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COMPANY TAKE-OVERS BILL 1979

COMPANY TAKE-OVERS (FEES) BILL 1979

EXPLANATORY MEMORANDUM

(Circulated by the Minister for Business

& Consumer Affairs, the Honourable Wal. Fife)

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INTRODUCTION

1. The purpose of this explanatory memorandum is to explain the contents of the proposed new Australian take-over code (hereafter referred to as the proposed t/o code) set out in the Company Take-overs Bill 1979 (hereafter referred to as 'the Bill' or 'the Take-overs Bill') and the Company Take-overs (Fees) Bill 1979 (hereafter referred to as the 'Fees Bill').
2. This explanatory memorandum (hereafter referred to as 'ex memo'):-
 - (a) contains an introduction to, and a brief outline of, the Take-overs Bill and its relationship to the co-operative companies and securities scheme (pages 1 to 9);
 - (b) deals sequentially with each clause of the Take-overs Bill (pages 10 to 92)
 - (c) deals sequentially with the Fees Bill (pages 93 to 94); and
 - (d) mentions other matters that may be relevant to the proposed t/o code.(pages 95 to 97)

Formal Agreement

3. On 22 December 1978 the Commonwealth and the six States executed a Formal Agreement that provided the framework for a co-operative Commonwealth/State scheme for a uniform system of law and administration in relation to company law and the regulation of the securities industry in the six States and the Australian Capital Territory. The Formal Agreement also provides a procedure to enable the Northern Territory (Agreement cl. 49) to become a party to the Agreement and to enable the Agreement to be extended to the various external Territories (Agreement cl. 50).

National Companies and Securities Commission Bill

4. There has already been introduced into the Commonwealth Parliament the National Companies and Securities Commission Bill ('NCSC Bill') which is the first of a series of Bills to give effect to the legislative obligations of the Commonwealth under this Formal Agreement (a copy of which is set out in the Schedule to the NCSC Bill)
5. A brief outline of the NCSC Bill and the co-operative scheme is as follows:-
 - (a) The NCSC Bill establishes the National Companies and Securities Commission (hereafter referred to as the 'NCSC') which will have responsibility for the entire area of companies and securities matters subject to directions from the Ministerial Council. The NCSC will have such functions and powers as are conferred on it by the various pieces of Commonwealth, State and Territory legislation that are required to give effect to the co-operative companies and securities scheme (hereafter referred to as the co-operative scheme legislation)
 - (b) The administration of the co-operative scheme legislation within each State and Territory that is covered by the scheme will, so far as practicable, be carried out by the relevant registering authority in that State or Territory under delegations from the NCSC.
 - (c) The aim is that, as far as is possible, any person or company in a particular State or Territory should be able to deal on all general companies and securities matters with the local registering authority in that jurisdiction as if that person or company were

only subject to one system of company and securities law and administration throughout Australia.

6. The Take-over Bill and the related Fees Bill are the next pair of Bills to give effect to the legislative obligations of the Commonwealth under the Formal Agreement.

Proposed new Australian Take-over code

7. Following the second interim report of the Company Law Advisory Committee a new Part VIB (ss. 180A to 180Y) and a new Tenth Schedule were inserted in the existing companies legislation of the five mainland States and the two internal Territories to regulate take-overs.
8. The central policy of the existing take-over legislation is contained in s. 180C which prohibits the dispatching of certain take-over offers or certain take-over invitations unless the conditions of that section are met.
9. The policy of the proposed t/o code is very different in that it is aimed at regulating acquisitions by a person who holds between 20% and 90% of the voting shares of a company, or whose holding would increase to more than 20% through acquisition.
10. Because the new policy is so different from that of the existing legislation it is necessary to replace the whole of the present take-over legislation.
11. The Take-overs Bill sets out the substantive provisions of the proposed t/o code and applies those provisions in the A.C.T.(see Bill cl. 3). The substantive provisions of the code will be capable of application in other parts of Australia by separate application legislation in the other Australian jurisdictions (hereafter referred to as the 'Application Bills').
12. The code will be administered by the NCSC which, so far as practicable, will delegate its administrative responsibilities to the authority in each jurisdiction.
13. A brief outline of the main features of the proposed t/o code is as follows:-
 - (a) There will be a basic prohibition on any acquisition of shares in a company, otherwise than in accordance with the code, if the acquisition would:-
 - (i) result in a person being entitled to more than 20% of the voting shares (see Bill s-cl. 12(1)); or
 - (ii) increase the entitlement of a person already entitled to between 20% and 90% of the voting shares (see Bill s-cl. 12(2));unless the person adopts one of the following procedures:
 - (iii) he only acquires (in any way he chooses) no more than 3% each 6 months (see Bill cl. 15)
 - (iv) he makes a formal take-over offer with similar requirements to those under existing take-over legislation (see Bill cl. 16) and
 - (v) he makes a take-over announcement on the floor of the home exchange of the offeree company, undertaking unconditionally to take, for a period of one month and at a specified price, all shares offered (see Bill cl.17).
 - (b) The code will not prohibit the following acquisitions:-

- (i) certain gifts, allotments or arrangements which do not need to be controlled by a take-over code (see Bill cl. 10)
 - (ii) where the target company may not be regarded as being owned by the public or a section of the public (see Bill s-cl.13(1))
 - (iii) on a stock exchange by a bidder once a take-over bid is in progress (see Bill s-cl. 13(3)).
 - (iv) as a result of an allotment of shares on a pari passu basis where the allotment is made either to a shareholder or to an underwriter or sub-underwriter of that allotment (see Bill cl. 14).
- (c) The code generally applies only to voting shares (see ex memo para 44). However, holders of non-voting shares, renounceable options and convertible notes have the right to have their interests acquired by the offeror if the offeror has acquired 90% of the voting shares (see Bill cl. 43) and are also liable to compulsory acquisition (see Bill cl. 42).
- (d) In the case of a take-over offer (see Part III of the Bill)
- (i) Separate take-over schemes are required for each class of shares. The offers must be the same and must be made to each shareholder in the class and accompanied by a registered Part A statement (see Bill cls. 16 and 18).
 - (ii) Offers may be for less than 100% of the shares in a company but the offeror must pro rata acquisitions equally amongst accepting shareholders where acceptances exceed the proposed acquisition number (see Bill cl. 26).
 - (iii) Various conditions are not permitted (see Bill cl. 20). Making conditional offers unconditional is controlled (see Bill cls. 28 and 29) . In certain circumstances conditional offers will become unconditional (see Bill cl. 30)
 - (iv) Offers can only be varied in accordance with cls. 19 and 27 of the Bill.
 - (v) Offers may be withdrawn provided the conditions of cl. 21 of the Bill are met.
 - (vi) The target company must respond to a bid by preparing a Part B statement (see Bill cl. 22) and an independent expert's report must be obtained if the offeror has a 30% or more shareholding in the target (see Bill cl. 23).
- (e) In the case of take-over announcements:-
- (i) The offeror must hold less than 30% of the shares in the target company, unless the NCSC consents, in order to use this take-over method (see Bill s-cl. 17(3)).
 - (ii) The offeror must prepare a Part C statement (which contains similar detail to a Part A statement) (see Bill s-cl. 17(9)).
 - (iii) The target company must prepare a Part D statement (similar to a Part B statement) in response to the bid (see Bill cl. 32).
 - (iv) The offer can only be withdrawn in a restricted number of circumstances (see Bill cl. 33).
 - (v) The offeror cannot sell the target's shares unless there is a counter bid (see Bill cl.

35).

- (f) In the case of both take-over offers and on-market announcements (see Part V of the Bill): -
 - (i) The bidder and the target company can only make profit forecasts with the consent of the NCSC (see Bill cl. 37) and the target company is only allowed to make statements on the valuation of assets with the consent of the NCSC (see Bill cl. 38).
 - (ii) The bidder must provide daily details of dealings in the target company's shares. Other persons who hold 5% or more of the shares must provide details of changes of 1% in their holdings (see Bill cl. 39).
 - (iii) Compulsory acquisition procedures can be used once an offeror holds 90% of the voting shares in the target company and may be initiated by:-
 - the offeror (see Bill cl. 42) or
 - the remaining shareholders and holders of options, notes and non-voting shares (see Bill cl. 43).
- (g) There are miscellaneous provisions (in Part VI of the Bill) dealing with matters such as:-
 - (i) liability for mis-statements (see Bill cl.
 - (ii) the powers of the Supreme Court (see Bill cls. 45 to 49);
 - (iii) unfair or unconscionable agreements, payments or benefits (see Bill cl. 50);
 - (iv) bluffing bids (see Bill cl. 52);
 - (v) offences (see Bill cl. 53);
 - (vi) NCSC's power of exemption (see Bill cl.
 - (vii) various transitional provisions relating to acquisition at the time the Act commences (see Bill cls. 56 and 57).

COMPANY TAKE-OVERS BILL 1979

14. The Take-overs Bill is divided into the following Parts: - Part I - Preliminary
- Part II - Control of acquisition of shares
 - Part III - Provisions relating to Take-over Offers
 - Part IV - Provisions relating to Take-over Announcements
 - Part V - Provisions relating to both Take-over Offers and Take-over Announcements
 - Part VI - Miscellaneous
 - Schedule - Part A to D statements

TAKE-OVERS BILL: PART I: PRELIMINARY

15. Part I of the Take-overs Bill (cls. 1 to 11) deals with various preliminary matters.

Cl. 1: short title

16. The Act will be cited as the Company Take-overs Act 1979 (Bill cl. 1).

Cl. 2: commencement

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

Cl. 3: object

18. The proposed t/o code will only apply, so far as this Bill is concerned, to the acquisition of shares in companies incorporated in the Australian Capital Territory. It will be construed as if it were an Ordinance made under the Seat of Government (Administration) Act 1910 (Bill cl. 3)

19. This provision will:

- (a) facilitate the incorporation of the proposed t/o code into the existing A.C.T. Companies Ordinance (see Bill cl. 5);
- (b) be consistent with the provisions of s-cl. 6(1) of the NCSC Bill which provides that the NCSC has such functions 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’); and
- (c) require the Bill to be construed in accordance with the A.C.T. Ordinances Interpretation Ordinance.

Cl. 4: exclusion of certain provisions of A.C.T. Companies Ordinance

20. Except for the transitional provisions (see Bill cl. 57), the proposed t/o code will operate, so far as this Bill is concerned, to the exclusion of the existing provisions in the A.C.T. Companies Ordinance regulating take-overs (Bill cl. 4) . The proposed t/o code will have a similar operation in other jurisdictions. Certain consequential amendments will also be required to the existing companies legislation (see ex memo paras 181 and 182).

Cl. 5: incorporation

21. For the purpose of its application in the A.C.T., the proposed t/o code will be incorporated into, and read as part of, the A.C.T. Companies Ordinance (Bill s-cl. 5(1)). This will ensure that the proposed t/o code will operate in the Australian Capital Territory in the context of the existing companies legislation. For example:-

- (a) Expressions used in the Bill but not defined in it (e.g., “officer in default”, “related corporation”, “subsidiary”, and “voting share”) will have the meanings given to the same expressions by the A.C.T. Companies Ordinance.

- (b) Other provisions of the A.C.T. Companies Ordinance will be applicable such as:-
- s-sec. 7(7) dealing with powers of inspection;
 - s. 12 dealing, among other things, with the rejection of documents and appeals from decisions of the registering authority;
 - s. 380 relating to default penalties (see also Bill s-cl. 53(5) which provides that the general offence provision (s. 379) of the A.C.T. Companies Ordinance will not apply).
22. For the purpose of this incorporation, references to the A.C.T. Registrar of Companies will be read as references to the NCSC (Bill s-cl. 5(2)). It is envisaged that the NCSC will delegate many of its functions and powers to the relevant State and Territory registering authorities (see Formal Agreement cl. 35). For example, all documents required to be lodged with the NCSC in relation to companies incorporated in the A.C.T. will be lodged at the office of the A.C.T. Corporate Affairs Commission (see Bill s-cl. 54(4) and ex memo para 156). Similar provisions will be required in the Application Bill of each other jurisdiction to ensure that documents in relation to companies incorporated in that jurisdiction are lodged with the registering authority in that jurisdiction.

Cl. 6: definitions

23. There are a series of definitions for the purpose of the Bill.
24. Some of the terms defined (with examples of their use) are as follows:-
- Agreement is defined to mean the Formal Agreement. This definition is one of the provisions that have been included to enable the provisions of the Bill to be applied, with appropriate modifications, in other jurisdictions.
 - another Territory means any Australian Territory other than the Australian Capital Territory (see, e.g., Bill s-cl. 8(7)).
 - business rules is defined so as to exclude 'listing rules' (the definition is consistent in this respect with the corresponding definition in the proposed Securities Industry Bill) (see, e.g., Bill cl. 6: 'marketable parcel')
 - Commission means the National Companies and Securities Commission (NCSC).
 - company is defined in the same way as in ICAC Coy. As s-sec 180A(2).
 - convertible note is defined by reference to s. 82L of the Income Tax Assessment Act 1936.
 - director is defined along the lines of ICAC Coy. As s-sec 5(i) but has been expanded to include persons not validly appointed.
 - expert is defined generally (along the lines of ICAC Coy. As s-sec 5(i) but without the specific reference to 'engineer valuer accountant') (see, e.g., Bill cl. 23).
 - home exchange is defined in the same way as in the AASE Listing Requirements.
 - invitation is defined in the same way as in ICAC Coy As s-sec 180(2) (see, e.g., Bill s-cl. 12 (3))

- marketable securities is defined in the same way as in ICAC Coy As s-sec 5(1) except that it omits the word ‘funds’ (see, e.g. Bill s-cl. 42(21)).
- offeror means a person who dispatches or two or more persons who dispatch formal take-over offers (one of the two types of take-over scheme provided for in the proposed t/o code). The definition includes a reference to offers made by a nominee (such as a nominee company) . (See, e.g., Bill cl. i6).
- officer is defined so that it only covers senior employees of a corporation (of ICAC Coy As s-sec 5(1)) (see, e.g., Bill s-cl. 38(2)).
- on-market offeror means a person who makes or two or more persons who make, an unconditional undertaking to purchase at or above a specified minimum price on the floor of a stock exchange all shares tendered during a period of one month (the other type of take-over scheme provided for in the proposed t/o code) (see, e.g., Bill cl. 17).
- participating State means any of the 6 States (all of which are currently parties to the Formal Agreement). This definition is one of the provisions that have been included to enable the provisions of the Bill to be applied, with appropriate modifications, in other jurisdictions.
- participating Territory means any Territory (other than the Australian Capital Territory) which will be part of the co-operative scheme. This definition is one of the provisions that have been included to enable the provisions of the Bill to be applied, in other jurisdictions.
- prescribed condition is a new definition and is a condition imposed by the offeror which relates to the offer (see, e.g., Bill s-para 16(2) (f) (v)).
- prescribed occurrence is a definition of certain events in relation to a target company or a subsidiary (e.g. alteration of share capital, winding up, etc.) which would make the continuation of a take-over intolerable (see, Bill para 13(4)(b) and s-cl. 33(1) - the term is not used elsewhere.)
- principal executive officer is a new definition. (see, e.g., Bill definition of ‘officer’, and s-cl. 7(5)).
- renounceable option is a new definition (see, e.g. Bill s-cl. 42(10)).
- stock exchange means a stock exchange prescribed in the regulations (same definition as in ICAC Coy As s-sec 180A(2)) (see, e.g., Bill cl. 6: ‘home exchanges’; ‘business rules’; ‘listing rules’; s-cl. 14(3); cl. 17).
- take-over offer and take-over scheme are redefined to clarify their meaning of ICAC Coy. As s-sec 180(2) which defines ‘take-over offer’ by reference to s-secs 180C(i) and (3). S-sec 180(1) sets out some of the particulars which an offer must contain or specify; it does not say what an offer is. S-sec 180C(i) refers to s-sec 180C(2) which sets out the kinds of offer to which s-sec 180C(i) does not apply. Similarly s-sec. 180C(3) sets out some of the particulars which an invitation must contain, but no definition is given. In practice many lodging parties confuse the terms “take-over offer” and “take-over scheme” in the existing ICAC Coy. As.
- trading day is a new definition (see, e.g. Bill s-cl. 17(2)).

Cl. 7: provisions relating to the acquisition and disposal of, and entitlement to, shares; and to associated persons

25. The proposed t/o code distinguishes between:-

(a) An acquisition of shares.

- The circumstances in which a person is taken to acquire shares are set out in Bill s-cl. 7(1). Its effect is that the prohibitions on the acquisition of shares (see Bill cl. 12) apply only to the person who actually acquires the shares.
- The provision is designed to preclude use of trusts to avoid the controls on acquisitions imposed under the new code, but will not affect normal commercial financing of take-over operations. (see also Bill cl. 9 which defines 'relevant interest').
- A person is deemed to have disposed of shares if he ceases to have a relevant interest, irrespective of the way in which that happens (Bill s-cl. 7(2)).

(b) An entitlement to shares. The shares to which a person is entitled include those in which he or, except where the person is an approved nominee corporation under s-cl. 7(8), any of his associates, has a relevant interest (Bill s-cl. 7(3) - same as ICAC Coy. As s-sec 180A (5) - 'relevant interests' are defined in cl. 9). The effect is that the interests of a person and his associates must be aggregated when applying provisions of the code which are based on share entitlements e.g.:-

- in determining whether or not share entitlements have risen beyond allowable levels permitted in cl. 12.; and
- the notification requirements (see Bill cl. 39).

26. The provisions relating to the determination of association for the purposes of the proposed t/o code are as follows:-

(a) When calculating the shares to which a person is entitled because of the entitlements of an associate: a person will be regarded as an associate of another person where:-

- (i) related corporations, or senior executives of related corporations, are involved (Bill para 7(4) (a))
- (ii) there is, or is proposed to be, an understanding etc. (which may be informal, and may be expressed or implied) impinging on the exercise of the voting power attached to a share or otherwise influencing the management of the company (Bill paras 7(4) (b) to (f)) . Persons acting in concert are also deemed to be associates (Bill para 7(4) (c)) . The test relates to present and not past conduct (see, however, Bill s-cl. 45(2)).

(b) When considering whether a person is associated with another person for the purposes of the rest of the Bill, the tests will be as similar as practicable to those under s-cl. 7(4) which applies to the calculation of entitlement to shares (Bill s-cl. 7(5)). This will be relevant to provisions such as Bill s-cl. 17(7) and 23(1).

(c) Legitimate commercial relationships will be excluded (Bill s-cl. 7(6)). While an association constituted by the fact that one of the persons concerned is a bare trustee and the other a beneficiary under that trust is not excluded, any relevant interest of a

bare trustee in a share that is subject to the trust will be disregarded (see Bill s-para 9(7) (c) (ii))

- (d) For the purposes of the provisions relating to warehousing (in paras 7(4) (b) and 7(5) (b)) limitations on power to control or influence voting are immaterial (Bill s-cl. 7(7) - cf ICAC Coy As s-sec 180A(8)). The situation where a bidder consists of more than 1 person is covered (see Bill s-cl. 8(6)).

Cl. 8: other interpretative and evidentiary provisions

- 27. Other interpretative and evidentiary provisions are contained in cl. 8 of the Bill.
- 28. where shares in a company are not divided into classes they will be deemed to constitute a class (Bill s-cl. 8(1)). This provision will be relevant to those provisions which are expressed to operate with respect to classes of shares (see, e.g., Bill s-cl. 28(3) and (5)).
- 29. Although an offeror makes an offer for all of the shares of an offeree (see Bill s-para 16(2) (a) (U) the offeror is construed as an offeror who does not propose to acquire all the shares in a company if he specifies in his offer (see Bill s-para 16(2)(f) (iii)) that he proposes to acquire less than 100% of the shares in the company to which he is not already entitled. (Bill s-cl. 8(2)).
- 30. The period during which an offer remains open will be the period it would have remained open if not accepted (Bill s-cl. 8(3) - except for cl. 25 which refers to the period when the offer is actually open).
- 31. References to a 'number of shares' in relation to a company title whole or a portion of the share capital of which consists of stock includes a reference to a number of shares equal to that stock (Bill s-cl. 8(4) - same as ICAC Coy As s-sec 180A(3)).
- 32. An 'odd lot' is defined for the purposes of the Bill (Bill s-cl. 8(5) - this definition is in the same form as the corresponding definition in the proposed Securities Industry Bill). (see, e.g., Bill s-cl. 26(3)).
- 33. Where an offeror or an on-market offeror is constituted by 2 or more persons, references in the Bill to an offeror, on-market offeror will be construed as a reference to either or any one or more of them (Bill s-cl. 8(6) - cf ICAC Coy As s-sec 180A(12)).
- 34. References to a corresponding law or to a provision of that law will be references to this Bill or its provisions as applied in a particular State or the Northern Territory under cl. 9 of the Formal Agreement (Bill s-cl. 8(7)). This provision is one of the provisions that have been included to enable the provisions of the Bill to be applied in other jurisdictions.
- 35. References to entering into a transaction in relation to shares will include a reference to making a contract in relation to shares and to exercising an option to have shares allotted (Bill s-cl. 8(8)).
- 36. References in the Bill to a corporation or to a body corporate include references to unincorporated societies, associations or other bodies which have been declared by the NCSC to be corporations for the purposes of the Bill. (Bill s-cl. 8(9)).
- 37. In any proceedings under or arising out of the Bill, knowledge of a servant or agent is to be imputed to the master or principal (Bill s-cl. 8(10) - based on s.69M of the present ICAC Companies Acts)

Cl. 9: relevant interests in shares

38. The circumstances in which a person is regarded as having a relevant interest in a share for the purposes of the proposed t/o code are set out in cl. 9 of the Bill. This provision relates back to the test for associated persons (see Bill cl. 7 and ex memo para 26)
39. The provision is similar to s.6A of the existing Victorian Companies Act except for some changes necessary to take account of the requirements of the proposed t/o code, e.g.:-
 - the increase from 15% to 20% in Bill para 9(4) (e) to reflect the new control thresholds,
 - Bill para 9(6) (c) covers only issued shares, and
 - Bill s-cl. 9(3) includes a reference to the revocation of trusts, etc.

It is envisaged that this provision will be the same as the corresponding provisions proposed for the Companies Bill and the Securities Industry Bill under the co-operative scheme.

Cl. 10: acquisitions to which proposed new take-over code will not apply

40. The proposed new take-over code will not apply to acquisitions:-
 - (a) by will or operation of law;
 - (b) pursuant to a registered prospectus seeking subscriptions from the public;
 - (c) by a promoter in respect of a first prospectus;
 - (d) by underwriters under agreements disclosed in a prospectus;
 - (e) through allotments made before it would be necessary to issue a prospectus;
 - (f) through allotments by subsidiaries to parent companies;
 - (g) pursuant to certain compromises or arrangements under the existing companies legislation (s. 270)
 - (h) under an allotment or sale provided the transaction is approved by majority vote of shareholders other than the acquirer and his associates;
 - (j) resulting from the exercise of an option or right where the shares could lawfully have been acquired at the time when the option or right was acquired;
 - (k) by acceptance of a take-over offer where the consideration includes shares;
 - (l) made directly through purchase of shares of a listed company with shareholdings in other companies. This covers the situation where the acquisition of shares of one company indirectly gives the offeror an entitlement to shares of another company by virtue of the first company's investment, and the indirect entitlement could otherwise be prohibited by cl. 12. It precludes the use of investments above the level prescribed in cl. 12 as an undesirable defence tactic to a take-over. The exemption does not apply to other companies because they provide greater scope for the misuse of interposed companies to avoid the provisions of the take-over code;
 - (m) in the ordinary course of the business of lending money e.g. by exercise of a power of sale;

- (n) of forfeited shares at an auction in the premises of a stock exchange; and
- (o) any other acquisitions approved by the NCSC e.g. by receivers and liquidators (this will alleviate the need for a formal instrument of exemption under cl. 55)

(Bill cl. 10)

Cl. 11: persons to whom new take-over code will apply

41. The proposed t/o code will apply to all persons and to all acts, without territorial limits (Bill s-cl. 11(1)). However, the new code of any given jurisdiction will not apply to the acquisition of shares in a company not incorporated in that jurisdiction (Bill s-cl. 11(2)). These provisions are to the same effect as ICAC Coy As s. 180B.

TAKE-OVERS BILL: PART II - CONTROL OF ACQUISITION OF SHARES

42. Part II of the Bill (cls. 12 to 17) contains a series of controls on the acquisition of voting shares (see Bill s-cl. 7(1) for definition of 'acquisition' and ex memo para 25. See also ex memo para 44 which discusses the position of holders of non-voting shares, renounceable options and convertible notes)
43. The Part begins with a basic prohibition on any acquisition (otherwise than as provided by the proposed t/o code) by a person who holds between 20% and 90% of the voting shares of a company or whose holding would increase to more than 20% through acquisition (see Bill cl. 12). However, this basic prohibition does not apply to:-
- (a) four types of permitted acquisitions:-
 - (i) those where the target company may be regarded as not being owned by the public or a section of the public (see Bill s-cl. 13(1));
 - (ii) purchases on a stock exchange by certain bidders once the take-over is in progress (see Bill s-cl. 13(3));
 - (iii) acquisitions pursuant to an allotment of shares on a pari passu basis where the allotment is made either to a shareholder or to an underwriter or sub-underwriter of that allotment (see Bill cl. 14) ; and
 - (iv) where the total of the relevant acquisition and net acquisitions in the preceding six month period does not exceed 3% of the voting shares in the company (see Bill cl. 15).
 - (b) a take-over conducted by a person (hereafter referred to as a 'bidder') in accordance with the code by means of formal take-over offers (see Bill cl. 16) or an on-market announcement (see Bill cl. 17).

Each of these clauses is dealt with in turn (see ex memo paras 45 to 68).

Non-voting shares, convertible notes and renounceable options.

44. The basic controls under the proposed t/o code apply only in relation to voting shares (see ex memo paras 42 to 48). It is thought that adequate protection is given to the holders of non-voting shares, renounceable options and convertible notes by giving them the right (conferred on them by cl. 43) to have their interests acquired by the offeror if the offeror acquires 90% of the voting shares. This will ensure that holders of non-voting interests are not disadvantaged by becoming a locked-in minority. In addition, where an offeror proposes to acquire all the voting shares in a listed company, comparable offers must be made for all other classes of shares, and convertible notes and options (see A.A.S.E. Listing Requirements 3R(5)). Consistent with this approach, once an offeror acquires more than 90% of the voting shares, the compulsory acquisition provisions will also apply to non-voting shares, renounceable options and convertible notes (see Bill s-cl. 42(4)).

Cl. 12: restriction on acquisition of shares

45. Introduction. Cl. 12 of the Bill underpins the operation of the threshold requirements of the proposed t/o code by prohibiting any acquisition (otherwise than in accordance with the code)

of shares which would:-

- s-cl. (1): result in a person becoming entitled to more than 20% of the voting shares;
or
- s-cl. (2): increase the entitlement of a person already entitled to between 20% and 90% of the voting shares.

In all cases, the threshold test is based on the number of voting shares, not the number of votes which might be cast.

46. The main intention of cl. 12 is to limit the speed with which persons can acquire control of companies other than by formal take-overs or similar procedures which afford all shareholders equal opportunities:-
- (a) Part VIB of the ICAC Coy As and, in particular, ss. 180C and 180D have been shown to be ineffective in preventing the control of companies being acquired rapidly other than by way of formal take-overs.
 - (b) At the present moment, Part VIB permits a person to acquire up to 15% of the voting shares in any way on or off the market, and in addition to that 15% to make up to 4 individual offers or approaches to other shareholders in a period of 4 months for an unlimited number of further voting shares. The person is also free to acquire a further unlimited number of voting shares of the company by way of transactions which are “in the ordinary course of trading on a stock exchange”.
 - (c) The right to make up to 4 individual offers for unlimited quantities of shares in any period of 4 months is unsatisfactory: the number of shares which might be acquired by those four offers is limited only by the size of the holdings of the persons approached and if those holdings are substantial, control can change.
47. 20% has been chosen as the appropriate threshold beyond which the acquisition controls imposed by the proposed t/o code will apply. Whatever figure is adopted as the threshold it should fall short of the figure that could generally be regarded as the point beyond which control can be said to have passed. The whole basis of the proposed t/o code is that control should not pass without the safeguards under the code applying (or alternatively that it should pass slowly enough for the people involved to make informed decisions) . cf
- (a) The ICAC Coy As where the threshold is 15% (see existing para 180C(2) (a)).
 - (b) The U.K. London City Code where there is a 30% threshold figure. However, this figure is used for a different reason (and not as a control threshold) : the London City Code provides that once a 30% threshold is reached, an offer must be made for all outstanding shares. The present Bill contains no such requirement.
8. Provisions of cl. 12. Acquisitions otherwise than in accordance with the code which would result in a person becoming entitled to more than 20% of the voting shares will be prohibited (Bill s-cl. 12(1)). Acquisitions otherwise than in accordance with the code which would increase the entitlement of a person already entitled to between 20% and 90% of the voting shares will also be prohibited (Bill s-cl. 12(2)). A person who is precluded by these provisions from acquiring shares will be prohibited from making an offer (or invitation) for the shares (Bill s-cl. 12(3) - see also ex memo para 65).
49. There will be a defence for inadvertent breaches of the acquisition controls (Bill s-cl. 12(4)).

This provision is particularly necessary in view of the aggregation of the acquirer's interests with those of his associates when determining entitlement. Acquisitions will remain valid even though made in breach of the prohibitions on acquisition (Bill s-cl. 12(5)). In such an event the remedy is a Court order under cl. 45 of the Bill.

50. There is a danger in tightening up the takeover provisions that companies seeking to effect takeovers will attempt to do so under the guise of schemes of arrangement, or reconstructions. To overcome this problem, s.cl. 12(6) of the Bill provides that the provisions of the Companies Ordinance relating to schemes of arrangement (ss 181, 183 and 185) have effect subject to the take-overs provisions. The effect of this provision is that any scheme of arrangement, amalgamation, reconstruction or compromise with creditors will be subject to the prohibition on acquisition of shares resulting in shareholdings in excess of 20%, etc. unless the acquisition is approved by the NCSC (Bill para 10(o)) or an exemption is granted by the NCSC (Bill cl. 55) This will enable the NCSC to permit genuine schemes of arrangement to proceed unaffected by the requirements of the Bill.

Cl. 13: acquisition of shares permitted in certain circumstances

51. Introduction. Cl. 13 of the Bill sets out some of the circumstances in which the t/o code will permit acquisitions of shares which would otherwise be prohibited under cl. 12. It relaxes the prohibitions in cl. 12 in the following circumstances:-

- s-cl. (1): certain acquisitions where the company involved may be regarded as not being owned by the public or a section of the public.
- s-cl. (3): acquisitions on a stock exchange by certain offerors after service of the Part A statement on the target or by an on-market offeror after his announcement and, in both cases, for as long as the offer remains open.

52. Provisions of cl. 13. The prohibitions in cl. 12 will not apply to acquisitions of shares in:-

- (a) a company with less than 15 members (joint members will be treated as one member - see Bill s-cl. 13(2)); or
- (b) a proprietary company with more than 15 members all of whom consent in writing.

(Bill s-cl. 13(1) - cf ICAC Coy As paras 180C(2) (d) and (e)). The provision as drafted will preclude the misuse of the exemption by the interposition between the acquirer and the real target of a company of the kind exempted (Bill paras 13(1) (c) and (d))

53. The prohibitions in cl. 12 will also not apply to acquisitions by an offeror or an on-market offeror (but not associates unless they participate in the bid) outside a relevant take-over scheme or on-market announcement if those acquisitions are made on a stock exchange:-

- para (a) : by an offeror under a relevant take-over scheme (as defined in Bill s-cl. 13(4)) after service of the Part A statement on the target company within 28 days after service or, if offers are dispatched, for as long as the take-over offer remains open; or
- para (b) : by an on-market offeror after his announcement and for as long as his offer remains open. (Bill s-cl. 13(3)).

54. Under this provision, the offeror under a take-over scheme will have access to the market after delivery of a Part A statement even though there is no certainty that an offer will be

made (cl. 52 is far from sufficient to cope with all the reasons an acquirer may have for not proceeding). However, failure to provide such access would place the proposing offeror at an unfair disadvantage to any competitors and might enable countermeasures so successful as to defeat the bid and deprive shareholders generally of the benefits of the bid. Accordingly, as an offeror is permitted to purchase 'on market' as soon as his Part A statement is delivered, the Bill provides safeguards against the abuse of that right which would occur if the offeror failed to dispatch his take-over offer to shareholders:-

- (a) An offeror who fails to dispatch take-over offers in accordance with a Part A statement will not be entitled, without the leave of the Court, to exercise, or to authorize another person to exercise, any voting rights attached to shares acquired by him after the Part A statement is served, where the acquisition of those shares would have contravened the prohibitions in cl. 12 if he had not served the Part A statement (see Bill s-cl. 13(5)).
- (b) Where offers are not dispatched within 28 days of the delivery of the Part A statement, the Court, on the application of the NCSC, will be able:-
 - (i) to make any of the orders it could make in relation to a prohibited acquisition (under Bill s-cl. 45(1)); or
 - (ii) to order the dispatch of the offers (see Bill cl. 46).

55. A take-over scheme will be a relevant take-over scheme for the purposes of the exemption given to offerors under para (3) (a) only if the following requirements are met: -

- (a) The acquirer is proposing to acquire under the scheme at least 20% of the shares to which he is not entitled (Bill para 13(4) (a) - cf Bill para 30(1) (c))
- (b) Where the offers are subject to conditions, these conditions only:-
 - (i) relate to minimum acceptances;
 - (ii) relate to certain prescribed occurrences (see Bill cl. 6 - generally they are events which would make continuation of the take-over intolerable for the offeror e.g. if the target company or subsidiary alters its capital structure or makes an allotment of shares - these specified events are the same as the events which permit an on-market offeror to withdraw his on-market offer - see s-cl. 33(1)); or
 - (iii) are such as are approved by the NCSC.

(Bill para 13(4) (b)). These requirements are designed to prevent abuse of the right to purchase on the market by making of conditional offers and are a qualification to the right, acknowledged by cl. 21 of the Bill, that an offeror would otherwise have to withdraw all offers under a take-over scheme.

56. This limitation on the types of take-over schemes that will enable an offeror to purchase shares on a stock exchange is intended to preclude the making of token offers in order to gain access to stock exchange trading. The problem of token offers is also dealt with in the following further provisions of the Bill:-

- (a) Take-over offers with a minimum acceptance condition will be deemed by force of law to be unconditional if more than 20% of the shares in the company are purchased outside that offer (Bill s-cl. 30(1)). This provision overrides cl. 29 which provides that where a take-over offer is conditional on the offeror obtaining acceptances that give

him more than 50% of the voting shares, the offeror may not declare the offer free from that condition until he has received sufficient acceptances to achieve that percentage shareholding

- (b) Where a cash offer is made and the offeror purchases for cash outside his offer, the offer price will be deemed to be varied to the highest price so paid whether or not the offeree has already accepted the bid (see Bill s-cl. 31(1) and (2)). where an offer consists not solely of cash the offeror must give the offeree the option of accepting the highest price paid or the original consideration under the offer (see Bill s-cl. 31(3) and (4)).

Cl. 14: pari passu allotments

- 57. The prohibitions in cl. 12 will not apply to an acquisition by a shareholder pursuant to a pari passu allotment of shares or by an underwriter or sub-underwriter of the allotment (Bill s-cl. 14(1)) provided that the allotment is to all persons registered as the holders of shares in proportion to their shareholding (Bill s-cl. 14(2)). Where there are foreign shareholders it will be sufficient if the company (instead of making an offer to a foreigner) allots the foreigner's entitlement to a nominee for sale on approved terms and payment of the proceeds to the foreign shareholders (Bill s-cl. 14(3)).

Cl. 15: acquisition of not more than 3% of voting shares permitted in each 6 months

- 58. Notwithstanding the prohibition in cl. 12 of the Bill, a holder of between 20% and 90% of the voting shares in a company will be permitted to increase his holding by 3% each 6 months in any way he chooses (Bill cl. 15 - cf formula for calculating voting power in ICAC Coy. As 5. 180D). The cl. 12 prohibition will be relaxed only where the total of the relevant acquisitions, plus net acquisitions in the preceding 6 month period, do not exceed 3% of the voting shares in the company.
- 59. The effect is to impose a 6 month freeze since the section operates only where a person has been entitled to at least 19% (the figure is 19% rather than 20% to ensure acquirers can bring their holding to between 19% and 20% rather than exactly 20%) for a continuous period of 6 months.

Cl. 16: take-over offers

- 60. Introduction. Under cl. 16 of the Bill, the prohibitions in cl. 12 will not apply to the acquisition of voting shares pursuant to formal offers under a take-over scheme that complies with its provisions - generally, to fall within cl. 16, separate take-over schemes are required for each class of share, the offers must be the same, must bear the same date and must be made to each shareholder in the class (accompanied by a copy of the Part A statement) . See also:-
 - (a) Bill cls. 18 to 31 for other provisions relating to formal take-over offers (Part III); and
 - (b) Bill cls. 36 to 43 for provisions relating to both take-over offers and take-over announcements (Part V).
- 61. Provisions of cl. 16. Cl. 12 will not prohibit an acquisition of shares pursuant to formal offers made under a take-over scheme that complies with the requirements of s-cl. 16(2) of the Bill.

62. Attention is drawn to the following requirements of s-cl. 16(2):-
- (a) Separate take-over schemes (and consequently, separate Part A statements) will not be required where there are differences in the price offered for shares flowing from differences in accrued dividends or in amounts paid up on shares (Bill s-para 16(2) (b) (ii))
 - (b) The Part A statement and other relevant documents must be served on the target company between 14 and 28 days before the offers are dispatched (Bill para i6(2)(d) - cf ICAC Coy As para 180C(1)(b)). The detailed information that must be included in a Part A statement is set out in that Part of the Schedule to the Bill (see ex memo paras 164 to 166)
 - (c) The offeror must, on the day on which the Part A statement is served, lodge with the NCSC a notice stating that the Part A statement has been served (Bill s-para 16(2) (e) (i) - the NCSC will already have the other documents that have to be served on the home exchange of a listed target company under Bill s-para 16(2) (e) (ii))
 - (d) A copy of the Part A statement and other relevant documents must be served on the home exchange of a listed target company on the date of service on the target company (Bill s-para 16(2) (e) (ii)).
 - (e) The required contents of the offer are dealt with in para 16(2) (f) of the Bill:-
 - The offer must be expressed to be open for between 1 and 6 months (Bill s-para 16(2) (f) (ii) - cf ICAC Coy As s-sec 180E(2))
 - see Bill s-cl. 27(7) which allows extension of the period for a further period allowing the offer to remain open for up to a total of 12 months)
 - Offers must be made to all shareholders, but where it is desired to acquire only a proportion of the shares of a company and acceptances are received in excess of those for which the offer is made, the offeror must pro rata the acceptances equally between shareholders (Bill s-para 16(2) (f) (iii) - when read with Bill para 16(2)(c) and cl. 26 - see also ex memo paras 84 to 85) . This will prevent an offeror from discriminating between shareholders.
 - The offer must provide for the consideration, whether in cash or shares to be paid within 30 days of the offer being accepted (Bill s-para 16(2) (f) (vii) (A)) or if the offer is conditional, within 30 days of the offer being accepted of the offer becoming unconditional, whichever is the later (Bill s-para 16(2) (f) (vii) (B))
 - Where an offer is conditional, offerees must be informed of a date for publication of the notice (under s-cl. 28(4)) that a conditional offer is free from the condition, or that the condition is fulfilled. (Bill s-para 16(2)(f) (v))
63. Additional non-statutory information can be included in a Part A statement provided that the information must not be information that is false in a material particular or materially misleading in the form and context in which it appears (Bill s-cl. 16(3) - this proviso is in line with cl. 44 dealing with liability for mis-statements)

Take-over invitations.

64. The ICAC Coy As include separate controls on take-over schemes by way of invitation (see

s-sec 180C(3)) to avoid the use of invitations to circumvent the controls in the code on take-over offers. Invitations have been criticised on the grounds that they leave the bidder completely in control of the situation since he has no obligation to accept any offer made to him as a result of the invitation and it is unfair to allow the bidder that degree of control.

65. The proposed t/o code is based on the regulation of acquisitions with all acquisitions that are not otherwise permitted being prohibited under cl. 12. Accordingly, the general prohibition will now preclude the use of invitations and there will be no provision for take-over schemes by way of invitation. (see Bill s-cl. 12(3)).

Cl. 17: take-over announcements

66. Introduction: the on-market alternative. The second form of take-over that is provided for under the proposed code is the acquisition of shares in a listed public company through announcement to the home exchange of the offeree company of an unconditional undertaking to stand in the market. The undertaking is to purchase on the floor of the exchange during a period of 1 month, all shares tendered at or above the specified minimum price. (Separate announcements are required for each class of share) The details of this on-market alternative are set out in cl. 17. See also:-
- (a) Bill cls. 32 to 35 for other provisions relating only to take-over announcements (Part IV); and
 - (b) Bill cls. 36 to 43 for provisions relating to both take-over offers and take-over announcements (Part V).
67. If a prospective bidder chooses to adopt the on-market alternative, it is a procedure which has substantial benefits for the shareholders in the target company: -
- (a) Those shareholders are guaranteed the right to sell at not less than a publicly announced price.
 - b) They will receive basically the same information as they receive under a takeover offer.
 - (c) They will receive the benefit of being paid cash almost immediately upon delivery of scrip in lieu of having to wait for a considerable period as is usually the case under a formal takeover offer.
68. Provisions of cl. 17. Attention is drawn to the following requirements of cl. 17 of the Bill:-
- (a) The trading period commences 14 days after the announcement (Bill s-cl. 17(2)). This will ensure that each shareholder has a copy of the Part C statement before trading commences (see Bill para 17(9)(b)).
 - (b) A holder of shares will be able to accept an offer in an announcement by notice served on the stock exchange itself (Bill para 17(2)(b)). This will ensure that the unconditional nature of the obligation is not prejudiced by such events as a broker not appearing on the floor or suspension of trading in the shares.
 - (c) Except with the consent of the NCSC the use of the on-market alternative will not be allowed where the offeror holds 30% or more of the target company (Bill s-cl. 17(3) - see also cl. 23). This will ensure that the procedure is not available in circumstances where because of a common shareholding collusion is possible (cf. Bill cl. 23 which

provides that where an offeror has a 30% shareholding in the target company, and a formal Part A bid is made, the target company must provide an independent evaluation of the adequacy of the bid to meet this possibility)

- (d) The stock exchange must notify the member of the exchange of acceptances under para 17(2) (b) as soon as practicable (Bill s-cl. 17(5)).
- (e) The minimum price will be the highest price paid by the offeror or his associates in the 4 months before the announcement. (Bill s-cl. 17(6)). It will not be possible for an offeror or his associates to use escalation clauses in the 4 months preceding a bid to achieve an artificially low minimum price (Bill s-cl. 17(7)). These provisions relating to the minimum price should eliminate some of the opportunities for offering an unrealistic price. If the on-market offeror has acquired shares on a stock exchange (see Bill para 13(3)(b)) at a higher price than the announced price, then the higher price paid will be deemed to be the price specified in the announcement (Bill s-cl. 17(8)).
- (f) On the day he makes the announcement the offeror must provide the target company, the home exchange and the NCSC with a Part C statement (which is to contain information similar to that required to be in a Part A statement involving a cash consideration - see Part C of the Schedule and ex memo para 170) ; and within 14 days of the announcement he must also send in a manner approved by the NCSC a copy of the Part C statement to each shareholder (Bill s-cl. 17(9)).
- (g) The price can be reduced with the consent of the NCSC, rather than a fresh start made, where the target company allots shares, grants options or issues convertible notes, or declares a dividend and any reduced price allowed is deemed to be the price specified in the announcement unless or until the price is increased (by the operation of Bill s-cl. 17(8)) because the on-market offeror has acquired shares on a stock exchange at a higher price (Bill s-cl. 17(10) - cf. Bill s-cl. 27(6) which enables a take-over offer to be varied in similar circumstances) . The trading period can be extended for a period of up to a month at a time, but so that the total period for which the offers remain open does not exceed six months (Bill s-cl. 17(11)). Where the price is reduced or the period varied, the offeror must notify the home exchange, the target and the NCSC of the change (Bill s-cl. 17(12)).
- (h) There is no right of withdrawal on grounds other than those set out in cl. 33 (Bill s-cl. 17(13)). Having made an announcement, all shares tendered during the trading period of one month must be accepted. Similar grounds of withdrawal to those in cl. 33 are often included in take-over offers: this provision seeks to ensure that on-market offerors are not unduly disadvantaged, by comparison with those who proceed by formal offers, because of the unconditional nature of the offer to stand in the market for a fixed period of 1 month.
- (i) The obligations under the alternative on-market procedure are placed on the broker himself (Bill s-cl. 17(14)). The broker is obliged to stand in the market in substitution for his client, but the broker /client relationship is not affected. (See also Bill para 17(2) (b) which is designed to ensure that members of an exchange do not avoid their obligations by not appearing on the floor, suspension of dealing in the shares etc, and Bill s-cl. 33(5) dealing with the withdrawal of the on-market offer if the broker's position is affected by certain events)

- (j) Where the broker is a member of a broking partnership, the obligations placed on the broker are also deemed to be obligations of the other members of the partnership (Bill s-cl. 17(15)).
- (k) Additional statutory information can be included in a Part C statement (Bill s-cl. 17(16)). This brings the on-market alternative into line in this respect with the requirements for take-over offers (see Bill s-cl. 16(3)).
- (l) Members of a stock exchange who are entitled to trade on the floor of another exchange (e.g., in the case of the Sydney and Melbourne exchanges,) may conduct on-market offers on the floor of that exchange (Bill s-cl. 17(17)).

TAKE-OVER BILL: PART III - PROVISIONS RELATING ONLY TO TAKE-OVER OFFERS

69. Part III of the Bill (cls. 18 to 31) contains a series of provisions that relate only to take-over offers (and not to the on-market alternative provided for in cl. 17 of the Bill).

Cl. 18: registration of Part A statement and offers

70. A copy of the Part A statement and of one of the offers to which it relates must be registered by the NCSC not later than 21 days before the Part A statement is served on the target company (Bill s-cl. 18(1) - cf cl. 173 of the CSI Bill - it is only after the Part A statement is served on the target company that the offers can be dispatched to shareholders - see Bill para 16(2)(d)). The registration of offers should ensure that incorrect offers are not being sent out, and the 21 day restriction should ensure that the Part A statement and the offer contain up to date information. The ICAC Coy As do not require the present Part A statement or any offer to which it relates to be registered. This restricts the ability of the registering authorities to examine the material being sent to offerees. Yet the atmosphere of a take-over bid tends, if anything, to increase the risk of false statements and material omissions. The Bill gives effect to a view that there is a need in such cases for take-over offerees to be provided with a document which sets out relevant information concerning the proposed issue and which has been registered by the NCSC.
71. The NCSC will be required to register the Part A statement unless in its opinion it does not comply with the Schedule to the Bill or it contains misleading information (Bill s-cl. 18(2)) - the latter requirement brings the provision into line with the prospectus registration provisions in ICAC Coy As para 42(2) (d) . The NCSC will be able to compel production of supporting material so that it can form an opinion (see existing companies legislation s.12). A Part A statement will be totally ineffective until registered (Bill s-cl. 18(3)).

Cl. 19: extension of time for paying consideration

72. The offeror will be able to obtain from the NCSC an extension of time for payment of the consideration pursuant to a take-over offer for voting shares (Bill s-cl. 19(1) - see Bill s-para 16(2) (f) (vii) which provides for a basic maximum of 30 days)
73. An offeror will be obliged to pay the consideration before the end of the period (either as provided in cl. 16 or as extended under s-cl. 19(1)). (Bill s-cl. 19(2)).

Cl. 20: take-over offers not to be subject to certain terms or conditions

74. Take-over offers will not be able to be subject to the following:-
- (a) a requirement that the offeree approve of compensation for loss of office by a director, secretary or principal executive officer of the target company or related corporations (Bill s-cl. 20(1) - cf ICAC Coy As s-sec 180E(3) - any such compensation must be disclosed in the Part A or Part C Statement - see paras 4(a) of those Statements) ; or
 - (b) a minimum acceptance condition if the minimum number is not specified in the offer (Bill s-cl. 20(2) - thereafter, the number can be varied only by formal variation of the offer under cl. 27); minimum acceptance conditions may be expressed as a number of shares or as a percentage of the total shares in the company or as a percentage of the

number of shares not held by the offeror (Bill s-cl. 20(3)); Bill clauses 28-30 also relate to minimum acceptance conditions in offers
- see ex memo paras 89-96.

Cl. 21: withdrawal of offers

75. where an offer to one shareholder is withdrawn, all other offers under the scheme must be withdrawn and, if offers have already been accepted, the resulting contracts will be voidable at the option of the offeree but the offeror will not be entitled to avoid such contracts (Bill s-cl. 21(1) - cf. ICAC Coy As s-sec 180E(4)). This will present discrimination by selective withdrawal of take-over offers. It will also protect an offeree who may have accepted the offer, sent his script in and thus given the offeror a free option to purchase for the period of the offer. The right of withdrawal that is acknowledged by these provisions is qualified by para 13(4) (b) of the Bill which only allows a formal take-over offeror to make purchases on a stock exchange if the formal offer is unconditional except for the conditions permitted under that provision.
76. People with rights to avoid contracts under this provision must be given notice of their rights at the time of withdrawal and copies of such notice must be given to the target company, the NCSC, and if the target company is listed, to the home exchange (Bill s-cl 21(2))

Cl. 22 Part B statements

- 77 The target company must respond to a bid by preparing a Part B statement which complies with Part B of the proposed Schedule (Bill s-cl 22(1) - cf ICAC Coy As s. 180G - there will only be one document called a Part B statement, which will be given to the offeror: other persons will receive only a copy of the Part B statement) The target company must give the Part B statement to the offeror:
- either within 14 days of receiving the part A statement (in which case the offer will have to send copies of the Part B statement out with its offer documents - see Bill s-s-para 16(2) (f) (viii) (B));
 - or within 14 days after the formal take-over offers are dispatched (in which case the target company must copy the Part B statement to its shareholders)

(Bill s-cl. 22(1))

78. The details required for a Part B statement are set out in that Part of the Schedule to the Bill (see e memo paras 167 to 169).
79. In addition, the Part B statement:-
- (a) must be signed (Bill s-cl. 22(2));
 - (b) must not refer to an expert's report, other than a report required by Bill cl. 23, unless:-
 - (i) the report is set out in the statement; and
 - (ii) the expert has given his consent for the inclusion of the report. (Bills-cl. 22(3))
 - (c) must be copied to the NCSC and, in the case of a listed company, to the home exchange (Bill s-cl. 22(4)); and

(d) may contain additional non-statutory material (Bill s-cl. 22(5)).

(The provisions in cl. 22 of the Bill are similar to those in cl. 32 of the Bill which deals with the Part D statement that a target company has to prepare after it has received a Part C statement from an on-market offeror)

Cl. 23 : offeror connected with target company

80. Where an offeror has a shareholding of 30% or more in the target company the Part B statement must be accompanied by a report by an independent expert (Bill s-cl. 23(1) - see also s-cl. 23(3) which specifies that 30% or more is the prescribed shareholding). Each report must be attached where there is more than one (Bill s-cl. 23(2) - to stop selective use of reports).
81. This provision will prevent the recurrence of situations where an offeror after gaining control of the offeree, makes a further and lower offer to minority shareholders, thus giving rise to an understandable scepticism in relation to recommendations in Part B statements, notwithstanding any assurances given that the common directors have taken no part in the deliberations prior to the second offer being recommended. A similar requirement was included in the European Economic Community Third Draft Directive on Company Law (chapter 2 - article 5) prepared in 1970, but not yet adopted by the E.E.C. It is a requirement of the London City Code on Take-overs and Mergers that the board of an offeree company must obtain competent independent advice on any offer (not only offers from companies with substantial holdings in the offeree or common directorships), and the substance of such advice must be made known to the shareholders.

Cl. 24 : notice of offers to be served

82. where take-over offers are dispatched, the offeror must notify the target company, the NCSC, and if the target is a listed public company, its home stock exchange (Bill s-cl. 24(1) - cf. ICAC Coy As 5. 180H), and the notice must be accompanied by a copy of one of the offers and a copy of every document that accompanied that offer (Bill s-cl. 24(2)).

Cl. 25 : acceptance of take-over offers by third parties

83. Take-over offers will extend to all persons registered or entitled to be registered as the holder of shares to which the offer relates (Bill s-cl. 25(1) - based on ICAC Coy As 5. 180K). This will cover the situation where third parties buy shares during a bid, or have previously purchased shares but are not yet on the register. Bill s-cl. 8(3) does not apply to this provision (see ex memo para 30) so that where an offer is made for a proportion only of an offeree's shares and is accepted by the offeree, any person who purchases the remaining shares from the offeree will not also be able to accept the offer in respect of a proportion of the shares purchased.

Cl. 26 : offeror not proposing to acquire all shares in class

84. An offeror will be able to specify in his offer the maximum number of shares sought, but must make offers to each shareholder (see Bill s-para 16(2) (f) (iii) and para 16 (2) (c)). Where an offeror is seeking less than 100% of a target company's shares he will not be able

to acquire selectively the holdings of particular shareholders: if he receives acceptances in excess of the number proposed to be acquired (as set out in Bill s-cl. 26(1) he must pro rata acceptances equally amongst all shareholders in the same proportions (Bill s-cl. 26(2)). This will prevent the offeror from discriminating between shareholders. The clause only applies where offers relate to all voting shares held by the offeree. If the offeror makes offers limited only to a proportion of the offeree's shares, (Bill s. para 16(2) (a) (ii)) he is not entitled to pro rata.

85. Where the number of the offeree's shares that would be calculated as acceptable in accordance with the pro rata process would otherwise constitute an odd lot, then the number of the shares that can be accepted will be rounded up to the nearest marketable parcel (Bill s-cl. 26(3)). This should avoid the creation of an undue number of odd lots in the hands of offerees.

Cl. 27: variation of offers

86. Except for the variation of the date by which consideration must be paid (see Bill cl. 19), an offer under a take-over scheme can only be varied in accordance with cl. 27 of the Bill (cf. ICAC Coy As s. 180L) and a corresponding variation must be made to all unaccepted offers (Bill s-cl. 27(1)).

87. The following types of variations will be permitted: -

- (a) certain specified increases in the consideration (Bill s-cl. 27(2)): amongst other things, an offer involving a share consideration can be varied by specifying a cash sum in addition (Bill para 27 (2) (b)) : earlier acceptors will be entitled to receive the increased consideration (Bill s-cl. 27(3)).
- (b) the inclusion of a cash sum as an alternative where the consideration formerly consisted only of securities (Bill s-cl. 27(4)): earlier acceptors will have the option of taking the cash alternative (Bill s-cl. 27(5));
- (c) variations, with the consent of the NCSC, to take account of certain actions of the target company: an allotment, granting options to subscribe for shares, issuing convertible notes or declaring a dividend (Bill s-cl. 27(6) - similar variations are permitted in the case of the on-market alternative - see Bill s-cl. 17(10));
- (d) extension of the offer period for up to 12 months (Bill s-cl. 27(7) and (8) - see also Bill s-para 16(2) (f) (ii) which provides for a basic period of up to 6 months) ; this extension will only be effective if an appropriate notice is sent to each offeree (see Bill s-cl. 27(11)); where a conditional offer is extended, a new date for the publication of the notice (under s-cl. 28(4)) informing shareholders of the status of the offer must be specified (Bill s-cl. 27(9)) cf. ICAC Coy As s-para 180C(1) (a) (i) - at present the offer may remain open for an indefinite period, or the period may be extended indefinitely. By this means payment of consideration to those shareholders who have accepted the offer and forwarded their share certificates may be deferred indefinitely.

88. The procedures in relation to variations will be as follows:-

- (a) Variations of associated offers must be bywritten notice to each offeree with a copy of one notice being served on the target company (Bill s-cl. 27(10)).

- (b) An attempt to extend an offer beyond 6 months will be ineffective unless the required notice is sent to offerees during the 6th month (Bill s-cl. 27(11)). Amongst other things, the notice must inform the offeree of his right to withdraw if he has already accepted the offer and where an offeree does withdraw his acceptance of an offer, the offeror must return his scrip to him within 14 days (Bill s-cl. 27(12)).
- (c) A copy of certain notices of variation must be registered with the NCSC before dispatch (Bill s-cl. 27(13)). The NCSC will have the same powers to refuse registration as it has in relation to Part A statements (Bill s-cl. 27(14)
 - see Bill s-cl. 18(2) dealing with Part A statement). Registerable notices must include a disclaimer of responsibility by the Commission for the contents of the notice (Bill s-cl. 27(15)).
- (d) Once the notices are dispatched the offeror must notify the target company and the NCSC and, if the target company is listed, serve on its home stock exchange a copy of the notice (Bill s-cl. 27(16)).

Cl. 28: declaration where take-over offers are conditional

89. Introduction. Cls. 28 to 30 of the Bill are three related provisions that apply where a take-over offer under a formal take-over scheme is subject to a condition. In brief:-

- (a) An offer will be able to be declared free from a condition by a public notice provided it is a term of the offer that this can be done at least 7 days before close of the offer and provided that all offers under the scheme are declared unconditional at the same time (see Bill s-cl. 28(2)). An offeror must not purport to treat a take-over offer as being free from a condition in any other way (see Bill s-cl. 28(1)),
- (b) Where a take-over offer is conditional on the offeror obtaining acceptances that give him more than 50% of the voting shares, the offeror may not declare the offer free from that condition until he has received sufficient acceptances to achieve that percentage shareholding (see Bill s-cl. 29(1)).
- (c) These last provisions (in cl. 29) are subject to s-cl. 30(1) under which take-over offers with a minimum acceptance condition are deemed by force of law to be unconditional if more than 20% of the shares in the company are purchased outside that offer (under cl. 13(3)). Where purchases outside a conditional offer do not result in an offer being declared unconditional they are counted in determining whether the minimum acceptance condition is fulfilled (see Bill s-cl. 30(2)).

90. Provisions of cl. 28. A take-over offer that is subject to a condition imposed by the offeror can only be freed from that condition if:-

- (a) it is a term of the offer that this can be done at least 7 days before close of the offer; and
- (b) all offers under the scheme are declared unconditional at the same time.

(Bill s-cl. 28(1) and 28(2) - cf ICAC Coy As s. 18ON).

91. However, the offeror must publish two notices:-

- (a) a notice stating that the offers are freed from the condition and specifying the offeror's percentage holding and his percentage increase since his offer - this notice must be

published immediately offers are freed from the condition (Bill s-cl. 28(3) - see also Bill s-cl. 8(1)); and

- (b) a notice as to the status of the conditional offers - this notice must be published at the time specified in the offer or in a notice of variation where the offer is extended (Bill s-cl. 28(4)). If this notice states that the offer is free from a condition it must specify the offeror's percentage holding in the target (Bill s-cl. 28(5) - see also Bill s-cl. 8(1)). Where a condition is not fulfilled and this notice is not published, any contracts formed by acceptance of offers under the schemes are void (Bill s-cl. 28(8)).
92. The procedural requirements in relation to these notices are as follows:-
- (a) The notice must be published in the jurisdiction of incorporation and, where the target is listed, in the jurisdiction where the shares are listed
 - (b) A copy of the notice must be lodged with the NCSC and in the case of a listed company, served on its home exchange (Bill s-cl. 28(7) and (9)). where the notice lodged with the NCSC relates to a minimum acceptance condition of more than 50%, the offeror must also provide a statement showing that he was entitled to declare the offer free of this condition (see Bill s-cl. 29(2)),

Cl. 29: conditional take-over offers not to be made unconditional in certain circumstances etc.

93. Where a take-over offer is conditional on the offeror obtaining acceptances that give him more than 50% of the voting shares, the offeror may not declare the offer free from that condition before he has received sufficient acceptances to achieve that percentage shareholding (Bill s-cl. 29(1)). The notice declaring the offer free from such a condition that is lodged with the NCSC (under s-cl. 28(7)) must be accompanied by a statement setting out particulars of the matters by virtue of which the offeror was entitled to declare the offer unconditional (Bill s-cl. 29(2)). The response of shareholders to a take-over offer can be influenced by whether the offeror is attempting to acquire a majority interest or only a partial interest. It is undesirable that an offeror be permitted to stipulate that his offer is subject to a condition that he obtains the shares necessary to enable him to control more than 50% of the voting rights and then, on receiving acceptances for a lesser number of shares, declare his offer to be free of that condition (cf CSI Bill cl. 246).
94. This provision takes effect subject to cl. 30, under which offers are deemed by force of law to be unconditional if more than 20% of the shares in the company are purchased outside that offer (Bill s-cl. 29(3))

- cls. 29 and 30 necessarily overlap and sub-cl. 29(3) ensures that cl. 30, which is directed at a more serious problem than that dealt with in cl. 29, remains paramount.)

Cl. 30 : take-over offers subject to conditions

95. while an offeror (but not his associates) may be entitled to buy shares outside his offer without regard to the 20% and 3% restrictions (in Bill cls. 12 and 15 - see Bill para 13(3) (a)) if his take-over offer has a minimum acceptance condition, and he acquires outside his offer more than 20% of the total number of voting shares in the company to which he was not entitled (cf Bill para 13(4) (a)) the offer is deemed by force of law to be free from that condition (Bill s-cl. 30(1) - this provision overrides cl. 29 - see Bill s-cl. 29(3)). If the

purchases outside the offer are not sufficient to make the offers unconditional, they will still be counted in determining whether the minimum acceptance condition is fulfilled (Bill s-cl. 30(2)).

96. It is necessary to permit a take-over offeror to compete with other persons who are buying in an attempt to frustrate the take-over bid. As an example, immediately a take-over offer becomes open, an intending competitor who holds no shares at all can purchase up to 20% of the voting shares in the company without infringing the restrictions applicable to non-offerors. The offeror would be unduly disadvantaged if he could not compete on the stock market while his offer remains open with other persons using the market to frustrate the take-over offer. However, harm can occur if a person makes a conditional take-over offer, proceeds to buy large quantities of shares in the same company on the stock market, and then withdraws the take-over offer because the acceptances received at the time he gains control did not equal the minimum specified as a condition of a take-over offer. Shareholders who had in good faith sent in acceptances would be disadvantaged because by sending in their acceptance they would be unable to take the advantage of selling to anyone who was buying on the market. Accordingly, if an offeror purchases shares in excess of the 20% and 3% restrictions under the normal rules, his conditional offer will be deemed by law to become unconditional so that persons who have sent in acceptances are guaranteed payment under the offer.

Cl. 31: effect of acquiring shares otherwise than under take-over scheme

97. Introduction. The purpose of cl. 31 of the Bill is to ensure that an offeror must pay any offeree the highest amount he has paid for a share acquired outside the take-over scheme. Such acquisitions are permitted by the offeror where the take-over scheme meets the requirements of s-cl. 13(4) (see Bill s-cl. 13(3)). There is already a similar requirement under the A.A.S.E. Listing Requirements (see Listing Requirement 3R(13)) and it ensures that persons who accept under a take-over offer get the same benefits as those who sell direct or through the market to the offeror while the offer is open. An offeror will not, however, be obliged to pay the highest price paid by any associate. As associates are not given the right to purchase on the market under cl. 13 in circumstances which would otherwise be a breach of cl. 12, it is not considered reasonable that the price they pay should affect the price that the offeror is obliged to pay under cl. 31.
98. Provisions of cl. 31. where an offer is for cash (alone or as one alternative) , and the offeror purchases for cash outside his offer, the offer price is deemed to be varied to the highest price so paid (Bill s-cl. 31(1)). where an offeree has already accepted the offer, the contract is deemed to be varied so that the offeree is entitled to receive the highest amount paid by the offeror and is entitled to receive the additional consideration resulting from the variation immediately (Bill s-cl. 31(2)).
99. where the consideration under an offer is not solely cash, the offeror has 14 days after the offer period to notify the offeree of the highest price paid outside the offer: he must give the offeree the option of accepting, within 28 days, that highest price paid or the original consideration under the offer (Bill s-cl. 31(3)). This provision applies the principles of s-cl. 31(1) and (2) to the case where the consideration offered under the take-over offer was not purely cash but was in whole or in part a share swap. At present the A.A.S.E. Listing Requirements require the take-over offer to be withdrawn and a new offer made in these

circumstances (see Listing Requirement 3R(13)(b)). The procedure in s-cl. 31(3) will achieve the same purpose as the existing listing requirements but with considerable savings in costs.

100. Similar provisions apply to offers conditional on the offeree using a cash consideration as a deposit or loan (Bill s-cl. 31(4)).

TAKE-OVER BILL : PART IV - PROVISIONS RELATING ONLY TO TAKE-OVER ANNOUNCEMENTS

101. Part IV of the Bill (cls. 32 to 35) contains provisions relating only to the on-market alternative (provided for in cl. 17 of the Bill) . None of these provisions apply to a take-over offer under a formal take-over scheme (provided for in cl. 16 of the Bill)

Cl. 32 : Part D statement

102. where a target company has received a Part C statement from the on-market offeror, it must serve its home exchange with the Part D statement within 14 days of the making of a take-over announcement under cl. 17. (Bill s-cl. 32(1) - cl. 32 contains provisions similar to those in cl. 22 which deals with the Part B statement that a target company has to prepare after it has received a Part A statement from an offeror under a formal take-over scheme) . The detailed requirements for a Part ID statement are set out in that Part of the Schedule to the Bill (see ex memo para 171).

103. In addition, the Part ID statement:-

- (a) must be signed (Bill s-cl. 32(2));
- (b) must not refer to an expert's report unless:-
 - (i) the report is set out in the statement; and
 - (ii) the expert has given his consent for the inclusion of the report. (Bill s-cl. 32(3);
- (c) must be copied to the NCSC (Bill s-cl. 32(4)); and
- (d) may contain additional non-statutory material (Bill s-cl. 32(5)).

Cl. 33 : withdrawal of on-market offers

104. Introduction. Cl. 33 of the Bill seeks to ensure that on-market offerors (or their brokers) are not unduly disadvantaged, by comparison with those who proceed by formal offers, because of the unconditional nature of the offer to stand in the market for a fixed period of 1 month.

105. Provisions of cl. 33. It does this by permitting the withdrawal of the on-market offer in the following circumstances:-

- (a) If certain prescribed occurrences take place in relation to the target, or one of its subsidiaries, which would make continuation of the take-over intolerable for the on-market offeror (Bill s-cl. 33(1) - these occurrences are defined in cl. 6) . A formal take-over offeror can impose conditions in relation to the same occurrences and still purchase shares outside his offer on a stock exchange (see Bill s-para 13(4)(b)(ii)). Once he has reached a majority shareholding in the target company, the on-market offeror will not be able to withdraw on the grounds of action taken by the target company (Bill s-cl. 33(2)).
- (b) If the offeror's own position is affected by certain events; bankruptcy, mental incapacity or death in the case of a natural person (Bill s-cl. 33(3)) or official management, receivership or winding up in the case of a corporation (Bill s-cl. 33(4)).
- (c) If the broker's position is affected by any of the following events:-

- bankruptcy;
- a direction from the governing body of the Stock Exchange to cease to carry on the business of dealing in securities; and
- in the case of a sole trader: death or mental incapacity.

(Bill s-cl. 33(5)).

- (d) If the NCSC considers it just and equitable to allow the offeror to do so (Bill s-cl. 33(6)).

Cl. 34 : suspension of acceptance of offers made pursuant to a take-over announcement

106. Acceptance of offers is suspended if the NCSC grants an order, on the application of the offeror or the member of the exchange who made the announcement on behalf of the offeror, declaring that offers that have not been accepted are not capable of being accepted while the order is in force (Bill cl. 34)).

Cl. 35 : restriction on disposal of shares by on-market offeror

107. An on-market offeror will be prohibited from selling his shares after the announcement unless another person not associated with him makes a counter-bid (Bill cl. 35 - the test of association is set out in s-cl. 7(5)).

TAKE-OVER BILL : PART V - PROVISIONS RELATING TO BOTH TAKE-OVER OFFERS AND TAKE-OVER ANNOUNCEMENTS

108. Part V of the Bill (cls. 36 to 43) contains provisions which apply to any take-over conducted in accordance with the proposed t/o code either by means of take-over offers under a formal take-over scheme (see Bill cl. 16) or by means of the on-market alternative (see Bill cl. 17). (References in this ex memo to a 'bidder' are to both an offeror under a formal take-over scheme and an on-market offeror)

Cl. 36 : obligations of target company to provide information

109. A target company must, if requested, provide a bidder with a list of shareholders (and holders of renounceable options and convertible notes) within 7 days of receipt of the prescribed fee (Bill cl. 36). This will provide the bidder with the addresses he will need to dispatch to all shareholders the offer and accompanying material in the case of a formal take-over offer (see Bill para 16(2) (c) and s-para 16(2)(f)(viii)) and the Part C statement in the case of an on-market offer (see Bill para 17(9)(b)) and to make general law offers to the holders of non-voting shares, convertible notes and renounceable options (see also ex memo para 44 in relation to the treatment of non-voting shares etc)

Cl. 37 : forecasts of profits

110. Introduction. The bidder and the target company can only make forecasts of profits during a take-over, with the written consent of the NCSC. (Bill cl. 37) cf CSI Bill cl. 237 which applied only to statements made by the offeror and its associates. It is just as essential to place the same restrictions on public statements made by the offeree company as those statements, if misleading, can be equally detrimental to shareholders as misleading statements made by the offeror company.

111. Provisions of cl. 37. There will be a general prohibition on forecasts of profits by:-
(a) bidders (Bill s-cl. 37(1)); and
(b) target companies (Bill s-cl. 37(2)).

112. This prohibition will not apply to a forecast that: -

- is in writing, and
- is issued with the written consent of the NCSC which may impose conditions

(Bill s-cl. 37(3)).

113. The controls relating to forecasts of profits will also apply to forecasts of profits of any business or income producing activity of a kind engaged in by the company or of any industry in which the company is engaged (Bill s-cl. 37(4)).

Cl. 38 : statements on asset valuations

114. During a take-over, or whilst it is believed that a take-over offer is imminent, the directors of the target company, and its associates, will be prohibited from making public statements concerning the target company's asset valuations, without the written consent of the NCSC

(Bill cl. 38). The object of this provision is to prevent the directors of the target company from giving unfounded but optimistic estimates of the asset values of the target company as a defence to the take-over bid.

115. Provisions of Cl. 38. There will be a general prohibition on statements by the directors of the target company, and by persons associated with the target company, to the effect that the market values of target company's assets differ from its book value, unless the statement
- is in writing; and
 - is issued with the written consent of the NCSC which can impose conditions

(Bill s-cl. 38(2)).

116. The controls will operate on any statement that the market value of any assets differ from the amount shown in the last accounts published, being accounts prepared under a statutory requirement to do so (Bill s-cl. 38(3)).

117. Accounts, and any document attached to such accounts, laid before an annual general meeting are excluded from the controls (Bill s-cl. 38(4)).

Cl. 39 : notification of acquisitions and disposals of shares

118. Introduction. During a take-over of a listed public company (and from the date of the announcement in the case of an on-market offer) the bidder will be required to keep the home stock exchange of the target company informed on a daily basis of details of any dealings in the shares. Any other person who holds 5% or more of the shares in the company at any time during the relevant period must notify the home exchange of the relevant particulars if he varies his holding by 1% or more, This information is essential information for an informed market. A defence will be provided for failure to notify because of ignorance of changes in entitlements.
119. provisions of cl. 39. The periods during which the notification requirements apply, and the persons to whom they apply, are set out in s-cl 39(1). Associates of offerors and on-market offerors are not required to notify separately.
120. A person making a take-over bid must advise the home exchange of the target company of details of his holding in that company, even if his holding is nil, by 9.30 am on the day after commencement of a relevant period, together with details of any changes in his entitlement to such shares since commencement of the period; thereafter he must give daily advice to the home exchange of details of any changes in his entitlement (Bill s-cl. 39(2) - see also Bill s-cl. 39(10) and (11) which set out the particulars required where there are changes)
121. The notification requirements will also apply to a person who becomes entitled to more than 5% of the shares during a relevant period (Bill s-cl. 39(3) - relevant period is defined in para 39(1)(a)). Where a person who has been required to notify because he holds more than 5% of the company reduces his entitlement to below 5% (as a result of dealings in the shares) , he must notify the stock exchange of the changes in entitlement which resulted in him dropping below the 5% level, and of any changes in his entitlement since last giving notice (Bill s-cl. 39(4)). A person entitled to more than 5% of the voting shares in the company must notify the required details of changes in entitlement only where the net fluctuation in his entitlement since he last gave notice is 1% or more of the number of the voting shares in the

company (Bill s-cl. 39(5)).

122. Other provisions relating to the notification requirements are as follows:-

- (a) There will be a defence of ignorance of changes in entitlement in a prosecution for failure to notify under the clause (Bill s-cl. 39(6)). This defence is necessary particularly because of the extended operation of the code through the provisions dealing with relevant interests.
- (b) Notification will not have to be more frequent than daily (Bill s-cl. 39(7)).
- (c) If two or more persons become entitled or cease to be entitled to the same shares by virtue of being associates, only one of those persons need give notice (Bill s-cl. 39(8)).
- (d) The prescribed particulars of acquisitions which must be notified to the home stock exchange are set out in s-cl. 39(9) and (10). Under paras (9) (d) and (10) (e) other matters may be prescribed. Note that under the Schedule Part A, 4(e) and Part C, 4(e), disclosure of any escalation clauses entered into before the relevant periods is required; such clauses are prohibited after service of a Part A statement, or after an announcement (see Bill cl. 40).
- (e) The prescribed particulars of dispositions which must be notified are set out in s-cl. 39(11).
- (f) Specific separate notification will be required of the highest price paid in relation to acquisitions of shares, or the highest price obtained with respect to disposal of shares, during a relevant period (Bill s-cl. 39(12)).

Cl. 40 : offerees or on-market offerees not to be given benefits except under take-over scheme or take-over announcement

123. The grant, during a take-over, of special benefits including 'escalation clauses' to shareholders which are not provided for under the take-over scheme or take-over announcement is prohibited (Bill cl. 40 - cf. ICAC Coy. As s. 180M). The prohibition commences when the Part A statement is served on the target company or when the take-over announcement (in relation to the on-market alternative) is made (Bill s-cl. 40(1) and (2)). The prohibition does not apply to a formal variation of the take-over scheme (see Bill cl. 27) or to acquisitions in the ordinary course of stock exchange trading (Bill s-cl. 40(3)). Existing agreements etc. for special benefits must be disclosed in the Part A or Part C statement (see paras 4(e) of Part A and of Part C of the Schedule).

Cl. 41 : expenses of directors of target company

124. Directors will be entitled to be recompensed reasonable expenses they incur in relation to a bid, including an on-market bid (Bill cl. 41 - based on ICAC Coy As s. 180P).

Cl. 42 : provisions relating to dissenting shareholders and dissenting holders of options or notes

125. Introduction. Cl. 42 of the Bill contains provisions relating to acquisition of the interests of minority holders who do not accept the bids in respect of their holdings. These provisions are based on ICAC Coy. As s. 180X. The major modifications are as follows:-

- (a) The level at which the bidder can compulsorily acquire will be 90% of all shares in the class
 - (b) The provisions will apply where the 90% holding is reached as a result of the use of the on-market alternative, and
 - (c) Once a 90% holding of all voting shares is reached, the bidder will also be able to acquire, in a similar way, any non-voting shares, renounceable options or convertible notes.
126. Provisions of cl. 42. A person who proposes to acquire all the shares in a company (and who makes offers under a take-over scheme or an on-market announcement accordingly) will be able (provided he gives the required acquisition notice to dissenting offerees within one month after the close of his bid) to acquire compulsorily the interests of the remaining minority shareholders provided:-
- (a) during his bid he becomes entitled (by any means) to 90% of the shares in the company; and
 - (b) if the outstanding shares represent less than 90% of the company, 75% of the offerees have disposed of their shares in response to the bid.

(Bill s-cl. 42(2) and (3)).

127. A bidder who is in a position to compulsorily acquire the remaining voting shares in a company may, in like fashion, compulsorily acquire the interests of holders of the non-voting shares, notes and options (s-cl. 42(4)). The notice of acquisition must be accompanied by an expert's report (see Bill s-cl. 42(9) and cf. Bill s-cl. 43(5)).
128. There are a number of provisions designed to safeguard the interests of the parties involved in the compulsory acquisition process (Bill s-cl. 42(5) - (17)).
129. There are also provisions for the disposal of the consideration paid by the bidder for the compulsorily acquired holdings where the holder does not claim the consideration (Bill s-cl. 42(19) - (23) - based on ICAC Coy. As s-secs 180X(13) to (17)). These provisions will be modified in their application in jurisdictions other than the Australian Capital Territory so that they refer to the relevant unclaimed moneys legislation in that jurisdiction.

Cl. 43 : rights of remaining shareholders and holders of options or notes

130. Introduction. Cl. 43 of the Bill contains provisions to protect the rights of remaining holders who have not accepted the bid for their holdings. These provisions are based on ICAC Coy As s. 180Y. The major modifications are as follows:-
- (a) They will now cover the on-market alternative, and
 - (b) They will confer certain rights on the holders of non-voting shares, convertible notes and renounceable options
131. Provisions of cl. 43. The main features of these provisions are as follows:-
- (a) A person who, after making a take-over offer under a take-over scheme or an on-market announcement is entitled (irrespective of the time or method of acquisition) to more than 90% of the voting shares in a company, is required to notify the remaining shareholders (Bill s-cl. 43(1)). Those shareholders then have 3 months in

which to require the person to acquire their shares on the same terms as under the offer or on-market announcement as the case may be (Bill s-cl. 43(2) and (3)).

- (b) Where a bidder attains a holding of 90% of all the voting shares, he must also give notice to the holders of non-voting shares, convertible notes and renounceable options (Bill s-cl. 43(4)). If this notice proposes terms for acquisition, it must be accompanied by an expert's report (Bill s-cl. 43(5) - see, also, Bill s-cl. 42(9)).
- (c) Where the holders of non-voting shares, renounceable options and convertible notes receive these notices they will be able to compel the person to acquire their interests on agreed terms or such terms as the Court orders (Bill s-cl. 43(6)).
- (d) Where the bidder has given a notice or notices under Bill s-cl. 43(1) or (4), he shall forthwith lodge a copy of the notice or one of the notices with the NCSC (Bill s-cl. 43(7)).

TAKE-OVERS BILL : PART VI - MISCELLANEOUS

132. Part VI of the Bill (cls. 44 to 58) deals with various miscellaneous matters.

Cl. 44 : liability for mis-statements

133. Introduction. Criminal and civil liability will be imposed on certain specified persons for false or misleading material (or omissions) in documents and statements relating to the proposed t/o code. Various defences will be provided (Bill cl. 44 - cf. ICAC Coy As s. 180J dealing with liability for mis-statements in Part A statements).

134. Provisions of cl. 44. Two groups of offences will be created:-

- (a) Offences for the inclusion of materially false or materially misleading matter in, or the omission of material matter from:- a Part A statement or an offer (Bill s-cl. 44(1) - see Bill s-cl. 44(11) and (15) for persons covered; see also Bill s-cl. 44(20) which extends the offence to modifications under para 27(10) (a));
 - a Part B or Part D statement (Bill s-cl. 44(2) - see Bill s-cl. 44(12) for persons covered);
 - a Part C statement (Bill s-cl. 44(3) - see Bill s-cl. 44(13) for persons covered);
 - a notice under cls. 42 or 43 (Bill s-cl. 44(1) to (3));
 - certain reports accompanying a Part B or Part D statement, a statement issued with the consent of the Commission or a cl. 42 or cl. 43 notice (Bill s-cl. 44(4)).
- (b) Offences for the inclusion of materially false or materially misleading matter in statements advertisements or documents (see bill para 44(8)(a)) relating to the affairs of, or to marketable securities of the target company or a related corporation or of the bidder (see Bill para 44(8)(b)) where:-
 - a person proposes to make a bid (Bills-cl. 44(5))
 - directors of a company believe it will be subjected to a bid (Bill s-cl. 44(6))
 - take-over offers have been dispatched or an on-market announcement is made (Bill s-cl. 44(7) - see Bill s-cl. 44(14) for persons covered).

The penalty for these offences will be \$5,000 or 1 year's imprisonment or both (see Bill s-cl. 44(21)).

135. Persons guilty of these offences will be liable to compensate persons who suffer loss because of the false or misleading matter or omission that constitutes the offence (Bill s-cl. 44(9) and (10)).

136. The persons who can be guilty of some of these offences are set out in s-cl. 44(11) to (14). The liability of an expert who has consented to the use of his report will be limited to liability for loss arising from the contents of the report (Bill s-cl. 44(15)).

137. Defences will be provided:-

- (a) defences for prosecutions under s-cl. 44(1) to (4) on the basis of a belief on reasonable grounds that false matter was true etc, provided that the belief was maintained until the date of commencement of the prosecution; if it was not, corrective advertising is a

- prerequisite for a defence to be made out (Bill s-cl. 44(16));
- (b) similar defences in relation to s-cl. 44(5), (6) and (7) (Bill s-cl. 44(17));
 - (c) appropriate defences to actions for compensation under s-cl. 44(9) and (10) (Bill s-cl. 44(18) and (19)).
138. The remainder of cl. 44:-
- (a) ensures that the reference to a Part A statement covers modifications under para 27(10) (a) (Bill s-cl. 44(20));
 - (b) provides that the penalty for these offences is \$5,000 or 1 year's imprisonment or both (Bill s-cl. 44(21) - this provision will apply to the exclusion of the general offence provisions - see Bill s-cl. 53(4)); and
 - (c) expressly preserves other remedies available under the general law (Bill s-cl. 44(22)).

Cl. 45 : orders where prohibited acquisitions take place

139. Introduction. Cls. 45 to 49 are a series of provisions dealing with the powers of each Supreme Court. These powers are:-
- to make orders where prohibited acquisitions take place (see Bill cl. 45) where offers are not dispatched pursuant to a Part A statement (see Bill cl. 46) or where rights under a take-over bid need protection (see Bill cl. 47); or
 - to validate any acts or matters not in compliance with the code on the grounds that the non-compliance was due to inadvertence, mistake or circumstances beyond the person's control (see Bill cl. 48).
140. Before exercising its powers under these provisions (or s-cl. 55(5)) the Court must satisfy itself that the order would not unfairly prejudice any person (see Bill s-cl. 49(1)). Each of these provisions is discussed in turn.
141. Provisions of cl. 45. Cl. 45 of the Bill confers wide powers on the relevant Supreme Court to make orders where prohibited acquisitions take place. The provision is similar to ICAC Coy As s. 69N which confers similar powers on Supreme Courts with respect to a defaulting substantial shareholder.
142. The nature of these powers is as follows:-
- (a) The target company, a member of the company, the NCSC or the person from whom the shares were acquired will be able to seek relief where there has been a contravention of s-cl. 12(2). The orders which the Court may make include orders directing divestiture or restraining the exercise of voting rights (Bill s-cl. 45(1)).
 - (b) In certain circumstances the Court will be able to have regard to associations formed after the acquisition takes place (Bill s-cl. 45(2)). This provision has effect for the purpose of determining whether there has been a contravention of cl. 12 so as to empower the Court to make an order under s-cl. 45(1). The sub-clause operates in the following way:-
 - where 2 persons are "associated" at the time when an application under s-cl. (1) is considered by the Court (e.g. if they are acting in concert in respect of the shares in

the company held by them), and one of them acquired all or any of his shares in the preceding 6 months, and those matters are proved to the satisfaction of the Court, then that proof constitutes prima facie evidence that those persons were associated at the time when those shares were acquired.

- If proved, it would have the effect that each of them is to be treated as having been entitled at that time to the shares of the other of them.
 - It follows that, in determining whether the acquisition breached cl. 12 by increasing a person's entitlement to shares beyond the permitted level, the Court may look not only at that person's actual entitlement at the time of the acquisition but also at his entitlement as increased by virtue of his having been associated with another person at that time.
 - The provision has effect only for the purpose of the making of orders by the Court and does not operate to make a person retrospectively guilty of an offence.
- (c) The Court will not be able to make an order (except an order restraining the exercise of voting rights) if the prohibited acquisition was due to ignorance or mistake and the Court is satisfied that in all the circumstances the contravention ought to be excused (Bill s-cl. 45(3)).

Cl. 46 : orders where offers not dispatched pursuant to Part A statement

143. Where an offeror serves a Part A statement on the target company and subsequently acquires shares (by virtue of the enabling provision in para 13(3) (a)) but then does not dispatch offers to shareholders, the NCSC will be able to apply to the Supreme Court for an order requiring the person to dispatch offers and/or for an order of the kind (set out in s-cl. 45(1)) that can be made where a prohibited acquisition takes place (Bill s-cl. 46(1)).
144. Where the Court orders the dispatch of offers:-
- (a) it will be able to require an offeror to send additional information to shareholders (and to the other relevant parties) (Bill s-cl. 46(2)); and
 - (b) the offers dispatched will be deemed to be made under a take-over scheme (Bill s-cl. 46(3)).

Cl. 47 : orders to protect rights under take-over schemes or announcements

145. The Supreme Court will be able to make a wide range of orders to protect the rights of a person affected by a take-over scheme or take-over announcement where the proposed t/o code has not been complied with. This will include orders restraining the registration of shares, cancelling contracts, and restraining or directing the disposal of shares. The right to seek relief will be given to bidders, the NCSC, individual offerees and the target company (Bill cl. 47 - based on ICAC Coy As s. 180R but the range of applicants and the range of orders the Court will be able to make has been widened).
146. The provision will apply to non-voting shares, convertible notes and renounceable options (Bill s-cl. 47(2) - see also Bill s-cl. 49(12) and ex memo para 44).

Cl. 48 : court may excuse non-compliance due to inadvertence etc.

147. The Supreme Court will be able to validate any acts or matters not in compliance with the proposed t/o code on the grounds that the non-compliance was due to inadvertence, mistake or circumstances beyond the person's control (Bill cl. 48 - cf. ICAC Coy As s. 180S which does not contain specific provisions equivalent to s-cl. 48(2) and (3)). This clause has effect notwithstanding anything contained in any other provision of the Bill (Bill s-cl 48 (4))

Cl. 49 : miscellaneous provisions relating to orders

148. There are general provisions relating to orders under cls. 45 to 48 and cl. 55 of the Bill (Bill cl. 49 - cf. ICAC Coy As s. 180T).

149. Among other things:-

- (a) Before making an order under those provisions the Supreme Court must satisfy itself that the order would not unfairly prejudice any person (Bill s-cl. 49(1) - based on existing s-sec. 180T(1)).
- (b) The Court will be able to include ancillary or consequential provisions in such orders (Bill s-cl. 49(3)).
- (c) An order for disposal of an interest in a share can be subject to any conditions the Court thinks fit (Bill s-cl. 49(4)).
- (d) If an interest is not disposed of the Court will be able to vest it in the NCSC (Bill s-cl. 49(5)). The disposal procedure set out in 5. 311 of the existing companies legislation will apply where interests are vested in the NCSC (Bill s-cl. 49(6)).
- (e) The Court will be able to rescind, vary or suspend its order (Bill s-cl 49(7))
- (f) The penalty for the breach of an order under cls. 45 to 47 and cl. 55 will be \$1,000 (with a default penalty of \$200) (Bill s-cl. 49(8) to (10) - these provisions will apply to the exclusion of the general offence provisions - see Bill s-cl. 53(4)).
- (g) The powers of the Supreme Court in relation to contempt of court are expressly preserved (Bill s-cl. 49(11)).

Cl. 50 : unfair or unconscionable agreements, payments or benefits

150. Introduction. The Supreme Court will be able to make certain orders where it is satisfied that the provision of a benefit etc., for management was unfair or unconscionable having regard to the interests of the corporation concerned (Bill cl. 50). This provision is directed at the use of service contracts by target companies as a defensive tactic and to confer unfair benefits on management. The provision applies only to those officers who take part in the management of the target company: this is to ensure the provision does not affect contracts between companies and employees.

151. Provisions of cl. 50. A brief outline of cl. 50 is as follows:-

- (a) The provisions will apply:-
 - (i) to agreements, payments or benefits etc. provided by a target company, within 12 months after commencement of a take-over or at any time when the directors of the company have reason to believe that a take-over is proposed (Bill s-cl. 50(1)); and

- (ii) to service contracts providing for a fixed period of tenure (Bill s-cl. 50(2)).
- (b) If the agreement, payment or benefit is made by the target company or a company related to the target company, it will be capable of approval by ordinary resolution at a general meeting of the target company, provided that the beneficiary and his associates do not vote on the resolution (Bill s-cl. 50(3)).
- (c) An application to the Court for any of the orders specified in paras 50(4)(a) to (c) must be made within 12 months (unless the Court thinks a longer period is just in the circumstances) of the payment, benefit or agreement, and may be made by the NCSC, by the corporation concerned or by persons holding at least 10% of the aggregate nominal value of the shares in that corporation or in a related corporation (Bill s-cl. 50(4)). Giving standing in the case of shareholders of related corporations will ensure that if a take-over offer is made for a company and a related corporation makes the relevant agreement or payment or provides the benefit, shareholders in the related corporation itself will be able to approach the Court for an appropriate order.

Cl. 51: recording of resolutions

152. The minutes of a directors' resolution for the purposes of the proposed t/o code must record the names of directors who vote against, or abstain from voting on, such a resolution (Bill cl. 51).

Cl. 52 : statements as to proposed take-over offers or announcements

153. Bluffing notices or announcements of take-overs will be prohibited (Bill s-cl. 52(1) - based on ICAC Coy As s-secs 180Q(1) and (2)). Where a proposed bid is announced, but not proceeded with within 2 months or such further period as the NCSC allows, the prohibitions will be deemed to be breached unless the person establishes that changed circumstances made it unreasonable for him to proceed with the bid (Bill s-cl. 52(2)). If the NCSC certifies that no extension of time was granted, it will be presumed, in the absence of proof to the contrary, that no further period was allowed (Bill s-cl. 52(3)).
154. There are also prohibitions on:-
- (a) The actual making of an offer or on-market announcement if the person has no reasonable or probable expectation of meeting his obligations under the bid (Bill s-cl. 52(4) - based on ICAC Coy. As s-secs 180Q(3) and (4)); and
 - (b) the causing of an offer or on-market announcement to be made by a person who has no reasonable or probable expectation that the person making the offer can meet his obligations (Bill s-cl. 52(5)).

Cl. 53 : offences

155. The general penalty for contravention of the proposed new take-over code will be a fine of \$2,500 or 6 month's imprisonment or both (Bill cl. 53 - based on ICAC Coy As s. 180W except that the fine has been increased from \$2,000 to \$2,500 and the period of imprisonment from 3 months to 6 months). The general offences provision of the existing companies legislation (s. 379) will not apply to the proposed code (Bill s-cl. 53(5)). However, the general provisions of the existing companies legislation relating to default penalties (s.

380) will apply (see Bill s-cl. 5(1)).

Cl. 54 : service of documents

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

- (a) Any document which is not required to be signed will be able to be served on a stock exchange by a telex etc. message to the effect of the document (Bill s-cl. 54(1)).
- (b) A document that has to be given to a stock exchange or the NCSC on a particular day when those bodies are closed will be able to be given on the next day when they are open (Bill s-cl. 54(2)).
- (c) A copy of a notice that is given to the NCSC or a stock exchange need not specify the individual to whom it was dispatched (Bill s-cl. 54(3)).
- (d) A document that has to be lodged with the NCSC shall be lodged at the office of the A.C.T. Corporate Affairs Commission (Bill s-cl. 54(4)). A similar provision will be included in the adopting legislation of each jurisdiction, so that all documents to be lodged with the NCSC under the proposed t/o code will be lodged with the local registering authority where the target company is incorporated. A document lodged with the local registering authority will be deemed to be lodged with the NCSC (Bill s-cl. 54(5)).
- (e) Where a provision requires a person to publish a notice in a newspaper and due to circumstances beyond his control, the notice is not published, the person is deemed to have complied with that provision
 - if his actions would have resulted in the publication of the notice, except for those circumstances, and
 - he causes the notice to be published immediately those circumstances ceased to exist (Bill s-cl. 54(6)).

Cl. 55 : power to exempt from compliance with Act

157. The NCSC will be able to grant exemptions from compliance with any provisions of the proposed t/o code (Bill s-cl. 55(1) - based on existing s. 180V). To cover a situation where the proposed code expressly prohibits the action in respect of which exemption is sought, the NCSC will also be able to declare that provisions of the code apply in a particular case as if varied or modified as set out in the declaration (Bill s-cl. 55(2)). All exemptions and declarations must be notified in the Commonwealth Gazette (Bill s-cl. 55(3)). Persons must comply with any conditions attaching to an exemption (Bill s-cl. 55(4)) and the Court, on the application of the NCSC, may order a person to comply with the conditions (Bill s-cl. 55(5)).

Cl. 56 : acquisition of shares within 6 months after commencement of Act

158. A person will be able to increase his holding during the first 6 months of the operation of the proposed t/o code beyond the levels that would be permissible under cl. 12 provided the net increase in entitlement through the acquisition in question plus any other acquisitions in the preceding 6 months is not more than 3% (Bill cl. 56). 3% will be the amount that can be acquired in any 6 months without infringing the code (see Bill cl. 15).

Cl. 57 : take-overs pending at commencement of Act

159. Where offers or invitations are despatched more than 30 days before the commencement of the proposed t/o code, and the take-over is still open before commencement, the person making the bid will not be subject to the controls imposed by the proposed code and the present law will continue to apply in relation to that bid for as long as that take-over remains on foot (Bill s-cl. 57(1)). Where a take-over bid is made in the 30 days before commencement of the proposed t/o code, and is still open at the time of commencement, acquisitions by any person within 60 days of commencement will be exempted from the controls imposed by the proposed code. Any offers or invitations in respect of the company during that 60 day period will not be subject to the new code (but will need to comply only with the provisions of the present code) (Bill s-cl. 57(2)).

Cl. 58 : regulations

160. The Governor-General will be able to make regulations in accordance with advice consistent with Ministerial Council resolutions (Bill s-cl. 58(1) and (2)

- the provision in s-cl. 58(2) is the same as in s-cl. 53(4) of the NCSC Bill).

161. Among other things, these Regulations will be able:-

- (a) to vary the requirements contained in the Schedule for Part A, B, C or D statements (Bill s-cl. 58(3) - based on ICAC Coy As s-sec 180U(1)); and
- (b) to require the stock exchanges and the NCSC to be given signed copies or prescribed notices of specified documents (Bill s-cl. 58(4) - based on ICAC Coy As s-sec 180U (2)).

TAKE-OVER BILL : THE SCHEDULE

162. The Schedule to the Bill sets out the detailed requirements in relation to four different statements under the proposed new take-over code:-

- Part A : statement to be furnished by offeror
- Part B : statement to be furnished by target company to which take-over scheme relates
- Part C : statement to be furnished by on-market offeror
- Part D : statement to be furnished by target company to which take-over announcement relates.

163. This schedule will, in effect, replace the present Tenth Schedule to the existing companies legislation.

Part A : statement to be furnished by offeror

164. Part A of the Schedule sets out the requirements with which these Part A statements must comply.

165. Among other things the Part A statement must contain:-

- the material set out in cls. 32, 33 and 34 of the Fifth Schedule if the consideration includes debentures (s-para 1(e)(i));
- particulars of alterations in the capital structure of any subsidiary at any time during the preceding five years, if consideration includes marketable securities (s-para 1(e)(iv));
- if the offeror will seek to acquire any non-voting shares, renounceable options or convertible notes: the terms proposed for any acquisition under cls. 42 or 43 (para 1(h));
- further details of the funding arrangements (cl. 3); and
- particulars of any escalation agreements prior to the bid (para 4(e)) - there is a prohibition on special benefits, including escalation clauses, which are not provided for in the take-over scheme once the Part A statement is served on the target company (see Bill cl. 40 and ex memo para 123).

166. Additional non-statutory information can be included in the Part A statement (see Bill s-cl. 16(3)).

Part B : statement to be furnished by target company to which take-over scheme relates

167. Part B of the Schedule sets out the requirements with which the statement given by the target company (Part B statement) must comply.

168. Among other things, the Part B statement must include:-

- the directors' reasons for making a recommendation, or not, as the case may be (cl. 1);

- a statement as to whether there have been any material changes to the financial position of the target company since the date of the last accounts of the company provided that the change or changes are known to the directors of the target company (cl. 2(j)); and
- any other material information known to the target directors and not previously disclosed (cl. 2(k)).

169. Copies of relevant experts' reports have to be attached (see Bill s-cl. 22(3)). Additional non-statutory material may be included (see Bill s-cl. 22(5)).

Part C : statement to be furnished by on-market offeror

170. Part C of the Schedule sets out the requirements with which the statement by the on-market offeror must comply. The Part C statement must include the same information as would be included in a Part A statement which involves only cash consideration, and also include information similar to that required by AASE Listing Requirements 3R(15) (a) which requires details of share dealing in the target company in the 3 month period proceeding the announcement (cl. 2(e)).

Part D : statement to be furnished by target company to which take-over announcement relates

171. Part D of the Schedule sets out the requirements with which the statement given by a listed target company for which an on-market bid is made must comply. The requirements are the same as those set out in Part B of the Schedule except for the omission of s-cl 2(h) of that Part which is not relevant to listed companies.

COMPANY TAKE-OVERS (FEES) BILL 1979

172. The fees that will be charged in connexion with the proposed new take-over code will be set out in regulations to be made under the Fees Bill.

Cl. 1 : short title

173. The Act will be cited as the Company Take-overs (Fees) Act 1979 (Fees Bill cl. 1)

Cl. 2 : commencement

174. The Act will come into operation on a date to be fixed by proclamation (Fees Bill cl. 2 - this provision is the same as cl. 2 of the Take-overs Bill).

Cl. 3 : interpretation

175. Expressions used in the Fees Bill will have the same meanings as in the Take-overs Bill (Fees Bill cl. 3).

Cl. 4 : fees payable

176. There will be payable to the Commonwealth such fees as are prescribed (Fees Bill s-cl. 4(1)). This Bill will relate to fees payable under the proposed t/o code so far as the A.C.T. is concerned. The fees payable under the proposed t/o code as in force in each State will be payable to that State by virtue of provisions in the State adopting bills.

177. A document will not be deemed to be lodged until the fee has been paid (Fees Bill s-cl. 4(2)). The NCSC must not deal with any application until the appropriate fee has been paid (Fees Bill s-cl. 4(3)).

Cl. 5 : regulations

178. The Governor-General will be able to make regulations in accordance with advice consistent with Ministerial Council resolutions (Fees Bill cl. 5 - the provision in s-cl. 5(2) is the same as in s-cl. 53(4) of the NCSC Bill and s-cl. 58(2) of the Take-overs Bill).

OTHER MATTERS

Applying legislation

179. The Take-overs Bill is the Bill that will apply the proposed t/o code in the Australian Capital Territory. It will be part of the initial Commonwealth legislation referred to in para 8(1) (a) of the Formal Agreement: -

“8. (1) The Commonwealth will -

- (a) submit to the Commonwealth Parliament legislation which has been unanimously approved by the Ministerial Council to form the basis of the scheme and take such steps as are appropriate to secure the passage of the legislation”

180. Each State will pass applying legislation to apply the provisions of the proposed t/o code in that State. The States’ obligations are set out in paras 9(a) and (b) of the Formal Agreement:-

“9. Each State will as soon as practicable after the passage of the Commonwealth Acts submit to the Parliament of the State and take such steps as are appropriate to secure the passage of legislation which has been unanimously approved by the Ministerial Council and which -

- (a) to the extent necessary for the purposes of this agreement, repeals, amends or modifies the operation of the legislation of the State relating to companies and to the regulation of the securities industry referred to in the Second Schedule and any regulations made under that legislation;
- (b) as from the coming into force of that legislation, applies, in place of the legislation so repealed, amended or modified in operation, the legislation relating to companies and to the regulation of the securities industry enacted by the Parliament of the Commonwealth as provided in paragraph (a) of sub-clause 8(1) and, as from the respective dates of that coming into force, any legislation from time to time enacted in accordance with this agreement which amends, supplements or is substituted for that legislation”

Consequential amendments to existing companies legislation

181. The following consequential amendments will be necessary to the existing State and Territory companies legislation once the proposed t/o code is brought into operation:-

- (a) The power to restrain certain persons from managing companies in s. 122 will require extension to a person convicted of an offence under cl. 44 of the Take-overs Bill.
- (b) S-sec 354(3) (relating to branch share registers) will also need to apply where a company or corporation is entitled, pursuant to the law of its home jurisdiction, to give a notice to a dissenting shareholder under cl. 42 of the Take-overs Bill.
- (c) S. 185 will require amendment so that the following are also excluded from the operation of that section:-
 - take-over offers that have been made in respect of shares included in a class of shares; and

- a take-over announcement that has been made in respect of shares included in a class of shares. (cf. paras 42(1)(a) and (b) of the Take-overs Bill)
- (d) In Tasmania, it will also be necessary to insert a provision along the lines of section 185 of the ICAC Companies Acts.

182. It is proposed to deal with these amendments as follows: -

- (a) In the A.C.T., the Commonwealth will introduce an appropriate Ordinance amending ss. 122, 185 and 354(3) of the Companies Ordinance.
- (b) In the six States the Company Take-overs (Application of Laws) Bills will, in addition to applying the take-over law in force in the A.C.T. as the law in force in that jurisdiction, also amend ss. 122, 185 and 354(3).