

1988

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CORPORATIONS BILL 1988

CORPORATIONS (FEES) BILL 1988

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

SECURITIES EXCHANGES (MEMBERSHIP) FIDELITY FUNDS
CONTRIBUTION BILL 1988

SECURITIES EXCHANGES FIDELITY FUNDS BILL 1988

NATIONAL GUARANTEE FUND (REPORTABLE TRANSACTIONS)
LEVY BILL 1988

NATIONAL GUARANTEE FUND (PARTICIPATING EXCHANGES)
LEVY BILL 1988

NATIONAL GUARANTEE FUND (MEMBERS OF PARTICIPATING
EXCHANGES) LEVY BILL 1988

FUTURES ORGANISATIONS (APPLICATION FOR MEMBERSHIP)
FIDELITY FUNDS CONTRIBUTION BILL 1988

FUTURES ORGANISATIONS (MEMBERSHIP) FIDELITY FUNDS
CONTRIBUTION BILL 1988

FUTURES ORGANISATIONS FIDELITY FUNDS LEVY BILL 1988

EXPLANATORY MEMORANDUM

VOLUME 4

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

Printed by Authority by the Commonwealth Government Printer

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CHAPTER 8 - THE FUTURES INDUSTRYIntroduction

3343. The provisions contained in this Chapter are based on those contained in the FIA but with some important modifications. For example, the Bill will require all futures brokers and futures advisers will be required to be foreign or trading corporations. Also, there will no longer be any requirement for representatives of a futures broker or futures adviser to be licensed. Representatives will, however, be required to hold a proper authority from a futures broker or futures adviser and disclose the proper authority to the client before they can act as a representative of a broker or adviser. Futures brokers and futures advisers will be required, through the imposition of conditions on their licences, to properly supervise representatives and to give them adequate training and education. The protection that licensing of representatives affords the investor will be replaced with a system where the futures brokers and advisers will be made fully liable for the conduct of a person who is their representative.

3344. The powers of inspection and investigation that are now contained in FIA Part II will now be dealt with by the ASC Bill.

3345. Penalties are dealt with in Schedule 3 to the Bill.

BILL PART 8.1 - INTERPRETATION

Cl.1120 : Business rules: futures association

Cl.1121 : Business rules: clearing house

Cl.1122 : Business rules: futures exchange

3346. Part 1 of the Bill (cls.1120 to 1122) contains definitions of "business rules" relating to a futures association, clearing house and futures exchange. Other definitions are contained in Bill Part 1.2. Some of the more important definitions and interpretative provisions which are relevant to the Futures Chapter are discussed below.

Definition of "futures contract"

3347. The definition of "futures contract" is fundamental to the operation of the Futures Chapter. The term "futures contract" is defined in Bill cl.72 and is based on the definition of "futures contract" in FIA sub-s.4(1). "Futures contract" is defined to mean a Chapter 8 agreement that is, or has been, an eligible commodity agreement or an adjustment agreement, a futures option or an eligible exchange-traded option. The following agreements are excluded:

- (a) currency and interest rate swaps, and forward exchange rate and forward interest rate contracts to which an Australian bank or merchant bank is a party; or
- (b) agreements prescribed by the Regulations.

(Bill sub-cl.72(1)).

3348. This definition has the following key elements:

- (a) Chapter 8 Agreement - A Chapter 8 agreement is any agreement, arrangement or understanding, whether formal or informal, written or oral, and whether or not having legal or equitable force, and includes a proposed agreement, an agreement as proposed to be varied and an agreement in force before variation or discharge (see definition of "Chapter 8 agreement" and "relevant agreement" in Bill cl.9). The definitions of "Chapter 8 agreement" and "relevant agreement" are based on the definition of "agreement" in FIA sub-ss.5(1) and (2).
- (b) Adjustment agreement - The definition of "adjustment agreement" in Bill cl.9 is based on the definition of "adjustment agreement" in FIA sub-s.4(1). An adjustment agreement means a standardised agreement the effect of which is that a person will be under an obligation to pay, or will have a right to receive, an amount of money calculated by reference to a state of affairs existing at a particular future time (e.g. currency futures contracts, share price index futures contracts). It should be noted that contracts or agreements under which the only possible results are that a particular party pays or does not pay, at a particular time (e.g. an insurance or superannuation contract) would fall outside the definition. The definition also includes the concept of 'fluctuations' in value in price: this concept was originally taken from the UK Financial Services Bill.

The definition of "standardised agreement" in Bill cl.9 is based on the definition of "standardised agreement" in FIA sub-s.4(1). This term will mean a Chapter 8 agreement that is one of 2 or more such agreements, each agreement being of the same kind. (See Bill cl.54 as to whether a Chapter 8 agreement is of the same kind as another Chapter 8 agreement - based on FIA sub-s.5(3)).

The obligation to pay or right to receive will include an obligation or right whether or not such obligation or right is enforceable at law or in equity (see definitions of "Chapter 8 obligation" and "Chapter 8 right" in Bill cl.9 and Bill sub-cl.55(1) - based on the definitions of "obligation" and "right" in FIA sub-s.4(1)).

- (c) Eligible commodity agreement - The definition of "eligible commodity agreement" is based on the definition of "eligible commodity agreement" in FIA sub-s.4(1). It is defined in Bill cl.9 to mean a commodity agreement where, when the agreement is entered into (or when the agreement becomes a commodity agreement in the case of an agreement that is not a commodity agreement when entered into), it appears likely that the agreement will be settled by offset rather than delivery (i.e. commodity futures contracts, only a very small percentage of which are settled by delivery of the underlying commodity).

The definition of "commodity agreement" in Bill cl.9 is based on the definition of "commodity agreement" in FIA sub-s.4(1). It means a standardised agreement the effect of which is that a person is under an obligation to make or accept delivery at a particular future time of a particular quantity of a particular commodity for a particular price or for a price to be calculated in a particular manner.

The definition of "commodity" in Bill cl.9 is the same as the definition of "commodity agreement" in FIA sub-s.4(1). It means anything capable of delivery pursuant to an agreement for its delivery or an instrument creating or evidencing a thing in action (e.g. bills of exchange).

The definition of "price" in Bill cl.9 is based on the definition of "price" in FIA sub-s.4(1). It includes any amount payable for the delivery of a commodity under an agreement.

- (d) Futures option - This definition is based on the definition of "futures option" in FIA sub-s.4(1).

It is defined in Bill cl.9 as an option or right to assume at a specified price or value and within a specified time a bought or sold position in relation to an eligible commodity agreement or an adjustment agreement, or any other option the subject matter of which is an eligible commodity agreement or an adjustment agreement (i.e. commodity options traded on a futures exchange and options over a futures contract).

The definition of "bought position" in Bill cl.9 is based on the definition of "bought position" in FIA sub-s.4(1). It is defined as the position of a person who is obliged to accept delivery under a commodity agreement or who will have an obligation to pay or a right to receive an amount under an adjustment agreement depending on whether the value or worth of the agreement has decreased or increased.

The definition of "sold position" in Bill cl.9 is based on the definition of "sold position" in FIA sub-s.4(1). It is defined as the position of a person who is obliged to make delivery under a commodity agreement or who will have an obligation to pay or a right to receive an amount under an adjustment agreement depending on whether the value or worth of the agreement has increased or decreased.

- (e) Eligible exchange-traded option - This definition is based on the definition of "prescribed exchange-traded option" in FIA sub-s.4(1). It is defined in Bill cl.9 to mean a contract, entered into on a futures market of a futures exchange, under which a party to the contract acquires an option or right to buy or sell a commodity, or to be paid an amount of money determined by rises or falls in the All Ordinaries Index.

3349. "Futures contract" does not include a currency swap or interest rate swap to which an Australian bank or merchant bank is a party. Stated briefly, an interest rate swap is the transfer between two parties of interest rate obligations - one that is a fixed interest rate, the other a floating rate. A currency swap is the exchange of a fixed rate liability in one currency for a fixed rate liability in another currency. Swap transactions are discussed at p.201 of Handbook of Australian Corporate Finance, (Bruce, McKern and Pollard (eds), Butterworths, 1983):

"The principle of swap transactions is straightforward: two cash flows are exchanged. In the case of currency swaps the cash flows are denominated in different currencies. In the case of interest rate swaps, each cash flow represents a stream of interest payments on a certain principal sum over a certain period; in one instance at a fixed interest rate, and in the other, at a variable interest rate. The advantage to borrowers is access to either fixed or floating rate funds or funds in the currency of their choice at a cheaper cost than through conventional methods."

3350. "Futures contract" will also not include forward exchange rate contracts or forward interest rate contracts to which an Australian bank or merchant bank is a party. Forward exchange contracts are discussed at p.329 of Handbook of Australian Corporate Finance (supra):

"Forward exchange contracts in the main overseas currencies are available with banks for the protection of exporters and importers who are subject to exchange risks in the course of their transactions. A forward exchange contract, between an Australian bank and a customer, is a written contract under which the bank agrees to buy from or sell to the customer a fixed amount in a certain overseas currency on a fixed future date (or during a period expiring on a fixed future date), at the rate of exchange quoted in the contract. The customer undertakes to deliver to or receive from the bank, the overseas currency in terms of the contract."

"Merchant bank" will mean a corporation the name of which is entered in the Register of corporations kept by the Reserve Bank pursuant to the Financial Corporations Act 1974 and included in the category for authorised money market dealers or money market corporations or a prescribed category. (Bill s-cl.72(4) and (5) - see also Commonwealth of Australia Gazette, No. S.321 of 19 August 1985, Categories C and D). These provisions are based on FIA sub-ss.4(5) and (6).

Although "futures contract" is defined widely (to cater for new contracts that may be developed and to ensure that all trading in futures contracts is subject to similar prudential requirements) there is an exempting mechanism to enable the exclusion by regulation of other transactions that are clearly outside the contemplation of the Bill (see para.(e) of the definition of "futures contract" in Bill sub-cl.72(1) - based on para.(e) of the definition of "futures contract" in FIA sub-s.4(1)).

3351. To ensure that all intermediaries in a chain (linking the person who actually enters into the futures contract with the ultimate client) are covered by the provisions of the Futures Chapter, Bill cls.26, 27 and 28 will ensure that a

person on whose behalf a futures contract is acquired or disposed of is also a party to the contract. These provisions are based on FIA sub-ss.4(2) and (3) but include references to a person dealing in a futures contract on another person's behalf otherwise than by way of acquisition or disposal and to dealings on a futures market.

Associates

3352. The circumstances in which a person will be deemed to be associated with another person are set out in Bill Part 1.2 Division 2. These provisions basically reproduce the "associate" provisions from each of the substantive co-operative scheme Acts (i.e. CA, SIA, CASA, and FIA). For the purposes of the Futures Chapter, Bill cls.11, 14, 15, 16 and 17 are relevant.

3353. In brief:

- (a) a reference to a person associated with another person will include-
 - (i) a director, executive officer or secretary of a body corporate (Bill para.11(a) - cf. FIA sub-para.6(1)(a)(i) which does not include executive officers);
 - (ii) related bodies corporate (Bill para.11(b) - based on FIA sub-para.6(1)(a)(ii));
 - (iii) a director, executive officer or secretary of a related body corporate (Bill para.11(c) - cf. FIA sub-para.6(1)(a)(iii) which does not include executive officers);

- (iv) a trustee of a trust in relation to which the other person benefits otherwise than by money lending transactions (Bill para.14(c) - based on FIA para.6(1)(e)); and
 - (v) subject to Bill sub-s.16(3), co-directors and partners (Bill paras.14(a), (b), (d), and (e) - based on FIA paras.6(1)(c), (d), (f) and (g)).
 - (vi) persons acting or proposing to act in concert (Bill para.15(1)(a) - based on FIA para.6(1)(b)).
- (b) A partner or co-director of another person in a non-futures business will not be deemed to be associated unless the person alleging the association proves that the first-mentioned person knew or ought reasonably have known the material particulars of the relevant matter (Bill sub-cl.16(3) - based on FIA sub-s.6(2)).
- (c) Where 2 or more persons constitute a futures broker or futures adviser, a person will be associated with the broker or adviser if associated with any of those persons (Bill cl.17 - based on FIA sub-s.6(3)).
- (d) A person is not to be regarded as associated with another person due to paras.15(1)(a) (acting in concert), 15(1)(b) (associates by virtue of the regulations) or 15(1)(c) (associates in any other way) by reason only that one person gives advice or acts for the other person as part of a business relationship or in a professional capacity (Bill para.16(2)(a) - based on FIA sub-s.6(4)).

Dealing in futures contracts

3354. The meaning of the expression "dealing in futures contracts", which is set out in Bill Part 1.2, Division 4, is based on the interpretation of "dealing in futures contracts" in FIA s.7.

3355. A person will be taken to deal in futures contracts if the person acquires or disposes of a futures contract, offers to acquire or dispose of a futures contract or induces or attempts to induce, another person to acquire or dispose of a futures contract (see definition of "deal" in Bill cl.9 and Bill sub-cl.25(1)). The meanings of "acquiring a futures contract" and "disposing of a futures contract" are set out respectively in Bill cls.23 and 24 (based on the definitions of "acquire" and "dispose of" in FIA sub-s.4(1)). There are several provisions in the Bill where the concept of dealing is significant. For example, Bill cls.1253-1257 (dealings by insiders), Bill cl.1213 (accounts to be kept) and Bill cl.1266 (sequence of orders).

3356. Of central importance to the Futures Chapter is the concept of dealing on behalf of others. A person will be taken to deal in futures contracts on another person's behalf if and only if the first person acquires or disposes of, or offers to acquire or dispose of, a futures contract on behalf of that other person (Bill sub-cl.25(2) - based on FIA sub-s.7(2)). For example, A will deal on behalf of B if A enters into or takes an assignment of a futures contract on the instructions of B (Note that the expression "on behalf of" includes on the instructions of - see definition of "on behalf of" in Bill cl.9). Thus an employee of a corporation acting in the proper course of his or her employment, would not be dealing on behalf of the corporation in a case where that employee arranged for the corporation to acquire a futures contract. The futures contract would be acquired by the corporation. A futures broker who took instructions from the employee in such a case would be acting on behalf of the corporation and would require a licence under Bill cl.1142.

3357. A specific provision has been included in the Futures Chapter to ensure that an overseas resident who deals through a licenced broker in Australia will not be considered to be a person who deals in futures contracts on behalf of other persons (Bill sub-cl.25(3) - based on FIA sub-s.7(3)). An example is an overseas resident who is a clearing member of ICCH.

Own account dealings and transactions : futures contracts

3358. The circumstances in which a person will be taken to deal in a futures contract, or enter into a transaction in relation to a futures contract, on the person's own account is dealt with in Bill cl.29, which is based on FIA s.8.

3359. A reference to a person dealing in futures contracts on the person's own account will include dealing on the instructions of an associate and dealing on behalf of a body corporate in which the person has a controlling interest. A broker who is a member of an exchange will not be regarded as dealing on own account merely because the transaction is with another exchange member.

Discretionary Accounts

3360. The interpretation of the expression "discretionary accounts", which is set out in Bill cl.61, is based on the definition of "discretionary accounts" in FIA s.9.

3361. A reference to a futures broker operating on a discretionary account (see e.g. Bill cl.1207) means the broker is authorised by a client to use the client's funds, or by a number of clients to use the clients' pooled funds, to deal in futures contracts on the client(s) instructions (not being dealings on instructions limited to time and/or price) without prior approval.

Exempt brokers and exempt futures advisers

3362. Bill cl.67, dealing with exempt brokers and exempt futures advisers, is based on FIA s.10 but will now require that persons (such as receivers and managers) who are appointed otherwise than by a Court to carry on an ailing futures business must first obtain approval from the ASC.

BILL PART 8.2 : FUTURES EXCHANGES, CLEARING HOUSES AND FUTURES ASSOCIATIONS

3363. Bill Part 8.2 deals with the approval and regulation of futures exchanges, clearing houses and futures associations. At present there are two futures exchanges in Australia - the Sydney Futures Exchange (SFE) and the Stock Exchange of Melbourne (SEM) . The International Commodities Clearing House Limited (ICCH) provides clearing facilities for both these exchanges. As the SFE, SEM and ICCH are already corporations approved, or deemed to be approved, under the FIA and Codes it is not proposed that they be required to obtain approval under Bill Part 8.2. However, any new corporation wishing to establish a futures exchange, clearing house or futures association will be required to obtain approval under Bill Part 8.2.

3364. Self-regulatory organisations can be either futures exchanges or futures associations. The essential difference between an exchange and an association is that the latter will be concerned primarily with the day-to-day regulation of its members, rather than having this function as well as providing a market as is the case with the SFE and SEM.

Division 1 - Futures Exchanges and Exempt Futures Markets

Cl.1123 : Conducting unauthorised futures markets

3365. This provision is based on FIA sub-s.45(1).

3366. A corporation will not be able to establish or conduct a futures market that is neither a futures market of a futures exchange nor an exempt futures market (Bill sub-cl.1123(1) - see also definition of "unauthorised futures market" in Bill cl.9. It should be noted that the definition of "unauthorised futures market" is not intended to have extraterritorial operation i.e. it is not intended to include a futures market of an overseas futures exchange.)

3367. It will be an offence for a person to conduct an unauthorised futures market where a corporation deals in a futures contract on that market (Bill sub-cl.1123(2)).

3368. This provision has been structured differently from FIA sub-s.45(1) in order to connect the offence of conducting an unauthorised futures market with a "corporation" (whether it be the corporation conducting the unauthorised futures market as in Bill sub-cl.1123(1), or the corporation dealing in a futures contract on an unauthorised futures market as in Bill sub-cl.1123(2)).

Cl.1124 : Corporation not to deal on unauthorised futures market

3369. This provision is new.

3370. It will be an offence for a corporation to deal in a futures contract on an unauthorised futures market (Bill para.1124(a)).

3371. As noted above, the definition of "unauthorised futures market" is not intended to have extraterritorial operation i.e. it is not intended to include a futures market of an overseas futures exchange. Clause 1124 will therefore not prohibit dealings on overseas futures exchanges.

3372. It will also be an offence for a corporation to deal in a futures contract that was acquired by a person on an unauthorised futures market (Bill para.1124(b)). The effect of Bill cls.26, 27 and 28 will be that a corporation that acts through an agent will be caught by Bill cl.1124 even if the agent deals through another agent or the other agent deals through a third and so on.

Cl.1125 : No dealing on corporation's behalf on unauthorised futures market

3373. This provision is new.

3374. It will be an offence for a person to deal on a corporation's behalf in a futures contract on an unauthorised futures market (Bill para.1125(a)).

3375. It will also be an offence for a person to deal on a corporation's behalf, in a futures contract that was acquired by a person on an unauthorised futures market (Bill para.1125(b)).

3376. The effect of Bill cls.26, 27 and 28 will be that where there is a chain of intermediaries leading "upward" from the person who actually deals in a futures contract, a person in the chain will be deemed to deal on behalf of each of the persons "higher up" in the chain.

Cl.1126 : Approval of futures exchange

3377. This provision is based on FIA s.46, with some modifications.

3378. Existing futures exchanges will not need to be approved under the Bill (sub-cl.1126(3)).

3379. A body corporate that proposes to establish or conduct a futures market may apply to the ASC for approval by the Minister as a futures exchange (Bill sub-cl.1126(1) - based on FIA sub-s.46(1)).

3380. The Minister will be able to approve a body corporate as a futures exchange if he or she is satisfied that:

- . it is in the public interest to do so (Bill para.1126(2)(f) - based on FIA para.46(2)(b));

- . the body is an eligible corporation i.e. a trading corporation or a foreign corporation (Bill para.1126(2)(a) - new provision);
- . all members of the body are eligible corporations (Bill para.1126(2)(b) - new provision);
- . the constitution of the body ensures that no person other than an eligible corporation may be a member (Bill para.1126(2)(c) - new provision);
- . the body's business rules make satisfactory provision for a number of matters including:
 - the admission of members;
 - the qualifications for membership including standards of training and experience;
 - the manner in which members are to conduct their business of dealing in futures contracts to ensure efficiency, honesty and fair practice;
 - the exclusion from membership of a corporation where a responsible officer of that corporation is not of good character and high business integrity;
 - the disciplining of members for improper conduct;
 - for corporations aggrieved by a refusal of a membership application etc to appeal to an independent body;
 - the inspection and audit of members' accounting records;

- futures contracts that members may deal in;
- requiring a member to accept or execute instructions to deal in futures contracts only in accordance with the business rules;
- requiring a member to deal in futures contracts on behalf of another person only in accordance with instructions accepted from the person;
- requiring a member to deal in futures contracts on behalf of another person on a futures market only in accordance with the business rules of the relevant futures exchange or recognised futures exchange (see also Bill cl.1258);
- requiring a member, subject to exceptions in the business rules, to execute instructions to deal in futures contracts on a futures market of a futures exchange or of a recognised futures exchange or on an exempt futures market (see also Bill cl.1258);
- the settlement of business claims and grievances between members; and
- the conciliation and settlement of member/client disputes concerning dealings in futures contracts.

(Bill para.1126(2)(d) - based on FIA para.46(2)(a)); and

- . there will be enough money in its fidelity fund to meet claims (Bill para.1126(2)(e)).

3381. The effect of Bill para.1126(2)(a) (requiring a body corporate seeking approval as a futures exchange to be an eligible corporation) together with the definition of "futures exchange" in Bill cl.9 is that in order to retain its status as a futures exchange a body must continue to be a trading corporation.

Cl.1127 : Exempt futures market

3382. This provision is based on FIA sub-ss.45(2) and (3). Existing exempt futures markets will have their exemption continued (Bill sub-cl.1127(3)).

3383. The Minister will be able to declare that a specified futures market is an exempt futures market (Bill sub-cl.1127(1) - based on FIA sub-s.45(1)).

3384. The Minister will be able to vary or revoke such a declaration and may, when considering whether to do so, have regard amongst other things, to a breach of condition specified in the declaration (Bill sub-cl.1127(2) - based on FIA sub-s.45(2)).

Division 2 - Clearing houses

Cl.1128 : When corporation may provide clearing house facilities

3385. This provision is based on FIA s.47, except that a clearing house is required to be an eligible corporation (i.e. a trading corporation or a foreign corporation).

3386. It will be an offence for a corporation to provide clearing house facilities for a futures market (other than an exempt futures markets) unless that market is conducted by a futures exchange and the corporation providing such clearing house facilities is an eligible corporation and has been approved for that purpose under Bill cl.1131.

3387. "Clearing house" and "clearing house facilities" are defined in Bill cl.9.

Cl.1129 : Providing clearing house facilities for a corporation

3388. This provision is new.

3389. It will be an offence for a person to provide clearing house facilities for a futures market (other than an exempt futures market) conducted by a corporation unless that corporation is a futures exchange, and the person providing such clearing house facilities is an eligible corporation which has been approved for that purpose under Bill cl.1131 (Bill sub-cl.1129(1)).

3390. It will also be an offence for a corporation that conducts a futures market (other than an exempt futures market) to authorise a person to provide clearing house facilities unless that corporation is a futures exchange and the person providing such clearing house facilities is an eligible corporation which has been approved for that purpose under Bill cl.1131 (Bill sub-cl.1129(2)).

Cl.1130 : Providing facilities for registering futures contracts made by corporations

3391. This provision is new.

3392. It will be an offence for a clearing house to register or provide facilities for the registration of a futures contract acquired or disposed of by a corporation on a futures market unless that futures market is conducted by a futures exchange and the clearing house is an eligible corporation that has been approved as a clearing house under Bill cl.1131.

3393. The effect of Bill cls.26, 27 and 28 will be to widen the ambit of this clause. For example, an unauthorised clearing house could be in breach of this provision where, despite the fact that the immediate parties to the futures contract are not corporations, one of them is dealing on a corporation's behalf.

Cl.1131 : Approval of clearing house

3394. This provision is based on FIA s.48. Existing clearing houses will not need to apply for approval under the Bill (sub-cl.1131(4)).

3395. A body corporate proposing to provide clearing house facilities for a futures market of a futures exchange will be required to apply to the ASC for approval by the Minister (Bill sub-cl.1131(1)) - based on FIA sub-s.48(1)).

3396. The Minister will be able to approve the body as a clearing house for a futures exchange if:

- . the body is an eligible corporation (Bill para.1131(2)(a));
- . its business rules are satisfactory (Bill paras.1131(2)(b) and (c) - based on FIA paras.48(2)(a) and (b));
- . the public interest will be served by granting approval (Bill para.1131(2)(d) - based on FIA para.48(2)(c)).

3397. One of the matters to which the Minister will be able to have regard in considering an application for approval of a clearing house is any business rules of the application concerning the guaranteeing to its members of the performance of futures contracts made on a futures market of the futures exchange (Bill sub-cl.1131(3) - based on FIA sub-s.48(3)).

Division 3 - Futures Associations

Cl.1132 : Approval of futures association

3398. This provision is based on FIA s.50.

3399. The SFE has already been approved as a futures association under the FIA and it is proposed that this approval will continue. However, any new corporation wishing to establish a futures association will have to comply with Bill cl.1132.

3400. Any futures association approved by the Minister under Bill cl.1132 will have responsibility for day-to-day regulation (including such matters as conduct of business and disciplinary action) of futures brokers that are members of the association. A futures broker will be required to be a member of a futures association or a futures exchange (see Bill sub-cl.1148(1)).

3401. The Minister will be able to approve a body corporate as a futures association if:

- . the body is an eligible corporation (Bill para.1132(2)(a));
- . all members of the body are eligible corporations (Bill para.1132(2)(b));
- . the body's constitution requires that all members be eligible corporations (Bill para.1132(2)(c));
- . the body may properly exercise its functions as a futures association, viz. regulating its affairs in the interests of the public and administering and enforcing its business rules (Bill para.1132(2)(d) - based on FIA para.50(2)(a));

. its business rules make satisfactory provision for a number of matters including:

- (i) the admission of members (who must be licenced or proposing to apply to be licenced);
- (ii) the standards of training and experience, and other qualifications, for membership;
- (iii) the efficient, honest and fair conduct by members of business of dealing in futures contracts;
- (iv) the exclusion of a corporation from membership where a responsible officer is not of good character and high business integrity;
- (v) the disciplining of members for improper conduct;
- (vi) for persons aggrieved by refusal of a membership application or by disciplinary action to appeal to an independent body;
- (vii) the inspection and audit of members' accounting records;
- (viii) requiring a member to accept or execute instructions to deal in futures contracts only in accordance with the business rules;
- (ix) requiring a member to deal in futures contracts on behalf of another person only in accordance with instructions accepted from the person;

- (x) requiring a member to deal in futures contracts on behalf of another person on a futures market only in accordance with the business rules of the relevant futures exchange or recognised futures exchange (see also Bill cl.1258);
- (xi) requiring a member, subject to exceptions in the business rules, to execute instructions to deal in futures contracts on a futures market of a futures exchange or of a recognised futures exchange or on an exempt market (see also Bill cl.1258);
- (xii) the equitable and expeditious settlement of members' claims and grievances relating to the transaction of futures business; and
- (xiii) appropriate mechanisms for the conciliation and settlement of disputes between members and their clients concerning, or connected with, dealings in futures contracts (other disputes will need to be resolved by recourse to ordinary legal remedies);

(Bill para.1132(2)(e) - based on FIA para.50(2)(b)).

- . if it is to be a futures organisation required to have a fidelity fund, there will be enough money in the fund to meet claims or it will have appropriate indemnity insurance (Bill para.1132(2)(f); and
- . that the public interest will be served by granting the approval (Bill para.1132(2)(c) - based on FIA para.50(2)(g)).

Cl.1133 : Suspension or cancellation of approval

3402. This provision is based on FIA s.51.

3403. The Minister will be able to require a futures association to show cause at a hearing before a specified person why its approval should not be suspended or cancelled (Bill sub-cl.1133(1) - based on FIA sub-s.51(1)).

3404. After giving such futures association an opportunity to be heard, the person specified in the notice will be required to submit to the Minister a report in relation to the hearing and a recommendation in relation to the matter. The Minister will be able to decide to take no further action, suspend the approval of the futures association or cancel its approval (Bill sub-cl.1133(3) and (4) - based on FIA sub-s.51(3)).

3405. If it is suspended, a futures association will be deemed not to be approved as a futures association during the period of its suspension (Bill sub-cl.1133(5) - based on FIA sub-s.51(4)).

Division 4 - General

Cl.1134 : Publication of certain instruments

3406. This provision is based on FIA ss.49 and 52.

3407. The ASC will be required to publish in the Gazette a copy of an instrument executed by the Minister under Bill sub-cl.1126(2) (approval of futures exchange), 1127(1) (exempt futures markets), 1131(2) (approval of clearing house), 1132(2) (approval of futures association) and 1133(4) (suspension or cancellation of approval of futures association).

Cl.1135 : Appeal to the Court against certain decisions of
futures exchanges and futures associations

3408. This provision is based on FIA s.53.

3409. Where an eligible corporation that is not a member of a futures exchange or futures association is refused membership of a futures exchange or futures association, there will be a right of appeal to the Court (see definition of "Court" in Bill cl.9). In addition, where a corporation's membership of a futures exchange or futures association is suspended or cancelled and at the time of suspension or cancellation the corporation is not a member of any other exchange or association, the person will be able to appeal to the Court (Bill sub-cl.1135(1) - based on FIA sub-s.53(1)).

3410. The rationale for this provision is that because a corporation's ability to hold a broker's licence is dependent on membership of an exchange or association, there is a need to have right of appeal where the effect of an adverse decision by an exchange or association is to preclude a person from participating in the futures industry.

3411. Examples are as follows:

- (a) where a corporation that is already a member of an exchange or association is suspended from that organisation, there will be no right of appeal to the Court in respect of the refusal of an application by that person for membership of another exchange or association (Bill para.1135(2)(a));
- (b) where a member is suspended by one or more exchanges or associations, a suspension by the only remaining exchange or association of which that person is a member will be subject to appeal (Bill para.1135(2)(b)).

3412. Stated briefly, the effect of Bill sub-cl.1135(1) and (2) is to provide a right of appeal to the Court in relation to an application for a first membership of an exchange or association and in relation to the last loss of membership of an exchange or association.

3413. Where a corporation appeals to the Court against a decision by an exchange or association to suspend or cancel membership, the Court will be able to make orders concerning the effect of the decision pending determination of the appeal (Bill sub-cl.1135(4)).

3414. After hearing an appeal, the Court may dismiss the appeal or decide that:

- (a) the application should be granted or should be granted subject to specified conditions;
- (b) the membership should not be suspended or should be suspended for a lesser period; or
- (c) the membership should not be cancelled or should be suspended for a specified period.

(Bill sub-cl.1135(5)).

3415. Where a Court varies the decision of a futures association the Court's decision has effect as a decision of the futures association (Bill sub-cl.1135(6)).

Cl.1136 : Commission to be notified of amendments of business rules

3416. This provision is based on FIA s.54.

3417. The ASC will be required to be notified of any amendments to the business rules of a futures exchange, clearing house or futures association (Bill sub-cl.1136(1) - based on FIA sub-s.54(1) and note definition of "business rules" in Bill Part 8.1).

3418. A brief outline of this provision is as follows:

- (a) An amendment will cease to have effect if it is not notified within 21 days (Bill sub-cl.1136(3) - based on FIA sub-s.54(3)).
- (b) The ASC will be required to send a copy of the notification to the Minister (Bill sub-cl.1136(4) - based on FIA sub-s.54(4)). The Minister will be able to disallow all or part of an amendment within 28 days (Bill sub-cl.1136(5) - based on FIA sub-s.54(5)).
- (c) The ASC will be required to give notice to the futures exchange, clearing house or futures association of any disallowance, and the amendment ceases, to the extent of the disallowance, to have effect on receipt of that notice (Bill sub-cl.1136(6) - based on FIA sub-s.54(6)).
- (d) There is a new transitional provision (Bill sub-cl.1136(7)) to cover notices of amendments given to the NCSC before the commencement of Part 8.2. If notices of amendments to business rules are lodged with the NCSC before the commencement of Part 8.2 and the 28 day disallowance period has not expired, the Minister will have another 28 days to consider the amendments.

Cl.1137 : Orderly markets in futures contracts - functions and powers of futures exchanges and clearing houses

3419. This provision is based on FIA s.55.

3420. A futures exchange and clearing house will be required, so far as is reasonably practicable, to take all steps necessary to ensure that an orderly and fair market is maintained (Bill sub-cl.1137(1) - based on FIA sub-s.55(1). For the purpose of maintaining an orderly market, a futures exchange will be able to give directions to a non-exchange member in whose name a futures contract is registered (Bill sub-cl.1137(2) - based on FIA sub-s.55(2)). Failure to comply with such directions will not be an offence (but may for example give rise to civil action under Bill cl.1324) (Bill sub-cl.1137(3)) - based on FIA sub-s.55(3).

Cl.1138 : Orderly markets in futures contracts - powers of Commission

3421. This provision is based on FIA s.56. Any directions or determinations given by the NCSC under FIA s.56 will continue in force with such modifications as the circumstances require (Bill sub-cl.1138(13)).

3422. Before taking action under this provision the ASC will be required to consult the futures exchange and clearing house (Bill sub-cl.1138(3) - based on FIA sub-s.56(3) but failure to do so will not affect any subsequent ASC determination of direction (Bill sub-cl.1138(4) - based on FIA sub-s.56(4)). (Note that under Bill cl.1139 the exchange and clearing house are required to provide reasonable assistance to the ASC).

3423. The ASC will then be required to determine that the futures exchange or clearing house has failed to ensure an orderly and fair market or that there is some interest that requires protection (Bill para.1138(2)(a)). The ASC will be

required to give the futures exchange and clearing house notice of its determination and the direction it considers should be given (Bill paras.1138(2)(b) - (d) - based on FIA paras.56(2)(b)-(d)).

3424. As soon as practicable after giving this notice, the ASC will be required to give the Minister a copy of the notice and a written report setting out reasons for giving the notice. The ASC will be required to give a copy of the report to the futures exchange and clearing house (Bill sub-cl.1138(5) - based on FIA sub-s.56(5)).

3425. The ASC will then be able to give written directions to the futures exchange unless the Minister has directed the ASC not to, or the exchange has acted as if a direction had been given (Bill sub-cl.1138(6) - based on FIA sub-s.56(6)). They include directions to a futures exchange:

- (i) to close a futures market;
- (ii) to suspend any dealing in futures contracts;
- (iii) to limit transactions on a futures market to the closing out of futures contracts;
- (iv) to defer the completion date for all futures contracts or a specified class of futures contracts;
- (v) to require a futures contract to be discharged by the tendering of a commodity (the quality or standard of which is determined by the exchange) and of a price determined by the exchange; or

- (vi) to require an exchange member to act in a specified manner in relation to dealings in futures contracts or a class of those dealings (Bill sub-cl.1138(1) - based on FIA sub-s.56(1)).

3426. As soon as practicable after giving a direction, the ASC will be required to give the Minister and clearing house a copy and direct the clearing house to act in accordance with the direction (Bill sub-cl.1138(7) - based on FIA sub-s.56(7)).

3427. Unless the Minister determines otherwise (Bill sub-cl.1138(8)), a direction given by the ASC will remain in force, unless sooner revoked, for 21 days or such shorter period as is specified by the ASC (Bill sub-cl.1138(9)). It will be an offence for a futures exchange or clearing house to fail to comply with a direction (Bill sub-cl.1138(10) and (11)).

Cl.1139 : Futures exchanges and others to assist Commission

3428. This provision is based on FIA s.57.

3429. A futures exchange, clearing house and a futures association will be required to assist to the ASC in the performance of its functions (Bill sub-cl.1139(1) - based on FIA sub-s.57(1)). Any disciplinary action taken by a futures exchange, clearing house or futures association against a member will be required to be notified to the ASC (Bill sub-cl.1139(2) - based on FIA sub-s.57(2)). Where a clearing house refuses to register a dealing in a futures contract or closes out a futures contract for failure to meet a deposit or margin call it will be required to notify the ASC forthwith (Bill sub-cl.1139(3) - based on FIA sub-s.57(3)). A person authorised by the ASC will be entitled to access to the futures exchange floor (Bill sub-cl.1139(4) - based on FIA sub-s.1139(4)). It will be an offence to refuse to allow a person authorised by the ASC to have access to the trading floor (Bill sub-cl.1139(5) - based on FIA sub-s.57(5)).

Cl.1140 : Power of court to order observance or enforcement of business rules of futures exchange, clearing house or futures association

3430. This provision is based on FIA s.58.

3431. The Court (see definition of "Court" in Bill cl.9) will be able to give directions, on the application of the ASC, the futures exchange, clearing house or futures association or a person aggrieved, where a person has failed to comply with, observe, enforce or give effect to the business rules of a futures exchange, clearing house or futures association.

Cl.1141 : Effect of certain laws on certain agreements

3432. This provision is based on FIA s.59 but has been drafted differently to reflect its different constitutional basis.

3433. State and Territory gaming and betting legislation will not prevent the entering into, or affect the enforceability, of a futures contract made:

- (a) on a futures market of a futures exchange or of an overseas recognised futures exchange;
- (b) on an exempt futures market conducted by a corporation;
- (c) in eligible circumstances (i.e. a futures contract made in the course of trade or commerce or in a Territory - see definition in cl.9); or
- (d) as permitted by the business rules of a futures association, of a futures exchange or of a recognised futures exchange.

BILL PART 8.3 : PARTICIPANTS IN THE FUTURES INDUSTRYDivision 1 - Futures brokers and futures advisersCl.1142 : Futures brokers

3434. This provision is based in part on FIA s.61. However, the effect of this and subsequent provisions in Part FIA will be that futures brokers and futures advisers will be required to be eligible corporations i.e. trading corporations or foreign corporations.

3435. A corporation will be prohibited from dealing in a futures contract on behalf of another or from holding itself out as carrying on a futures broking business unless the corporation is an eligible corporation and has a futures broker's licence or is an exempt broker (Bill sub-cl.1142(1)).

3436. "Futures broking business" and "exempt broker" are defined in Bill cls.9 and 67.

3437. The prohibition on dealing in futures contracts unless an eligible corporation has a futures broker's licence or is an exempt broker should be read in conjunction with Bill cl.1258 which specifies the manner in which dealings in futures contracts on behalf of others may be effected.

3438. A person will be prohibited from dealing in a futures contract on a corporation's behalf or from dealing in a futures contract on a person's behalf in the course of trade or commerce or in a Territory unless the person is an eligible (trading or foreign) corporation and holds a futures broker's licence or is an exempt broker (Bill sub-cl.1142(2) - new provision - and see definitions of "eligible circumstances" and "eligible corporation" in Bill cl.9). A person will be prohibited from holding himself, herself or itself out as carrying on a business of dealing in futures contracts on

behalf of corporations, or persons including corporations, or as carrying on a business of dealing in futures contracts in circumstances including dealing in the course of trade or commerce or in a Territory, unless the person is an eligible (trading or foreign) corporation and holds a futures broker's licence or is an exempt broker (Bill sub-cl.1142(3) - new provision).

3439. A person will be prohibited from using a postal, telegraphic, telephonic or other like service in the course of a futures broking business unless the person is an eligible (foreign or trading) corporation and holds a futures broker's licence or is an exempt broker (Bill sub-cl.1142(4) - new provision - and see definition of "eligible communications service" in Bill cl.9).

Cl.1143 : Futures advisers

3440. A corporation will be prohibited from carrying on a futures advice business (defined in Bill cl.7) or holding itself out to be a futures adviser (defined in Bill cl.9) unless the corporation is an eligible (foreign or trading) corporation and holds a futures brokers or futures advisers licence or is an exempt broker (Bill sub-cl.1143(1) and (3) - based in part on FIA s.63).

3441. A person will be prohibited from advising a corporation about futures contracts or giving a corporation an analysis or report about futures contracts unless the person is an eligible (foreign or trading) corporation and holds a futures broker's licence or a futures adviser's licence or is an exempt futures adviser (Bill sub-cl.1143(2) - new provision).

3442. A person will be prohibited from using a postal, telegraphic, telephonic or other like service in the course of a futures advice business unless the person is an eligible corporation and holds a futures broker's or futures adviser's

licence or is an exempt futures adviser (Bill sub-cl.1143(4) - new provision).

Cl.1144 : Application for a licence

3443. This provision is based on FIA s.65 with the modification that the provisions in respect of applications by representatives have not been included. (There will no longer be any requirement for representatives to be licensed. Futures brokers and futures advisers will be made fully liable for the conduct of their representatives.) Furthermore, applications made to the NCSC for a licence that have not been dealt with by the NCSC will be deemed to have been made to the ASC (Bill sub-cl.1144(3)).

3444. A body corporate will be able to apply to the ASC for a licence (Bill sub-cl.1144(1)). The ASC will be able to request further information in relation to the application (Bill sub-cl.1144(2)).

Cl.1145 : Grant of a licence

3445. This provision is substantially based on FIA s.66, with some modifications.

3446. Where a body corporate applies for a futures broker's or a futures adviser's licence the ASC will be required to grant the licence if:

- (a) the application was made in accordance with Bill cl.1144;
- (b) the ASC is satisfied the applicant is an eligible (foreign or trading) corporation;

- (c) the corporation is not in receivership, under official management or in the course of being wound up, and has not entered into a compromise with its creditors (see definition of "externally-administered body corporate" in Bill cl.9);
- (d) if the application is for a futures broker's licence, it is a member of a futures organisation;
- (e) the ASC is satisfied the educational qualifications and experience of each responsible officer are adequate having regard to the duties that the officer would perform; and
- (f) the ASC has no reason to believe the corporation will not perform efficiently, honestly and fairly the duties of a holder of a licence of the kind applied for.

3447. Otherwise the ASC will be required to refuse the application (Bill sub-cl.1145(2) and (3)).

3448. In determining whether or not it has reason to believe the corporation will perform its duties efficiently, honestly and fairly (pursuant to para.(f) above), the ASC will be required to have regard to the following in respect of each responsible officer:

- (a) whether or not the officer is an insolvent under administration;
- (b) any conviction of serious fraud over the last 10 years;
- (c) any reason to believe the officer is not of good fame and character; and

- (d) any reason to believe the officer will not perform efficiently, honestly and fairly the duties the officer is to perform.

(Bill sub-cl.1145(4)).

3449. Nothing in the above provision limits the matters to which the will be able to may have regard in deciding on an application or in connection with performing any other function or power under this Part (Bill sub-cl.1145(5)).

3450. This provision will be subject to Bill cl.1200 (dealing with hearings) and the regulations.

Cl.1146 : Licences under corresponding laws

3451. An eligible (trading or foreign) corporation which holds a futures broker's or futures adviser's licence in force under a co-operative scheme law will not be required to obtain a new licence under Bill Part 8.3 but will be subject to the other requirements of the Bill. Other existing licensees will be required to comply with all requirements of the Bill subject to any modifications made to the Futures Chapter by the Regulations.

Cl.1147 : Conditions of licence: general

3452. This provision is based on FIA sub-s.69(1).

3453. A licence will be subject to such conditions and restrictions as are imposed by the regulations and, subject to Bill sub-cl.1200, such conditions and restrictions as are imposed by the ASC when granting the licence or while it is in force.

Cl.1148 : Conditions of futures brokers licence : membership of futures organisation

3454. This provision is based on FIA sub-s.69(2).

3455. A futures brokers licence will be subject to a condition that:

- (a) the licensee is a member of a futures exchange or association (Bill para.1148(1)(a)); and
- (b) the licence is suspended where the licensee is not a member of any futures organisation and would, but for the suspension of the licensee's membership, be a member of the futures organisation (Bill para.1148(1)(b)).

3456. Where a licensee's membership of a futures organisation is suspended:

- (a) the effect of Bill para.1148(2)(a) is that the licensee is not in breach of the licence condition in Bill para.1148(1)(a) and thus the ASC would not be able to revoke a licence in such a case; and
- (b) the effect of Bill para.1148(1)(b) and Bill para.1148(2)(b) is that the licence is suspended during the period of suspension of membership.

Cl.1149 : Conditions of futures brokers licence : assets and liabilities

3457. This provision is based on FIA sub-ss.69(4), (5), (6) and (7).

3458. Conditions and restrictions regarding assets and liabilities will be able to relate to:

- (a) the limitation of liability that may be incurred in connection with a business of dealing in futures contracts (Bill para.1149(1)(a));
- (b) the incurring or disclosure of liabilities arising otherwise than from such a business (Bill para.1149(1)(b));
- (c) the licensee's financial position, whether or not resulting from such a business (Bill para.1149(1)(c));
- (d) the licensee's assets including or not including specified assets (Bill para.1149(1)(d)); and
- (e) the sum of the values of specified assets being not less than, or not greater than, an ascertained amount (Bill para.1149(1)(e)).

3459. A condition imposed pursuant to Bill para.1149(1)(e) may provide:

- (a) for values of assets to be ascertained in a manner specified in, or determined in accordance with, the condition (Bill sub-cl.1149(2)).
- (b) for the amount referred to to be a specified percentage of the sum of:
 - (i) the values of all assets
 - (ii) the values of specified assets
 - (iii) the amounts of all liabilities
 - (iv) the amounts of specified liabilities.

(Bill sub-cl.1149(3)).

Cl.1150 : Conditions of licence : supervision of representatives

3460. Under this new provision, one or more of the following conditions may be imposed regarding representatives:

- (a) A condition about what the licensee is to do to prevent representatives from contravening this Chapter or other conditions of the licence (Bill para.1150(a)).
- (b) A condition about what the licensee is to do to ensure each representative has adequate qualifications and experience having regard to the representative's duties (Bill para.1150(b)).

3461. This new provision is designed to ensure that the ASC will be able to make licensees take reasonable steps to supervise the conduct of their representatives and to giving training and on-going education to their representatives.

Cl.1151 : Revocation and variation of licence conditions

3462. This provision is based on FIA sub-s.69(9).

3463. The ASC will be able to revoke or vary a condition of a licence unless it was imposed by Regulations. This is subject to the hearing requirement in Bill cl.1200.

Cl.1152 : Futures organisations to be informed about conditions of futures broker's licence

3464. This provision is based on FIA sub-s.69(10).

3465. The ASC will be required to notify each futures organisation and each clearing house of which the licensee is a member when it imposes, varies or revokes conditions or restrictions in a licence (Bill sub-cl.1152(1)).

3466. A contravention of Bill sub-cl.1152(1) will not affect the validity of an act done by the ASC (Bill sub-cl.1152(2)).

Cl.1153 : Licensee to notify breach of licence condition

3467. This provision is based on FIA. s.70.

3468. A licensee will be required to notify the ASC and each futures organisation of which the licensee is a member within one business day of a breach of a condition or restriction (Bill sub-cl.1153(1)). A defence is provided in Bill sub-cl.1153(2).

Cl.1154 : Commission may require licensed futures broker to give information

3469. This provision is based on FIA s.71.

3470. The holder of a futures broker's licence will be required to furnish written statements in respect of the broker's business to the ASC if required (Bill sub-cl.1154(1)). The ASC will be able to require such a statement to be audited (Bill sub-cl.1154(2)). The futures broker will be required to comply within the specified time or a reasonable time if no time is specified. The ASC will be able to extend time for the futures broker to give the information (Bill sub-cl.1154(3)).

Cl.1155 : Register of Futures Licensees

3471. This provision is based on FIA s.72, requiring the NCSC to keep a Register of Futures Licensees, with the following modifications:

- (a) There is the added requirement for the inclusion in the register of a copy of the licence and each instrument imposing conditions or revoking or varying conditions of the licence after it has been granted.

- (b) The requirements to maintain details of representatives and recognised licencees are no longer appropriate and have not been included.

3472. The information to be maintained on the Register is set out in Bill sub-cl.1155(2) and (3).

3473. A person will be able to inspect and make copies or take extracts from the Register (Bill sub-cl.1155(4)).

Cl.1156 : Notifying changes in particulars

3474. This provision is based on FIA s.73, with the modification that the requirement to notify changes in particulars of representatives is no longer appropriate and has not been included.

3475. The holder of a licence will be required to notify the ASC within 21 days when ceasing to carry on the business to which the licence relates, or a change occurs in particulars that are required to be entered in the Register.

Cl.1157 : Annual statement of licensee

3476. This provision is based on FIA sub-s.74(1) with the modification that the annual statement is to set out the number of representatives holding a proper authority of the licensee. Proper authority is defined in Bill cl.87.

3477. The holder of a futures broker's licence or a futures adviser's licence must lodge with the ASC each year a statement containing prescribed information (Bill sub-cl.1157(1) and (3)).

Cl.1158 : Time for lodging annual statement

3478. This provision is based on FIA ss.75 and 76.

3479. The annual statement by a licensee will required to be lodged:

- (a) by the holder of a futures broker's licence - when the profit and loss account and balance sheet referred to in Bill cl.1218 are required to be lodged (Bill para.1158(a)); and
- (b) by the holder of a futures adviser's licence - within 1 month before the anniversary of the date on which the licence was granted (Bill para.1158(b)).

3480. The ASC will be able to extend the period for lodging a statement under Bill cl.1157. Any extension of time granted by the NCSC will be deemed to have been granted by the ASC (Bill sub-cl.1158(2)).

Division 2 - Agreements with unlicensed persons

3481. Division 2 is new. Under the FIA there is no provision to prevent the enforcement of a contract by a person who either advises or deals in futures contracts and does not have a licence but who should be licensed. Division 2 introduces a series of provisions to bring about this result, with appropriate safeguards to ensure that the rights of third parties are properly protected.

3482. Division 2 is divided into 2 Subdivisions. Subdivision A identifies the classes of agreements to which Subdivision B applies and Subdivision B deals with the extent to which agreements are enforceable by non-licensees and the circumstances in which the client has a right to rescind those agreements.

Subdivision A - Agreements affected

3483. This subdivision identifies the agreements to which Subdivision B applies.

Cl.1159 : Excluded clients

3484. This new definitional provision ensures that a futures broker or futures adviser is not regarded as a client for the purposes of Division 2. Futures brokers and futures advisers will be able to rely on their own expertise in dealings with others and do not need the protection afforded by Division 2.

Cl.1160 : Agreement about dealing in breach of Bill cl.1142

3485. Where an unlicensed person and a client (other than a futures broker or futures adviser) enter into an agreement relating to a dealing or proposed dealing in a futures contract by an unlicensed person on the client's behalf, Subdivision B will have effect where the dealing or proposed dealing involves a contravention of Bill cls.1142, (failure to hold a futures broker's licence).

Cl.1161 : Agreement with corporation acting in breach of Bill cl.1143

3486. Where an unlicensed corporation in contravention of Bill cl.1143 (failure to hold a futures broker's or futures adviser's licence) carries on a futures advice business or holds itself out to be a futures adviser and a client (other than a futures broker or futures adviser) enters into an agreement that relates to the advising of the client about futures contracts or to giving the client futures reports, Subdivision B will have effect.

Cl.1162 : Agreement about advice, or reports, given in breach of subsection 1143(2)Cl.1163 : Agreement with person acting in breach of subsection 1143(3)

3487. Where an unlicensed person carrying on a futures advice business enters into an agreement with a client (other than a

futures broker or futures adviser) relating to giving advice or reports about futures contracts and the person does not hold a futures broker's or futures adviser's licence, Subdivision B will apply.

Subdivision B - Effects on Agreements

3488. This subdivision deals with the enforceability or otherwise of agreements between non-licensed persons and their clients.

Cl.1164 : Client may give notice of rescission

3489. This is a new provision.

3490. The client of a non-licensee will be able to give written notice to the non-licensee stating that the client wishes to rescind his or her agreement (Bill sub-cl.1164(1)). The client will, however, have to do so within a reasonable time (Bill sub-cl.1164(2)). The client will also lose the right to give a notice under this clause if the client engages in conduct that amounts to an affirmation of the agreement (Bill sub-cl.1164(3)). The client will have a right to give a notice under this clause whether or not the effect of the notice will be to rescind the agreement and whether or not the Court will be empowered to make an order under cl.1164 (Bill sub-cl.1164(5)).

Cl.1165 : Effect of notice under section 1164

3491. This is a new provision.

3492. A valid notice given by a client under cl.1164 stating that the client wishes to rescind the agreement will rescind the agreement unless rescission of the agreement would prejudice the rights of a third party. For this exception to apply the third party will be required to have acquired those rights in good faith for valuable consideration and without notice of the facts that have entitled the client to give notice under cl.1164.

Cl.1166 : Court may make consequential orders

3493. This is a new provision.

3494. If the client exercises his or her right to rescind, the Court will have the power to make such orders as it would have power to make if the client had rescinded on the grounds of misrepresentation by the non-licensee (Bill sub-cl.1166(1)). But the Court will not be able to make an order if the order would prejudice the rights of a third party and the third party acquired those rights in good faith, for valuable consideration and without notice of the facts that have given the client a right to rescind (Bill sub-cl.1166(2)).

Cl.1167 : Agreement unenforceable against client

3495. This is a new provision.

3496. This clause only applies if the agreement has been rescinded or if the client is entitled to give a notice under cl.1164 and giving of the notice will result in rescission of the agreement. That is, this clause will not apply if it is not possible to rescind the agreement (Bill sub-cl.1167(1)). Where this clause applies the non-licensed person will not be able, whether directly or indirectly, to enforce or rely on the agreement between the client and the non-licensee (Bill sub-cl.1167(2)).

Cl.1168 : Non-licensee not entitled to recover commission

3497. This a new provision.

3498. This clause will apply only while a client is entitled to give a notice under cl.1164 that he or she wishes to rescind the agreement or after he or she has given such a notice. It will not matter that the agreement may not be rescinded (i.e. because rescission would prejudice the rights of third parties (Bill sub-cl.1168(1))). Where this clause applies, the non-licensed person will not be entitled, by any means, to recover from the client any commission or other fee owed by the client under the agreement.

Cl.1169 : Onus of establishing non-application of section 1167 or 1168

3499. This is a new provision.

3500. In any proceedings where a non-licensee is seeking to enforce an agreement against a client or is seeking to recover a commission or other fee from a client, it will be presumed that cl.1167 or cl.1168 applies, as the case may be, and hence the non-licensee will be unsuccessful. The non-licensee will however be able to bring evidence to rebut the presumption. Thus the onus is on the licensee to show that the client has lost the protection granted by cls.1167 and 1168.

Cl.1170 : Client may recover commission paid to non-licensee

3501. This is a new provision.

3502. The client will be given a right to recover from the non-licensee any commission or other fee the client has paid to the non-licensee under the agreement. The client will be able to recover that money only if he or she has given a notice under cl.1164 of his or her wishes to rescind the agreement.

Cl.1171 : Remedies under this Division additional to other remedies

3503. This is a new provision.

3504. The rights and remedies conferred under this Division will be additional to any other rights or remedies the client may have against a non-licensee.

Division 3 : Futures representatives

3505. Division 3 is a new Division. It deals with representatives of futures brokers and futures advisers. Representatives will no longer be licensed. However, representatives will be required to hold an appropriate document (a proper authority) from their principal and disclose it to persons with whom they deal. Licensees will be required to keep a register of persons who hold a proper authority from them.

Cl.1172 : Representatives of futures brokers

3506. This is a new provision.

3507. A natural person will not be able to act as a representative of a futures broker (other than an exempt broker) unless the broker is a corporation and holds a futures broker's licence and the person holds a proper authority from the broker.

Cl.1173 : Representatives of futures advisers

3508. This is a new provision.

3509. A natural person will not be able to act as a representative of a futures adviser (other than an exempt adviser) unless the futures adviser is a corporation and holds

a futures broker's licence or and the person holds a proper authority from the futures adviser.

Cl.1174 : Defence

3510. This is a new provision.

3511. Where a person is prosecuted for acting as a representative of a futures broker or futures adviser in contravention of cl.1172 or 1173 it will be a defence if the person can prove that:

- (a) the act was a contravention only because the licence of the broker or adviser had been revoked or suspended;
- (b) the person believed that the broker or adviser held a licence and was unaware of the revocation or suspension; and
- (c) it was reasonable for the person so to believe and to be unaware of the revocation or suspension.

Cl.1175 : Body corporate not to act as futures representative

3512. This is a new provision that makes explicit what is already implicit in FIA sub-ss.65(1) and (2).

3513. A body corporate will not be able to act as a representative of a futures broker or futures adviser. Only a natural person will be able so to act.

Cl.1176 : Licensee to keep register of holders of proper authorities

3514. This is a new provision.

3515. A licensee will be required to establish a register of persons holding proper authorities from the licensee. The register is to be kept in written form or in such other form as approved by the ASC (Bill sub-cl.1176(1) and (2)).

3516. The register is to contain in respect of each person:

- (a) a copy of the proper authority;
- (b) the person's name;
- (c) current residential address and current business address (unless the same as the licensee's); and
- (d) such other information as is prescribed by the Regulations.

(Bill sub-cl.1176(3)).

3517. A copy of the proper authority will have to be placed in the register within 2 business days of the person beginning to hold the proper authority (Bill sub-cl.1176(4)). Other information required to be included in the register will have to be included within 2 business days after the person begins to hold a proper authority from the licensee or after the licensee receives the information, whichever happens later (Bill sub-cl.1176(5)). After a person ceases to hold a proper authority from the licensee, the licensee will have to transfer the information in the register to a separate part of the register (Bill sub-cl.1176(6)).

Cl.1177 : Licensee to notify Commission of location and contents of register

3518. This is a new provision.

3519. Within 14 days after establishing the register the licensee will be required to advise the ASC in writing as to where the register is kept (Bill sub-cl.1177(2)).

3520. Where there is a change of place where the register is kept the licensee is to advise the ASC in writing of the new place as soon as practicable (Bill sub-cl.1177(3)).

3521. Within 2 business days of a person beginning to hold a proper authority, the person's supervising licensee will be required to lodge with the ASC a copy of the authority and a notice stating when the person began to hold the authority (Bill sub-cl.1177(4)).

3522. The licensee will be required to notify the ASC of the information that the register is required to contain (Bill sub-cl.1177(5) and within 2 business days of a person ceasing to hold a proper authority from the licensee (Bill sub-cl.1177(6)).

Cl.1178 : Inspection and copying of register

3523. The register is to be open for inspection without charge (Bill sub-cl.1178(1)). A person will be able to request a licensee in writing to give the person a copy of the whole or part of the register (Bill sub-cl.1178(2)). The licensee's obligation to comply with such a request is set out in Bill sub-cl.1178(3).

Cl.1179 : Disclosure to client by representative

3524. A representative of a futures broker or futures adviser who holds a proper authority will be prohibited from:

- (a) accepting instructions from a person (other than the licensee or a person acting on the licensee's behalf) to deal in futures contracts;

- (b) dealing in futures contracts otherwise than on a futures market;
- (c) advising a person (other than the licensee or a person receiving advice on a licensee's behalf) about futures contracts; or
- (d) giving a futures report to a person (other than a licensee or a person receiving the futures report on the licensee's behalf);

unless the representative:

- (e) has informed the person that he or she is acting as a futures representative of the licensee;
- (f) has at some previous time shown the proper authority to the person; and
- (g) has at some previous time informed the person in writing of his or her business address.

Cl.1180 : Commission may require production of authority

3525. This is a new provision.

3526. The ASC will have the power to require a person to produce any proper authority or invalid futures authority held by that person. The ASC will only be able to exercise this power where it has reason to believe that a person holds a proper authority from a licensee or has acted as a representative of another person (Bill sub-cl.1180(1)).

Cl.1181 : Commission may give licensee information about representative

3527. This is a new provision.

3528. If the ASC has information about a person, the ASC will be able to give that information to a licensee if it believes on reasonable grounds that:

- (a) the person holds or will hold a proper authority from the licensee;
- (b) the ASC should give the information to licensee; and
- (c) the information is true.

(Bill sub-cl.1181(1)).

3529. Where the ASC gives such information to a licensee, the licensee or an officer of the licensee will be able to give that information to another person or make use of or record that information for purposes related to taking action against the holder of the proper authority (Bill sub-cl.1181(2)). Similarly a person who receives information under sub-cl.1181(2) will be able to give that information to another person or make use of or record that information only for purposes related to taking action against the holder of the proper authority (Bill sub-cl.1181(3)). Qualified privilege will be conferred on persons who do things permitted by sub-cl.1181(2) and (3) (Bill sub-cl.1181(5)). A person who is given information in accordance with this clause will be prohibited from disclosing that information in court except in the following cases:

- (a) for purposes connected with the licensee taking action, if any, against the holder of the proper authority;
- (b) in proceedings relating to an alleged contravention of cl.1181;

- (c) in proceedings relating to an ancillary offence relating to an offence against cl.1181;(see definition of "ancillary offence" in Bill cl.9); or
- (d) in proceedings relating to the giving to a court of false information to a court.

(Bill sub-cl.1181(6)).

Cl.1182 : Holder of authority may be required to return it

3530. This is a new provision.

3531. Where a person holds a proper authority from the licensee, the licensee will be able to require the person to give the proper authority to the licensee (Bill sub-cl.1182(1)). Similarly, where a person holds an invalid futures authority from another person, that other person will be able to require the return of the invalid authority (Bill sub-cl.1182(2)).

Division 4: Liability of Principals for Representatives' Conduct

3532. This is a new Division.

3533. As representatives of futures brokers and advisers will no longer be required to be licensed, futures brokers and advisers will be required to accept greater responsibility for the acts of their representatives. In general all the principals of a representative will be jointly and severally liable for the representative's conduct unless it can be established that the representative was acting for a particular identified principal. If the principal is identified then that principal will be fully liable for the acts of the representative.

Cl.1183 : Conduct engaged in as a representative

3534. This is a new provision.

3535. Where a person engages in conduct as a representative of another person, then as between that other person (or principal) and a third party, the principal will be liable as if the principal had done the act himself or herself. Under this clause the principal will be liable even if the person acting as a representative acts beyond the express limits of the instructions from the principal.

Cl.1184 : Liability where identity of principal unknown

3536. This is a new provision.

3537. This clause will apply where a person (or representative) engages in conduct while that person is a representative of 2 or more principals and that person engages in the conduct as a representative of a principal but the identity of the principal is not established (Bill sub-cl.1184(1)). Where this clause applies and only one of the principals is a party to a proceeding, that principal is liable in respect of the conduct of the representative as if he or she were the unidentified principal (Bill sub-cl.1184(2)). Where this clause applies and 2 or more of the principals are a party to a proceeding then each of those principals is liable in respect of the conduct of the representative as if each of them were the unidentified principal (Bill sub-cl.1184(3)).

Cl.1185 : Liability of principals where act done in reliance on representative's conduct

3538. This is a new provision.

3539. This clause will apply where the following 3 elements are satisfied:

- (a) a person is a representative of one or more principals and engages or proposes to engage in particular conduct;
- (b) the client does or omits to do an act because the client believes in good faith that the representative engaged in or proposes to engage in that conduct on behalf of a principal and in connection with a futures broking business or futures advice business carried on by the principal; and
- (c) it is reasonable for the client to have that belief and to do or omit to do the act in question because of that belief.

(Bill sub-cl.1185(1)).

3540. It will not matter that the conduct of the representative may be outside the scope of the representative's employment by, or authority from the principal.

3541. Where this clause applies, and the representative has engaged in the particular conduct then the principals of the representative will be liable in respect of the conduct of the representative as if they had engaged in the conduct themselves (Bill sub-cl.1185(2)).

3542. The liability of principals under this clause will include liability to pay damages to the client in respect of any loss or damage that the client suffers as a result of doing or omitting to do an act in reliance on the conduct of the representative (Bill sub-cl.1185(3)).

3543. If during proceedings the identity of the principal on whose behalf the representative acted can be established, and the identified principal is a party to the proceedings, then only the identified principal will be liable in respect of the conduct of the representative (Bill sub-cl.1185(4)).

Cl.1186 : Presumptions about certain matters

3544. This is a new provision.

3545. Where a person is a representative of one or more principals, and engaged in particular conduct, it will be presumed until the contrary is proved, that the person engaged in that conduct as a representative of one of those principals (Bill sub-cl.1186(1)).

3546. Where the application of cl.1185 is at issue in a proceeding, and it is proved that a client did or omitted to do an act because the client believed in good faith that the representative had or would engage in particular conduct then it will be presumed unless the contrary is proved that it was reasonable for the client to so act and believe (Bill sub-cl.1186(2)).

Cl.1187 : No contracting out of liability for representative's conduct

3547. This is a new provision.

3548. Sub-clause 1187(1) is definitional and identifies the nature of the liability of a principal that is dealt with in the clause. Any agreement that purports to exclude, restrict or otherwise affect a liability of a principal in respect of conduct engaged in by a person as a representative of the principal will be void (Bill sub-cl.1187(2)). An agreement that provides for a person to indemnify the principal will be similarly void (Bill sub-cl.1187(2)). However, some types of agreements will not be made void. They are as follows:

- (a) a contract of insurance;
- (b) an agreement between a representative and a principal for the representative to indemnify the principal in respect of the liability of the principal arising from acts of that representative; and
- (c) an agreement between licensees who have both given a person a proper authority, providing for one licensee to indemnify the other licensee in respect of the other licensee's liability arising from acts of the person holding the proper authority.

(Bill sub-cl.1187(3)).

3549. A person will be prohibited from making, offering to make, or inviting another person to offer to make an agreement that would be void under sub-cl.1187(2).

(Bill sub-cl.1187(4)).

Cl.1188 : Effect of Division

3550. This is a new provision.

3551. Where two or more people are liable under Part 8, Division 4 in respect of the same conduct or the same loss, they will be jointly and severally liable (Bill sub-cl.1188(1)). The liability created by this Division will not affect a liability arising otherwise than under this Division. However, this Division will not give a person an entitlement to be compensated twice in respect of the same loss or damage (Bill sub-cl.1188(2)).

Cl.1189 : Additional operation of Division

3552. This is a new provision which will extend the operation of various provisions contained in Part 8 Division 4 e.g. references in certain provisions to:

- (a) persons will include references to corporations;
- (b) eligible futures conduct will include any conduct; and
- (c) third persons will include corporations.

3553. Furthermore, cl.73, which defines "futures representative" will have additional operation in certain circumstances so as to include a person acting as a representative of any futures broking business or futures advice business.

Division 5: Excluding persons from the futures industry

3554. This Division deals with the various means by which participants in the securities industry may be disciplined. Under the FIA, disciplining took the form of suspension or revocation of a person's licence or disqualification by the Court. Under this Division, in addition to these forms (which are expanded in scope) the ASC is given a power to make a banning order against a person, as well as a power to fine a licensee or representative. Also the provisions dealing with revocation and suspension of licences have been restructured to provide a format that is easier to follow.

Cl.1190 : Power to revoke licence without a hearing

3555. This clause is based on FIA s.77.

3556. The ASC will be able , by written order, to revoke a licence in certain specified circumstances (Bill cl.1190) without giving the licensee an opportunity to be heard. These circumstances are as follows:

- (a) the licensee ceases to be an eligible (trading or foreign) corporation;

- (b) if the body ceases to carry on business;
- (c) if the licensee becomes externally-administered i.e. if it begins to be wound up, comes under official management, has a receiver or receiver and manager appointed, or enters into a compromise or scheme of arrangement with its creditors;
- (d) if the body contravenes cls.1157 and 1158 (failure to lodge an annual statement within the permitted time) or 1218 (failure to prepare proper accounts);
- (e) if the licensee asks the ASC to revoke the licence; or
- (f) if a director, secretary or executive officer of the body contravenes this Chapter because he or she does not hold a licence or a licence held by him or her is suspended.

Cl.1191 : Power to revoke licence after a hearing

3557. This clause is based on FIA s.78 although a number of additional grounds for revocation have been inserted.

3558. The ASC will be able, by written order, to revoke a licence in certain specified circumstances provided that the licensee is given an opportunity for a hearing under cl.F80. These circumstances are as follows:

- (a) if the application for the licence contained false or misleading information, or omitted material information (Bill paras.1191(1)(a) and (b));
- (b) if the licensee contravenes a futures law (other than cls.1157, 1158 and 1218 dealing with annual statements and accounts) or contravenes a condition of the licence (Bill para.1191(1)(c) and (d));

- (c) if the ASC is satisfied that the educational qualifications or experience of an officer of the licensee are inadequate having regard to the duties that that officer performs in connection with holding the licence. This power will be exerciseable only in relation to persons who become officers after the grant of the licence or in relation to duties that an officer performs that are different to those performed at the time of granting the licence (Bill paras.1191(1)(e) and (f));
- (d) if the ASC believes that the licensee has not or will not perform his or her duties as a licensee efficiently, honestly and fairly (Bill paras.1191(1)(h) and(j))
- (e) if a licence held by a director, secretary or executive officer of the body is suspended or revoked or a banning order under cl.1194 is issued against such a director, secretary or executive officer (Bill para.1191(1)(g)).

3559. In determining whether the good fame and character criterion or the efficiency, honesty and fairness criterion is met, the ASC will be able to regard to matters that arose before the licence was granted (Bill sub-cl.1191(2)).

Cl.1192 : Power to suspend licence instead of revoking it

3560. This clause is based on FIA sub-ss.77(3), 78(2) and FIA s.79, although a number of additional grounds of suspension have been inserted.

3561. The ASC will be able, by written order, to suspend a licence rather than revoke it in certain specified circumstances provided the licensee is given an opportunity for a hearing under cl.1200 (Bill para.1192(1)(c)). These circumstances are as follows:

- (a) on any of the grounds specified in cls.1190, except of course where the licensee has requested that the licence be revoked (Bill para.1192(1)(a))
- (b) on any of the grounds specified in cls.1191 except:
 - (i) if the application for the licence contained false or misleading information or omitted material information; or
 - (ii) if the ASC believes the licensee, being a natural person, is not of good fame and character (Bill para.1192(1)(b)).

3562. The ASC will also be able, in the same circumstances, to prohibit the licensee from doing specified acts which would be prohibited if the licensee did not hold a licence (Bill para.1192(1)(d)).

3563. The holder of a licence will be deemed not be the holder for any period during which the licence is suspended. This will mean that a person cannot act as a representative of a licensee while the licensee's licence is suspended. (Bill sub-cl.1192(3)). Similarly, a person will not be able, as a representative, to do an act which a licensee is prohibited from doing pursuant to an order under para.1192(1)(d) (Bill sub-cl.1192(4)).

Cl.1193 : Power to make banning order

3564. This a new provision.

3565. After providing an opportunity for a hearing, the ASC will be able to issue a banning order against a natural person prohibiting that person from doing an act as a representative of a futures broker or futures adviser (see Bill cl.1194):

- (a) if the person becomes an insolvent under administration (Bill para.1193(a))
- (b) if the person is convicted of serious fraud (Bill para.1193(b))
- (c) if the person becomes incapable, through mental or physical incapacity, of managing his or her affairs (Bill para.1193(c))
- (d) if the person contravenes a futures law (Bill para.1193(d))
- (e) if the ASC believes the person is not of good fame and character (Bill para.1193(e))
- (f) if the ASC believes the person has not or will not perform his or her duties as a representative of a futures broker or futures adviser efficiently, honestly and fairly (Bill paras.1194(f) and (g))

Cl.1194 : Nature of banning order

3566. This is a new provision.

3567. This clause specifies the nature of the banning orders that the ASC is empowered by other clauses to make. The ASC will be able to permanently prohibit a person from doing an act as a representative of a futures broker or futures adviser or both (Bill paras.1194(1)(a), (c), (d) and (e)).

3568. The ASC will also be able to prohibit, for a specified period, a person from doing an act as a representative of a futures broker or futures adviser or both. This power, however, will not be available where the ground for making the banning order is that the person is not of good fame and character. (Bill para.1194(1)(b)).

Cl.1195 : Exceptions to banning order

3569. This is a new provision.

3570. A banning order made by the ASC will be able to include a provision that permits the person to do things that the order would otherwise prohibit. This provision may be subject to conditions (Bill sub-cl.1195(1)). The ASC will be able to vary a banning order by inserting or removing such a provision or by varying the conditions to which the provision is subject (Bill sub-cl.1195(2)). Such variations will be able to be made only if the person is given an opportunity for a hearing under cl.1200.

Cl.1196 : Variation or revocation of banning order on application

3571. This is a new provision.

3572. A person will be able to apply to the ASC for a variation or revocation of a banning order relating to the person (Bill sub-cl.1196(1)). The ASC will be required to revoke the banning order if the person is not an insolvent under administration, if the ASC has no reason to believe that the person is not of good fame and character and if the ASC has no reason to believe that the person will not perform efficiently, honestly and fairly the duties of a representative of a futures broker or of a futures adviser (Bill paras.1196(2)(a), (b), (c) and (e)). If the ASC has no reason to believe that the person will not perform efficiently, honestly and fairly the duties of a representative of either a futures broker or futures adviser, but not both, the ASC will be required to vary the banning order accordingly (Bill paras.1196(2)(a), (b), (c) and (d)). In determining whether the efficiency, honesty and fairness criterion is met, the ASC will be required to have regard to any convictions of the person for serious fraud in the preceding 10 years (Bill sub-cl.1196(4)).

Cl.1197 : Revocation of banning order in certain cases

3573. This a new provision.

3574. Where the ASC is required to vary a banning order so that it no longer has a particular operation and the banning order has no other operation, the ASC will be required to revoke the banning order instead (Bill cl.1197).

Cl.1198 : Effect and publication of orders under this Division

3575. This a new provision.

3576. A banning order or variation of a banning order will take effect when it is served on the person to whom the order relates (Bill sub-cl.1198(1)). After the order is served the ASC will be required to publish a copy of the banning order or the banning order as varied in the Gazette, together with the day the banning order or variation took effect (Bill sub-cl.1198(2)). If the banning order includes a provision that permits, subject to conditions, the person to do things that are otherwise prohibited, and inclusion of those conditions in the Gazette would make the notice unreasonably long, the notice published in the Gazette will be able to contain a summary of the effect of those conditions instead (Bill sub-cl.1198(3)).

Cl.1199 : Contravention of a banning order

3577. This is a new provision.

3578. It will be an offence for a person to contravene a banning order.

Cl.1200 : Opportunity for hearing

3579. This clause is based on FIA s.80 although, as a consequence of other amendments, a number of additional circumstances where a person is entitled to a hearing have been inserted.

3580. The ASC will be required to give a person an opportunity to appear in private before the ASC and to make submissions and give evidence to the ASC before the ASC takes action in any of a number of specified ways (Bill sub-cl.1200(2)). The matters in relation to which the ASC must give the person affected an opportunity for a hearing before it acts are as follows:

- (a) refusing to grant a licence because, amongst other things, the applicant does not have adequate educational qualifications and experience or the ASC believes the applicant will not perform the duties of a licensee efficiently, honestly and fairly;
- (b) imposing or varying conditions of a licence;
- (c) revoking or suspending a licence otherwise than as empowered by Cl.1190 or para.1192(1)(a);
- (d) making a banning order against a person, otherwise than by virtue of paras.1193(a), (b) or (c);
- (e) varying a banning order under sub-cl.1195(2); or
- (f) refusing an application for a variation or revocation of a banning order

(Bill sub-cl.1200(1)).

Cl.1201 : Disqualification by the Court

3581. This clause is based on FIA sub-ss.78(3) and (4), although some minor changes have been made in order to give the Court more flexibility in the types of orders it can make.

3582. The ASC will be able to apply to the Court for a disqualification order against a person if it has revoked the person's licence after a hearing or if it has made a permanent banning order against that person (Bill sub-cl.1201(1)). The Court will be able to make an order disqualifying the person permanently or for a specified period from holding either a futures broker's licence, a futures advisers licence or both (Bill para.1201(2)(a)) or disqualifying the person permanently or for a specified period from doing an act as a representative of either a futures broker or futures adviser or both (Bill para.1201(2)(b)) or such other order as it thinks fit (Bill para.1201(2)(c)).

Cl.1202 : Effect of orders under section 1201

3583. This clause is new.

3584. A licence will not be able to be granted to a person while there is in force an order from the Court disqualifying that person from holding a licence (Bill sub-cl.1202(1)). It will be an offence for a person to contravene a disqualifying order that prohibits that person from doing an act as a representative of a futures broker or futures adviser or both (Bill sub-cl.1202(2)).

Cl.1203 : Effect of previous orders under laws corresponding to section 1201

3585. This provision is new.

3586. Court orders disqualifying a person from holding a futures licence that are in force when cl.1201 commences will continue to have effect.

BILL PART 8.4 : CONDUCT OF FUTURES BUSINESS

3587. Part 8.4 of the Bill (cls.1204 to 1210) deals with the conduct of futures business.

Cl.1204 : Certain representations prohibited

3588. This provision is based on FIA s.81.

3589. A licence holder will be prohibited from representing that his or her abilities or qualifications have been approved by the ASC (Bill sub-cl.1204(2)). A statement that a person holds a licence will not contravene the provision (Bill sub-cl.1204(2)).

Cl.1205 : Undesirable advertising

3590. This provision is based on FIA s.82.

3591. Where, having regard to past, present or proposed conduct, the ASC considers it is in the public interest to do so, it will be able to serve an order on a person prohibiting the publication or broadcast of statements relating to futures contracts or to the carrying on of futures business unless the ASC has first approved the form and content of the statements (Bill sub-cl.1205(2)). Failure to comply with an ASC order will be an offence (Bill sub-cl.1205(4)).

3592. Before the ASC will be able to make such an order it must first give the person affected an opportunity to appear at a private hearing and to make submissions and give evidence (Bill sub-cl.1205(3)).

3593. A person will be presumed to have published or broadcast a statement where that statement sets out the name and address details of the person (Bill sub-cl.1205(5)).

Cl.1206 : Issue of contract notes

3594. This provision is based on FIA s.83.

3595. The primary purpose of a contract note is to inform a client of the essential features of the contract which the broker has made after effecting a futures transaction.

3596. A contract note will be required to be issued as soon as practicable by a futures broker to the following persons in respect of the acquisition or disposal of a futures contract on behalf of the persons:

- (a) the person on whose behalf the transaction was effected (other than an operation on a discretionary account); or
- (b) to each person who gave the broker instructions authorising the broker to operate on a discretionary account (other than a person who agrees not to receive a contract note);

(Bill sub-cl.1206(2));

3597. A futures broker will not be required to give a contract note to the holder of futures broker's licence (Bill sub-cl.1206(3)).

3598. A contract note in respect of a futures contract transaction (other than in a transaction in relation to a futures option or eligible exchange-traded option - see definitions of these terms in cl.9) will be required to include the particulars set out in Bill sub-cl.1206(4), such as:

- (a) the day the transaction took place;

- (b) a description of the futures contract;
- (c) the deposit paid or payable in respect of the transaction;
- (d) the name of abbreviation of the futures exchange or exempt futures market where the transaction took place; and
- (e) a statement of the amount of commission charged or the rate (if any) at which the commission was charged.

3599. A contract note in respect of the acquisition or disposal of a futures option will be required to include the particulars set out in Bill sub-cl.1206(5) and a contract note in respect of the acquisition or disposal of an eligible exchange-traded option will be required to include the particulars set out in Bill sub-cl.1206(6).

Cl.1207 : Futures broker to furnish monthly statement to client

3600. This provision is based on FIA s.84.

3601. In order to keep a client informed, a futures broker will be required to provide the client with a monthly statement where the broker has:

- (a) held money or property on account of the client during the month (Bill para.1207(2)(a)); or
- (b) an open position at the end of the month in a futures contract acquired on behalf of the client (Bill para.1207(2)(b)).

3602. The monthly statement will be required to be sent to the client within 7 days after the end of the month and to specify various matters including:

- (a) the opening cash balance for the month in the client's account (Bill para.1207(2)(d));
- (b) all deposits, credits, withdrawals and debits affecting the account during the month (Bill para.1207(2)(e));
- (c) the cash balance at the end of this month (Bill para.1207(2)(f)); and
- (d) particulars of each futures contract acquired on behalf of the client and of open positions at the end of the month in futures contracts acquired on behalf of the client (Bill para.1207(2)(g)).

3603. Where the broker has authority to operate on a discretionary account, the statement sent to each client who has authorised the broker to operate on that account will be required to specify certain matters including:

- (a) the opening and closing cash balance and all deposits, credits, withdrawals and debits for the month in the client's account;
- (b) in relation to each transaction in respect of a futures contract that was effected during the month:
 - (i) a description of the futures contract and details of any liquidating trade; and
 - (ii) details of outstanding deposit or margin calls.

(Bill sub-cl.1207(3)).

Cl.1208 : Dealing by futures broker on own account

3604. This provision is based on FIA s.85.

3605. A futures broker will be required to keep separate records that correctly record and explain dealings in futures contracts by the broker on the broker's own account.

3606. These records are to include the time, date and description of the broker's dealings on own account and the source of the funds used for effecting those dealings (Bill sub-cl.1208(1)). The records must be in English or be readily convertible into English (Bill sub-cl.1208(2)).

3607. A futures broker will be prohibited from knowingly taking the other side of client's order unless:

- (a) the client consents to the broker doing so with respect to each transaction where this is contemplated: or
- (b) the broker is taken, for the purposes of the legislation, to be dealing in a futures contract on the broker's own account - including, for example, where the the broker deals in a futures contract on the instructions of an associate - see Bill sub-cl.29(1) (Bill sub-cl.1208(3)).

3608. For the purposes of Bill sub-cl.1208(3), a futures broker will take the other side of a client's order where the broker, dealing on the broker's own account, assumes a bought or sold position and, when dealing on the instructions of a client, assumes the opposite sold or bought position (Bill sub-cl.1208(4)).

Cl.1209 : Segregation of client money and property

3609. This provision is based on FIA s.86.

3610. Where money or property (other than property that is delivered in accordance with a futures contract - see Bill cl.1214) is deposited with the broker by or on behalf of the client, the broker will be required to deposit the money in a client's segregated account and the property in safe custody within the next business day (Bill sub-cl.1209(3)).

3611. Clause 1209 will apply only to money or property of bona fide clients. For the purpose of this provision "client" will not include:

- (a) the futures broker or a director, officer or employee of the broker;
- (b) a body corporate that is related to the broker i.e. its subsidiary or holding company;
- (c) a person who is associated with, or who is a partner of, the broker; or
- (d) a body corporate in which the broker has, or the broker and the partners of the broker together have, a controlling interest

(Bill sub-cl.1209(1) - definition of "client").

3612. The property of a client that may be deposited with a futures broker will include credit facilities and securities (Bill sub-cl.1209(1) - definition of "property"). "Credit facility" is defined to mean a document evidencing the right of a person to obtain money or credit from another person, including a letter of credit and a bank guarantee. Where a clearing house or some other person or body corporate pays a futures broker an amount of money, some of which is attributable to dealings on behalf of clients, the broker will be required to deposit the money in a clients' segregated account (Bill sub-cl.1209(4)).

3613. A futures broker will not be able to withdraw any of the money in a clients' segregated account except for the purpose of -

- (a) making a payment to a person entitled to the money;
- (b) making a payment for the entering into, margining, guaranteeing, securing, transferring, adjusting or settling of dealings in futures contracts effected on behalf of a client - ("settling" is defined in Bill sub-cl.1209(1) to include making delivery, or taking delivery, of a commodity to which a futures contract relates);
- (c) defraying brokerage and other proper charges incurred in respect of dealings in futures contracts effected on behalf of a client;
- (d) investing it in authorised trustee investments, or with an authorised dealer in the short term money market, a bank or the clearing house of a futures exchange, or in a cash management trust;
- (e) paying the broker a fee that the broker may charge, or an amount to which the broker is entitled, under an agreement with a client;
- (f) making a payment that is otherwise authorised by law; or
- (g) reimbursing the broker with funds which the broker has deposited to meet a client's shortfall (see Bill sub-cl.1209(10) and (11), discussed below)

(Bill sub-cl.1209(5)).

3614. Where a futures broker invests client money that has been deposited in a clients' segregated account:

- (a) the broker will be able to charge such fee, and is entitled to so much of the return on the money invested, as the broker and the client agree in writing (Bill sub-cl.1209(8));
- (b) the broker will be required to:
 - (i) inform the institution with which the money is invested that the money is client money that has been withdrawn from a clients' segregated account; and
 - (ii) obtain from the institution a signed statement setting out the amount invested and acknowledging that the broker has informed the institution as mentioned in (i) above

(Bill sub-cl.1209(9)).

3615. A futures broker will not be able to deal with property deposited in safe custody pursuant to Bill sub-cl.1209(3) otherwise than in accordance with the terms and conditions on which the property was deposited with the broker (Bill sub-cl.1209(7)).

3616. Where the total of a client's relevant liabilities (defined in Bill sub-cl.1209(1)) exceed the client's relevant credit balance (also defined in Bill sub-cl.1209(1)), the broker will be able to deposit money in a clients' segregated account sufficient to make up the shortfall (Bill sub-cl.1209(10)). Money so deposited is deemed to be money to which the client is entitled (Bill sub-cl.1209(10)) except that once the shortfall is made up the broker will be able to withdraw any excess funds from the account (Bill sub-cl.1209(11)).

3617. In relation to the clients' segregated account, a futures broker will be required to keep accounting records that -

- (a) are separate from other accounting records;
- (b) record, separately in respect of each client, particulars of the amounts deposited in and withdrawn from the account or accounts; and
- (c) record, separately from the particulars referred to in para.(b) -
 - (i) particulars (including withdrawals) of money to which the broker is entitled which has been received from a clearing house;
 - (ii) particulars of money deposited to make up a client shortfall; and
 - (iii) particulars of money withdrawn after the client shortfall has been made up

(Bill sub-cl.1209(12)).

3618. A futures broker will also be required to keep records of property deposited pursuant to Bill sub-cl.1209(3) and to keep separate records of each client's property (Bill sub-cl.1209(13)). The records required by Bill sub-cl.1209(12) and (13) will be required to adhere to the requirements of Bill cl.1213 (accounts to be kept by futures brokers) so far as Bill cl.1213 is capable of application (Bill sub-cl.1209(14)).

3619. Money in a clients' segregated account, property in which such money has been invested and property deposited in safe custody pursuant to Bill sub-cl.1209(3) will not be

available for the payment of the debts or liabilities of the broker (Bill sub-cl.1209(15)). This will not, however, affect the right of a client to recover money or property to which the client is entitled (Bill sub-cl.1209(16)) or prevent the broker withdrawing money from the account to which the broker is entitled (Bill sub-cl.1209(17)).

3620. Where a futures broker invests client money from a clients' segregated account, neither that money nor any property in which the money is invested is available for the payment of the debts or liabilities of the investment institution (Bill sub-cl.1209(18)).

3621. Clause 1209 will does not prejudice any claim or lien that a futures broker has against or on any money in a clients' segregated account, property in which such money has been invested and property deposited in safe custody (Bill sub-cl.1209(19)).

Cl.1210 : Futures broker to give certain information to prospective clients

3622. This provision is based on FIA s.87.

3623. The Bill will require all futures brokers to provide certain information to clients to ensure, among other things, that the client is aware that futures trading involves the risk of a loss as well as the prospect of profit.

3624. A futures broker will be required to give a prospective client:

(a) a document that:

(i) explains the nature of futures contracts and client obligations;

- (ii) sets out a risk disclosure statement in the prescribed form;
 - (iii) sets out the specifications and essential details of futures contracts in which the broker deals; and
- (b) a copy of each agreement which the broker proposes to require the prospective client to enter into.

BILL PART 8.5 : ACCOUNTS AND AUDIT

3625. Part 8.5 (Bill cls.1211 to 1227) deals with the accounts to be kept by the holder of a futures broker's licences and with the auditing and supervision of those accounts. The application of this Part is dealt with in cl.1212.

Cl.1211 : Interpretation

3626. This provision is based on FIA s.88.

3627. A reference in Part 8.5 to a book, futures contract or business of a futures broker who carries on business in partnership is to be read as a reference to a book, futures contract or business of the partnership.

Cl.1212 : Application of Part

3628. This provision is based on FIA sub-s.89(2).

3629. Part 8.5 will not affect the operation of Bill Parts 3.6 and 3.7 in relation to a company which holds a futures broker's licence (Bill cl.1212).

Cl.1213 : Accounts to be kept by futures brokers

3630. This provision is based on FIA s.90.

3631. A brief outline of cl.1213 is as follows:

- (a) A futures broker will be required to keep accounting records that correctly record and explain the transactions and financial position of the broker's futures business. A futures broker will be required to keep accounting records that enable true and fair profit and loss accounts and balance sheets to be

made up and conveniently and properly audited (Bill sub-cl.1213(1)).

- (b) These accounting records will be required to be in English or readily convertible into English and to be kept in sufficient detail to show particulars of the matters set out in Bill paras.1213(2)(b)-(e) (Bill sub-cl.1213(2)).
- (c) In respect of a discretionary account on which the futures broker operates, the broker will be required to keep records in sufficient detail to show the particulars required to be furnished to the client in order to comply with Bill sub-cl.1207(3) (Bill sub-cl.1213(3)).
- (d) A futures broker will also be required to keep records in sufficient detail to show separately particulars of all transactions in relation to clients, the broker, the broker's partners, other futures brokers and the broker's representatives (Bill sub-cl.1213(4)).
- (e) An entry in the records will be deemed to have been made by or with the authority of the futures broker (Bill sub-cl.1213(5)).
- (f) If required, a futures broker will be required to convert a record not kept in English into English within a reasonable time (Bill sub-cl.1213(6)).
- (g) If records are kept outside Australia, the broker will be required to send to and keep in Australia such particulars as will enable true and fair profit and loss accounts and balance sheets to be prepared (Bill sub-cl.1213(8)). If required by the ASC to produce such records, the broker will be required to comply within 28 days (Bill sub-cl.1213(9)).

Cl.1214 : Property in custody of futures broker

3632. This provision is based on FIA s.91.

3633. A brief outline of cl.1214 is as follows:

- (a) Where a futures broker receives property of a client delivered in accordance with a futures contract and for which the broker or the broker's nominee is accountable, the broker will be required forthwith:
 - (i) if so requested, deposit it in safe custody at a bank; or
 - (ii) deposit it in accordance with the futures exchange business rules

(Bill sub-cl.1214(1)).

- (b) If an amount is owed to a futures broker by the client, the broker will be required to deposit the client's property as security with the broker's creditors if the broker gives a written notice to the client identifying the property and stating that the broker intends to deposit it as a security (Bill sub-cl.1214(2)). Where money owed to the broker is paid by the client, the broker will be required, at the client's request, to withdraw the property from deposit as soon as practicable. This will not, however, prevent the broker from redepositing the property as permitted by Bill sub-cl.1214(2) (Bill sub-cl.1214(3)).

- (c) If the property is maintained as security for more than 3 months the futures broker will be required to give the client written notice of this fact, and at 3 monthly intervals thereafter (Bill sub-cl.1214(4)).

Cl.1215 : Appointment of auditor by futures broker

3634. This provision is based on FIA s.92.

3635. A person who holds a futures broker's licence (other than an Australian bank) will be required to have auditor. A brief outline of cl.1215 is as follows:

- (a) A futures broker (other than an Australian bank) will be required to appoint an auditor within one month of becoming licence holder (Bill sub-cl.1215(1)). The appointment of an auditor will be required to be notified to the ASC within 14 days (Bill sub-cl.1215(12)).
- (b) A person or firm will not be able to be an auditor where one or more of the restrictions set out in Bill sub-cl.1215(2) and (3) exist. The appointment of a firm as auditor will be taken as the appointment of all members of the firm who are registered company auditors (Bill sub-cl.1215(8)) and a newly constituted firm (due to death or retirement etc.) will be deemed to be appointed as auditor if not disqualified by Bill sub-cl.1215(9). Except as provided by Bill sub-cl.1215(9) the appointment of members of a firm as auditors will not be affected by dissolution of the firm (Bill sub-cl.1215(10)).
- (c) Each member of a firm that consents to be appointed as the auditor of a futures broker will be guilty of an offence if this appointment is in breach of this clause (Bill sub-cl.1215(13)).
- (d) A person will be prohibited from knowingly disqualifying himself or herself or a firm (if he or she is a member) from acting as auditor of the futures broker (Bill sub-cl.1215(14)).