

1986

**THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
HOUSE OF REPRESENTATIVES**

FUTURES INDUSTRY BILL 1986

EXPLANATORY MEMORANDUM

**(Circulated by Authority of the Deputy Prime Minister and
Attorney-General, the Honourable Lionel Bowen, M.P.)**

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ABBREVIATIONS

The following is a list of abbreviations used in the Explanatory Memorandum:

AASE - Australian	Associated Stock Exchanges
CA	Companies Act 1981 (Cth)
CASA	Companies (Acquisition of Shares) Act 1980 (Cth)
C & S Interpretation Act	Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 (Cth)
First exposure draft	First exposure draft of the Futures Industry Bill 1985
ICCH	International Commodities Clearing House Limited
NCSC	National Companies and Securities Commission
NCSC Act	National Companies and Securities Commission Act 1979 (Cth)
SEM	Stock Exchange of Melbourne Limited
SFE	Sydney Futures Exchange Limited
SIA	Securities Industry Act 1980 (Cth)
Second exposure draft	Second exposure draft of the Futures Industry Bill 1985

OUTLINE

1. The purpose of the Futures Industry Bill 1986 is to regulate the futures industry in the Australian Capital Territory. The purpose of the Futures Industry (Fees) Bill 1986 is to detail the matters in respect of which fees are payable for the purposes of the Bill. The purpose of the Companies and Securities Legislation Amendment (Futures Industry) Bill 1986 is to amend co-operative companies and securities legislation consequent upon changes proposed to be made by the Futures Industry Bill 1986.
2. These Bills, which have been approved by the Ministerial Council for Companies and Securities, are submitted to the Commonwealth Parliament in accordance with the Commonwealth's obligations under the Formal Agreement entered into with the States on 22 December 1978.
3. If enacted, the Bills will apply in the Australian Capital Territory. Each State will enact legislation to apply the Commonwealth law (subject to any necessary local modifications) as the law of that jurisdiction, to the conclusion of any present legislation, as from the date of commencement of the Commonwealth law.

Financial impact statement

4. The Formal Agreement requires the Commonwealth to contribute 50% of the NCSC's operational costs. The other 50% is provided by the States on a population basis.
5. The only additional funds required will be the cost to the NCSC of employing a small number of additional staff to administer the new legislation. It is proposed that the bulk of the administration will be *handled by* State and Territory Corporate Affairs Commissions.

Rationale for proposed futures industry legislation

6. The need for regulation of the futures industry within the context of the co-operative scheme has been recognised by the Campbell Committee and the Sydney Futures Exchange ('SFE'). In its submission on the second exposure draft of the Futures Industry Bill 1985 the SFE made the following comment: "The Exchange strongly supports the implementation of the Bill at an early date and would not wish enactment of the Bill to be delayed. The Exchange believes that it is important that the industry is, and is seen to be, appropriately regulated and the Exchange is ready to perform its own role in the co-regulatory process."
7. Experience with the administration of the New South Wales Futures Markets Act, the manner in which some non-members of the SFE have promoted and conducted their business and the failure of some futures brokers have indicated the need for Australia-wide legislation in this area.

Economic Functions of Futures Trading

8. The major economic functions of futures trading are all stated to be as follows:
 - (a) The "hedging" effect: A person (e.g. a producer) is able to transfer the risk of adverse economic movements (e.g. changes in price or interest rates) which are inherent in his commercial or financial activities to another person (usually a speculator) who is more willing and able to bear these risks.
 - (b) The ability to transfer risk results in the following benefits:
 - (i) Entrepreneurs are encouraged to participate in "high risk" ventures which normally might not be contemplated.
 - (ii) As an entrepreneur does not expect as large a return on the investment of his capital when the risk is reduced, the production costs (and costs to the consumer) are accordingly reduced.
 - (c) "Price Discovery". Because the price of a futures contract is influenced by factors such as the prevailing cash market price, net storage costs (until maturity of the futures contract) and the expectations of futures market participants as to the likely course of cash market prices, the price of the futures contract will converge with the cash market price until at maturity the difference between the two prices will be no greater than the cost of delivery from the cash market to the futures market. Producers, distributors, stockholders and

end users of a commodity are able to plan their future requirements and policies using futures prices as well as their own forecast of prices. This market average of expectations of the future course of prices operates at its most efficient in a mature, liquid futures market involving solid hedging and speculative participation by cash market users and well informed speculation by those without cash market involvement.

(d) The flow of investment into an industry is increased because resources are freed which would otherwise be required to maintain a large inventory or to stockpile raw materials.

(e) Associated with the effect referred to in (d) **above** is the increased market liquidity due to the influx of speculative investment funds into an industry which permits of a greater range of futures contracts to the hedger.

Overlap with SIA

9. It is not practicable to attempt to incorporate the futures legislation into the SIA. To do so would make the SIA a complex and cumbersome piece of legislation, and would fail to take account of the differences between the futures and securities markets. Whereas securities markets are concerned the transfer of title in property, a major function of a futures market is to facilitate risk management rather than enable title in property to be transferred.

10. In order to provide an appropriate framework for the various 'products' traded on futures and securities exchanges, it is proposed that the following regime will apply:

(a) The Futures Industry Bill will:

(i) apply to futures contracts, options over futures contracts, and to commodity options traded on a futures exchange (it should be noted that, at this stage, the Futures Industry Bill will not apply to deliverable commodity options not traded on a futures exchange) ;

(ii) adopt appropriate SIA provisions (e.g. prohibition on insider trading) to cover futures contracts where the underlying instrument is a security.

(b) There will be no regulation of physical commodity sales or of the sale of commodity options not traded on a stock or futures exchange.

(c) The SIA will apply to:

(i) securities and commodity options traded on a stock exchange (but not options over futures);

(ii) the marketing of discretionary accounts or of a right to participate in a commodity pool.

NOTE: A dealing in a futures contract will not be a dealing in securities for the purposes of the SIA (see cl. 12 of: the Companies and Securities Legislation Amendment (Futures Industry) Bill 1986).

(d) The CA will apply to the offering of a right to participate in a commodity pool.

Outline of explanatory memorandum

11. The remainder of this explanatory memorandum:

(a) contains a brief outline of the main proposals in the Futures Industry Bill 1986;

(b) contains an index of clauses of the Futures Industry Bill 1986, the Futures Industry (Fees) Bill 1986 and the Companies and Securities Legislation Amendment (Futures Industry) Bill 1986;

(c) deals sequentially with the content of each clause of those Bills (paras. 22 to 378); and

(d) contains a list of major changes made to **the first exposure draft** of the Futures Industry Bill by the second exposure draft (Appendix A), and a list of changes made to the second exposure draft by the Futures Industry Bill 1986 (Appendix B)..

FUTURES INDUSTRY BILL 1986 ("THE BILL")

Brief Outline of Main Proposals in Bill

12. A brief outline of main proposals contained in the Bill are set out below:

(a) *Definition of "Futures Contract"*

The Bill contains a wide definition of "futures contract" order to cater for new forms of contracts that may be developed and to ensure that all trading in futures contracts is subject to similar prudential requirements. Interest rate and currency swaps and forward exchange and interest rate contracts to which a bank or merchant bank is a party will be specifically excluded from the definition of "futures contract". Provision is also made for other contracts to be exempted from the definition by regulation.

(b) *Licensing*

14. The Bill provides for a system of licensing for all futures brokers, futures advisers, and their representatives, whether or not they are members of the Sydney Futures Exchange.

15. A pre-condition to obtaining a futures broker's licence will be membership of a futures exchange, a local recognised futures exchange (i.e. a futures exchange approved by the Ministerial Council in another participating State or Territory) or a futures association. (The Bill provides for the approval of futures associations, which will have the day-to-day responsibility for the regulation of futures brokers).

16. The licensing regime in the Bill in relation to futures broker's representatives and futures adviser's representatives may be changed in the light of the NCSC Licensing Review. It is proposed that the representatives licensing provisions in the Bill will not be proclaimed pending the outcome of the review.

(c) *Off-market trading/Anti-bucketing provision*

17. It will be an offence for a futures broker to deal in a futures contract on behalf of another person unless the dealing is effected on an exempt futures market, or on a futures market of a futures exchange or recognised futures exchange or as permitted by the business rules of a futures association or futures exchange of which the broker is a member (see cl. 128).

(d) *Insider Dealing*

18. A prohibition on insider dealing similar to that provided for under SIA s.128 will apply to dealing in futures contracts where the underlying "commodity" is or relates to securities (which will have the same meaning as in the SIA -see cl. 129).

(e) *Anti-fraud provision*

19. The Bill contains a general anti-fraud provision based on a provision in the US Commodity Exchange -Act (7 USCA s.6b) which essentially makes it unlawful for a futures broker (or any of its agents or employees) to deceive or defraud a client (see cl. 135).

(f) *Other provisions*

20. The Bill also provides for:

- (i) inspection and investigation powers modelled on Part II of the SIA to empower the NCSC to investigate the affairs of a futures exchange, a clearing house, a futures association and persons licensed under the legislation;
- (ii) a Futures Consultative Committee to provide expert policy advice to the Ministerial Council and the NCSC on developments in the futures industry;
- (iii) the approval of futures exchanges, futures associations-exchanges and clearing houses;

- (iv) a system of segregated accounts for clients' moneys and for dealing with clients' property deposited with a futures broker;
- (v) requirements to be imposed on licensed futures brokers to maintain books of account and be subject to audit;
- (vi) fidelity fund arrangements to compensate persons who suffer loss by reason of defalcation or fraudulent misuse of money or other property arising in the course of a futures broker's business of dealing in futures contracts;
- (vii) other provisions to deal with undesirable or fraudulent practices.

Contents of the Bill

21. The Bill is divided into the following parts:

Part I	Preliminary
Part II	Administration
Part III	Futures Exchanges, Clearing Houses and Futures Associations
Part IV	Licences
Part V	Conduct of Futures Business
Part VI	Accounts and Audit
Part VII	Fidelity Funds
Part VIII	Offences
Part IX	Miscellaneous

FUTURES INDUSTRY BILL : PART I : PRELIMINARY

22. Part I of the Bill (cls. 1 to 11) deals with various preliminary matters.

Cl. 1 : Short title

23. When enacted, the Bill be cited as the Futures Industry Act 1986 (cl. 1).

Cl. 2 : Commencement

24. The Bill will come into operation on a date to be fixed by Proclamation (cl. 2).

Cl. 3 : Object

25. The *Bill* will regulate the futures industry in the A. C. T. (s-cl. 3(1)).

26. The C&S Interpretation Act will apply to the *Bill* (s-cl. 3(2)).

27. Clause 3 is consistent with the provisions of s-cl. 6(1) the NCSC Act which provides that the NCSC has such powers and powers as are conferred on it by any Commonwealth legislation that is a law of a kind referred to in s.122 of the Constitution (the 'Territories power').

Interpretation Provision

28. Cl. 4 of the Bill deals with various matters of interpretation. Some of the more important definitions and interpretative provisions in the Bill are discussed below.

29. Definition of "futures contract" - The definition of "futures contract" is fundamental to the operation of the Bill. "Futures contract" will mean an agreement that is, or has been, an eligible commodity agreement or an adjustment agreement, a futures option or a prescribed 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 a bank or merchant bank is a party; or
- (b) agreements prescribed by the Regulations (Bill s-cl. 4(1)).

30. The definition has the following key elements:

- (a) Agreement - This is defined to mean any agreement, arrangement or understanding, whether formal or informal, written or oral, and whether or not having legal or equitable force. It will also mean a proposed agreement, an agreement as proposed to be varied and an agreement in force before variation or discharge (cl.5).
- (b) Adjustment agreement - This is defined in s-cl.4(1) to mean 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 or price: this concept is taken from the U.K. Financial Services Bill. "Standardised agreement" is defined to mean an agreement: that is one of 2 or more agreements, each agreement being of the same kind. (Futures contracts, unlike many other forward contracts, are standardised agreements.) (s-cl.4(1), see also s-cl.5(3)).

"Obligation" and "right" are defined in s-cl.4(1) to include an obligation or right that is enforceable neither at law nor in equity.

- (c) Eligible commodity agreement - This is defined in s-cl.4(1) 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).

"Commodity agreement" is defined in s-cl. 4(1) to mean 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.

"Commodity" is defined in s-cl. 4(1) to mean any thing 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).

"Price" is defined in s-cl. 4(1) to include any amount payable for the delivery of a commodity under an agreement.

(d) Futures option - This is defined in s-cl. 4(1) 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).

(e) Bought position - This is defined in s-cl. 4(1) 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.

(f) Sold position - This is defined in s-cl. 4(1) 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.

(g) Prescribed exchange-traded option - This is defined in s-cl. 4(1) 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.

31. "Futures contract" does not include a currency swap or interest rate swap to which a 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), Woolworths, 1983):

"The principle of swap transactions is straightforward: i 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."

32. "Futures contract" will also not include forward exchange contracts or forward interest rate contracts to which a merchant bank is a party. Forward exchange contracts 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."

33. "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. 4(5) and (6) - see Commonwealth of Australia Gazette, No. 5321 of 19 August 1985, Categories C and D.).

34. 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 definition of "futures contract").

35. To ensure 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 Bill, s-cl. 4(2) and (3) ensure that a person on whose behalf a futures contract is acquired or disposed of is also a party to the contract for the purposes of the Bill.

Cl. 6 : Associated persons

36. The circumstances in which a person will be deemed to be associated with another person are set out in Bill cl. 6. The provision is based on SIA s. 6..

37. In brief::

(a) A reference to a person associated with another person will include

(i) a director or secretary of a body corporate;

(ii) related bodies corporate, or a director or secretary of related bodies corporate;

(iii) persons acting or proposing to act in concert;

(iv) a trustee of a trust in relation to which the other person benefits otherwise than by money lending transactions; and

(v) subject to s-cl.6(2), co-directors and partners.

(s-cl. 6(1)).

(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 to have known the material particulars of the relevant matter (s-cl. 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 these persons (s-cl. 6(3)).

(d) A person is not to be regarded as associated with another person due to paras 1(b) (acting in concert), (h) (associates by virtue of the regulations) or (j) (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 (s-cl. 6(4)).

Cl. 7: Dealing in futures contracts

38. A person will be taken to deal in futures contracts for the purposes of the Bill 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 a person to acquire or dispose of a futures contract (Bill s-cl.7(1) - see also Bill s-cl.4(1) for definitions of acquire and dispose of). There are several provisions in the Bill where the concept of dealing is significant, for example cl. 129 (dealings by insiders) cl. 90 (accounts to be kept) and cl. 138 (sequence of orders).

39. Of central importance to the Bill is the concept of dealing on behalf of others. A person will be taken to deal in futures contracts on behalf of another person 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 s-cl. 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 - Bill s-cl. 4(1)). 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 employees in such a case would be acting on behalf of the corporation and would require a licence under Bill cl. 61.

40. A specific provision has been included in the Bill (s-cl.7(3)) **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. An example is an overseas resident who is a clearing member of ICCH.

Cl. 8 : Dealings and transactions on a person's own account

41. 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 (Bill s-cl.8(1)).

Cl. 9 : Discretionary accounts

42. A reference in the Bill to a futures broker operating on a discretionary account (see e.g. Bill cl. 84) means the broker is authorised by a client to use the client's funds, or by a number of client's to use their pooled funds, to deal in futures contracts on the client(s) instructions (except for instructions limited to time and/or price) without prior approval (Bill cl. 9).

Cl. 10 : Exempt brokers

43. For the purposes of the Bill, certain bodies will be exempt brokers. The categories include:

- (a) a body corporate prescribed by the regulations;
- (b) a public authority declared by the Ministerial Council; and
- (c) an official manager, receiver etc - (Bill cl. 10).

Note that exempt brokers do not require a futures brokers licence under cl. 61 and do not have to comply with the segregated accounts provisions (cl. 86). Personal representatives of a deceased brokers that are carrying on business must comply with cls. 83 and 84.

Cl. 11 : Certain persons not to be taken to be recognised licensees

44. Residential qualifications will apply to recognised licensees (Bill cl. 11).

FUTURES INDUSTRY BILL : PART II : ADMINISTRATION

45. Part II of the Bill (cls. 12 to 44) deals with inspections, investigations and the Futures Consultative Committee. It is divided into three Divisions:

- Division 1 - General (which is concerned with inquiries other than by means of a special investigation)
- Division 2 - Investigations (which deals with special investigations)
- Division 3 - Futures Consultative Committee (which deals with the constitution, functions, and meetings of the Futures Consultative Committee).

Division 1 - General

46. The provisions of Division 1 are designed to ensure that the NCSC will have adequate powers of inquiry when performing its functions in relation to the futures industry. They are based on corresponding SIA provisions. It is considered desirable that the NCSC's powers of inquiry be consistent for both the SIA and the proposed futures industry legislation.

47. The provisions proposed are as follows:

- (a) The NCSC is to have a wide general authority to have books produced for inspection that relate to the futures industry.
- (b) The authority will include power to require explanations in respect of the books.
- (c) Where attempts to exercise the foregoing authority are unsuccessful, a magistrate may issue a search warrant to be executed by the police, subject to normal warrant safeguards.
- (d) Information obtained by exercise of the authority should not be disclosed except for the purposes prescribed by the legislation.
- (e) Falsification of relevant books, or of explanations given in respect of them, should be an offence.

Cl. 12 : Interpretation

48. In Division 1 "books" includes banker's books (defined in s-cl. 4(l)) and "clearing house" means a body in relation to which an approval as a clearing house for a futures exchange is in force under Bill s-c. 48(1) (Bill cl. 12).

Cl. 13 : Power of NCSC to require production of books

49. The NCSC will be able to require the production of various books relating to the futures industry (cl. 13 - cf. SIA s. 8). The investigation powers given to the NCSC by cl. 8 in relation to things and matters in and of the A.C.T. will be given to the NCSC in relation to things and matters in and of each State and Territory by the operation of cl. 13 as the law of each State and Territory.

50. A brief outline of the NCSC's powers under cl. 13 is as follows:

- (a) The NCSC will be able to give a direction requiring the production of books relating to the affairs of persons involved in the **futures industry (para 13(3)(a))** to
 - (i) a futures exchange, clearing house or futures association;
 - (ii) a Board member of a futures exchange, clearing house or futures association;
 - (iii) a licence holder
 - (iv) a nominee controlled by a person referred to in (iii);
 - (v) a person who is or has been an officer, agent, banker, solicitor, auditor or other person acting for any of the above; or
 - (vi) any other person who the NCSC believes has been a party to any dealing in futures contracts;
- (b) The NCSC will be able to direct any person to produce any books relating to matters mentioned above (para. 13(3)(b)).
- (c) The NCSC will be able to require a futures exchange, clearing house, a futures association, or any other person to produce books relating to the matters mentioned above (s-cl. 13(4)).
- (d) Production of such books will not prejudice any lien (s-cl. 13(7)).
- (e) Where the NCSC requires the production of books, the person to whom the books are produced will be able to make copies of the books; to require a person who was a party to the compilation of the books to make an explanatory statement; and to retain the books for a reasonable period. Inspection by persons otherwise entitled to inspect must be permitted (para. 13(8)(a) - cf. s-cl. 14(6)). If the books are not produced the NCSC or authorised person may require the person to give his opinion both as to their location and custodian (para. 13(8)(b)). A person is not subject to any liability by reason of complying or proposing to comply with directions of the NCSC or of a person authorised by the NCSC under s-cl.13(3) and (4) (s-cl. 13(9)).

(f) The provisions will apply in the case of a body corporate, to an officer. or former officer (s-cl. 8(9)). "Officer" is given a wide definition (s-cl. 13) (11;1).

Cl. 14 : Power of magistrate to issue warrant to seize books

51. A magistrate will be empowered to issue a warrant if satisfied that there are, on particular premises, books that have not been produced in compliance with cl. 13 (cl. 14 - based on SIA s. 9).

52. The provisions relating to these warrants are as follows:

(a) This warrant will authorise any member of the Australian Federal Police (in jurisdictions other **than the A.C.T. it will** be the police force of that jurisdiction) and any other person named in the warrant:

(i) to enter those premises (defined widely -see s-cl. 14(8)) ;

(ii) to search the premises;

(iii) to takes possession of any books; and

(iv) to deliver the books to an authorised person (s-cl. 14(1)).

(b) The information laid is to state that the informant suspects that books required to be produced are on these particular premises, and the grounds why the informant so suspects (s-cl. 1.4(2)).

(c) Where a warrant is issued, the magistrate shall state on the information the grounds relied on in justifying the issue of the warrant (s-cl. 14(3)).

(d) The warrant shall state whether entry is authorised at any time, and on what date the warrant ceases to have effect (s-cl. 14(4)).

(e) Liens will not be prejudiced by any action taken under this clause (s-cl. 14(5)).

(f) A person who takes possession of any books under a warrant:

(i) will be able to make copies of them; to require a person who took part in their compilation to make an explanatory statement; and to retain the books for a reasonable period; and

(ii) must permit inspection 'by persons otherwise entitled to inspect them at reasonable times

(s-cl. 14(6)).

Cl. 15 : Offences

53. Failing to comply without reasonable excuse with a requirement made under cls. 13 or 1.4 will be an offence (s-cl. 15(1)). Furnishing a false or misleading statement in purported compliance with cl. s. 13 or 14 will be an offence (s-cl. 15(2)). It will be a defence to s-cl. 15(2) if it is established that the defendant believed on reasonable grounds that the statement was true and not misleading (s-cl. 15(3)). Obstructing or hindering the NCSC or a person acting under cls. 13 or 14, without reasonable excuse, will be an offence (s-cl. 15(4)). The occupier of premises entered pursuant to a warrant must provide reasonable assistance (s-cl. 15(5)). It will be no excuse that an explanation under cls. 13 or 14 might incriminate a person, but where a person claims before making a statement that it may be incriminating the explanation is not admissible evidence in criminal proceedings other than proceedings under this provision (s-cl. 15(6)).

54. Subject to s-cl. 15(6), a statement made by a person in compliance with cls. 13 or 1.4 may be used in evidence in any civil or criminal proceedings against him (s-cl. 15(7)).

Cl. 16 : Copies or extracts to be admitted in evidence

55. In any legal proceeding, a copy of or extract from a book relating to affairs of persons involved in the futures industry is admissible in evidence (s-cl. 16(1) - cl. 16 is based on SIA s.10A).

56. To be admissible, the copy or extract must be proved to be a true copy (s-cl. 16(2)) and this can be proved by a person comparing the copy and the original (s-cl. 16(3)).

Cl. 17 : Privilege

57. A lawyer will be able to refuse to comply with a requirement under cls. 13 or 14 in respect of a book that contains a **privileged communication unless the person to whom** or by or on behalf of whom the communication was made agrees to the lawyer complying. If the lawyer refuses, the lawyer must furnish the NCSC with the name and address of the person to whom or by or on behalf of whom the communication was made, and with sufficient particulars to identify the book (s-cl. 17(1)). Similar protection is afforded to lawyers in respect of statements they are required to make to explain any matter relating to the books (s-cl. 17(2)).

Cl. 18 : Disclosure to NCSC

58. The NCSC will be able to require:

- a) a futures broker to disclose whether or not a dealing in a futures contract was effected on the instructions of another person and, if so, the name of the person and the nature of any instructions given (s-cl. 18(1));
- (b) a person who instructed a futures broker to deal in a futures contract to disclose whether the person gave the instructions as a trustee for a beneficiary and, if so, to disclose the name of the beneficiary and the nature of any instructions given to the trustee (s-cl. 18(2));
- (c) a futures exchange or clearing house to disclose the names of its members who acted, or failed to act, in a particular dealing in a futures contract (s-cl. 18(3));
- (d) any person whom the NCSC believes can give information that may assist it in determining whether to give a direction under cl.55 (to ensure that an orderly and fair futures market is maintained) or in determining whether a person has contravened certain offence provisions, to disclose the information which the person has (s-cl. 18(4)).

59. A person is not excused from disclosing information under s-cl. 18(4) on the ground that the disclosure might be incriminating (s-cl. 18(5)). If, however, a person claims before disclosure that the disclosure might be incriminating, evidence of the disclosure is not admissible in criminal proceedings other than proceedings under cl. 18 (s-cl. 18(6)). Where the NCSC requires a person to disclose information under s-cl. 18(4), the NCSC must give the person a notice in the prescribed form (s-cl. 18(7)).

60. Failure to comply, without reasonable excuse, with an NCSC requirement will be an offence (s-cl. 18(8)). It will also be an offence to disclose information or make a statement that is false or materially misleading (s-cl. 18(9)) unless it is established that the defendant believed the information or statement to be true (s-cl. 18(10)). A person complying or proposing to comply with a requirement made or purporting to have been made under cl. 18 will not incur liability e.g. for defamation or breach of confidence (s-cl. 18(12)).

Cl. 19 : Investigation of certain matters

61. The NCSC will be able to investigate where it suspects that

- (a) an offence under companies and securities legislation or against any other law concerning dealing in futures contracts; or
- (b) an offence relating to futures contracts that involves fraud or dishonesty, may have been committed (Bill cl. 19 - based on SIA s. 13).

Cl. 20 : Power of Court to make certain orders

62. Where it appears to the Supreme Court that a person has committed (or is about to commit) an offence relating to dealing in futures contracts or **has contravened (or is about to contravene)** a condition of a licence, or the business rules of a futures exchange, clearing house or futures association, the Court will be able to make various orders (cl. 20 - based on SIA s. 14).

Division 2 - Investigations

63. Division 2 deals with special investigations by a duly appointed inspector. It is based on SIA ss. 15 to 36.

Cl. 21 : Interpretation

64. There are various special interpretation provisions for the purposes of Division 2 (cl. 21 - cf. SIA s. 15).

65. There are provisions to ensure the NCSC has the necessary powers to conduct special investigations itself as provided for in cl. 22 of the Formal Agreement (s-cl. 21(6) and (5)).

66. Where a special investigation is ordered by an individual Minister, the powers in relation to that investigation will remain vested in that Minister (s-cl. 21(6)).

Cl. 22 : Investigations

67. The powers of the local Minister, the Commonwealth Minister (when read with State application legislation) and the Ministerial Council to order special investigations are set out in s-cl. 22(1) to (3) (cf.. SIA s-secs 16(1) to (3)).

68. The NCSC will be able to request the Minister or the Ministerial Council to order a special investigation (s-cl. 22(4) and (5)).

69. The Ministerial Council will be able to approve a direction of the Minister for a special investigation (s-cl. 22(6)). This reflects the provision for subsequent approvals by the Ministerial Council contained in cls. 17(g) and 18 of the Formal Agreement. It is relevant to the vesting of powers under Division 2 (see the definition of "relevant authority" in s-cl. 21(1)), and the question of who bears the cost of a special investigation in accordance with cl. 18 of the Formal Agreement.

Cl. 23 : Conduct of investigations

70. Cl. 23 deals with the conduct of special *investigations* it is based on SIA s. 17.

71. An instrument of direction:

- (a) must specify the matters to be investigated;
- (b) may require that the investigation be carried out by the NCSC or by an inspector to be appointed by the NCSC; and
- (c) where the investigation is to be carried out by an inspector appointed by the NCSC - may require the inspector to be a specified person appointed on specified terms and conditions.

72. The NCSC will be required to comply with any instrument of direction and to arrange the conduct of the investigation. Depending on the circumstances the NCSC, the relevant Minister or the Ministerial Council decides who will be appointed as inspector and the terms and conditions of that appointment.

Cl. 24 : Powers of NCSC and inspectors appointed under responding laws

73. The NCSC, or a person appointed as an inspector, undertaking a special investigation under the law of a participating State or Territory will be able to exercise all the powers in the jurisdiction as if the investigation had been ordered under the law of the jurisdiction (cl. 24 - based on SIA s. 18).

Cl. 25 : Powers of inspectors

74. An inspector will be able, by notice, to require a prescribed person (defined in s-cl.21(1) as someone believed capable of giving relevant information):

- (a) to produce books relating to the investigation t'zat are in the person's custody or control;
- (b) to give the inspector all reasonable assistance; and
- (c) to appear and answer questions on oath or affirmation

(s-cl. 25(1)).

75. A notice requiring a prescribed person to appear for an examination on oath or affirmation must set out the provisions of s-cl. 25(9) (attendance of lawyer) and (10) (Use of incriminating answers in evidence) (s-cl. 25(2)).

76. An examination under cl. 25 will attract the provisions of Part III of the Crimes Act 1914 which deals with offences relating to the administration of justice such as destroying evidence and giving false testimony (s-cl. 25(3)).

77. Any person normally entitled to inspect the books must be given reasonable access to them while they are held by the inspector (s-cl. 25(4)).

78. A prescribed person will be guilty of an offence:

- (a) if, without reasonable excuse, the person refuses or fails to comply with a requirement of an inspector under s-cl. 25(1);
- (b) if the person provides information or makes a statement that is false or misleading in a material particular; or
- (c) if the person refuses or fails to take an oath or make an affirmation

(s-cl. 25(5) -(8)).

79. A prescribed person will be entitled to have a lawyer represent during an examination. The lawyer will be able to address the inspector and cross-examine the person (s-cl. 25(9)), provided that in so doing the lawyer does not obstruct the examination (s-cl. 25(14)).

80. A prescribed person must answer every question at an examination. Where the prescribed person claims the answer may be incriminating, the answer is not admissible in evidence against the person in proceedings other than under cl. 25 or other proceedings in respect of the falsity of the answer (s-cl. 25(10)).

81. Persons who comply or propose to comply with a requirement made or purporting to be made by an inspector will be protected from actions by third parties based on compliance s-cl. 25(11)).

82. Expenses will be paid to persons attending for an examination (s-cl. 25(12) and (13)).

83. An inspector may certify to the Supreme Court that a prescribed person has failed, without reasonable excuse, to comply with a requirement. The Supreme Court will be able to order the prescribed person to comply with the requirement, or punish the person as if he or she had been in contempt of court (s-cl. 25(16) and (17)). The Supreme Court may take action notwithstanding that the person has been convicted of an offence under cl. 25 (s-cl. 20(18)).

Cl. 26 : Investigation deemed to be a proceeding

84. An investigation under this Division will be deemed to be a proceeding for the purposes of Part V of the Evidence Ordinance 1971 (cl. 26 - based on SIA s. 20). Part. V of the Evidence Ordinance deals with Bankers' Books. Cl. 26 has been included to enable copies of bank accounts, records etc- to be admissible as evidence in proceedings.

Cl. 27 : Record of examination

85. An inspector will be able to make a written record of statements made at an examination (cl. 27 - based on SIA s. 21). A reference in Division 2 to a statement made at an examination includes a reference to a question asked, an answer given, or any other comment or remark made, at an examination (s-cl. 21(2)).

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

- (a) Statements made at an examination of a person may be recorded, and if authenticated will constitute prima facie evidence of those statements (s-cl. 27(1) and (3)). A person examined will be entitled, on request, to a free copy of the record (s-cl. 27(2)).
- (b) The provision will not affect the admissibility in any criminal or civil proceedings of other evidence of statements made in an examination (s-cl. 27(5)).
- (c) The NCSC will be able to give a copy of the record and any related book to a lawyer representing a person conducting or contemplating legal proceedings relevant to matters into which the investigation has been or is being made (s-cl. 27(6)). However, the use of the record or book for other purposes will be prohibited (s-cl. 27(7)).

Cl. 28 : Record to accompany report

87. The record of statements made at an examination must be submitted with the final report of the investigation (cl. 28 - based on SIA s.22).

Cl. 29 : Admissibility of record of examination in evidence in proceedings against person examined

88. The record of examination is generally admissible as evidence against the person examined in any civil or criminal proceedings (cl. 29 - based on SIA s.23). There are exceptions relating to:

- (a) self-incrimination (in criminal proceedings);
- (b) relevance
- (c) the record being misleading by virtue of associated evidence not having been tendered in the proceedings; and
- (d) a statement disclosing matters that could be the basis for a claim of legal professional privilege.

Cl. 30 : Admissibility in other proceedings of statements made at an examination

89. Statements made at an examination will be admissible in any proceedings against other persons. However, such evidence will not be admissible if the party seeking to admit the evidence fails to call the person examined as a witness when asked to do so by the opposing party, unless it is unreasonable, impractical or impossible to call the person as a witness (cl. 30 - based on SIA s.24).

Cl. 31 : Weight of evidence

90. The weight of any evidence admitted under cl. 30 in any proceedings will be judged in the light of any inferences that can be drawn as to its accuracy or otherwise. Circumstances which may give rise to such inferences include:

- (a) the passage of time between a matter occurring and it being dealt with at the examination; and
- (b) the presence or absence of an incentive for the person examined to conceal or misrepresent relevant facts

(cl. 31 - based on SIA s.25).

Cl. 32 : Credibility of person who made statements

91. Where evidence given during an examination is admitted in any proceedings and the person examined is not called as a witness, evidence relevant to the credibility of the person will be admissible. However, there will be a limitation on the admissibility of such evidence if it could be refuted by cross-examination (cl. 32 – based on SIA s. 26).

Cl. 33 : Determination of objection to admissibility of statements

92. A party may, at least 14 days prior to a proceeding, give another party to the proceeding a notice of intention to tender as evidence all or part of the record of an examination. The other party will have a further 14 days (unless extended) in which to object, giving reasons, to the admission of such evidence. The Court may determine the question of admissibility before or during actual proceedings. If a party raises no objection under these provisions, the party may not object to the admission of the record at the hearing. Existing law that would allow evidence to be admitted will be preserved (cl. 33 - based on SIA s. 27).

Cl. 34 : Delegation by inspector

93. An inspector may delegate powers or functions except the **power** to delegate. However, only an inspector that is a State Territory authority can delegate the power to:

- (i) administer an oath or affirmation; or
- (ii) examine on oath or affirmation

(cl. 34 - same as SIA s. 28).

Cl. 35 : Reports of investigations

94. An inspector other than the NCSC will be able to, and if required by the NCSC or relevant authority must, make interim reports to the NCSC or relevant authority and, on completion or termination of the investigation, a final report on his or her opinion of the facts obtained during the investigation. A similar provision applies where the NCSC is appointed as inspector (cl. 35 - same as SIA s. 29).

Cl. 36 : Report of inspector

95. The availability of a report and the initiation of proceedings as a result of a report are dealt with in cl. 31 (based on SIA s. 30).

96. A brief outline of cl. 36 is as follows:

(a) A copy of the report must be given to each person who in the opinion of the NCSC ought to receive a copy by reason that it relates to the person's affairs (s-cl. 36(1)). A report must be withheld if proceedings might be prejudiced (s-cl. 36(2)). A Court will be able to order that a copy of the report or part of the report be given to a person against whom legal proceedings are brought (s-cl. 36(3)).

(b) The Ministerial Council will be able to publish a report if the cost of the investigation is being borne by the NCSC (para. 36(4)(a)). The Minister may likewise publish where the Commonwealth is bearing the cost (para. 36(4)(b)). However, where a Minister or the Ministerial Council receives a certificate from an Attorney-General stating that publication of the report would be prejudicial to the administration of justice, a Minister or the Council must not publish the report (s-cl. 36(5)).

(c) The NCSC will be able to cause a prosecution to be initiated if it appears from a report or examination under this Division that an offence may have been committed (s-cl. 36(6)). The NCSC will be able to order a person (except a likely defendant or his or her lawyer) who may be able to assist with the prosecution to do so (s-cl. 36(7)) and the Supreme Court may direct: a person to comply with such an order (s-cl. 36(8)).

(d) The NCSC will be able to bring proceedings in the name of a person for the recovery of damages in relation to matters connected with an investigation (s-cl. 36(9)).

(e) A copy of an inspector's or an NCSC report purporting to be certified as such by the NCSC is admissible in civil proceedings as evidence of any matters stated in the report to have been found to exist (s-cl. 36(10) and (11) - based on CA s-secs 306(12) and (13)).

Cl. 37 : NCSC' s powers in respect of books

97. An inspector will be able to give the NCSC any books which the inspector has taken possession of under cl. 25. The NCSC will be able:

- (a) to retain the books for such time as is necessary to decide whether to institute proceedings;
- (b) to permit other persons to inspect the books;
- (c) to permit the books to be used in legal proceedings instituted as a result of the investigations.

98. A person otherwise entitled will be able to inspect the books (s-cl. 37(1) - same as SIA s--sec. 31(1)).

99. If the NCSC itself takes possession of books under cl. 25, it has such powers as it would have had if they had been given to it by an inspector under s-cl. 37(1) (s-cl. 37(2) - same as SIA s-sec. 31(2)).

Cl.8 : Privileged communications

100. A lawyer will be entitled to refuse to comply with a requirement by an inspector to reveal privileged communications unless the person to whom, or by or on behalf of whom, the communication was made agrees to the lawyer complying with the requirement. If the lawyer refuses to comply the lawyer is bound (if the lawyer has the information) to provide the name and address of the person involved in the privileged communication (cl. 38 - same as SIA s. 32).

Cl. 39 : Expenses of investigation

101. Subject to certain exceptions (see cl. 18 of the Formal Agreement and s-cl. 39(3) to (7)), the expenses of and incidental to an investigation will be paid by the NCSC (cl. 39 - same as SIA s. 33).

102. A brief outline of the provision is as follows:

- (a) Expenses will include expenses incurred in any proceedings brought in the name of a person (under s-cl. 36(9)) and expenses incurred before a direction is approved by the Ministerial Council (under s-cl. 22(6)) (s-cl. 39(2)).
- (b) Where an investigation has been carried out under Division 2 and proceedings are instituted (under s-cl. 36(9) or otherwise) as a result of the investigation the NCSC will be able to make one or more of the following orders:
 - (i) that a specified person pay, in the time and manner specified in the order, all or part of the expenses of the investigation;
 - (ii) that a specified person reimburse the NCSC in the time and manner specified in the order; or
 - (iii) that a specified person pay, in the time and manner specified in the order, or reimburse the NCSC all or a specified part of the cost of **carrying out the investigation** including the remuneration of any NCSC **employee concerned with** the investigation

(s-cl. 39(3)).

- (c) The NCSC will be able:
 - (i) to order a person to whose of fairs the investigation relates to pay a specified amount (s-cl. 39(4));

(ii) to take proceedings to recover this amount as a debt due I; s-cl. 39(5)).

(d) If a party to the Formal Agreement bears the cost of the investigation, expenses recovered by the NCSC are used to reimburse that party (s-cl. 39(7)).

Cl. 40 : Concealing, &c., of books relating to futures contracts

103. It will be an offence:

- to conceal, destroy or alter a book defined in s-cl. 4(1) that is the subject of investigation; or
- to send or take, or cause the sending or taking of, the book out of the ACT or out of Australia

s-cl.40(1) - same as SIA s-sec. 34(1)).

104. There will be a defence if it is established that the defendant did not act with intent. to defeat the purposes of Division 2 or to delay or obstruct the investigation (s-cl. 40(2) - same as SIA s-sec. 34(2)).

Cl. 41 : Power of NCSC to make certain orders

105. Where it appears that facts relevant to an investigation cannot be ascertained because a prescribed person (i.e. a person believed capable of giving relevant information – see s-cl. 21(1)) has failed to comply with an inspector's requirements, the NCSC will be able to make an order:

- restraining a person from acquiring or disposing of futures contracts;
- restraining the exercise of any rights under futures contracts; or

(s-cl. 41(1) - requiring a person to dispose of the futures contracts - cf. SIA s-sec. 35(1)):

106. Such an order will not prevent a futures exchange or its clearing house closing out ,a futures contract for failure to meet a deposit or margin, call, entering into a liquidating trade in order to close out a futures contract or registering a futures contract in a new name (s-cl. 41(2)).

107. The NCSC will be able 'to vary or revoke such an order (s-cl. 41(3)). An aggrieved person will be able to apply to the Supreme Court to vary or revoke the order (s-cl. 41(5)). Failure to comply with an order will constitute an offence (s-cl. 41(6)).

Cl. 42 : Certain powers not to be delegated

108. The NCSC will not be able to delegate its **power to** appoint an inspector to carry out an investigation, to determine the terms and conditions, or to terminate, such an appointment or to make an order (under cl. 41 where a person fails to comply with the requirement of an inspector). (Cl. 42 - same as SIA s. 36).

Division 3 - Futures Consultative Committee

109. Division 3 of Part II empowers the Ministerial Council to establish a Futures Consultative Committee (cf. Part 1, Ontario Commodity Futures Act 1978).

110. It is envisaged that the Committee:

- (a) would provide the Ministerial Council and NCSC with advice, as requested,, on developments in futures trading and its economic influence;
- (b) would conduct economic analysis of futures trading and consult with participants in the futures industry as required; and
- (c) might consist of futures industry professionals (including brokers, advisers and representatives), representatives of a futures exchange, clearing house or association, market users, and regulatory authorities.

Cl. 43 : Constitution and functions of Futures Consultative Committee

111. The Ministerial Council may establish a Futures Consultative Committee to advise the Ministerial Council and the NCSC on matters related to the futures industry. The Committee will consist of a Chairman and such other members as the Ministerial Council thinks fit (s-cl. 43(1)).

112. In the absence of a Chairman the NCSC must appoint a temporary Chairman (s-cl. 43(2);1. Members of the Committee:

- (a) hold office during the pleasure of the Ministerial Council;
- (b) may resign in writing; and
- (c) will be unpaid except for reasonable expenses for attending Committee meetings and transacting the business of the Committee

(s-cl. 43(3)).

Cl. 44 : Meetings of Futures Consultative Committee

113. The Futures Consultative Committee is to meet at the direction of the Ministerial Council or the NCSC and may meet as occasion requires (s-cl. 44(1)). The Chairman must preside at meetings (s-cl. 44(2)) and the procedure at meetings will be determined by the members present (s-cl. 44(3)).

FUTURES INDUSTRY BILL : PART III : FUTURES EXCHANGES, CLEARING HOUSES AND FUTURES ASSOCIATIONS

114. Part III (cls. 45 to 59) deals with the approval and regulation of futures exchanges, clearing houses and futures associations. At present there are two futures exchanges in Australia the SFE and the Stock Exchange of Melbourne ('SEM'). ICCH provides clearing facilities for both of these exchanges. In the same way as existing stock exchanges were not required obtain approval in each of the States in the securities Industry legislation, it is proposed to deem the SFE and the SEM to be futures markets in the relevant State futures industry legislation. Likewise, ICCH will be approved in the relevant State legislation as a clearing house for the SFE and the SEM.

115. 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 the SEM.

Cl. 45 : Establishment of futures markets

116. Bill cl. 45 provides as follows:

- (a) It will be an offence to establish, maintain or provide a futures market that is neither a futures market of a futures exchange nor an exempt futures market (s-cl. 45(1)). The penalty for a breach of s-cl. 45(1) will be \$20,000 or imprisonment for 5 years, or both for an offence committed by an individual, and \$50,000 in any other case.
- (b) The Ministerial Council will be able to declare that a specified futures market is an exempt futures market (s-cl. 45(2)).
- (c) The Ministerial Council 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 a condition specified in the declaration (s.-cl. 45(3)).

Cl. 46 : Power of Ministerial Council to approve futures exchange

117. A body corporate that proposes to establish or maintain a futures market must lodge an application with the NCSC for approval by the Ministerial Council as a futures exchange (s-cl. 46(1)).

118. The Ministerial Council will be able to approve a body corporate as a futures exchange if it is satisfied that it is in the public interest to do so and that its business rules make satisfactory provision for a number of matters including:

- (a) the admission of members;
- (b) the standards of training and experience for membership;
- (c) the manner in which members are to conduct their business of dealing in futures contracts to ensure efficiency, honesty and fair practice;
- (d) the exclusion from membership of a person who is not of good character and high business integrity;
- (e) the disciplining of members for improper conduct;
- (f) for persons aggrieved by a refusal of a membership application etc to appeal to an independent body;
- (g) the inspection and audit of members' accounting records;
- (h) futures contracts that members may deal in;
- (i) requiring a member to accept or execute instructions to deal in futures contracts only in accordance with the business rules;
- (j) requiring a member to deal in futures contracts on behalf of another person only in accordance with instructions accepted from the person;
- (k) 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 cl. 128);
- (l) 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 cl. 123);
- (m) the settlement of business claims and grievances between members; and
- (n) the conciliation and settlement of member/client disputes concerning dealings in futures contracts.

(s-cl. 46(2)).

Cl. 47 Provision of clearing house facilities

119. It will be an offence to provide clearing house facilities for a futures market without Ministerial Council approval (cl. 47). 'Clearing house' and 'clearing house facilities' are defined in s-cl.4(1).

Cl. 48 : Power of Ministerial Council to approve clearing house

120. Bill cl. 48 provides as follows:

- (a) A body corporate proposing to provide a clearing house facilities for a futures market of a futures exchange must apply to the NCSC for approval by the Ministerial Council (s-cl. 48(1)).
- (b) The Ministerial Council will be able to approve a body corporate as a clearing house for a futures exchange if its business rules are satisfactory and the public interest will be served by granting approval (s-cl. 48(2)).

(c) One of the matters which the Ministerial Council may have regard to in considering an application for approval as a clearing house is any business rules of the applicant relating to the guaranteeing to its members the performance of futures contracts made on a futures market of the applicant

(s-cl. 48(3)0.

Cl. 49: Publication of instruments executed under section 45, 46 or 48

121. The NCSC will be required to publish in the Gazette a copy of an instrument executed by the Ministerial Council under cls.45, 46 or 48.

Cl. 50 : Power of Ministerial Council to approve futures association

122. Any futures association approved by the Ministerial Council (s-cl.50(l)) 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, a futures exchange or a local recognised futures exchange (see s-cl. 69(2)). The first and second exposure drafts of the legislation required membership of an association as a pre-requisite to obtaining a futures **broker's licence**. The Bill widens the categories to include a futures exchange or local recognised futures exchange. This alteration has been made because entities such as the SFE and the SEM, which already have the dual functions of providing a market and regulating their members, would have had to seek oval as futures associations to carry out a function that already perform. It is envisaged that self regulatory organisations, concerned solely with the regulation of their members, may develop and these entities will be able to seek approval as a futures association.

123. The Ministerial Council may approve a body corporate as a futures association if it is satisfied that:

- (a) it 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;
- (b) 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 licensed under Part IV);
 - (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 from membership of a person who is not of good character and high business integrity;
 - (v) the disciplining of members for improper conduct;
 - (vi) for persons aggrieved by a 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 cl. 128);

(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 futures market (see also cl. 128);

(xii) the equitable and expeditious settlement of members' claims and grievances relating to the transaction of futures business;

(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);

(d) that the public interest will be served by granting the approval.

(s-cl. 50(2)).

Cl. 51 : Suspension or cancellation of approval

124. The Ministerial Council may require a futures association to show cause at a hearing before a designated person why its approval should not be suspended or cancelled (s-cl. 51(1)).

125. After giving a futures association an opportunity to be heard, the person designated in the notice must submit to the Ministerial Council a report in relation to the hearing (if any) and a recommendation in relation to the matter. The Ministerial Council may decide to take no further action, suspend the approval of a futures association or cancel its approval (s-cl.51(3)). If it is suspended, a futures association will be deemed not to be approved as a futures association during the period of its suspension (s.-cl. 51(4)).

Cl. 52 : Notification of approval etc., of futures association

126. A notice of the approval of a futures association, and the suspension or cancellation of the approval of a futures association will be published in the Gazette (s-cl., 52(l)).

Cl. 53 : Appeal to the Court against certain decisions of futures exchange and futures associations

127. Where a person who is not a member of a futures exchange, a local recognised futures exchange or a futures association is refused membership of a futures exchange or futures association, there will be a right of appeal. to the Supreme Court. In addition, where a person's membership of a futures exchange or futures association is suspended or cancelled and at the time of suspension or cancellation the person is not a member of any other exchange, local recognised exchange or association, that person will be able to appeal to the Supreme Court (s-cl.53(1)).

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

129. Examples are as follows:

(a) Where a person who is already a member of an. exchange or association is suspended from that organisation, there will be no right of appeal to the Supreme Court in respect of the refusal of an application by that person for membership of another exchange or association (para. 53(2)(a)).

(b) Where a member is suspended by one or more exchange or association, a suspension by the only remaining exchange or association of which, that person is a member will be subject to appeal (para. 53(2)(b)).

130. Stated briefly, the! effect of Bill s-cl.53(1) and (2) is to provide a right of appeal to the Supreme 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.

131. Where a person appeals to the Supreme 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 f[^]-cl.53(4)).

132. 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.

(s-cl. 53(5)).

133. Where the Court varies the decision of a futures association the Court's decision has effect as a decision of the futures association (s-cl. 53(6)).

Cl. 54 : NCSC to be notified of amendments to business rules

134. The NCSC must be notified of any amendments to the business rules of a futures exchange, clearing house or futures association (cl. 54 - based on SIA s. 39).

135. A brief outline of these provisions is as follows:

- (a) An amendment will cease to have effect: if it is not notified within 21 days (s-cl. 54(3)).
- (b) The NCSC must send a copy of the notification to each member of the Ministerial Council (s-cl. 54(4)). The Ministerial Council may disallow all or part of an amendment within 28 days (s-cl. 54(5)).
- (c) The NCSC is 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 (s-cl. 54(6)).

Cl. 55 : Orderly markets in futures contracts - functions and powers of futures exchanges and clearing houses

136. 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 (s-cl. 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 (s-cl.55(2)). Failure to comply with such directions will not be an offence (but may for example give rise to civil action under cl. 157) (s--cl.55(3)).

Cl. 56 : Orderly markets in futures contracts - powers of the N CS C

137. Before taking action under this provision the NCSC must consult the futures exchange and clearing house (s-cl. 56(3)) but failure to do so will not affect any subsequent NCSC determination or direction (s-cl. 56(4)). (Note that under cl. 57 the exchange and clearing house are :required to provide reasonable assistance to the NCSC.)

138. The NCSC must then 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 (para 56(2)(a)). The NCSC must give the futures exchange and clearing house notice of its determination and the direction it considers should be given (paras 56(2)(b) - (d)).

139. As soon as practicable after giving this notice, the NCSC must give the Ministerial Council a copy of the notice and a written report setting out reasons for giving the notice. The NCSC must give a copy of the report to the futures exchange and clearing house (s-cl. 56(5)).

140. The NCSC will then be able to give written directions to futures exchange unless the Ministerial Council has directed the NCSC not to or the exchange has acted as if a direction had been given (s-cl. 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 a futures contracts; or a class of those dealings (s-cl. 56(1)).

141. As soon as practicable after giving a direction the NCSC must give the Ministerial Council and clearing house a copy and direct the clearing house to act in accordance with the direction (s-cl. 56(7)).

142. Unless the Ministerial Council determines otherwise (s-cl. 56(8)), a direction given by the NCSC remains in force, unless sooner revoked, for 21 days or such shorter period as is specified by the NCSC (s-cl. 56(9)). It is an offence for a futures exchange or clearing house to fail to comply with a direction (s-cl. 56(10) and (11)).

Cl. 57 : Futures exchange's and others to assist NCSC

143. A futures exchange, clearing house and a futures association must assist the NCSC in the performance of its functions (s-cl. 57(1) - cl. 57 is based on SIA s.41). Any disciplinary action taken by a futures exchange or clearing house against a member and certain disciplinary action taken by a futures association against a member must be notified to the NCSC (s-cl. 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 must notify the NCSC forthwith (s-cl. 57(3)). A person authorised by the NCSC is entitled to access to the futures exchange floor (s-cl. 57(4)). It will be an offence to refuse to allow a person authorised by the NCSC to have access to the trading floor (s-cl. 57(5)).

Cl. 58 : Power of Court to order observance or enforcement of business rules of futures exchange, clearing house or futures association

144. The Supreme Court will be able to give directions, on the application of the NCSC, 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 business rules of a futures exchange, clearing house or futures association (cl. 58 - based on SIA s.42).

Cl. 59 : Effect of certain laws or certain agreements

145. A contravention of the Bill affects neither the validity nor the enforcement of an agreement (s-cl.59(1) - note that 'agreement' is defined in s-cl..5(1)). Thus, for example, a breach of any provision of the Bill will still enable a client or a futures broker to enforce an agreement to the extent that it is legally enforceable.

146. A futures contract is not a contract by way of gaming or betting (and therefore not void under State and Territory gaming and betting legislation) if it is made:

- (a) on a market declared by the Ministerial Council to be an exempt futures market (see s-cl. 45(2));
- (b) on a futures market of a futures exchange or of a recognised futures exchange; or
- (c) as permitted by the business rules of a futures association, futures exchange or recognised futures exchange.

(s-cl. 59(2)).

FUTURES INDUSTRY BILL : PART IV : LICENCES

147. The Bill proposes a licensing system similar to that currently operating under Part IV of the SIA. However, it is proposed to defer bringing into operation the provisions in the Bill concerning the licensing of representatives pending the outcome of the NCSC review of licensing under the SIA (see cls. 60, 62 and 64).

Cl. 60 : Proclaimed day

148. A reference in Bill Part IV to the proclaimed day is a reference to a day to be fixed by Proclamation (cl.60). This provision is relevant for the purposes of cls. 62 and 64, dealing with the licensing of representatives. As mentioned in para. 147 above, it is proposed to defer bringing into operation the representatives' licensing provisions pending the outcome of the NCSC review of licensing.

Cl. 61 : Futures broker's licence

149. After the legislation has been in force 6 months, a person will be prohibited from dealing in a futures contract on behalf of another or from carrying on a business of dealing in futures contracts on behalf of others unless the person is an exempt broker, has a futures broker's licence or is a recognised futures broker (cl. 61).

150. The prohibition on dealing in futures contracts unless an exempt broker, the holder of a futures broker's licence or a recognised futures broker should be read in conjunction with cl.128 which specifies the manner in which dealings in **futures contracts on behalf of others may be effected**.

Cl. 62 : Futures broker's representatives

151. Six months after the proclaimed day (:see cl. 60), a person employed by, or acting for or by arrangement with a futures broker (other than an exempt broker) will be prohibited from acting on behalf of the broker without a licence (cl. 62 based on SIA s.44).

Cl. 63 : Futures advisers

152. After the legislation has been in force 6 months, a person will be prohibited from acting as a futures adviser without a futures adviser's licence or unless the person is a recognised futures adviser (s.-cl. 63(1) - cl. 63 is based on s.45).

153. The prohibition will not apply to the holder of a futures broker's licence, an exempt broker or a recognised futures broker (s-cl. 63(2)).

Cl. 64 : Futures adviser's representatives

154. Six months after the proclaimed day (see cl. 60), a person employed by or acting on behalf of a futures adviser (other than an exempt broker) will be prohibited from acting on behalf of the futures adviser without a licence (cl. 64 based on SIA s. 46)

65 : Application for grant: of licence

155. An application for a licence must be made to the NCSC (cl. 65 - based on SIA s.47).

Cl. 66 : Grant of futures broker's licence or futures adviser's licence

156. The NCSC shall grant a futures broker's licence or a futures adviser's licence if among other things:

- (a) where the applicant is a natural person:
 - (i) the applicant is not an insolvent under administration;;
 - (ii) the applicant has not been convicted during the last ten years of an offence of fraud or dishonesty punishable by imprisonment;

- (iii) the applicant for a futures broker's licence is a member of a futures exchange, local recognised futures exchange or futures association;
 - (iv) the NCSC is satisfied as to the applicant's educational qualifications or experience;
 - (v) the NCSC has no reason to believe that the applicant is not of good fame and character; and
 - (vi) the NCSC has no reason to believe that the applicant will not perform the duties of a holder of a futures broker's licence or a futures adviser's licence efficiently, honestly and fairly;
- (b) where the applicant is a body corporate:
- (i) it is not under official management or in the course of being wound up;
 - (ii) it is not a body corporate in respect of property of which a receiver, or a receiver and manager, has been appointed;
 - (iii) if the body corporate is applying for a futures broker's licence, it is a member of a futures association;
 - (iv) it has not entered into a compromise or scheme of arrangement with its creditors and that compromise or scheme of arrangement is still in operation;
 - (v) the NCSC is satisfied as to the educational qualifications or experience of its officers who are to perform duties in connection with the holding of the futures broker's licence or futures adviser's licence; and
 - (vi) the NCSC has no reason to believe it will not perform the duties of a holder of a futures broker's licence or a futures adviser's licence efficiently, honestly and fairly

(s-cl. 66(1)).

157. The NCSC must not refuse an application for a licence on the ground that the applicant or the officers have insufficient qualifications or experience or are inefficient or of bad character unless it has afforded the applicant an opportunity to appear at a private hearing and make submissions and give evidence (s-cl. 66(2)).

Cl. 67 : Grant of representative's licence

158. If the NCSC has no reason to believe that the applicant for a representative's licence will not act efficiently, honestly and fairly it must grant such a licence. Otherwise, the NCSC shall, subject to the applicant being afforded an opportunity to appear at a hearing, refuse the application (s-cl. 67(1) - cl. 67 is based on SIA s.49). The NCSC must not refuse an application unless the applicant has been given an opportunity to appear at a private hearing and make submissions and give evidence (s-cl. 67(2)).

159. A futures broker's representative's licence must specify the licensed broker or brokers on whose behalf the representative may act (s-cl. 67(3)) and a futures adviser's representative's licence must specify the licensed futures adviser or advisers on whose behalf the representative may act (s-cl. 67(4)). A representative's application for a licence may refer to a business name where 2 or more persons constitute the futures broker or futures adviser (s-cl. 67(5)).

Cl. 68 : Change of principals of representative

160. The holder of a representative's licence will be able to apply to the NCSC to alter the name of the broker or futures adviser on whose behalf he or she may act (s-cl. 68(1) -cl. 68 is based on SIA s.50).

Cl. 69 : Conditions to which licence is subject

161. A licence granted by the NCSC may be subject to such conditions and restrictions as are prescribed, or as the NCSC imposes (cl. 69 - based on SIA s.51). For a futures broker, the conditions include a requirement that the licensee

be a member of at least one futures exchange, local recognised futures exchange or futures association (s-cl.69(2)). Where a person's only membership is suspended:

- (a) the effect of para.69(3)(a) is that the person is not in breach of the licence condition in para.69(2)(a) and thus the NCSC would not be able to revoke a licence in such a case; and
- (b) the effect of para.69(2)(b) and para.69(3)(b) is that the licence is suspended during the period of suspension of membership.

162. Conditions and restrictions may relate to:

- (a) the limitation of liability that may be incurred by a futures broker in the broker's futures business and the incurring or disclosure of liabilities arising from non-futures business (para s 69(4)(a) and (b)); and
- (b) the financial position of a futures broker (para 69(3)(c));

163. The conditions relating to the financial position of a futures broker (see para 69(4)(c)) may include a condition that

- (a) the broker's assets include or do not include a particular kind of asset (para 69(5)(a)); and
- (b) the value of particular assets be not less or not greater than an amount ascertained in accordance with that condition (para 69(5)(b)). (Various methods of determining the value of the amount are also specified - s-cl. 69(6) and (7)).

164. Other provisions relating to conditions and restrictions are as follows:

- (a) The reference to assets is to all assets, not merely those used in connection with futures business (s-cl.69(7)).
- (b) Subject to giving an opportunity for hearing, the NCSC will be able to vary conditions or restrictions it has imposed (s-cl.69(9)).
- (c) The NCSC must notify each futures exchange, local recognised futures exchange and futures association of which a futures broker is a **member** and each clearing house for a futures exchange or local recognised futures exchange of which the broker is a member when it imposes, varies or revokes conditions or restrictions in the broker's licence. (s-cl.69(10)).

Cl. 70 : Holder of licence to notify prescribed bodies of each of condition or restriction applicable to licence

165. A licensee must notify the NCSC and each futures exchange, local recognised futures exchange and futures association of which the licensee is a member within one business day of a breach of a condition or restriction (s-cl. 70(1)). A defence is provided in s-cl. 70(2).

Cl. 71 : Furnishing of information and statements to NCSC

166. The holder of a futures broker's licence must furnish written statements in respect of the broker's business to the NCSC if required (s-cl. 71(1)). The NCSC will be able to acquire such a statement to be audited (s-cl. 71(2)).

Cl. 72 : Register of Licence Holders

167. The NCSC must keep a Register of Licence Holders (cl. 72 based on SIA s.54). The information to be entered in the register is set out in s-cl. 72(2).

Cl. 73 : Notification of change in particulars

168. The holder of a licence must notify the NCSC 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. 73 - based on SIA.55).

Cl. 74 : Annual statement to be lodged with the NCSC

169. The holder of a futures broker's licence or a futures adviser's licence must lodge with the NCSC each year a statement containing prescribed information (s-cl. 74(1) -cl. 74 is based on SIA s.56).

Cl. 75 : Time for lodging annual statement

170. The annual statement by a licensee must be lodged:

- (a) by the holder of a broker's licence - when the profit and loss account and balance sheet referred to in cl. 95 are required to be lodged (para 75(a));
- (b) by the holder of a futures adviser's licence - within one month before the anniversary of the date on which the licence was granted (para 75(b)) ; and
- (c) by a representative -- within the period prescribed after the date referred to in s-cl. 74(2) (para 75(c)).

(cl. 75 - based on SIA s.57).

Cl. 76 : NCSC may extend period for lodging statement

171. The NCSC will be able to extend or further extend the period for lodging a statement under cl. 74, even if the period has expired (cl. 76 - based on SIA s.58).

Cl. 77 : Revocation and suspension of licences

172. The NCSC will be able to revoke a licence without giving the licensee an opportunity to be heard (see para. 80(a)) in a number of situations including:

- (a) insolvency or conviction of an offence involving fraud or dishonesty;
- (b) where the holder is a body corporate, if it enters a scheme of arrangement;
- (c) where the holder fails to lodge an annual statement or accounts under cls. 74, 75 or 95; or
- (d) where the holder requests.

173. The NCSC will also be able to revoke a futures broker's or futures adviser's licence of a body corporate without a hearing where a director, secretary or person concerned in its management does not hold a licence or his or her licence has been suspended (s-cl. 77(2)).

174. The NCSC will be able to suspend rather than revoke a licence it is considers it desirable to do so (s-cl. 77(3)).

175. A representative will be prohibited from acting on behalf of a futures broker or futures adviser whose licence has been revoked or suspended (s-cl. 77(4)).

Cl. 78 : Further provisions relating to revocation and suspension of licences

176. The NCSC will also be able to revoke a licence in certain circumstances provided that the licensee is given an opportunity for hearing under cl. 80 (cl. 78 - based on SIA s.60). A person 'aggrieved' by such a revocation also has; certain rights of appeal (see cl. 141).

177. A brief outline of cl.. 78 is as follows:

- (a) The NCSC will be able to revoke a licence (subject to cl. 80) if:
 - (i) the licensee contravenes a condition in the licence;

(ii) the NCSC has reason to believe that a licensee has not performed the duties of a licensee efficiently, honestly and fairly; or

(iii) the application for the licence contained materially false or misleading matter or omitted material matter.

(b) The NCSC will be able to suspend rather than revoke a licence where there has been a failure to comply with a condition (s-cl. 78(2)).

(c) The NCSC will be able to apply to the Supreme Court for an order disqualifying the person from holding a licence either permanently or for such period as the Court specifies (s-cl. 78(3)). The Court will be able to make such order as it thinks fit which it may revoke or vary at any time (s-cl. 78(4)).

(d) A person disqualified from holding a particular licence under a corresponding law is deemed to be disqualified from holding a similar licence under this legislation (s-cl. 78(5)).

Cl. 79 : Holder of licence to be deemed not to be holder while licence suspended

178. The holder of a licence will be deemed for the purposes of cls. 61-64 not to be the holder for any period during which the licence is suspended (cl. 79 - based on SIA s.161).

Cl. 80 : Opportunity for hearing

179. The NCSC is prohibited from revoking or suspending a licence (except under cl. 77) or imposing or varying conditions on a licence unless it has given the holder or applicant an opportunity to appear at a private hearing and make submissions and give evidence (cl. 80 - based on SIA s.62).

FUTURES INDUSTRY BILL : PART V : CONDUCT OF FUTURES BUSINESS

180. Part V of the Bill (cls. 81 to 87) deals with the conduct of futures business.

Cl. 81 : Certain representations prohibited

181. A licence holder will be prohibited from representing that his or her abilities or qualifications have been approved by the NCSC (s-cl. 81(1) - cl. 81 is based on SIA s.63). A statement that a person holds a licence will not contravene the provision (s-cl. 81(2)).

Cl. 82 : Undesirable advertising

182. Where, having regard to past, present or proposed conduct, the NCSC considers it is in the public interest to do so, it may serve an order on a person prohibiting the publication of statements relating to futures contracts or to the carrying on of futures business unless the NCSC has first approved the form and content of the statements (s-cl. 82(3)). Failure to comply with an NCSC order will be an offence (s-cl. 82(5)).

183. Before the NCSC can 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 (s-cl.82(4)).

184. The term "publish", where used in cl. 82, is widely defined to include press, radio and TV advertisements,, billboard advertising and advertising circulars (s-cl.. 82(1)).

Cl.83 : Issue of contract notes

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

186. A contract note must be issued forthwith by a futures broker or the personal representative of a deceased 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);

(S-cl. 83(1) and (2)).

187. A futures broker or the personal representative of a deceased futures broker will not be required to give a contract note to the holder of a futures broker's licence or a recognised futures broker (s-cl. 83(3)).

188. A contract note in respect of a futures contract transaction (other than a transaction in relation to a futures option or a prescribed exchange-traded option) must include the particulars set out in s-cl.83(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 or abbreviation of the futures exchange, recognised 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.

189. A contract note in respect of the acquisition or disposal of a futures option must include the particulars set out in s-cl.83(5) and a contract note in respect of the acquisition or disposal of a prescribed exchange--traded option must include the particulars set out in s-cl. 83(6).

190. A futures broker must not include in a contract note a name that the broker knows is not the name of the person with whom the broker has entered the transaction (s-cl.83(7)).

Cl. 84 : Futures broker to furnish monthly statement to client

191. In order to keep a client informed, a futures broker or the personal representative of a deceased 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 (para.. 84(2)(a)); or
- (b) an open position at the end of the month in a futures contract acquired on behalf of the client (para 84(2)(b)).

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

- (a) the opening cash balance for the month in the client's account (para 84(2)(d));
- (b) the cash balance at the end of the month (para 84(1)(f)); and
- (c) 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 (para. 84(2)(g)).

193. 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 must specify certain matters including:

- (a) the opening and closing cash balance 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.

(s-cl. 84(3)).

Cl. 85 : Dealings by futures broker on own account

194. 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 (cl. 85).

195. 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 (s-cl. 85(1)). The records must be in English or be readily convertible into English (s-cl. 85(2)).

196. Sub-clause 78(3) of the first exposure draft (the earlier version of what is now Bill s-cl.85(3)) prohibited a futures broker knowingly taking the other side of a client's order except with the client's consent. It was modelled on sections 155(2)(c) and 155(3)(b)(2) of the U.S. Commodity Futures Trading Commission Regulations and section 26.31 of the Toronto Exchange By-Laws. Its purpose was to resolve the conflict of interest which arises when a broker takes the other side of a client's order in circumstances which might be against the client's interest.

197. In general, there will not be a problem because trades will be done in accordance with Exchange rules and will be subject to the competitive bidding process. Hence the importance of the word "knowingly". It will not be necessary for the broker to obtain the client's consent where the broker's and the client's orders meet on the floor of the Exchange and the transactions are governed by Exchange rules concerning trading floor procedures. In "after-hours" trading, however, the transactions are not subject to the competitive bidding process of the market. To resolve any possible conflict of interest in such circumstances it is considered necessary for the broker first to obtain the consent of the client before the broker takes the other side of the client's order.

198. A futures broker will be prohibited from knowingly taking the other side of a 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 broker deals in a futures contract on the instructions of an associate - see s-cl. 4(7) (s-cl. 85(3)).

199. For the purposes of s-cl. 85(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 (s-cl. 85(4)).

Cl. 86: Segregation of client money and property

200. The practices of the SFE and the ICCH make the trust account an impracticable method of protecting clients' moneys. The clearing house deals with the floor member on a principal to principal basis and makes no distinction between contracts of the floor member and contracts of the floor member's clients. Accordingly, when the clearing house calculates the deposit and margin calls with respect to any floor member, it has regard to the net position of all contracts registered with it by that floor member. When funds are paid by the floor member to the clearing house in response to deposit and margin calls it is not possible to trace funds received from any particular client as passing to the clearing house. So far as the clearing house is concerned, the mechanism for calculating deposits and margins and the procedure for dealing with such funds upon receipt will remain unchanged. However, the mechanism by which the floor member calculates and pays such deposits and margins and deals with funds of clients will be directly affected by cl.86.

201. Where money or property, (other than property that is delivered in accordance with a futures contract - see cl.84) is deposited with the licensed broker by or on behalf of the client, the broker will be required to deposit the money in a clients' segregated account and the property in safe custody (s-cl. 86(2)).

202. Cl.86 will apply only to money or property of bona fide clients. For the purposes of cl.86, "client" will not include:

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

(s-cl. 86(1) - definition of "client").

203. The clients' segregated account referred to in cl.86 will be required to be kept with a bank, be designated as a clients' segregated account and not contain money other than money deposited pursuant to cl.86 (s-cl. 86(1) - definition of "clients' segregated account").

204. The property of a client that may be deposited with a futures broker under cl.86 will include credit facilities and securities (s-cl. 86(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. "Securities" will have the same meaning as in the SIA (s-cl. 86(1)).

205. 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 (s-cl. 86(4)).

206. 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 from 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 s-cl. 86(1) to include making delivery, or taking delivery, of a commodity to which a futures contract relates);
- (c) defraying brokerage and other proper charge; 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 s-cl. 86(10) and (11), discussed below)

(s-cl. 86(5) and (6)).

207. 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 (s-cl. 86(8);I.

(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

(s-cl. 86(9)) .

208. A futures broker will not be able to deal with property deposited in safe custody pursuant to s-cl. 86(2) otherwise than in accordance with the terms and conditions on which the property was deposited with the broker (s-cl. 86(7)).

209. Where the total of a client's relevant liabilities obtained in s-cl. 86(1)) exceed the client's relevant credit balance (defined in s-cl. 86(1)), the broker may deposit money in a clients' segregated account sufficient to make up the shortfall (s-cl. 86(10)). Money so deposited is deemed to be money to which the client is entitled (s-cl.86(10)) except that once the shortfall is made up the broker may withdraw any excess funds from the account (s--cl.86(11)).

210. 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

(s-cl. 86(12)).

211. A futures broker will also be required to keep records of property deposited pursuant: to s-cl. 86(3) and to keel) separate records of each client's property (s-cl. 86(7.3)). The records required by s-cl. 86(12) and (13) will be required to adhere to the requirements of cl. 90 (accounts to be kept by futures brokers) so far as cl. 90 is capable of application (s-cl. 86(14)).

212. Money in a clients' segregated account, property in which such money has been invested and property deposited in safe custody pursuant to s-cl. 86(2) is not available for the payment of the debts or liabilities of the broker (s-cl. 86(15)). This does not, however, affect the right of ,3 client to recover money or property to which the client is entitled (s-cl. 86(16)) or prevent the broker withdrawing money from the account to which the broker is entitled (s-cl. 86(17)).

213. Where a futures broker invests client money from a clients' segregated acocunt, 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 (s-cl. 86(18)).

214. Cl. 86 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 (s-cl. 86(19)).

Cl. 87 : Futures broker to give certain information to prospective clients

215. At present, the rules of the SFE require members to warn clients of the risks of futures trading (see SFE Articles 3.6(d) and 4.6(d) and first schedule, Part B). 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.

216. 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.

(cl. 87).

FUTURES INDUSTRY BILL : PART VI : ACCOUNTS AND AUDIT

217. Part VI (cls. 88 to 104) deals with the accounts to be kept by the holder of a futures broker's licence and with the auditing and supervision of those accounts. The application of this Part is dealt with in cl. 89.

Cl. 88 : Interpretation

218. A reference in Part VI 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. 88 - based on SIA s.69).

219. The purpose of this clause is to ensure that Part VI applies to the partnership in which a futures broker carries on business as a partner as well as to the individual futures broker.

Cl. 89 : Application of Part

220. Part VI will apply to or in relation to the holder of a futures broker's licence and to the business of dealing in futures contracts carried on by the licence holder. It will not apply to a recognised futures broker or to that broker's business, which will be regulated under the corresponding Part of the law of the relevant participating State or Territory.

221. Part VI of the proposed futures industry legislation will not affect the operation of CA Part VI (dealing with a company's accounting and auditing obligations) in relation to a company which holds a futures broker's licence (cl. 89 - based on SIA s.70).

Cl. 90: Accounts to be kept by futures brokers

222. A brief outline of cl. 90 is as follows:

- (a) A futures broker must keep accounting records that correctly record and explain the transactions and financial position of the broker's futures business. A futures broker must keep accounting records that enable true and fair profit and loss accounts and balance sheets to be made up and conveniently audited (s-cl. 90(1)).
- (b) These accounting records must be in English or readily convertible into English and must be kept in sufficient detail to show particulars of the matters set out in paras. 90(2)(b)-(e) (s-cl. 90(2)).

- (c) In respect of a discretionary account on which the futures broker operates, the broker must keep records in sufficient detail to show the particulars required to be furnished to the client in order to comply with s-cl. 84(3) - see para 193 of this explanatory memorandum (s-cl. 90(3)).
- (d) A futures broker must also 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 within and outside the Territory, and the broker's employees and representatives (s-cl. 90(4)).
- (e) An entry in the records will be deemed to have been made by or with the authority of the futures broker (s-cl. 90(5)).
- (f) If required, a futures broker must convert a record not kept in English into English within a reasonable time (s-cl. 90(6)).
- (g) If records are kept outside the A.C.T. the broker must send to and keep in the A.C.T. such particulars as will enable true and fair profit and loss accounts and balance sheets to be prepared (s-cl. 90(8) - similar provisions in the application legislation will ensure that these particulars are kept in the 'home' jurisdiction of any futures broker). If required by the NCSC to produce such records in the A.C.T., the broker must comply within 14 days (s-cl. 90(9) - based on CA s-sec. 267(4)).

Cl. 91 : Property in custody of futures broker

123. A brief outline of cl. 91 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 shall:
 - (i) if so requested, deposit it in safe custody at a bank; or
 - (ii) deposit it in accordance with the futures exchange business rules

(s-cl. 91(1)). t

- (b) If an amount is owed to a futures broker by the client, the broker may 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 (s-cl. 91(2)). Where money owed to the broker is paid by the client, the broker must, at the client's request, broker from redepositing the property as permitted by s-cl. 91(2) (s-cl. 91(3)).
- (c) If the property is maintained as security for more than 3 months the futures broker must give the client written notice of this fact, and at 3 monthly intervals thereafter (s-cl. 91(4)).

Cl. 92 : Appointment of auditor by futures broker

224. A person who holds a futures broker's licence (other than a bank) will be required to have an auditor (cl. 92 - based on SIA s.75). A brief outline of cl. 92 is as follows:

- (a) A futures broker (other than a bank) must appoint an auditor within one month of becoming a licence holder (s-cl. 92(1)). The appointment of an auditor must be notified to the NCSC within 14 days (s-cl. 92(12)).
- (b) A person or firm cannot be an auditor unless certain conditions set out in s-cl. 92(2) and (3) are satisfied. The appointment of a firm as auditor is taken as the appointment of all members of the firm (s-cl. 92(8)) and a newly constituted firm (due to death or retirement etc.) is deemed to be appointed as auditor if not disqualified by s-cl. 92(3.1) (s-cl. 92(9)).
- (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 (s-cl. 92(13)).

- (d) A person will be prohibited from knowingly disqualifying himself or a firm (if he is a member) from acting as auditor of the futures broker (s-cl. 92(14)).
- (e) An auditor will hold office until death, removal, resignation or incapacity (s-cl. 92(15)).
- (f) If there is no surviving or continuing auditor, a futures broker must appoint an auditor within 14 days (s-cl. 92(16)).
- (g) The provisions of cl. 85 will not apply to a body corporate (other than an exempt proprietary company) in relation to which CA s. 280 applies. (CA s. 280 deals with the appointment of auditors by a company) (s-cl. 92(19)).

Cl. 93 : Removal and resignation of auditors

125. Cl. 93 deals with the removal and resignation of a futures broker's auditor (based on SIA s. 76).

126. A brief outline of cl. 93 is as follows:

- (a) A futures broker will be able to remove an auditor if the NCSC consents (s-cl.93(1)). An auditor will be able to resign if the NCSC consents (s-cl.93(2)).
- (b) A statement made in an application by an auditor or in answer to an inquiry by the NCSC is not admissible evidence in civil or criminal proceedings (except in relation to cl. 7_42, which deals with the offence of false or misleading statements) and may not be the ground of a prosecution (other than in relation to cl. 142) (s-cl.93(4)).
- (c) where, on the retirement. or withdrawal of a member of a firm the firm is no longer capable of being auditor because no member of the firm is a registered company auditor ordinarily resident in a State or Territory (see para 92(3)(d)) the be the auditor until the NCSC consents to the member's retirement or withdrawal (s-cl.93(6,,).
- (d) A person aggrieved where the NCSC does not consent to the removal. or resignation of an auditor hill be able to appeal to the Supreme Court, which may confirm or reverse the decision or make such further order as it thinks appropriate (s-cl. 93(7)). Cl. 93 does not apply, in relation to a body corporate (other than an exempt proprietary company) tc which CA s.282 applies (S.282 deals with the removal and resignation of company auditors) (s-cl. 93(8)). "Exempt proprietary company" will have the same meaning as in the CA (s-cl. 93(9)).

Cl. 94 : Fees and expenses of auditors

227. A futures broker must pay the reasonable fees and expenses of the broker's auditor (cl. 94).

Cl. 95 : Futures brokers' accounts

228. Cl. 95 requires a futures broker (other than a bank) to prepare a yearly profit and loss account and balance sheet and to lodge these with the NCSC. Banks are exempted from this provision because they are already under stringent internal and external accounting requirements imposed by the Reserve Bank. (Note cl. 74 which requires a futures broker's annual statement to the NCSC to be lodged during the same period as is required for the lodgment of the accounts.)

Cl. 96 : Auditor's right of access to records, information &c

229. An auditor of a futures broker will have a right of access at all reasonable times to the broker's records and may require information and explanations for the purposes of the audit (s-cl. 96(1)). It will be an offence for a futures broker, or an executive officer of a corporate futures broker, without lawful excuse to:

- (a) refuse access to records;
- (b) refuse or fail to give information or explanations as required; or

- (c) hinder or obstruct the auditor

(s-cl. 96(2) - cf. CA s-sec. 286(1)).

Cl. 97 : Auditor to report to NCSC in certain cases

230. Cl. 97 requires an auditor to lodge with the NCSC within days, a written report of any prescribed matter coming to the auditor's attention: a copy must be sent to the futures broker, each futures exchange and futures association of which the broker is a member, and to the clearing house. "Prescribed letter" is defined by s-cl. 97(2) as a matter that, in the opinion of the auditor:

- (a) adversely affects the ability of the futures broker to meet obligations as a broker; or
- (b) constitutes or may constitute a breach of cls. 86 (requirement to segregate client money and property), 90 (requirement of futures broker to keep accounts) or 91 (requirement to keep clients' property in safe custody) or any breaches of licence conditions

Cl. 98 : Certain matters to be reported to NCSC

231. A futures exchange, clearing house or futures association st notify the NCSC of a prescribed matter in relation to its "Prescribed matter" is defined in similar terms to the definition in cl. 97 except that it also includes a matter that in the opinion of the futures exchange, clearing house or futures association concerned constitutes a failure to make contributions to the fidelity fund in accordance with Part 16711 (s-cl. 98(2)).

Cl. 99 : Defamation

232. An auditor will not be liable, in the absence of malice, to a defamation action in respect of an oral or written statement made or issued by the auditor in the course of the auditor's duties or the dissemination of any report under cl. 97 (s-cl. 99(1) - cl. 99 is based on SIA s.81). A futures exchange, clearing house, futures association or their officers will not be liable, in the absence of malice, to a defamation action in respect of an oral or written statement made in the course of performing duties imposed by cl. 98 or the dissemination of any report under cl. 98 (s-cl. 99(2)). Protection will also be given (in the absence of malice) to the publisher of any of these statements or reports (s-cl. 99(3)). Nothing in the clause affects any other right, privilege or immunity that an auditor or other person has as defendant in a defamation action (s-cl. 99(4)).

Cl. 100: This part not to affect right of futures exchange or futures association to impose obligations, etc., on members

233. Nothing in Part VI will prevent a futures exchange or futures association from imposing on members any obligations dealing with auditing of accounts, furnishing information in auditors' reports or the keeping of books, provided they are not inconsistent with the proposed legislation (cl. 100 -based on SIA s.82).

Cl. 101 : Power of Court to restrain dealings with futures broker's accounts

234. Restraining dealings in relation to a futures broker's bank accounts where the NCSC, a futures exchange, a local, recognised futures exchange or a futures association shows to the satisfaction of the Court that:

- (a) there are reasonable grounds for believing there is a deficiency in a clients' segregated account provided for by cl. 86;
- (b) there has been undue delay or unreasonable refusal by a futures broker in paying or accounting for money;
- (c) a person who is or has been a futures broker or a member of a futures exchange, a local recognised exchange or futures association has not paid moneys into the clients' segregated account; or
- (d) where a business is or was carried on otherwise than in partnership - that a person's futures broker's licence has been revoked or suspended, that the broker is mentally or physically incapable of managing his or her affairs, that the broker has ceased to carry on a business of dealing in futures contracts or that the broker has died (s-cl. 101(1) - based on SIA s.83).

235. Before considering an application for an order under s-cl.101(1), the Supreme Court may grant an interim order pending the determination of the application (s-cl. 101(3)).

236. Where the NCSC applies for an order under s-cl. 101(1), the Court shall not require the NCSC, as a condition of granting an interim order under s-cl. 101(3), to give any undertaking as to damages (s-cl. 101(4)).

Cl. 102 : Duty of banker or body corporate to make full disclosure

237. Where an order made under cl. 101 is directed to a banker, or body corporate, the banker or body corporate must make full disclosure to the applicant for the order (cl. 102 - based on SIA s.84).

Cl. 103 : Power of Court to make further orders and give directions

238. The NCSC, a futures exchange, a futures association or , person affected by an order under cl. 101 will be able to apply to the Supreme Court which will be able to make further orders (cl. 103 - based on SIA s.85).

Cl. 104 : Power of Court to make order relating to payment of moneys

239. The Court, in making an order under cl. 103, will be able to include directions directing the person to whom moneys are to be paid:

- (a) to pay the moneys into a trust account;
- (b) to prepare a scheme for distributing the moneys; or
- (c) to apportion the moneys in proportion to the proved claims where the moneys received are insufficient.

(s-cl. 104(1) - cl. 104 is based on SIA s.86).

240. A scheme prepared pursuant to s-cl. 104(1) must be approved by the Court (s-cl. 104(2)). The Court will be able to give such directions as it thinks fit in relation to moneys held in a trust account under s-cl. 104(1)(s-cl. 104(3)).

FUTURES INDUSTRY BILL: PART VII : FIDELITY FUNDS

241. Part VII of the Bill (cls. 105 to 127) deals with the fidelity fund which must be established by each relevant organisation. The term "relevant organisation" has been defined in cl.105 to mean a futures exchange or a futures association (of which not all the members are members of a futures exchange).

242. The effect of Part VII is that:

- (a) where a futures exchange is also a futures association, only one fidelity fund is required, provided the fund covers all members;
- (b) a person who is a member of a futures exchange and a futures association is only required to contribute to the futures exchange fidelity fund;
- (c) only those futures association members who are not members of a futures exchange are to be required to contribute to the futures association fidelity fund.

Cl. 105 : Interpretation

243. Cl. 105 contains the following definitions:

- (a) "contributing member" means a futures exchange member; an individual who, or partnership that, is a futures association member but not a futures exchange member; and a member of a partnership that is a futures association member but not a futures exchange member;

(b) "relevant organisation" means a futures exchange or a futures association, the members of which are not all futures exchange members. (Note that 'relevant organisation' is defined for the purposes of Part VII. The expression is defined for other provisions in the Bill in s-cl.1.4(1)).

C1. 106 : Establishment of fidelity funds

244. Each relevant organisation must establish a fidelity fund which is administered by its Board (s-cl. 106(1)). The assets of the fund will be the property of the relevant organisation, but must be kept separately from other property and must be held in trust for the purposes of Part VII (s-cl. 106(:2)).

C1. 107 : Money constituting fidelity fund

245. A "basic amount" must be paid to the credit of the fidelity fund of a relevant organisation upon its establishment (para 107(1)(a)). The basic amount will be \$500,000 or such lesser amount as is determined by the Ministerial Council (s-cl. 107(6)). The Ministerial Council will be able to exempt a relevant organisation from compliance with para. 107(1)(a) if the relevant organisation has entered into an approved contract of insurance which will supplement the fund if a claim is made (s-cl. 107(2)). Such an exemption ceases to have effect when the insurance lapses (s-cl. 107(3)).

246. Where an amount is paid into the fidelity fund in accordance with proposed SIA s.103A (see para. 376 of this explanatory memorandum) the liability under para. 107(1)(a) discharged (s-cl.107(4)). The Ministerial Council may approve (conditionally or otherwise) the repayment of the whole or a specified part of the basic amount from the fidelity fund to the general fund of the relevant organisation (s-cl. 107(5)).

247. The fidelity fund will consist of:

- (a) not less than the basic amount paid to the credit of the fund by the relevant organisation on the establishment of the fund;
- (b) money paid by contributing members to the relevant organisation in accordance with this Part or the business rules of the relevant organisation (this will include a proportion of the annual membership fee - see cl. 112);
- (c) the interest and profits accruing from the investment of the fidelity fund;
- (d) money paid into the fund by the relevant organisation;
- (e) money recovered by or on behalf of the relevant organisation in the exercise of a right of action conferred by this Part;
- (f) money paid by an insurer pursuant to an insurance or indemnity contract entered into by the relevant organisation under cl. 126; and
- (g) all other money lawfully paid into the fund

(s-cl. 107(1)).

C1. 108 : Fund to be kept in separate bank account

248. Fidelity fund money must be kept in a separate bank account (cl. 108).

C1. 109 : Payments out of fund

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

- (a) claims allowed by the Board or established against the relevant organisation;
- (b) expenses incurred in investigating or defending claims or in the exercise by the relevant organisation or Board of rights, powers and authorities under this Part;

- (c) premiums payable in respect of insurance or indemnity contracts entered into under cl. 7.26;
- (d) expenses incurred in administering the fund, including wages and salaries; and
- (e) all other money payable out of the fund in accordance with the Bill.

(cl. 109 - based on SIA s.103).

C1. 110 : Accounts of fund

250. A relevant organisation must establish and keep proper accounts of its fidelity fund, prepare a balance sheet within 3 months of the end of its financial year (s-cl. 110(1.) -cl. 110 is based on SIA s.104) and have the accounts audited (s-cl. 110(2)). The auditor must lay a report before the Board (s-cl. 110(3)) and a copy of this report and the balance sheet must be given to the NCSC (s-cl. 110(4)).

C1. 111 : Management sub-committee

251. The Board of a relevant organisation will be able! to appoint a management sub-committee of not more than 5 nor less than 3 members, one of whom is a member of the Board (s-cl. 111(1)).

252. Other provisions (in cl. 111) relating to this management sub-committee are as follows:

- (a) The Board will be able to delegate its powers, authorities and discretions under Part VIII other than this power of delegation (s-cl. 111(2)).
- (b) A delegation by the Board will be able to be varied or revoked (s-cl. 111(4)) and delegation does not prevent the exercise by the Board of a power, authority or discretion (s-cl. 111(6)).
- (c) The Board may remove a member or fill a vacancy in a sub-committee appointed by it (s-cl. 111(5)).

C1. 112 : Contribution to fund

253. This provision reflects the basic scheme referred to in para. 242 of this explanatory memorandum. A person (including a partnership) must not be admitted to membership of a relevant organisation unless the person has paid to the relevant organisation, as a fidelity fund contribution, such part of the annual membership fee as is determined by the relevant organisation, unless the person is already a member of a futures exchange and the relevant organisation is not a futures exchange. Failure to do so will not, however, affect the validity of a person's membership of a relevant organisation (s-cl. 112(1) and (2)).

254. A contributing member of a relevant organisation will be required to pay to the relevant organisation on or before 31 March each year, as a contribution to its fidelity fund, such part of the annual membership fee as is determined by the relevant organisation (s-cl. 112(3)).

C1. 113 : Levy in addition to annual contributions

255. A relevant organisation will be able to impose a levy on each contributor if the fidelity fund is insufficient to pay all amounts required to be paid under cl. 109 (s-cl. 113(1) -cl. 113 is based on SIA s.108.). The amount will be payable in the time and manner specified by the relevant organisation (s-cl. 113(2)) but a person will not be required to pay more than \$5,000 in the aggregate or more than \$1,000 in any 12 month period or such other amount as may be prescribed (s-cl. 113(3)).

C1. 114 : Power of relevant organisation to make advances to fund

256. A relevant organisation will be able to give or advance money to its fidelity fund (s-cl. 114(1)) which may be repaid at any time (s-cl. 114(2)). Cl. 114 is based on SIA s.109.

C1. 115 : Investment of fund

257. Money in a fidelity fund not immediately required may be invested in authorised trustee investments or on deposit with an authorised dealer in the short-term money market (cl. 115 -based on SIA s.110).

Cl. 116 : Application of fund

258. C1. 116 deals with the payment of moneys out of the fidelity fund where a person has suffered pecuniary loss or where there is a deficiency in an insolvency.

259. A brief outline of cl. 116 is as follows:

(a) The fund will be applied to compensate persons who suffer loss because of defalcation or fraudulent misuse of money or other property (wherever and whenever occurring) by a contributing member of a relevant organisation or a director, partner, officer, or employee of such a contributing member or a partner in (or employee of) a partnership that is a contributing member who received that money or property in connection with a dealing in futures contracts (whether or not effected on a futures market) (s-cl. 116(1), (2) and (12)).

(b) In the case of an individual contributing member, if there is no right to compensation under s-cl. 116(1) a payment from the fund may be made at the discretion of the Board to an official receiver or trustee in bankruptcy. The amount of such a payment will be limited to the amount the official receiver or trustee certifies is required to make up or reduce the deficiency in the bankrupt member's estate to satisfy debts arising from dealings in futures contracts (s-cl. 116(3)).

(c) S-cl. 116(3) applies to any contributing member who has made a composition with creditors or has executed a deed of assignment or deed or arrangement (s-cl. 116(4)).

(d) In the case of a corporate contributing member, if there is no right to compensation under s-cl. 116(1), a payment from the fund may be made to a liquidator at the discretion of the Board. The amount will be limited to the amount the liquidator certifies is required to make up or reduce the deficiency in the available assets of the corporate member to satisfy debts arising from dealings in futures contracts (s-cl. 116(5)).

(e) Moneys paid pursuant to s-cl. 116(2) or (3) can only be applied to satisfy debts arising from dealings in futures contracts (s-cl. 116(6)).

(f) The total liability of a relevant organisation in relation to the defalcations etc. of one member will be \$500,000 or such other amount as is prescribed (s-cl. 116(7)).

(g) If the assets of the fidelity fund permit, the relevant organisation will also be able to apply out of the fund such sums in excess of the amount limited by this clause as it thinks fit in compensating persons who have suffered loss, or in payment to a trustee, official receiver or liquidator (s-cl. 116(9)).

(h) The fund will also be applied to compensate a person who suffers loss because of a defalcation or fraudulent misuse of money or other property by a former contributing member or by a director, partner, officer or employee of the former member where the person seeking compensation believed on reasonable grounds that the former member was at that time a member of a relevant organisation (s-cl. 116(10)).

(i) The fund will also be able to be applied (if the Board of a relevant organisation sees fit) to compensate creditors of a former contributing member in a bankruptcy or winding up who, when a debt arising from dealings in futures contracts has incurred, believed on reasonable grounds that the former member was a member of a relevant organisation (s-cl. 116(11)).

C1. 117 : Claims against the fund

260. A person who suffers pecuniary loss will be entitled to claim compensation from the fidelity fund and to take Supreme Court proceedings to establish the claim (s-cl. 117(1) -cl. 117 is based on SIA s.112).

261. Other provisions of cl. 117 are as follows:

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

(i) the pecuniary loss was suffered before the commencement of the proposed legislation; or

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

(s-cl. 117(2)).

(b) The claimant will be able to claim the actual pecuniary loss suffered including the reasonable costs in making and proving the claim less any benefit received from any other source in reduction of the loss (s-cl. 117(3)).

(c) Interest will be payable on the amount of the compensation at the prescribed rate (s-cl. 117(4)).

Cl. 118 : Rights of innocent partner in relation to fund

262. An innocent partner who has made payments to persons who have suffered loss will be able to make a claim against the fidelity fund in certain circumstances (cl. 118 - based on SIA 113).

263. A brief outline of cl. 118 is as follows:

(a) Where all claimants have been fully compensated for loss suffered in relation to money or other property entrusted to or received by a partner of a contributing member, any partner who has made a that person against the fund. This will occur only if the Board determines that the partner was 3.n no way a party to the loss and acted honestly and reasonably in the matter (s-cl. 118(1)).

(b) A partner aggrieved by the Board's decision may appeal to the Supreme Court (s-cl. 118(2)).

(c) The Court will be able to direct that the partner be subrogated to the rights and remedies against the fund of the person to whom the partner made the payment (s-cl. 118(4)).

Cl. 119 : Notice calling for claims against fund

264. A relevant organisation will be able to call for claims in relation to a particular person (cl. 119 - based on SIA s.114).

265. A brief outline of cl. 119 is as follows:

(a) A relevant organisation will be able to publish in, a daily newspaper a notice specifying a date (not earlier than 3 months after the date of the notice) by which compensation claims must be made (s-cl. 119(1)).

(b) A claim must be made in writing before the specific date or, where there is no notice, within 6 months of the claimant becoming aware of the loss: other claims are barred unless the relevant organisation determines otherwise (s-cl. 119(2)).

(c) It is a defence to an action for damages against the relevant organisation, a member or employee if the defendant establishes that the notice (published under s-cl. 119(1)) was published in good faith for the purposes of the provision (s-cl. 119(3)).

Cl. 120 : Power of Board to settle claims

266. The procedure for the settlement of claims for compensation by the Board of the relevant organisation is set out in cl. 120 (based on SIA s.115).

267. A brief outline of cl. 120 is as follows:

(a) The Board will be able to allow and settle a compensation claim against the fund (s-cl. 120(1)).

(b) A claimant is barred from commencing proceedings against a relevant organisation without leave of the Board unless claim has been disallowed and the claimant has exhausted other remedies (s-cl. 120(2)). A person refused leave may apply to the Supreme Court for leave to commence proceedings (s-cl. 120(3)).

(c) Notice of disallowance of a claim must be served on the claimant or the claimant's solicitor (s-cl. 120(4)), and proceedings against the relevant organisation must be commenced within 3 months of this notice (s-cl. 120(5)).

(d) The Board or Court will be able to allow a claim if satisfied there was defalcation or fraudulent misuse even though the person against whom the allegation is made was not convicted or prosecuted (s-cl. 120(7)).

C1. 121 : Form of order of Court establishing claim

268. Where the Supreme Court is satisfied that there was a defalcation or fraudulent misuse of property and the claimant has a valid claim it will be obliged, by order, to declare this and the date it occurred and to direct the Board to allow that claim (s-cl. 121(1) - cl. 121 is based on SIA s.116). Costs are at the Court's discretion (s-cl. 121(2)).

C1. 122 : Power of Board to require production of documents, &c.

269. The Board will be able to require any person to produce any documents or statements of evidence necessary to support a claim, to enable criminal proceedings to be taken or to enable the Board to exercise its rights against a contributing member or partner in a partnership that is a contributing member (cl. 122 - based on SIA s.117).

C1. 123 : Subrogation of relevant organisation to rights, &c., of claimant on payment from fund

270. The relevant organisation will be deemed to be subrogated to the rights and remedies of a claimant on payment being made out of the fund (cl. 123 - based on SIA s.118).

C1. 124 : Payment of claims only from fund

271. Money or other property of the relevant organisation other than the fidelity fund will not be available for the payment of a claim under this Part (cl. 124 - based on SIA s.119).

C1. 125 : Provisions where fund insufficient to meet claims or where claims exceed total amount payable

272. Where the amount of the fund is insufficient to satisfy all claims allowed, the amount of the fund will be apportioned among the claimants in such manner as the Board thinks equitable and the remaining unpaid amount will be charged against future receipts, to be paid when available (s-cl. 125(1) - cl. 125 is based on SIA s.120.) Where the aggregate of claims allowed in respect of a contributing member exceeds the total amount in the fund that may be paid in respect of that member, the total amount will be apportioned among the claimants and after this apportionment all such claims are discharged (s-cl. 125(2)).

C1. 126 : Power of relevant organisation to enter into contracts of insurance or indemnity

273. A relevant organisation will be able to insure itself against liability in respect of claims under this Part (cl. 126 - based on SIA s.121).

274. The fidelity fund will consist, among other things, of moneys paid by the insurer pursuant to a contract of insurance or indemnity entered into by the relevant organisation under cl. 126 (see para. 107(1)(g)). Premiums payable in respect of contracts of insurance or indemnity entered into by the relevant organisation under cl. 126 may be paid out of the fidelity fund (see para. 109(c)).

C1. 127 : Application of insurance moneys

275. A claimant against a fidelity fund has no right of action against a person with whom a contract of insurance is taken out in respect of any money paid by the insurer under such a contract (cl. 127 - based on SIA s.122).

FUTURES INDUSTRY BILL: PART VIII : OFFENCES

C1.128 : Dealings by futures brokers on behalf of others

276. C1. 128 prohibit the practice of "bucketing" but permits off-market dealing where this is permitted by the business rules of a futures exchange, local recognised futures exchange or futures association. Bucketing occurs where

orders of a client are not placed for execution on the relevant futures market. Rather, the broker either takes the other side of the transaction, or matches it with equal and opposite order:: from other clients. One mayor criticism of bucketing is that clients do not obtain the benefits of clearing house arrangements.

277. It will be an offence for a futures broker to deal in a futures contract on behalf of another person unless the dealing is effected:

- (a) on a futures market of a futures exchange or recognised futures exchange;
- (b) on an exempt futures market; or
- (c) as permitted by the business rules of a futures association or futures exchange of which the broker is a member.

(C1. 128)

278. The business rules of a futures exchange or futures association will be required to prohibit a member:

- (a) from dealing in futures contracts on behalf of others on a futures market of a futures exchange or of a recognised futures exchange, otherwise than in accordance with the business rules of the futures exchange or recognised futures exchange (s-paras 46(2)(a)(xiii) and 50(2)(b)(xii));
- (b) except as permitted by the business rules, from executing the instructions of another person to deal in futures contracts unless the instructions are executed in such a manner that the dealing is effected on a futures market of a futures exchange or of a recognised futures exchange (s-paras 46(2)(a)(xiv) and 50(2)(b)(xiii)).

279. This provision should be read in conjunction with cl. 61 which prohibits an unlicensed person from dealing in futures contracts on behalf of another person.

C1. 129 : Prohibition of dealings by insiders in futures contracts relating to securities

280. SIA s.128 prohibits insider dealing in securities. The prohibition on dealing in SIA s.128 is directed to persons connected with a body corporate ("insiders") or their contacts or associates ("tippees") who have inside information about a body corporate that is not generally available but, if it were, would be likely materially to affect the price of the reties of that body corporate ("price sensitive information").

281. C1. 129 imposes a similar prohibition in relation to dealing in a futures contract concerning a body corporate.

282. A futures contract will concern a body corporate if:

- (a) a commodity to which the futures contract relates is securities of the body corporate; or
- (b) a state of affairs to which the futures contract relates concerns the price of securities of the body corporate

(s-cl. 129(11)).

283. "Securities" will have the same meaning as in the SIA (s-cl. 129(15)). It will include, for example, shares, bonds and debentures.

C1. 130 : Futures market manipulation

284. C1.130 prohibits a person from effecting or taking part in one or more transactions (whether involving futures contracts or not) that have or are intended to have or are likely to have the effect of creating an artificial price, or maintaining at an artificial level the price, for dealing in futures contracts on a futures market within the Territory:

285. The two main forms of manipulation are "squeezing" and "cornering" which involve attempts to manipulate futures prices by manipulating supply and demand for the physical commodities that are deliverable under futures contracts so that available supply is exceeded and artificial prices are created.

C1. 131 : False trading and market rigging

286. False trading and market rigging will be prohibited. A person will be prohibited from creating a false or misleading appearance of active trading, or creating a false or misleading appearance with respect to the market for futures contracts (s-cl.131(1)).

287. A person will also be prohibited from maintaining, inflating, depressing or causing fluctuations in the price for dealing in futures contracts on any futures market in the Territory by any fictitious or artificial transactions or devices (s-cl.131(2)).

288. For the purpose of determining whether a transaction is fictitious or artificial within the meaning of s-cl. 131(2), the fact that the transaction is, or was at any time, intended by the parties who entered into it to have effect according to its terms will not be conclusive (s-cl. 131(3)) - cf North v ?? a Developments Ltd (1981) 56 ALJR 106 at 112 per Mason J.).

Cl. 132 : False or misleading statements, &c.

289. It will be an offence for a person to make a false or misleading statement or to disseminate information that is likely to induce dealing in futures contracts or affect their market price if, when the person makes the statement or disseminates the information, that person does not care whether the statement or information is true or false or knows or ought reasonably to know that it is false or misleading (cl. 132).

C1. 133 : Fraudulently inducing person to deal in futures contracts

290. A person will be prohibited from inducing another person to deal in a futures contract by making a statement that the person knows to be misleading, false or deceptive; by dishonestly concealing material facts; by recklessly making a misleading, false or deceptive statement, or by recording or storing information that the person knows to be misleading in a material particular (s-cl. 133(1) - cl. 133 is based on SIA s.126). With regard to a prosecution for recording or storing misleading information, it is a defence if the defendant can show that when he recorded or stored the information, the defendant had no reasonable grounds for expecting that the information would be available to any person (s-cl. 133(2)).

C1. 134 : Dissemination of information about illegal transactions

291. It will be an offence for a person to disseminate information to the effect that the price for dealing in a class of futures contracts is likely to rise or fall or be maintained because of transactions by that person or associates that were in contravention of the prohibitions against:

- futures market manipulation (see cl. 130);
- false trading or market rigging (see cl. 131);
- false or misleading statements (see cl. 132); or
- fraudulently inducing persons to deal in futures contracts (see cl. 133)

(cl. 134 - based on SIA s.127).

C1. 135 : Fraud in connection with dealings in futures contracts

292. C1. 135 is a general anti-fraud provision based on a provision in the US Commodity Exchange Act (7 USCA s.6b) which essentially makes it unlawful for a futures broker (or any of its agents or employees) to deceive or defraud a client.

293. It will be unlawful for a futures broker (or for the broker's employees or agents) or a person who has an interest in a dealing in a futures contract:

- (a) to deceive or defraud a client; or
- (b) to make a false or misleading statement to the client or to include such a statement in a record

Cl. 136 : Penalties

294. The penalty for breaching certain offence provisions will be \$20,000 or imprisonment for 5 years, or both, in the case of a natural person and \$50,000 in any other case (cl. 136).

C1. 137 : Compensation for loss, &c.

295. Compensation will be payable in certain circumstances to persons who suffer losses as a result of the contravention of market offence provisions (cls.129-135) (cl. 137 - based on SIA s.130).

296. A brief outline of cl. 137 is as follows:

(a) Any person who contravenes cls. 129 (insider dealing), 130 (futures market manipulation), 131 (false trading and market rigging), 132 (false or misleading statements, &c.), 133 (fraudulently inducing a person to deal in futures contracts), 134 (dissemination of information about illegal transactions) or 135 (fraud in connection with dealings in futures contracts), whether convicted of an offence or not, will be liable to pay compensation to any other person who suffers loss because of price differences in dealing that result from the contravention (s-cl. 137(1)).

(b) The amount of compensation or profit for which a person is liable will be reduced by any award made under this Part or CA s-sec.229(6) by reason of the same act or transaction (s-cl. 137(3)). The onus will lie on the person liable to pay the amount to prove that the liability arose from the same act or transaction (s-cl. 137(4)).

(c) An action under this clause must be commenced within 2 years from the day the transaction was completed (s-cl. 137(5)).

(d) The NCSC will be able to bring an action in the name of a person for the recovery of compensation for a loss suffered by that person, if it considers it is in the public interest to do so (s-cl. 135(6)).

(e) Any liability under any other laws will not be affected (s-cl. 137(7)).

Cl. 138 : Sequence of transmission and execution of orders

297. Subject to s-cl. 138(3), a futures broker will be required to transmit all clients' instructions in the sequence in which they are received (s-cl. 138(2)). A reference to the transmission of instructions is a reference to the transmission of the instructions to the futures market to which the broker has direct access or, where access is through another futures broker (as in the case of an associate member of the SFE) it is a reference to the transmission of the instructions to that other broker (s-cl. 138(1)).

298. Except to the extent necessary to execute a client's instructions, to comply with the Bill or any other law or as required by business rules, a futures broker, or a director, partner, officer or employee of the broker will be prohibited from disclosing those instructions to any other futures broker or person engaged or employed by any other futures broker (s-cl. 138(4)).

299. Where a futures broker proposes to deal in futures contracts on the broker's own account, and the person by whom or on whose instructions the instructions for the dealing, are to be transmitted is aware of instructions of a client to deal in those futures contracts that have not been transmitted, that person shall not give effect to the futures broker's proposal before the client's instructions are transmitted (s-cl. 138(3)).

300. An exchange member concerned with the execution of instruction on the trading floor must execute these instructions to deal in futures contracts in the order in which they are received (s-cl. 138(5)).

301. Where a futures broker transmits instructions to deal in .ss of futures contracts at or near market price, and dealings in those futures contracts are effected pursuant to those instructions, the broker must (except where business rules provide otherwise) allocate the dealings to those instructions in the sequence in which the dealings were effected and in the sequence in which the broker transmitted those instructions (s-cl. 138(6)).

302. A futures broker will be required to keep records relating to:

- (a) clients' instructions to deal in futures contracts;
- (b) the date and time of receipt, transmission and execution, of those instructions;
- (c) the person who received, transmitted and executed the instructions;
- (d) the date and time of receipt, transmission and execution of instructions for dealing by the broker in futures contracts on his own account; and
- (e) the person who received, transmitted and executed the broker's instructions. (s-cl. 138(7)).

303. Where a futures broker transmits instructions to deal in futures contracts for execution on an overseas futures market and it is not reasonably practicable to set out the date and time of execution, the broker will be required to indicate the date and time as precisely as is reasonably practicable (s-cl . 138(8)) .

Cl. 139 : Dealings by employees of licence holders

304. A brief outline of cl. 139 is as follows:

- (a) A futures broker or a futures adviser, and an employee or officer of either (including an independent contractor) will be prohibited from jointly dealing in futures contracts as principals (s-cl. 139(1), (8) and (10)). A similar prohibition will apply where a partnership is a futures broker or a futures adviser in relation to its employees (s-cl. 139(2), (3) and (10)).
- (b) A futures broker or a futures adviser will be prohibited from giving credit to an employee, independent contractor or officer or a person the broker knows is associated with the employee, independent contractor or officer if the purpose is to assist the employee, independent contractor or officer to deal in futures contracts (s-cl. 139(4), (8) and (10)). A similar prohibition will apply where a partnership is a futures broker or futures adviser (s-cl. 139(5), (6) and (10)).
- (c) Employees, independent contractors or officers of exchange members will be prohibited from dealing in futures contracts as principal unless the exchange member acts as agent in the transaction (s-cl. 139(7), (9) and (10)).

FUTURES INDUSTRY BILL: PART IX : MISCELLANEOUS

Cl. 140 : Restrictions on use of title "futures broker", "futures exchange", & c.

305. A person will be prohibited from using the title "futures broker" if the person is not the holder of a futures broker's licence (s-cl. 140(1)).

306. A body corporate will be prohibited from using the title "futures exchange" if it is not a futures exchange or a recognised futures exchange (s-cl. 140(2)), and the title "futures association" if it is not a futures association (s-cl.140(3)).

Cl. 141 : Appeal

307. A person aggrieved by the refusal of the NCSC to grant a licence or by the revocation of a licence or by any other act or decision of the NCSC will be able to appeal to the Supreme Court (s-cl. 141(1) - cl. 141 is based on SIA s.134). This right of appeal will not be available in relation to an act or decision in respect of which an appeal or review procedure is provided, or which is declared to be conclusive (s-cl. 141(2)).

Cl. 142 : False or misleading statements

308. A person will be prohibited from making a false or misleading statement in an application for a licence (s-cl. 142(1) - cl. 142 is based on SIA s.135 and from lodging a document that contains a false or misleading statement (s-cl. 142(2)) .

C1. 143 : Preservation and disposal of records, &c.

309. C1. 143 deals with the preservation and disposal of

310. A brief outline of cl. 143 is as follows:

(a) Anyone required to keep a register or record must keep it for the prescribed period even if ceasing to carry on business before the expiration of that period (s-cl. 143(1)).

(b) The prescribed period for a register or record other than an accounting record is 5 years from the day on which the last entry was made. For an accounting record the period is 7 years after the last day of the accounting period to which the record relates (s-cl. 143(2)).

(c) These provisions do not apply to a contract note received or issued by a futures broker if the matters referred to in s-cl. 83(4), (5) or (6) are recorded by the exchange or (subject to any conditions imposed by the NCSC) by the broker in a manner approved by the NCSC and the record is retained for 5 years (s-cl. 143(3)).

(d) The NCSC will have certain powers regarding disposal of documents (s-cl. 143(4)).

C1. 144 : Concealing, &c. of books relating to futures contracts

311. Concealment, destruction or alteration of books relating to the business of a futures broker will be an offence (cl. 144).

C1. 145 : Falsification of records

312. A person will be prohibited from recording or storing false or misleading material, destroying or falsifying such material or not recording matter that is required to be used in connection with the keeping of a book where such matter is stored in an illegible form by means of a mechanical device, an electronic device or other device (s-cl. 145(1) - cl. 145 is based on SIA s.138). It will be a defence if it is established that the person acted honestly and that in all the circumstances the act or omission constituting the offence should be excused (s-cl. 145(2)).

C1. 146 : Precautions against falsification of records

313. A person required to keep records must take reasonable precautions to guard against any falsification (cl. 146 - same as SIA s.139) .

C1. 147: Obstructing or hindering NCSC, &c.

314. A person will be prohibited, without lawful excuse, from hindering the NCSC or another person in the performance of duties (cl. 147 - same as SIA s.140).

C1. 148 : General penalty provisions

315. The general penalty for a breach of the second exposure draft will be \$500 (cl. 148 - same as SIA s.141).

316. A brief outline of cl. 148 is as follows:

(a) The maximum penalty will be the penalty applicable to the offence (s-cl. 148(2)).

(b) The penalty set out at the foot of the clause or sub-clause will be the applicable penalty (s-cl. 148(3), (4) and (5)).

(c) The penalty for an offence against the Bill will be \$500 except as provided by s-cl. 148(3), (4) and (5) (s-cl. 148(6)).

C1. 149 : Penalty notices

317. Minor breaches will be dealt with by means of a penalty notice system (much like on-the-spot parking fines) rather than having the matter taken to court. It is anticipated that this will lead to a reduction in the number of cases

proceeding to a court hearing, thereby resulting in a saving of time and cost for both the enforcing authority and the alleged offender. (C1. 149 is based on SIA s.141A.)

318. A brief outline of cl. 149 is as follows:

- (a) The NCSC can serve a notice on a person it believes has committed a prescribed offence, and this must set out particulars relating to the offence (s-cl. 149(1)).
- (b) Where the offence is a failure to do a particular act or thing and the person receiving a notice:
 - (i) does not pay the penalty specified in the notice within the specified period - proceedings can be brought;
 - (ii) does not do the act or thing - the obligation to do the act continues, and the person is subject to cl. 148 penalties (s-cl. 149(3)).
- (c) Where the offence is not a failure to do a particular act or thing and the person receiving a notice does not pay the prescribed penalty within the specified period, proceedings may be instituted (s-cl. 149(4)).
- (d) Payment of a penalty does not constitute any admission of liability by the person (s-cl. 149(5)).
- (e) This clause does not affect the institution of proceedings under this or any other Act, except as provided in paras 149(3)(a) and (b) and (4)(a) (s-cl. 149(6)).

C1. 150 : Continuing offences

319. It will be an offence in certain circumstances to continue to fail to do an act or thing that is required to be done (cl. 150 - based on SIA s.142).

320. C1. 150 deals with the means by which continuing offences are committed by

- (a) the substantive offender - that is, the person whose commission of an offence by reason of the failure to do the required act arises directly (eg in cl. 70, a licence holder); and
- (b) the derivative offender - that is, the person who commits an offence by virtue of being an officer of a body corporate, or a person who is knowingly concerned in, or party to, the commission of the substantive offence (eg in cl. 70, the officer in default - see cl. 151).

321. In the case of the substantive offender, if after conviction of the offence of failing to do the act required by the provision creating the offence (ie the "primary substantive offence"), the failure to do the act continues, that person will be guilty of a second substantive offence in respect of the conviction for the primary substantive offence and until the date specified in the subsequent information laid for the second substantive offence. If, after the substantive offender has been convicted of that second substantive offence, the required act remains undone, the substantive offender is guilty of a third substantive offence in respect of the next period (ie after the conviction for the second substantive offence and until the date specified in the information of each further substantive offence until the act is done (s-cl. 150(3)).

322. In the case of the derivative offender the time for the commission of further derivative offences begins to run from, alternatively:

- (a) the conviction of the derivative offender of an offence constituted by being knowingly concerned in or party to the primary substantive offence - that is, the "primary derivative offence"; or
- (b) the conviction of a person for the primary substantive offence (para. 150(4)(c)).

323. The second ground for the commission of a further offence by the derivative offender is to overcome the defect exposed in former UCA s.380 by the judgment of Lush J. in *Welsh v. Cornfoot* (1973) V.R. 21. That case decided that where a company officer was not knowingly concerned in the company's failure to do the particular act within the time prescribed for doing so by the primary substantive offence, that officer could not be criminally liable for a

continuing offence where he had acquired the relevant knowledge and failed to act upon it after that period had expired. Pursuant to proposed cl. 151, the officer will now be guilty of an offence where the company has been convicted of the primary substantive offence and the act remains undone, notwithstanding that the officer himself has not been convicted of the primary derivative offence.

324. The commission of an offence by a derivative offender on either of the above grounds, or in respect of subsequent periods during which the failure continues after conviction, pattern for the further commission of secondary derivative offences. is along the same lines as that for the commission of further substantive offences.

325. S-cl. 150(5) specifies that the penalty is to be calculated by a daily rate in respect of the period during which each further offence continues.

C1. 151 : Offences by bodies corporate

326. An officer of a body corporate who was in any way knowingly concerned in the commission of an offence by the body corporate is also guilty of that offence (cl. 151).

327. Some features of cl. 151 are as follows:

- (a) The provision does not apply where a body corporate is guilty of a continuing offence under cl. 151.
- (b) The provision will apply to a former officer of a body corporate; and
- (c) The penalty which an officer or former officer will incur will be the penalty applicable to the offence of which the body corporate is guilty

(cl. 151 - based on SIA s.143).

C1. 152 : Certain persons to assist in prosecutions

328. The NCSC will be able to require an officer, employee, partner or agent of an individual or body corporate defendant to assist in a prosecution and such a person must give all reasonable assistance (s-cl. 152(1) - cl. 152 is the same as SIA s.144).

329. Other provisions of cl. 152 are as follows:

- (a) A person who is or is likely to be a defendant in the proceedings or a person who is or has been a lawyer acting for that person will be exempted from this requirement (s-cl. 152(2)).
- (b) It will be an offence to fail to give assistance and the Supreme Court will be able to order a person, on the application of the NCSC, to comply with the NCSC's request for assistance (s-cl. 152(3)).
- (c) "Agent" is defined to include a banker of, and an auditor employed by, the defendant (s-cl. 152(4)).

C1. 153 : Reciprocity in relation to offences

330. Reciprocity is provided for in relation to offences between jurisdictions (cl. 153 - same as SIA s.145).

C1. 154 : Offences committed partly in and partly out of the Territory

331. Where any act, omission or thing done partly inside and partly outside the Territory would have constituted an offence under the second exposure draft if done wholly within the Territory, then that act, omission or thing is deemed to constitute an offence under the second exposure draft (cl.- same as SIA s.146).

C1. 155 : Power of Court to prohibit payment or transfer of moneys, futures contracts or other property

332. The Supreme Court will be able to ensure that a person who is subject to investigation or to legal proceedings does not transfer property out of the jurisdiction (cl. 155 - based on SIA s.147).

333. A brief outline of cl. 155 is as follows:

- (a) Where an investigation is being carried out or where a prosecution or civil proceeding has been instituted under the provisions of the second exposure draft, the Supreme Court will be able, by order
- (i) to prohibit the taking out of the Territory or Australia of property, money or futures contracts of a person or of the person's associates;
 - (ii) to prohibit a person who is indebted to another person or a person associated with that other person from making a payment in total or partial discharge of the debt;
 - (iii) to prohibit a person holding money or other property on behalf of another person or that person's associates from paying the money, or parting with possession of the property;
 - (iv) to appoint a receiver, trustee, or receiver and manager, of the property of a person;
 - (v) to require a person to deliver his or her passport to the Court and such other documents as the Court thinks fit;
 - (vi) to prohibit a person from leaving Australia without the consent of the Court

(s-cl. 155(1)).

- (b) The Court may grant an interim order (s-cl. 155(2)).
- (c) Where the NCSC applies under s-cl. 150(1), no undertaking as to damages need be given (s-cl. 155(3)).
- (d) The Court will be able to rescind or vary an order on the application of the NCSC or any person affected (s-cl. 155(4)).
- (e) An order under this provision will operate for the period specified in the order (s-cl. 155(5)).
- (f) A person must comply with an order made under th clause (s-cl. 155(6)).

C1. 156 : Power of NCSC to intervene in proceedings

334. The NCSC may intervene in any proceedings brought pursuant to the provisions of the second exposure draft and will be deemed to be a party to the proceedings (s-cl. 156(1) and (2) - cl. 156 is based on SIA s.148).

335. The NCSC may appear and be represented in such proceedings by an employee, a natural person, an officer or employee of a person to whom or to which the NCSC has delegated its powers or by a solicitor or counsel (s-cl. 156(3)).

C1. 157 : Injunctions

336. The Supreme Court will be able to grant an injunction on the application of the NCSC or a person whose interests have been, are or would be affected by conduct that constitutes a contravention of the provisions of the second exposure draft (s-cl. 157(1) and (2) - cl. 157 is the same as SIA s.149). The Supreme Court will be able to grant an injunction:

- (i) restraining a person from engaging in conduct that constitutes or would constitute an offence under the second exposure draft; or
- (ii) requiring a person to do a particular act or thing which is required by the second exposure draft.

337. A brief outline of the remainder of cl. 157 is as follows:

- (a) The Supreme Court will be able:
 - (i) to grant an interim injunction (s-cl. 157(3)); and

- (ii) to rescind or vary an injunction granted under s-cl. 157(1), (2) or (3) (s-cl. 157(4)).
- (b) The Court will have a wide discretion in exercising its power to grant injunctions (s-cl. 157(5)).
- (c) Where an injunction to require a person to do a particular act is applied for, the Court may grant the injunction if it is satisfied the person has failed to do the act, or will fail to do so if an injunction is not granted (s-cl. 157(6)).
- (d) Where the NCSC makes an application for an injunction, the Court shall not require the NCSC or any other person to give any undertakings as to damages as a condition of granting an interim injunction (s-cl. 157(7)).
- (e) The court has power to award damages, either in addition to or in substitution for an injunction (s-cl. 157(8)).

C1. 158 : Power of Court to punish for contempt of Court

338. The power of the Court in relation to punishment for contempt of court is unaffected by any provision in the Bill which provides that a person must comply with an order of the Court, or will be guilty of an offence for failure to do so (cl. 158 - same as SIA s.149A).

C1. 159 : Rules of court

339. The rule-making power conferred by s. 28 of the A.C.T. Supreme Court Act 1933 will extend to making rules of court with respect to proceedings and the practice and procedure of the A.C.T. Supreme Court under the Bill.

C1. 160 : Regulations

340. The Governor-General will be able to make regulations prescribing all matters required or permitted (s-cl. 160(1)). Particular matters that may be the subject of regulations are set out in paras 160(1)(a)-(j). The regulations will be able to prescribe offences, penalties and particulars for the purpose of the penalty notice system provided for by cl. 147 (s-cl. 160(2)-(4)). The regulations will be able to exempt specified persons (including a person who is, or proposes to be, a clearing house) or transactions from the operation of certain provisions, subject to prescribed terms and conditions, and may provide that a breach or failure to comply with any such prescribed terms or conditions is an offence (s-cl. 160(5)).

341. The regulations will be able to be general or specific (s-cl. 160(6)). This provision only applies to the A.C.T. Particular State (Application of Laws) Bills will provide for the impact of the Commonwealth regulations to be varied as required by the particular jurisdictions.