill (cl.66 and see also cl.65, excluded corporations). As a consequence of the definition of securities (i.e. it includes prescribed interests) and the requirement that a prospectus be issued in respect of all offers, invitations and issues of securities, prospectuses will be required for all issues of prescribed interests. Prescribed interests are dealt with in detail in Division 5.

3031. Interpretations are provided in Chapter 1 and also in the Securities Chapter. Penalties for contravention of provisions of the Part are found in Schedule 3 to the Bill.

3032. Prospectuses will be lodged with the ASC but will not be registered and pre-vetted as presently occurs under the CA. Registration and vetting of prospectuses by the various State CAC offices has been the subject of numerous complaints, from businessmen and other persons who have been involved in prospectus preparation, as causing unnecessary delays and increased costs. Pre-vetting of prospectuses has also involved a substantial part of the CACs' time and resources. Despite all care on the part of CAC officers misleading

prospectuses could and on occasions did slip through. Consequently, on balance, it has been considered to be desirable to improve the efficiency of issuing securities by removing both of these procedures. At the same time other means of ensuring prospectus integrity and investor protection have been included.

3033. Content requirements have also been altered. Section 98 of the CA and the regulations thereunder contained detailed prospectus content requirements. These provisions were specific and whilst requiring extensive quantities of material to be disclosed did not necessarily ensure that the investor received adequate information about the securities in question. The present amendments complement the removal of pre-vetting and seek to remedy the above mentioned problems.

3034. The new content clause lists basic material to be included in a prospectus such as a director's interest in the issue and the date of issue. A general requirement that the prospectus contain all such information as investors and their professional advisers would reasonably require and expect to find in the prospectus for the purpose of making an informed investment assessment, about the securities in question, has also been included. As a result of this clause prospectus contents may be variable as between persons who are targeted in the offer. For instance, a prospectus directed at institutional investors may differ from a prospectus directed at individual investors. While the full ramifications of this provision will be left to be worked out in the market place the ASC will maintain an important 'watch dog' role over prospectus preparation and issue.

3035. The ASC's investigative powers have been improved (over those of the NCSC) and it has been given a new power to order, in certain circumstances, that the issue of securities cease (see cl.1033). This latter power is considered to be very important in creating a new role for the ASC in the prospectus

area. While any ASC involvement in pre-vetting and registration of prospectuses has been substantially curtailed, if a prospectus is misleading or otherwise 'defective' the issuer may be subject to an ASC order that stops the 'issue' of the securities in question (cl.1033). (Issue is broadly defined in Chapter 1 to include circulate, distribute and disseminate).

3036. The ASC will also retain the exempting power presently conferred on the NCSC by CA s.215C. Clause 1084 replaces CA s.215C. Consequently the Bill provides a flexible means of exempting issues from the need to comply with the provisions of this Part on a case by case basis.

Cl.1017 : Exceptions

3037. This Division does not apply to an excluded issue of securities, an excluded offer of securities for subscription or purchase, or an excluded invitation to subscribe for or buy securities. Excluded issues, offers and invitations and excluded corporations are defined in CB sub-cl.66 and 65 respectively.

Cl.1018 : Prospectus in Relation to Securities

3038. A person will not be able to allot or issue, offer or invite subscription or purchase of securities unless:

- (a) a prospectus in respect of those securities has been lodged with the Commission; and
- (b) the prospectus complies with the requirements of Division 2 of Part 7.12.

3039. Prospectuses will no longer be registered by the ASC but they will need to be lodged with the ASC. The ASC will not pre-vet lodged prospectuses but may at any time undertake a

detailed consideration of a prospectus and if necessary order that the issue of securities the subject of a defective prospectus cease.

Cl.1019 : Prohibition on Invitations or Offers in Respect of Securities of Proposed Corporation

3040. This provision is based on CA s.95 and sub-s.552(9).

3041. A person shall not issue a form of application for the issue of or make an invitation for or an offer of securities in respect of a corporation that has not been formed.

Cl.1020 : Forms of Application for Securities to be Attached to Prospectus

3042. This clause is based on CA s.96.

3043. A person must not issue a form of application for securities of a corporation unless the form is attached to a prospectus and a copy of both the form and the prospectus have been lodged with the ASC.

Cl.1021 : Specific Provisions Applicable to all Prospectuses

3044. This clause is based on CA s.98.

3045. However, unlike CA s.98 the specified contents required are more limited. The detailed content rules of CA s.98 were frequently criticised for being overly complex. Despite the detail that they required they did not always provide the information that private and professional investors needed to make an informed investment decision.

3046. The new content rules aim to overcome these defects and at the same time maintain prospectus integrity.

3047. Print size is specified in the clause, sub-cl.1021(2) is based on CA para.98(1)(a).

3048. The following basic information is to be provided in the prospectus:

- . the prospectus is to be dated, sub-cl.1021(3) and (4) are based on CA para.98(1)(b) and sub-s.98(2)
- . directors' names, qualifications and interest in the promotion are to be stated, sub-cl.1021(6) is based on CA para.98(1)(m)
- . it should state that a copy of the prospectus has been filed with the ASC, the date of such filing and that the ASC takes no responsibility as to the contents of the prospectus, sub-cl.1021(13) is based on CA para.98(1)(c)
- . the life-time of prospectuses will be 6 months from the date of the issue of the prospectus, sub-cl.1021(5) is based on CA para.98(1)(g).

3049. Directors and all persons who are named in the prospectus as proposed directors, or the director's agent authorised in writing, should sign the prospectus, sub-cl.1021(12) is based on CA para.103(2)(b)).

3050. Regulations may be made requiring prospectuses included in a specified class of prospectuses, or relating to a specified class of securities or corporations to contain specified matters or reports (CB sub-cl.1021(7) is based on CA sub-s.98(3)). The regulation making power may be used if there is a need or demand for more specific requirements to be included in prospectuses for particular securities at some future stage. However, it is envisaged that before the regulation making power would be exercised in this manner consultations with persons likely to be affected by the change would be undertaken.

3051. CB sub-cl.1021(8), (9), (10) and (11), are based on CA sub-ss.98(6), (8), (9), and (10).

3052. The ASC may, as the occasion requires, publish policy statements concerning contents of particular prospectuses. These statements will not be binding but will nonetheless be persuasive and may constitute guidelines relevant to the ASC's use of its stop issue order power.

Cl.1022 : General Provisions Applicable to All Prospectuses

3053. This provision is new. It complements the above provision and is aimed in part at ensuring prospectus integrity.

3054. This provision finds a parallel in s.163 of the Financial Services Act 1986, UK.

3055. The above clause requires specific information to be included in a prospectus. In addition, this clause provides that a prospectus will also be required to contain such information as investors and their professional advisers would reasonably require and expect to find in the prospectus for the purpose of making an informed investment decision. For example, a full and true description of the securities in question will be required as will all relevant financial information about the corporation.

3056. The provision provides a guide to the preparers of a prospectus about what information should be included (sub-cl.1022(2)). The information should be known to them or it should be reasonable for them to obtain that information. The information that will be required will depend on the nature of the securities and the corporation; the kinds of persons likely to consider subscribing for or buying the securities; the fact that certain matters may reasonably be expected to be known to professional advisers; and information that may be known to investors or their professional advisers by virtue of any other legislation (sub-cl.1022(3)).

3057. The information supplied under this clause should not be false, misleading or deceptive.

Cl.1023 : Special Provisions Applicable to Prospectuses In Relation to Debentures

3058. This clause is based on CA s.97.

3059. A prospectus concerning the offer or invitation of debentures will need to contain an undertaking by the corporation that it will, within 2 months after the acceptance of any money as a deposit or loan from a person in response to an invitation or offer, issue to that person a document that acknowledges, evidences or constitutes an acknowledgement of the indebtedness of the corporation.

3060. The document will need to acknowledge that debt and comply with CB cl.1045 (sub-cl.1023(2) (clause 1045 is based on CA sub.ss.97(3), (4) and (5)).

Cl.1024 : Supplementary Prospectuses

3061. This a new provision.

3062. This provision finds a parallel in s.164, Financial Services Act 1986, UK.

3063. In recognition of the fact that the nature of the contents of a prospectus can vary over time this clause provides for the issue of supplementary prospectuses. A supplementary prospectus will need to be lodged with the ASC where, during the life time of the prospectus, there is a significant change affecting any matter contained in the prospectus or a significant new matter arises that should be included in the prospectus. The supplementary prospectus will contain particulars of the change or new matter. The clause aims to ensure the accuracy and reliability of prospectuses throughout their lifetime. The issue of a supplementary prospectus will not increase the lifetime of the original prospectus.

3064. The provision provides that if there is a significant change affecting any matters contained in the prospectus or a significant new matter arises then the person who lodged the prospectus will be required to lodge a supplementary prospectus that contains particulars of those matters. In determining what is significant, the matters referred to in sub-cl.1024(2) are relevant.

3065. Sub-cl.1024(3) and (4) provide for the situation where the person who lodged the prospectus is not aware of the change or new matter. In such a case a person, who is named in the prospectus or otherwise authorises or causes the issue of the prospectus and is aware of the change or new matter, will be required to give notice of the change or new matter (i.e. is listed in sub-cl.1006(2)), to the person who lodged the prospectus.

3066. Sub-cl.1024(5) relates to the stop issue order power of the ASC. Where the ASC makes such an order, concerning a defective prospectus, the person who lodged the prospectus will be able to lodge a supplementary prospectus that remedies any defect found in the prospectus. In such a case, however, the ASC will consider the supplementary prospectus to see if it does in fact remedy the identified defects, before it lifts any stop issue order that is in place.

3067. After a supplementary prospectus is lodged every prospectus that is issued will need to be accompanied by a copy of the supplementary prospectus (CB sub-cl.1024(6)).

3068. Sub-cl.1024(7) lists the circumstances in the CB when a reference to a prospectus is also a reference to a supplementary prospectus.

Cl.1025 : Certain Notices etc not to be Published

3069. This clause is based on CA s.99 but reflects the new approach to advertising of securities.

3070. The prohibitions found in CA s.99 on advertising of securities are relaxed in part by this clause. This approach is made possible by virtue of the inclusion of clauses 765 and 995 which expand on the meaning of misleading representations and prohibit the engaging in of conduct that is misleading or deceptive or likely to mislead or deceive in relation to securities, respectively. Advertising of securities by the issuer of the prospectus, the holder of a dealers licence or investment advisers licence or an exempt dealer will be permissible provided the following material is included in the advertisement, namely:

- . a statement that a prospectus has been lodged
- . the date of the prospectus and statement where a copy of the prospectus can be obtained
- . a statement that allotments or issues of, or contracts for the subscription for or purchase of securities to which the prospectus relates will only be made on receipt of a form of application attached to a prospectus
- . a statement of any interest that the person publishing the notice has in the success of the offer or invitation.

3071. Sub-clause 1025(3) specifies that except as allowed in the above sub-clause persons shall not publish advertisements concerning the securities of a corporation. Sub-clause 1025(4) has been added to ensure that bodies other than corporations do not seek to use advertising as a means of circumventing the provision of this Division. Particular reference in this regard is made to holding companies. Consequently, unless sub-cl.1025(2) applies, corporations that publish newspapers or periodicals are not to publish notices concerning securities of a body corporate. This provision complements cls.994 and 1016.

Cl.1026 : Certain Reports referring to Prospectuses not to be Published

3072. This clause is based on CA s.100.

3073. The publication of certain reports referring to prospectuses will be prohibited except in specified circumstances.

3074. In the new clause the order of prohibition and permission has been reversed in order to be consistent with drafting of clause 1025.

Cl.1027 : Evidentiary Provisions etc.

3075. This clause is based on CA s.101.

3076. Evidentiary provisions for the two preceding provisions are contained in cl.1027.

Cl.1028 : Retention of over-subscriptions in Debenture Issues

3077. This clause is based on CA s.102.

3078. The retention of over-subscriptions to a debenture issue will be prohibited unless the corporation specifies in the prospectus:

- (a) that it reserves the right to retain over subscriptions; and
- (b) the limit on the amount of over-subscriptions that may be retained.

Cl.1029 : Documents to be kept by Corporations

3079. This clause is based on CA sub-s.103(3).

3080. A corporation will be required to keep a true copy of a lodged prospectus and any consents required in respect of the prospectus at its registered office in Australia for the period of the term of the prospectus (6 months).

Cl.1030 : Document containing offer of securities for sale deemed to be prospectus

3081. This clause is based on CA s.104.

3082. Any document that directly or indirectly offers securities for sale to the public will be deemed to be a prospectus and all provisions relating to prospectuses and offering securities will apply to such documents.

Cl.1031 : Allotment or Issue of securities where Prospectus indicates application for quotation on stock market

3083. This clause is based on CA s.105.

3084. Any allotment or issue will be void and any application moneys must be repaid if the prospectus indicates that an application has been, or is proposed to be made, for listing of the securities, and the listing is not achieved within the specified time. Despite the fact that content requirements have been relaxed (see CA para.98(1)(ka)) the provision has effect where the statements in question are made. Listing on a securities exchange or application for listing is a matter that the preparers of prospectuses may use to sell the issue. Where a statement to this effect is made, cl.1013 will apply.

Cl.1032 : Expert's consent to issue Prospectus containing Statement by the Expert

3085. This clause is based on CA s.106.

3086. A prospectus that contains a statement by an expert must not be issued unless the expert has given and not withdrawn written consent to the issue of the prospectus with the

statement included in the form and context in which it is included.

Cl.1033 : Order to stop issue of securities

3087. This is a new provision.

3088. It finds a parallel in ss.60 and 69 of the Securities Act, 1978, Ontario.

3089. In order to ensure that prospectus integrity is maintained the ASC has been given the power, to make orders stopping the issue of securities to which a prospectus relates where certain 'defects' are found. Relevant 'defects' are specified in sub-cl.1033(2). The power is flexible, it can be exercised on an interim basis and orders made can be revoked. It is envisaged that the ASC will exercise this power whenever the situation requires. It will not merely be an auxiliary power but will be important in establishing the ASC's role in the marketplace. 'Issue', in relation to securities, is defined in Chapter 1 to include 'circulate, distribute and disseminate'. Consequently it can be seen that the potential scope of stop issue order power is quite broad.

3090. While prospectuses will no longer be pre-vetted and registered the ASC may consider, in detail, a lodged prospectus at any time. The ASC may by random checking discover or may be put on notice of a shortcoming in a prospectus or the conduct of a corporation. This provision makes clear that despite the simplification of procedures for the issuing of a prospectus issuers have not been given a free rein to engage in misleading or other unsavoury practices in the issue of securities. The ASC will act as a 'watch dog' on their activities and should they engage in the conduct listed in this clause the ASC will be entitled to hold a hearing to consider whether it should direct that the issue of the securities of the corporation in question be stopped.

3091. Where any of the failings referred to in sub-cl.1033(2) are found by the ASC in its investigations and are substantiated in a hearing, a stop issue order, in writing, may be made. The listed failings include: the prospectus contravenes in a substantial respect any of the requirements of this Division, the prospectus contains a promise, estimate or forecast that is false, misleading or deceptive, or the prospectus contains a material misrepresentation. Paragraphs 1033(2)(d)-(g) inclusive, particularly paragraphs 1033(2)(f)-(g) list 'failings' on the the part of the corporation's management that may also result in a stop issue order being made in respect of any prospectuses currently in force in respect of securities of that corporation. The scope of this clause can be seen to be quite wide.

3092. However, despite its broad scope the clause makes clear that the power should not be exercised unjustly. Except in special circumstances where an interim order is warranted, no stop issue order will be made under sub-cl.1033(1) unless the ASC has held a hearing and given a reasonable opportunity to any interested person to make submissions on the question whether such an order should be made.

3093. Sub-cl.1033(4) allows the ASC to make an interim stop issue order if it considers that any delay pending the holding of a hearing would be prejudicial to the public interest. An interim order can also be made at any time during the hearing. (sub-cl.1033(6)). Interim orders will have effect for 21 days from making or a lesser time if the interim order is revoked (sub-cl.1033(5)).

3094. While an order is in force under this clause the Division applies as if the prospectus had not been lodged and no one can lodge a further prospectus in relation to the securities. Lodgement of a supplementary prospectus, under s.1024, to remedy the defect is however allowable (sub-cl.1033(7)).

3095. The ASC is given the power to revoke any stop issue order if it becomes satisfied that whether because of the lodgement of a supplementary prospectus or otherwise, the circumstances that resulted in the making of the order no longer exist, sub-cl.1033(8).

Cl.1034 : Transitional

3096. This clause provides transitional provisions in respect of prospectuses registered under a corresponding law (see cl.58) within 6 months before the commencement of this Part.

3097. Such prospectuses will be deemed to be a prospectus lodged with the Commission for the purposes of this Part. Prospectuses that were previously lodged with but not registered by the NCSC should be relodged with the ASC.

Division 3 - Restrictions on Allotment and Variation of Contracts

3098. Division 3 of Part 7.12 of the Bill places restrictions on the allotment of shares and the variation of contracts.

Cl.1035 : Prohibition of allotment unless minimum subscription received

3099. This clause is based on CA sub-ss.110(1)-(4).

3100. Shares that have been offered to the public will not be able to be allotted until the appropriate minimum subscription and the sum payable on application have been received.

Cl.1036 : Repayment of subscriptions

3101. This clause is based on CA sub-ss.110(5)-(7).

3102. A company has 4 months from the issue of a prospectus to have the minimum subscription and to receive the amount payable on application as provided for by cl.1035. If these requirements are not satisfied, the company must repay all money received from applicants within 7 days of the expiration of that 4 month period. If repayment is not made by the company, directors will be personally liable, jointly and severally in respect of repayment of those monies together with interest thereon.

3103. It will be a defence to both offence proceedings and liability in respect of a contravention if a director proves that failure to make the required repayment was not due to any misconduct or negligence on his or her part.

Cl.1037 : Allotment voidable at applicant's option

3104. This clause is based on CA sub-ss.110(8) and (9).

3105. An allotment made in contravention of this Division is voidable at the option of an applicant, notwithstanding the fact that the company is in the course of being wound up. The option may be exercised by serving written notice on the company within the required time.

Cl.1038 : Restriction on varying contracts referred to in prospectus

3106. This clause is based on CA s.112.

3107. The terms of a contract referred to in a prospectus cannot be varied before the statutory meeting unless the variation is made subject to the approval of the statutory meeting.

Cl.1039 : Certain conditions void

3108. This clause is based on CA sub-s.110(11).

3109. Any condition which attempts to have the effect of waiving compliance with any requirement of this Division is void.

Cl.1040 : Securities not to be allotted or issued after 6 months

3110. This clause is based on CA sub-s.110(12).

3111. The allotment or issue of securities shall not be made more than six months after the issue of the relevant prospectus.

Cl.1041 : Validity of allotment or issue of securities

3112. An allotment or issue of securities in contravention of cl.1040 will not be void or voidable merely because a contravention has occurred.

Cl.1042 : Liability of Directors for loss or damage

3113. This clause is based on CA sub-s.110(10).

3114. In addition to liability for repayment of monies received by the company, contravention of a provision of this Division will give rise to liability on the part of directors to compensate the company and any person to whom an allotment has been made, for any loss, damage or cost suffered or incurred because of the allotment. Liability is not dependent upon a conviction for an offence.

Cl.1043 : Application moneys to be held in trust until allotment

3115. This clause is based on CA s.111.

3116. All moneys received from an applicant pursuant to a prospectus must be held in trust until securities have been allotted to that applicant.

Division 4 - Debentures

3117. This Division is based on CA Division 5 of Part IV and does not change the substantive law in relation to debentures. The Division contains a limited re-arrangement of the co-operative scheme provisions for ease of reference. In this regard provisions based on CA sub-ss.97(3), (4), (5) and (12) contained in CA Division 1 of Part IV relating to Prospectuses has been brought within this Division.

Cl.1044 : Application to close corporations

3118. This clause is a new provision.

3119. The provisions of the Bill relating to debentures will apply to debentures issued by close corporations (i.e registered under the Close Corporations Bill) with such modifications as are necessary or as are prescribed by regulations.

Cl.1045 : How debentures may be described

3120. This clause is based on CA sub-ss.97(3), (4), (5) and (12).

3121. A document, which acknowledges, evidences or constitutes an acknowledgment of the indebtedness of a corporation relating to money accepted by the corporation in response to an invitation to subscribe for or buy debentures or an offer to the public of debentures for subscription or purchase (Bill sub-cl.1023(1)), will be required to be described or referred to in certain ways (Bill sub-cl.1045(1)).

3122. Unless the document will be able to be described under Bill sub-cl.1045(3) as a mortgage debenture or certificate of mortgage debenture stock or under Bill sub-cl.1045(4) as a debenture or certificate of debenture stock, the document will have to be described as an unsecured note or an unsecured deposit note (Bill sub-cl.1045(2)).

3123. For a document to be described or referred to as a mortgage debenture or a certificate of mortgage debenture stock it must include a statement containing certain information (Bill sub-cl.1045(3)). For the document to be described as a debenture or certificate of debenture stock it must include a statement containing the information set out in Bill sub-cl.1045(4).

Cl.1046 : Application

3124. The following provisions of this Division will apply to debentures issued before or after the commencement of this Part.

Cl.1047 : Register of Debenture Holders

3125. This clause is based on CA s.147.

3126. A corporation that issues debentures will be required to keep a register of debenture holders (Bill sub-cl.1047(1)).

3127. A foreign corporation that issues debentures to an applicant whose application has an address in Australia or an external Territory or issues debentures following an application made pursuant to a prospectus registered under this Part will also be required to keep a register of debenture holders (Bill sub-cl.1047(2)).

3128. A register kept under this section will be required to contain certain particulars and to be open for inspection by debenture holders and shareholders of the corporation and by any other person for a fee (Bill sub-cl.1047(3)).

3129. A registered holder of debentures or a shareholder in a corporation will be entitled to a copy of the register of debenture holders. A registered holder of debentures will be entitled to a copy of any trust deed relating to the issue of those debentures (Bill sub-cl.1047(5) and (6)).

3130. "Debenture" will be defined, for the purposes of the section, to exclude:

- (a) a cheque, order for the payment of money or bill of exchange; or
- (b) a promissory note having a face value of at least \$50,000;

but will include a unit of a debenture (Bill sub-cl.1047(9)).

Cl.1048 : Branch registers of debentures holders

3131. This clause is based on CA s.148 subject to the modification described below.

3132. A corporation that issues debentures will be able to keep a branch register of debenture holders inside or outside Australia (Bill sub-cl.1048(1)).

3133. This clause differs from CA s.148 in that a corporation will no longer be obliged to keep a branch register in a State or Territory at the request of a debenture holder resident in that State or Territory. Removal of this obligation to maintain a branch register is consistent with the policy being adopted in relation to a branch register of members (see Bill cl.214).

3134. A branch register will be deemed to be part of the principal register of debenture holders (Bill sub-cl.1048(2)).

3135. The branch register will be required to be kept in the same manner as the principal register is kept (Bill sub-cl.1048(3)).

3136. Debentures registered in a branch register will be required to be distinguished from debentures registered in the principal register (Bill sub-cl.1048(5)).

3137. A corporation will be able to discontinue a branch register and will be required to transfer all entries in that register to another register of debenture holders kept by it (Bill sub-cl.1048(6)).

3138. The definition of debenture will be the same as in Bill cl.1047 (Bill sub-cl.1048(8)).

Cl.1049 : Specific performance of contracts

3139. This clause is based on CA s.149.

3140. A contract to take up and pay for debentures will be able to be enforced by an order for specific performance.

Cl.1050 : Perpetual Debentures

3141. This clause is based on CA s.150.

3142. A condition contained in any debenture will not be invalid by reason only that the debenture is thereby made irredeemable or redeemable only on the happening of a contingency however remote or on the expiration of a period however long.

Cl.1051 : Re-issue of redeemed debentures

3143. This clause is based on CA s.151.

3144. A company will be able to re-issue redeemed debentures provided that:

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

(Bill sub-cl.1051(1)).

3145. After re-issue the new holder is deemed always to have had the same priorities that would have applied if the debenture had never been redeemed (Bill sub-cl.1051(2)).

Cl.1052 : Qualifications of trustee for debenture holders

3146. This clause is based on CA s.152.

3147. A corporation that issues invitations to subscribe for or buy debentures or offers debentures for subscription or purchase or a body corporate that offers debentures as consideration under a takeover scheme will be required to provide in a trust deed for the appointment of a trustee.

3148. Only a Public Trustee, a company entitled to take a grant of probate of the will or letters of administration of the estate of a dead person, a company registered under the Life Insurance Act 1945, an Australian bank and certain approved body corporates will be qualified to act as a trustee for debenture holders (Bill sub-cl.1052(1)).

3149. A borrowing corporation will not be allowed to issue debentures until the person proposed to be appointed as trustee has consented to act and the appointment as trustee made (Bill sub-cl.1052(4)).

3150. Certain body corporates will be prohibited from appointment as or holding office as trustee without the leave of the court (Bill sub-cl.1052(5)).

Cl.1053 : Retirement of trustees

3151. This clause is based on CA s.153.

3152. A trustee for debenture holders will only be able to retire upon the appointment of a suitably qualified replacement.

Cl.1054 : Contents of trust deed

3153. This clause is based on CA s.154.

3154. If a corporation offers debentures to the public, or a body corporate offers debentures under a takeover scheme for the acquisition of shares, the relevant trust deeds will be required to contain certain particulars as to the maximum amount that can be borrowed. Also, if a trust deed or the relevant debentures do not expressly contain certain covenants by each borrowing corporation, then either of them will be deemed to contain covenants to the effect that the borrowing corporation will:

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

(Bill sub-cl.1054(1), (2) and (3)).

3155. Similar provisions to those specified in (a) to (c) will also apply to a guarantor body (Bill sub-cl.1054(4)) which, for the purposes of the application of those covenants, will be deemed to be a party to the trust deed (Bill sub-cl.1054(5)).

Cl.1055 : Power of Court in relation to certain irredeemable debentures

3156. This clause is based on CA s.155.

3157. In certain circumstances the Court will be able to order that the security for debentures be enforced either immediately or as the Court directs.

Cl.1056 : Duties of Trustees

3158. This clause is based on CA s.156. A trustee will have certain duties imposed on him to protect the interests of debenture holders including a requirement that he exercise reasonable diligence to ascertain whether the property of the borrowing corporation and each of its guarantor bodies is sufficient to discharge the principal debt (Bill sub-cl.1056(1)).

3159. The trustee will be able to apply to the ASC in certain circumstances for an order imposing restrictions on the activities of the corporation. The ASC will also be able to direct the trustee to apply to the Court for an order (Bill sub-cl.1056(2) and (3)).

3160. Where the trustee applies to the Court for an order the Court will be able to make certain orders having regard to the rights of all creditors (Bill sub-cl.1056(6)).

Cl.1057 : Powers of trustee to apply to the Court for directions

3161. This clause is based on CA s.157.

3162. The trustee for debenture holders will be able to apply for and receive directions from the Court regarding any matter or question concerning the performance of his functions as trustee or the interests of debenture holders.

Cl.1058 : Obligations of borrowing corporation

3163. The borrowing corporation will have to submit periodical three monthly reports to the trustee for debenture holders and copies of those reports to the ASC (Bill sub-cl.1058(1)). Matters to be included in these reports are set out in Bill sub-cl.1058(2) and (3). Particulars of any charge created by the borrowing corporation or any guarantor corporation must be furnished to the trustee for debenture holders (Bill sub-cl.1058(4)).

3164. Also the borrowing corporation and every relevant guarantor corporation must lodge with the ASC and the trustee a profit and loss account and balance sheet:

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

(Bill sub-cl.1058(5)).

3165. A borrowing corporation that is a holding company must submit a set of consolidated accounts for itself and each of its subsidiaries that is a guarantor corporation to the ASC and the trustee, for the same periods and within the same time periods stated in Bill sub-cl.1058(5) (Bill sub-cl.1058(6)). However, the trustee will be able also to require guarantor subsidiary companies to lodge accounts required under Bill sub-cl.1058(5) (Bill sub-cl.1058(7)). A copy of the notice under Bill sub-cl.1058(7) will have to be lodged with the ASC (Bill sub-cl.1058(8)).

3166. Nothing in Bill sub-cl.1058(5), (6), or (7) will apply to a pastoral company which has an exemption under s.11 of the Banking Act and is declared by the ASC to be a body corporate to which those sub-clauses will not apply (Bill sub-cl.1058(9)).

3167. In general, accounts prepared for the purpose of these three monthly reports will have to comply with certain accounts and audit provisions of the Bill (sub-cl.1058(12), (13), (14) and (15)).

3168. The trustee will have certain powers and obligations regarding accounts prepared by borrowing corporations and guarantor corporations (Bill sub-cl.1058(17), (18), (19) and (20)).

Cl.1059 : Obligation of guarantor body to provide information

3169. This clause is based on CA s.159.

3170. A borrowing corporation will be able to require any of its guarantor corporations to furnish information for inclusion in the three monthly reports of the borrowing corporations.

Cl.1060 : Loans and deposits to be immediately repayable on certain events

3171. This clause is based on CA s.160.

3172. Subject to certain qualifications, a borrowing corporation will be bound to repay loans and deposits received where the trustee for debenture holders considers that reports submitted by the company indicate that the purpose or project for which the moneys were raised has not been achieved or completed within the appropriate time.

Cl.1061 : Invitations or offers by excluded corporations

3173. This clause is based on CA s.161.

3174. An invitation by an excluded corporation (under Bill cl.65 - declared corporations including authorised dealers in the short term money market, Australian banks and exempt pastoral companies) will be deemed not to be an invitation or offer to the public for the purposes of this Division.

Cl.1062 : Liability of trustees for debenture holders

3175. The clause is based on CA s.163.

3176. Subject to certain exceptions, any trust deed provision that exempts the trustee from or indemnifies a trustee for liability for a breach of trust where the trustee fails to show the required degree of care and diligence will be void.

Division 5 : Prescribed Interests

3177. The provisions of Division 5 of Part 7.12 of the CB (cls.1063-1076) are based on CA Division 6 of Part IV. The provisions regulate the offering of 'prescribed interests'. Prescribed interests are defined in Chapter 1 to include almost any profit making scheme which does not fit within an exclusion relating to other interests (e.g. interests arising out of life insurance policies which are regulated under other Commonwealth legislation).

3178. The CB restricts the right to issue prescribed interests to public corporations (defined in Chapter 1) or agents of public corporations authorised for that purpose (sub-cl.1064(1)-(7)). The prospectus provisions found in Division 2 apply to this Division by virtue of the fact that prescribed interests are securities within the meaning of this Chapter of the Bill. The word 'of' in the context of

'securities' of a corporation, refers to securities 'made available by' a corporation, in the context of the prescribed interest provisions (see cl.5). The stop issue provisions that apply to prospectuses will apply to prescribed interests by virtue of the fact that a prospectus should accompany all issues of securities (other than excluded issues).

3179. The prescribed interest provisions found in the restructured format of the Bill should not cause significant disruption to the prescribed interests industry as the restrictions essentially follow those of the CA. However it should be noted that in order to provide added protection to investors the covenants found in cl.1069 (previously CA s.168) will now be deemed to be in a deed relating to prescribed interests whether they are there or not.

3180. The general prohibition against engaging in misleading and deceptive conduct contained in cl.995 applies to all securities including prescribed interests.

Cl.1063 : Modification of Certain Provisions

3181. This clause is based on CA sub-s.170(3).

3182. This clause makes clear that the provisions of the Bill and in particular the prospectus provisions apply to prescribed interests. Any modifications of those provisions, as are necessary or as are prescribed by regulations, for them to apply to prescribed interests are to be made.

Cl.1064 : Issue of Prescribed Interests Restricted

3183. This clause is based on CA ss.164 and 169.

3184. Section 169 CA permitted prescribed interests to be offered or issued to the public by a public company (as defined in CA s.164). The CB parallels this provision although the new clause is restated in terms that highlight the relevant heads of Commonwealth constitutional powers relied on in these provisions.

3185. The corporations power is used to prohibit public constitutional corporations from issuing or offering a prescribed interest unless as authorised under the provisions (sub-cl.1064(1)). The power is also used to prevent such a corporation from dealing in a prescribed interest offered by a person, not being such a corporation (sub-cl.1064(2)).

3186. Further, a person will be prevented from dealing with an unauthorised prescribed interest made available by a person other than a public corporation (sub-cl.1064(3)).

3187. Authorised agents of public corporations are permitted to make available, offer or issue invitations to subscribe for or buy prescribed interests (sub-cl.1064(7)). The effect of the prohibition based on the corporations power is reinforced by provisions relying on a range of other constitutional powers available to the Commonwealth.

3188. These provisions prohibit any person from dealing in prescribed interests made available by a person other than a public corporation or its authorised agent:

- . by use of eligible communications services, namely postal, telegraphic, telephonic or other like services (defined in cl.5), sub-cl.1064(4), or
- . in eligible circumstances namely, in interstate, overseas or inter-territory trade or commerce (see cl.63), sub-cl.1064(5).

3189. Use is also made of the constitutional power over cheques and negotiable instruments to prevent a person from suing on a cheque or other bill of exchange or promissory note used in a transaction concerning the making available of a prescribed interest by a person not being a public corporation or its authorised agent (sub-cl.1064(6)).

Cl.1065 : No Issue Without Approved Deed

3190. This clause is based on CA s.171.

3191. A person will be prohibited from issuing, offering or inviting subscriptions for prescribed interests of a public corporation unless there is in force in relation to the interest an approved deed. A person will also be prohibited from referring to the approval of a deed or of a trustee in other documents.

Cl.1066 : Approved Deeds

3192. This clause is based on CA ss.165 and 166 but reflects the fact that the ASC will not pre-vet deeds.

3193. Unlike the position under the CA, the ASC will not be required to pre-vet and approve each deed lodged with it. Deeds will however need to be lodged with the ASC and trustees and representatives will need to be approved by the ASC.

3194. An approved deed will be one that complies with the requirements of the Division and of the regulations, is lodged with the ASC and has an ASC approved trustee or representative appointed for the purposes of the deed.

3195. Sub-cl.1066(2) is a transitional provision concerning deeds that were approved deeds immediately before the commencement of this Division.

Cl.1067 : Approval of Trustees

3196. This clause is based on CA s.167.

3197. The ASC will be able to grant approval, on such terms and conditions as it thinks fit, to a company acting as trustee or representative for the purposes of the deed

(sub-cl.1067(1)). The ASC will also be able to revoke the approval if terms or conditions subject to which the approval was granted have been breached (sub-cl.1067(2)).

Cl.1068 : Lodgment of Consolidated Copies of Deed

3198. This clause is based on CA sub-s.166(4) and (5).

3199. Provision is made where an instrument or instruments amend a deed for the management company to lodge a printed consolidated copy of the deed with the ASC.

Cl.1069 : Covenants to be Included in Deeds

3200. This clause is based on CA s.168 but reflects amendments concerning the deemed existence of the listed covenants in deeds.

3201. The covenants contained in this clause parallel those found in CA s.168. Paras.1069(1)(c), 1069(1)(d), 1069(1)(e)(ii) and 1069(1)(f) dealing with buy-back covenants have been added. 'Buy-back' arrangements are defined in cl.5. Paragraph 1069(1)(n) allows other covenants to be prescribed by the regulations. These provisions, which expand upon the buy back arrangements found in CA para.1069(1)(b)(iii) and impose additional obligations on the trustee or representative, are based on the findings of the NCSC licensing review.

3202. Under the CA a number of problems came to light concerning the offering of a prescribed interest scheme when there was no approved deed containing the statutory covenants. Although a criminal penalty may have been incurred pursuant to CA para.174(1)(a) for failure to produce an approved deed, it appeared that the statutory covenants by which duties and obligations were be imposed on the trustee and manager of the trust did not apply. The new provisions

aim to fill this void. In order to remedy this situation the covenants listed in cl.1069 will now be deemed to be included in the deed whether or not they are actually included in the deed (see sub-cl.1069(5)-(7)). Consequently if there is an offer, invitation or issue of any prescribed interest without there being an approved deed or the approved deed is defective in not referring to all of the required covenants, the deed constituting the interest will be deemed to contain the covenants set out in sub-cl.1069(1), (see sub-cl.1069(5), (6), (7), (8) and (9)).

3203. Sub-cl.1069(8) provides for the above deeming to occur so far as practicable in a situation where there is no deed. The provision seeks to ensure that there is a 'deed containing the covenants' in a situation where there is in fact no formal trust deed.

3204. While only certain covenants are specified in this clause it can be noted that the clause also contains a power to prescribe by regulation other covenants that should be included in deeds. These covenants may be subject to the deeming provisions if this becomes necessary. Sub-cl.1069(9) deals with the situation where a covenant is prescribed by regulation. Except so far as the regulations otherwise provide, every deed that is in force when a regulation comes into force will be deemed to contain the covenant/s prescribed in the regulations.

3205. Sub-cl.1069(5) and (6) deem covenants concerning primarily trustees obligations and buy back arrangements to be contained in deeds which were approved under the previous corresponding law.

3206. Further to the deeming of certain covenants to exist, sub-cl.1069(10) provides for the situation where prices are to be calculated. In the absence of any formula, prices will be calculated as prescribed or as the ASC determines.

3207. In addition to the covenants to be included in the deed, deeds should not contain misleading or deceptive information. Preparers of deeds should as a matter of course include in the deed such items as a true disclosure of the nature and extent of the undertaking, scheme, enterprise or investment contract, the nature of the prescribed interest, the rights of the holders of the prescribed interest, full particulars of the trustee or representative etc.

3208. Sub-cl.1069(7), (8), (9), (10) are based on CA sub-s.168(3)-(6).

Cl.1070 : Register of Holders of Prescribed Interests

3209. This clause is based on CA s.172.

3210. The management company will be required to keep, at its registered office, its principal place of business in Australia or another place approved by the ASC a register of holders of prescribed interests in respect of each deed with which the company is concerned. The register will contain details of the names of holders of prescribed interests, the extent of their holdings and the dates during which time the interests were held.

Cl.1071 : Returns and Information Relating to Prescribed Interests

3211. This clause is based on CA s.173.

3212. A management company will be required to lodge a return within 2 months after the end of each financial year applicable to a deed containing a list of interest holders and such other particulars as are prescribed.

Cl.1072 : Buy-back covenant and buy-back arrangements

3213. This provision is new.

3214. It relates to the buy-back covenants found in cl.1069 and imposes certain notification duties on trustees, representatives and the management company.

3215. The trustee or representative in relation to a deed that is or has been an approved deed is required to notify the management company if he or she considers the buy-back covenant to be inadequate (sub-cl.1072(1)). Failure to give the requisite notices or non compliance with a buy-back covenant results in the contravention of this clause.

Cl.1073 : Preservation of Civil Liability

3216. This clause is based on CA sub-s.174(2).

3217. A person will not be relieved from any liability to a holder of a prescribed interest made available by a corporation merely because the person has been convicted of an offence in respect of a contravention of a provision of this Part.

Cl.1074 : Winding Up of Schemes

3218. This clause is based on CA s.175.

3219. Where the management company goes into liquidation or, in the opinion of the trustee or representative, it has ceased to carry on business or has failed to comply with a provision of the deed to the prejudice of holders of prescribed interests, the trustee will be required to convene a meeting of holders.

Cl.1075 : Non-application of Division in Certain Circumstances

3220. This clause is based on CA s.176.

3221. The Division will not apply in the case of the sale of any prescribed interest by a personal representative, liquidator, receiver or trustee in bankruptcy in the normal course of realisation of property.

Cl.1076 : Liability of Trustees

3222. This clause is based on CA s.177.

3223. With certain limited exceptions, a provision contained in an approved deed or in any contract with the holders of prescribed interests to which such a deed relates will be void insofar as it would have the effect of exempting a trustee under the deed from liability for breach of trust where the trustee fails to show the required care and diligence.

Division 6 : Hawking of Securities

3224. The security hawking provisions were previously found in the Offences provisions of the CA in s.552. It is considered that these provisions are more appropriately found with the other security trading provisions in the Bill.

3225. While the provisions are redrafted in a different form to the CA their effect is basically the same. The new provisions refer to securities rather than to shares and debentures. This does not change the ambit of the provision as shares were broadly defined in CA sub-s.552(14). Differences occur in the definition of going from place to place and the fact that the Bill does not use the terminology 'offer to the public' or 'member of the public'.

Cl.1077 : Interpretation

3226. In this Division references to a person going from place to place will include references to a person communicating with other persons at different places by the use of an eligible communications service (defined in Chapter 1 to mean postal, telegraphic, telephonic or other like services, within the meaning of para.51(5) of the Constitution) (para.1077(a)). The use of modern means of communication for the purpose of security hawking will clearly fall within the meaning of the legislation.

3227. References to the buying or purchasing of securities includes a reference to acquiring securities by barter or exchange. (para.1077(b) is based on CA sub-s.552(15)).

Cl.1078 : Restriction on Hawking Securities

3228. This clause is based on CA sub-ss.552(1) and (2).

3229. A person will be prohibited from going from place to place issuing invitations to subscribe for or buy securities of a corporation or offering securities of a corporation for subscription or purchase unless the ASC has exempted the corporation whose securities are in question from the operation of this provision. Problems have arisen with the interpretation of the terms 'offer to the public' and 'member of the public', which are used in the CA. These terms are not used in the Bill in relation to the security hawking nor the prospectus provisions. In place of these words the Bill refers to offers, invitations and issues and excluded offers, invitations and issues (see cls.65 and 66).

Cl.1079 : Restriction on Written Offers in Respect of Securities

3230. This clause is based on CA sub-ss.552(3), (4), (5) and (15)).

3231. Except in the circumstances set out in sub-cl.1079(4) a person will not be able to issue written invitations to buy securities nor written offers for purchase of securities to persons other than persons whose ordinary business is the buying or selling of securities unless the invitation or offer is accompanied by a statement in writing complying with this clause or a prospectus that complies with Division 1.

3232. Sub-cl.1079(2) provides that sub-cl.1079(1) applies in relation to an invitation or offer that is broadcast, televised or included in a cinematograph film.

Cl.1080 : Particulars to be Included in Statement

3233. This clause is based on CA sub-s.552(6).

3234. This provision specifies the contents of the statement referred to in cl.1079(1).

Cl.1081 : Prohibition on Hawking of Securities of Proposed Corporation

3235. This provision parallels the prohibition in CA sub-s.552(8) in respect of a proposed corporation.

Cl.1082 : Power of Court to Make Orders

3236. This clause is based on CA sub-ss.552(12) and (13).

3237. Where a person is convicted of an offence in respect of an invitation or offer in contravention of this Division, a Court may order that any contract made pursuant to the invitation or offer is void and may give such consequential directions as it thinks proper for the repayment of any money or the re-transfer of any securities.

Division 7 - Exemptions and Modifications

Cl.1083 : Australian Banks

3238. This clause is based on CA s.215B.

3239. Australian banks (defined in Chapter 1) will not be required to comply with the provisions contained in Divisions 2, 4 and 6 when acting in the ordinary course of their business.

Cl.1084 : Powers of Commission

3240. This clause is based on CA s.215C.

3241. The ASC will by instrument in writing be able to exempt a person from compliance with all or any of the provisions in the Bill relating to:

- (a) Division 2 Prospectuses
- (b) Division 3 Restrictions on Allotment and variation of contracts
- (c) Division 4 Debentures
- (d) Division 5 Prescribed Interests
- (e) Division 6 Security Hawking.

3242. If a person contravenes or fails to comply with a condition of an exemption the Court, on application of the ASC, may order the person to comply with the condition (sub-cl.1084(5)).

3243. The ASC will have power to declare, by instrument in writing, that a Division has effect as if all or any of the provisions in the Division are omitted, modified or varied in manner specified in the declaration in their application to a particular person (sub-cl.1084(6)).

3244. There is a general requirement for the ASC to publish a copy of an instrument executed under cl.1084 in the Gazette (sub-cl.1084(8)).

3245. Sub-cl.1084(9) is a transitional provision. It provides for exemptions or declarations made under a previous corresponding law to be continued in force. Accordingly NCSC exemptions made in respect of prospectuses for example, will continue to be available in so far as this is possible under the Bill.

PART 7.13 - TITLE TO, AND TRANSFER OF, SECURITIESIntroduction

3246. Part 7.13 deals with title to shares and other interests in a company and the transfer of securities. Special provisions relating to the transfer of marketable securities and marketable rights are included. Divisions 1 and 2 are based very closely on Division 7 of Part IV of the Companies Act. Division 3 is based on Division 8 of that Part but includes a number of reforms.

3247. These reforms include provision for a broker to execute a transfer of marketable securities on behalf of the owner where the owner has given the dealer selling instructions in respect of the securities (see cl.1104). Transferee acceptance forms have also been deleted (see cl.1101). In addition, a wide exemption and modification power has been granted to the ASC in respect of the provisions in this Part (see cl.1113).

Division 1 - Title to Securities.Cl.1085 : Nature of shares and other interests

3248. This clause is to the same effect as CA s.178.

3249. A share or other interest in a company is :

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

(sub-cl.1085(1)).

3250. Subject to the above, the laws applicable to ownership of, and dealing with, personal property apply to shares or other interests of a member in a company, including equitable interests in respect of a share or other interest (sub-cl.1085(2)).

3251. For the purpose of any law, a share or other interest of a member in a company will be taken to be situated in the State or Territory in which the register of members of the company is kept. If the name of the member is entered on a branch register, the interest will be taken to be situated in the State, Territory or country other than Australia in which the branch register is kept (sub-cl.1085(3)).

Cl.1086 : Numbering of shares

3252. This clause is to the same effect as CA s.179.

3253. Each share in a company must be distinguished by an appropriate number unless all shares in the company or the class are and remain fully paid up and rank equally (para.1086(2)(a)) or all the shares are evidenced by share certificates (para.1086(2)(b)).

Cl.1087 : Certificate to be evidence of title

3254. This clause is to the same effect as CA s.180.

3255. A certificate issued in accordance with this clause specifying any shares held by a member of the company is prima facie evidence of the title of the member to the shares. Such a certificate is required to be under the common seal of the company and to state:

- (a) the name of the company and the short title of this Act;
- (b) the class of shares; and

- (c) the nominal value of the shares and the extent to which the shares are paid up.

Cl.1088 : Company may have duplicate common seal

3256. This clause is to the same effect as CA s.181.

3257. A company will be able, if authorised by its articles, to have a duplicate common seal, which must be a facsimile of the original with the addition on its face of the words "Share Seal" or "Certificate Seal". A certificate sealed with such a duplicate deal is deemed to be sealed with the common seal.

Cl.1089 : Loss or destruction of certificates

3258. This clause is to the same effect as CA s.182.

3259. Where a certificate of title to shares, debentures or prescribed interests is lost or destroyed, the company is required, on application by its owner, to issue a duplicate certificate to the owner within 21 days after the application or payment of a required company fee (which cannot exceed a maximum prescribed amount) or within any longer period approved by the Commission (sub-cl.1089(1)). The application must be supported by a written statement and an undertaking that, if found, the certificate will be returned. The directors may require the applicant to place an appropriate advertisement or to lodge a bond indemnifying the company against loss (sub-cl.1089(3)).

Division 2 - Transfer of Securities

Cl.1090 : Definition

3260. This definition only appears once for the purpose of all provisions in Division 2. It previously appeared a number of times in CA ss.182 to 188.

Cl.1091 : Instrument of transfer

3261. This clause is to the same effect as CA s.183.

3262. A company is not able to register a transfer of shares, debentures or interests unless a proper instrument of transfer has been delivered to the company (sub-cl.1091(1)). However, this does not prejudice the power of the company to register as a shareholder, debenture holder or interest holder a person to whom a right has devolved by will or by operation of law (sub-cl.1091(2)). Transfers by personal representatives are treated as if the personal representative is the registered holder (sub-cl.1091(3)).

3263. Where the dead holder is represented by a personal representative under a law in a different State to that in which the holder was registered, a transfer by that representative is to be registered by the company provided an appropriate declaration is made by the representative in relation to grants of representation in the State of registration (sub-cl.1091(4)).

3264. An application by a personal representative for registration is treated as a transfer to the representative (sub-cl.1091(7)).

Cl.1092 : Registration of transfer at request of transferor

3265. This clause is to the same effect as CA s.184.

3266. On the written request of a transferor of any share, debenture or interest in a company, the company is required to enter the name of the transferee in the register in the same manner as if the application for entry were made by the transferee (sub-cl.1092(1)).

3267. A company, at the transferor's request, must also require the transferee, or other person holding the documents of title, to produce them for registration of the transfer (sub-cl.1092(2)). The transferor may apply to the Court for certain orders if the transferee or other person fails to comply with such a requirement (sub-cl.1092(3) and (4)).

Cl.1093 : Notice of refusal to register transfer

3268. This clause is to the same effect as CA s.185.

3269. If a company refuses to register a transfer of any share, debenture or interest in the company, it must, within 2 months of the date of lodgement of the transfer, send the transferee notice of the refusal.

Cl.1094 : Remedy for refusal to register transfer or transmission

3270. This clause is to the same effect as CA s.186.

3271. Where directors refuse to register a transfer or transmission without just cause the Court will be able to order the transfer to be registered or may make such other order as it considers just and reasonable for the purchase of the shares .

Cl.1095: Certification of transfers

3272. This clause is to the same effect as CA. s.187.

3273. The certification by a company of any instrument of transfer in relation to any shares, etc. of the company is taken as a representation by the company that there have been produced to the company such documents as on their face show prima facie title to the shares in the transferor named in the instrument of transfer (sub-cl.1095(1)).

3274. If a person acts on the basis of a certification which was false and negligently made, the company is liable as if it had been fraudulently made (sub-cl.1095(2)). A company is able to limit its exposure to such liability (provided the certification was not made fraudulently) to a minimum of 42 days (sub-cl.1095(3)).

Cl.1096 : Duties of company with respect to issue of certificates

3275. This clause is based on CA s.188.

3276. Within 2 months after the allotment of any shares etc., and within 1 month after the date on which a valid transfer of shares etc is lodged with it, the company is required to complete and have ready for delivery all the appropriate certificates, debentures or other documents in connection with the allotment or transfer. The company must send the certificates to the transferee or allottee unless otherwise instructed in writing by them (sub-cl.1096(1) and(2)).

3277. A person can apply to the ASC for a declaration that a company is not required to comply with the above obligations in relation to the person (sub-cl.1096(3)).

3278. Where a company fails to comply with its above obligations an appropriate Court order can be sought after the company is given notice of the default (sub-cl.1096(4)).

Division 3 - Transfer of Marketable Securities and Marketable Rights

3279. Division 3 (cls.1097 to 1112) contains provisions designed to facilitate the processing of marketable securities and rights to marketable securities. Some amendments have been made to the Companies Act provisions to expedite the share transfer process. Those amendments, and consequential amendments to the National Guarantee Fund provisions, are:

- (a) deletion of the requirement that a transferor sign security transfer forms. The transferor's broker will be able to execute the transfer on the owner's behalf by placing the broker's validation stamp on the transfer. The transfer will still need to be accompanied by the relevant certificate(s) and a transfer executed by a broker where the broker has not received selling instructions from the owner will not be sufficient to pass title to the shares. In addition, it will be an offence for a broker to execute a transfer unless the broker has received selling instructions from the owner. A broker will be liable to indemnify all parties suffering loss as a result of any unauthorised transfer;
- (b) extension of the National Guarantee Fund provisions to provide compensation to both the owner and the transferee where a broker transfers the owner's shares without authority (see Division 7 of Part 7.10);
- (c) deletion of transferee acceptance forms that were previously required (CA Schedule 4, Forms 4, 9 and 11) where the transfer related to securities or rights involving uncalled liabilities;
- (d) the addition of two new consolidated transfer forms - one relates to multiple transfers of securities to one transferee and the other to multiple transfers of rights to one transferee. The new forms will mean that where there are several transferors, details relating to the transferee need only be completed once rather than repeated on every transfer (see Schedule 2 of the Bill).

3280. While several of the CA provisions remain unchanged in substance some have been restructured and some drafting changes have been made for the purposes of greater clarity.

Cl.1097 : Interpretation

3281. This clause is based on CA s.189 with the following modifications:

- (a) the definition of "associate" is new and is based on CA para. 194(3)(b).
- (b) the definitions of "duly completely", "duly completed Part 1", "eligible body", "execution time", "issuing body" and "stamp" are new definitions.
- (c) the definition of "marketable right" replaces the definition of "right to a marketable security".
- (d) the definition of "marketable security" incorporates the new definition of "eligible body" with the result that the old definition of "prescribed corporation" is no longer necessary.
- (e) provisions relating to the stamping of documents now appear in a separate clause (cl.1099).

Cl.1098 : Document duly completed in accordance with a particular form

3282. Sub-clause 1098(1) is based on CA sub-s.191(3).

3283. This provision deals with the requirements for due completion of a document in accordance with a form or part of a form appearing in Schedule 2 of the Bill. A document is not duly completed unless it contains a name and address and a stamp which purports to be that required by the form.

3284. Sub-clauses 1098(2) to (5) apply where consolidated transfer forms are used (see Schedule 2, Forms 4 and 8 and Part 3 of Forms 1, 2, 3, 5, 6 and 7 of that Schedule). Such forms are designed to be used where a transferee broker wishes to register a number of transfers to the one transferee. Under CA, the transferee broker would need to fill in transferee details on every transfer form. By use of the new consolidated transfer form, the transferee broker will only need to fill in the transferee's details once.

3285. For due completion where a consolidated transfer form is used the following requirements must be met:

- (a) Part 3 of each transfer form will need to bear a transferee's broker's stamp which has on it a transfer consolidation number (sub-cl.1098(3)).
- (b) the consolidated transfer form (Part 4 or 8 of the Schedule) must set out the transfer consolidation number stamped on the Part 3 of each of the transfer forms (sub-cl.1098(4)).

3286. Sub-clause 1098(5) provides that due completion of the consolidated transfer form will not be dependent on the total number of securities to which the form relates being accurately stated or all the transfer consolidation numbers coinciding exactly with those on the transfers. This is designed to prevent a mistake by the transferee broker in respect of one of the transfers (e.g. where the consolidation number doesn't match that in the consolidated transfer), resulting in all the other transfers, whose consolidation numbers do match those in the consolidated transfer, being rejected on the basis that the form is not duly completed.

Cl.1099 : Stamping of documents

3287. This clause is to the same effect as CA sub-ss.189(5) and (6) and contains interpretation provisions dealing with the stamping of transfers.

Cl.1100 : Sufficient transfers

3288. This clause is to the same effect as CA s.190.

3289. A sufficient transfer (previously in CA a "sufficient instrument of transfer") under Division 3 can be used as a proper instrument of transfer for the purposes of cl.1091 of the Bill and for the purposes of any other law or instrument relating to marketable securities or marketable rights.

Cl.1101 : What is a sufficient transfer of marketable securities or marketable rights : generally

3290. This clause is to the same effect as CA sub-ss.191(1) and (2) except that para.(b) of both those sub-sections has been deleted as a result of deletion of transferee acceptance forms in Schedule 2 (previously CA Schedule 4, Form 4) and that the clause (paras.1101(1)(c) and (d)) now refers to the forms and parts of forms which can be used to effect a consolidated transfer.

3291. A document will only be regarded as a sufficient transfer of marketable securities (or rights) if it relates to those securities (or rights) and is duly completed in accordance with a specified form or parts of specified forms in Schedule 2.

3292. The forms in CA, Schedule 4 have been modified as a result of the reforms to enable a transferor brokers to execute a transfer on behalf of a transferee broker and to enable a transferee broker to use a consolidated transfer form where the transferee's purchase is made up of transfers from a number of transferors (see Schedule 2 to the Bill).

Cl.1102 : What is a sufficient transfer by an authorised trustee corporation

3293. This clause is to the same effect as CA s.192 except that the clause reflects the deletion of CA Forms 9 and 11 from the Schedule.

3294. In a transfer of marketable securities or rights other than by way of sale, gift or exchange by an authorised trustee corporation (see cl.9) to the beneficial owner of the securities or rights, a document will constitute a sufficient transfer if it relates to those securities or rights and is duly completed in accordance with the specified form.

Cl.1103 : Transferee's execution of transfer of marketable securities

3295. This clause is to the same effect as CA sub-ss.193(1) and (3)).

3296. The clause sets out the effects of the execution of a sufficient transfer of marketable securities on a transferee's rights and obligations in respect of the company or other issuing body whose securities are transferred e.g. the transferee is deemed to have accepted the securities on the same terms and conditions as the previous holder (sub-cl.1103(2)).

Cl.1104 : Transferee's execution of transfer of marketable rights

3297. Sub-clauses 1104(1) and (2) are based on CA sub-s.193(2).

3298. Sub-clause 1104(3) has been added as a result of the removal of transferee acceptance forms (see cl.1101). It also ensures consistency in the treatment of marketable securities (see sub-cl.1103(3)) and marketable rights where the relevant

securities are shares. Where marketable rights are transferred, the transferee is deemed to have applied for the allotment of the securities and to have agreed to the terms of subscription of the issuing body. Where the rights relate to shares, the transferee is deemed to have agreed to become a member, and be bound by the constitution, of the issuing body.

Cl.1105 : Effect where document purports to bear transferor's broker's stamp

3299. This clause is based on CA sub-s.194(1) but contains changes as a result of the deletion of transferor's signatures on transfer forms.

3300. Where a transfer is duly completed and bears a stamp purportedly that of the transferor's broker, the transferor broker and his associates are deemed to have warranted the accuracy of the certified statements in the document and the right of the transferor to sell or dispose of the securities or rights (sub-cl.1105(2)).

3301. Where a transferor's broker executes a transfer and has received selling instructions from the owner in relation to the securities transferred, the broker is deemed to have been authorised to execute, and to have executed, the document on the transferor's behalf. In such a case, the broker and each of the broker's associates are liable to indemnify the transferor as well as the issuing body, the transferee and the transferee's broker against any loss resulting from wrongful stamping or unauthorised execution of the transfer (sub-cl.1105(3)).

3302. Unauthorised transfers i.e. those executed by the broker without instructions, will not be sufficient to pass title. Owners of the securities the subject of the unauthorised transfer and transferees suffering loss as a result of it will be able to claim against the National Guarantee Fund (see Division 7 of Part 7.10).

Cls.1106 to 1108 : New provisions on effect of securities exchange stamp

3303. Transfers that purport to bear the stamp of a securities exchange are treated separately. This is designed to overcome possible confusion over an exchange's liability (i.e. where a transfer bears a stamp that purports to be that of the exchange) by virtue of that liability currently being dealt with together with that of the transferor's broker's in CA sub-s.194(1).

3304. In addition, warranties by a securities exchange are the subject of one clause while indemnities by or for a securities exchange are the subject of another. The indemnity provisions make it clear that an exchange, as well as the transferor's broker, can be liable for losses suffered by specified parties. The exchanges will continue to be entitled to cross indemnity from transferor brokers.

Cl.1106 : Warranties by securities exchange where document purports to bear its stamp

3305. This clause is based on CA paras.194(1)(a) and (b).

3306. Where a duly completed transfer bears a stamp purporting to be that of a securities exchange, the exchange will be deemed to have made the same warranties as the transferor broker (see sub-cl.1105(2)).

Cl.1107 : Indemnities by securities exchange where documents purport to bear their stamps

3307. Where a securities exchange has stamped a document of transfer (e.g. a split transfer form), and another document of transfer relating to all or any of the securities or rights (e.g. a security transfer or broker's transfer form), has been stamped by the transferor's broker, the exchange is liable to indemnify the issuing body, the person specified as the

transferor, the transferee and the transferee's broker in the document bearing the exchange's stamp against any loss arising from wrongful stamping or unauthorised execution by the transferor broker of the form bearing that broker's stamp (sub-cl.1107(1) and (2)). However, the exchange is entitled to recover any amounts so paid from the above transferor broker or the broker's associates (sub-cl.1107(3)).

Cl.1108 : Joint and several warranties and liabilities

3308. If 2 or more persons are liable in respect of the warranties and indemnities under cl.1105 or cl.1107 they are liable jointly and severally (sub-cl.1108(1) and (2)). This extends the previous CA position in which only the broker's liability to cross indemnify an exchange was expressed to be joint and several.

Cl.1109 : Registration of certain instruments

3309. This clause is to the same effect as CA s.195.

3310. A company or other "eligible body" (defined in cl.1097) receiving a sufficient transfer for registration is entitled to assume, in the absence of contrary knowledge:-

- (a) that a stamp on a document of transfer is what it purports to be (para.1109(a)); and
- (b) that when a transfer under cl.1102 is executed, the authorised trustee corporation held the relevant securities in trust for the transferee and that the transfer was not made by way of a sale, gift or exchange (para.1109(b)).

Cl.1110 : Operation of Division

3311. This clause is to the same effect as CA s.196.

3312. These provisions operate to ensure that the provisions relating to the transfer of marketable securities and marketable rights:

- (a) apply despite any provision to the contrary in the Bill or in any other law, trust deed or other instrument relating to transfer of marketable securities or rights (sub-cl.1110(1) and (6));
- (b) do not affect the terms and conditions on which marketable securities or rights are sold (sub-cl.1110(2));
- (c) do not affect a company's rights to refuse to register a person as the holder of shares or to allot marketable securities to the person except that such an objection will not be valid if it relates only to the form of the instrument of transfer (sub-cl.1110(3));
- (d) do not constitute a breach of any law, memorandum, articles, trust deeds or other instrument (sub-cl.1110(4));
- (e) do not prevent the use of forms of transfer or modes of execution otherwise permitted by law (sub-cl.1110(5));

Cl.1111 : Occupation need not appear in instrument, register etc.

3313. This clause is to the same effect as CA s.197.

3314. It is not necessary in an instrument of transfer of marketable securities or rights to state the occupation of the transferor or transferee regardless of the constitution of a company or other eligible body or the terms of creation or issue of the securities or rights (sub-cl.1111(1) and (2)).

3315. The omission from any register or document relating to marketable securities of the occupation of the person who is, or is entitled to be, registered as the holder of the securities does not breach any law, memorandum, articles, trust deed or any other document relating to the securities (sub-cl.1111(3)).

Cl.1112 : Offences

3316. Subject to the creation of the new offence mentioned below, this clause is to the same effect as CA s.198.

3317. It is an offence for a broker to stamp a document of transfer unless the instrument relates to a sale or purchase made in the ordinary course of business of the broker for a consideration of not less than the unencumbered market value of the securities (sub-cl.1112(1)).

3318. A provision additional to those in CA s.198 makes it an offence for a person to use a stamp that purports to be that of a transferor broker on a transfer document unless:

- (a) the stamp is genuine;
- (b) the broker has the transferor's authority; and
- (c) the person is the transferor's broker or an authorised agent (sub-cl.1112(2)).

3319. Paragraph 1112(2)(b) is consequential on the deletion of transferor signatures on transfer forms - transferor broker's will now be able to execute transfer documents on behalf of the transferor. Even though unauthorised execution of transfers by brokers will not be sufficient to pass title and compensation will, in any event, be available under the NGF, it is important for the integrity and efficiency of the transfer system that the broker only execute transfer

documents where he has the authority of the owner of the particular securities to do so. Paragraph 1112(2)(b) provides that a transferor broker's deemed authority under para.1105(3)(a) is to be disregarded in determining whether the broker actually had authority to execute the transfer.

3320. A securities exchange is prohibited from using its stamp on a transfer document unless a duly completed Part 1 (see sub-cl.1097(1)) has been lodged with the issuing body or the exchange holds the latter document on which the transferor broker certifies that such a document has or will be so lodged (sub-cl.1112(3)).

3321. An authorised trustee corporation (see cl.9) is prohibited from executing transfer documents under cl.1102 where the transfer involves a sale, gift or exchange or the recipient is not the beneficial owner of the securities or rights (sub-cl.1112(4)).

3322. It is an offence for a person other than an authorised trustee corporation to knowingly cause or permit the execution of a document that may be used as, but is not, a sufficient transfer under cl.1102 (sub-cl.1112(5)).

3323. A person is not permitted to lodge with a company or other eligible body a document stamped or executed in a prohibited manner for the purpose of registration, allotment or issue of marketable securities (sub-cl.1112(6)).

Division 4 - Exemptions and Modifications

Cl.1113 : Powers of Commission

3324. This is a new provision although the power it confers on the ASC is partly based on CA s.215C and CASA ss.57 and 58.

3325. Where the ASC is satisfied that security holders will be adequately protected and that transfer of the securities will be made more efficient (sub-cl.1113(2)) it will be able to:

- (a) exempt particular securities or classes of securities, subject to any conditions it wishes to impose, from any of the provisions of Part 7.13 or any regulations made for the purposes of the Part (sub-cl.1113(3)); and
- (b) modify or vary the operation of any of the provisions, or any regulations made for their purposes, in their application to particular securities or classes of securities (sub-cl.1113(6)).

3326. The ASC must publish a copy of an exemption or a modification declaration in the Gazette (sub-cl.1113(7)).

PART 7.14 - MISCELLANEOUS

3327. This Part (cls.1114-1119) includes provisions dealing with the Court powers, use of particular titles associated with the securities industry and, books and records. The clauses in the Part are based on SIA ss.14, 133 and 136-139.

Cl.1114 : Power of Court to make certain orders

3328. This clause is to the same effect as SIA s.14.

3329. A brief outline of this clause is as follows:

(a) If it appears to the Court

- (i) on the application of the ASC that a person has contravened (or is about to contravene) any law relating to dealing in "eligible securities" (defined in cl.9), the conditions of a licence or the business or listing rules of a securities exchange; or
- (ii) on the application of a securities exchange, that a person has contravened its business or listing rules

the Court may make such orders as it thinks fit including those listed in paras.1114(1)(c) to (h); (but not if it would unfairly prejudice any person (sub-cl.1114(4))).

- (b) the Court is empowered to make an interim order (sub-cl.1114(2)); no undertakings as to damages shall be required before such an order is made (sub-cl.1114(3)).

- (c) the Court may require that notice be given or published before making an order under sub-cl.1114(1) (sub-cl.1114(5)).
- (d) among the examples of orders in sub-cl.1114(1) is the appointment of a receiver of the "property" (defined in sub-cl.1114(7)) of a dealer. The receiver is given wide powers by sub-cl.1114(6)).
- (e) contravention of an order under this section or the requirements of such a receiver is prohibited (sub-cl.1114(8)).
- (f) the Court may rescind, vary or suspend an order made under this clause (sub-cl.1114(9)).

Cl.1115 : Restrictions on use of titles "stockbroker", "sharebroker" and "stock exchange"

3330. This clause is based on SIA s.133. The persons to whom, and the circumstances in which, that section applied have been modified for constitutional reasons.

3331. A corporation will be prohibited from using the title "stockbroker" or "sharebroker" if it is not a member of a stock exchange (sub-c.1115(1)). A person other than a corporation who is not a stock exchange member will be prohibited from engaging in conduct which would give the impression that the person is a sharebroker or stockbroker who deals in "eligible securities" - see cl.9 (sub-cl.1115(2)).

3332. A body corporate that is not a stock exchange will be prohibited:

- (a) in the case of a corporation, from using the title stock exchange or a title creating the same impression (sub-cl.1115(3))

- (b) in the case of body corporate not being a corporation, from engaging in conduct giving the impression that it conducts a stock market on which eligible securities are traded or on which information is provided in relation to such securities (sub-cl.1115(4)).

Cl.1116 : Preservation and disposal of records etc.

3333. This clause is to the same effect as SIA s.136.

3334. This clause deals with the preservation and disposal of records. It is also an offence to falsify those records.

3335. A brief outline of this clause is as follows:

- (a) Anyone required to keep a register or record under the Chapter must keep it for the prescribed period even if they cease to carry on business before the expiration of that period (sub-cl.1116(1)).
- (b) The prescribed period for a register or record other than an accounting record is 5 years from the day on which the last entry was made. For an accounting record the period is 7 years after the last day of the accounting period to which the record relates (sub-cl.1116(2)).
- (c) These provisions do not apply to a contract note received or issued by a dealer if the matters referred to in sub-cl.842(3) are recorded by the exchange or (subject to any conditions imposed by the ASC) by the dealer in a manner approved by the ASC and the record is retained for 5 years (sub-cl.1116(3)).
- (d) The ASC will have certain powers regarding disposal of documents lodged with it (sub-cl.1116(4)).

Cl.1117 : Concealing etc. of books relating to securities

3336. This clause is based on SIA s.137 with certain amendments.

3337. It will be an offence to conceal, destroy or alter a book required to be kept by a dealer, licence holder (or a representative holding a proper authority from him) or financial journalist or to send such a book out of Australia (sub-cl.1117(1)).

3338. It will be a defence to a prosecution under sub-cl.1117(1) that the act was not done with an intent to defraud, to defeat the Chapter or obstruct an investigation (sub-cl.1117(2)).

Cl.1118 : Falsification of records

3339. This clause is to the same effect as SIA s.138.

3340. A person will be prohibited from recording false or misleading material, destroying, removing or falsifying recorded matter or not recording (with intent to falsify) matter that is required to be used in connection with the keeping of a book under this Chapter or other record referred to in cl.1116. This prohibition applies only where the material is recorded or stored in an illegible form by means of a mechanical device, an electronic device or other device (sub-cl.1118(1)). It will be a defence if it is proved that the person acted honestly and that in all the circumstances the act or omission constituting the offence should be excused (sub-cl.1118(2)).

Cl.1119: Precautions against falsification of records

3341. This clause is to the same effect as SIA s.139.

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3342. A person required by the Chapter to keep records must take reasonable precautions to guard against any falsification.
