

1980

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

LIBRARY

THE HOUSE OF REPRESENTATIVES

SECURITIES INDUSTRY BILL 1980

SECURITIES INDUSTRY (FEES) BILL 1980

EXPLANTORY MEMORANDUM

(Circulated by The Hon. R. V. Garland M.P.,
Minister for Business & Consumer Affairs)

CONTENTS

Item	Paragraph
INTRODUCTION	1
Formal Agreement	3
National Companies and Securities Commission Act	4
Proposed new company take-over code	7
Proposed legislation to regulate the securities industry	9
Fees	15
State application legislation	16
SECURITIES INDUSTRY BILL 1980	18
PART I - PRELIMINARY	19
cl. 1 : short title	20
cl. 2 : commencement	21
cl. 3 : object	22
cl. 4 : interpretation	24
cl. 5 : relevant interests in securities	31
cl. 6 : associated persons	34
PART II - ADMINISTRATION	36
Division 1 - General	37
cl. 7 : interpretation	38
cl. 8 : power of NCSC to require production of books	39
cl. 9 : power of magistrate to issue warrant to seize books	41
cl. 10 : offences	43
cl. 11 : privilege	45
cl. 12 : disclosure to NCSC	47

(ii)

cl. 13 : investigation of certain matters	48
cl. 14 : power of Court to make certain orders	49
Division 2	52
cl. 15 : interpretation	54
cl. 16 : investigations	55
cl. 17 : conduct of investigations	58
cl. 18 : powers of NCSC and inspectors appointed under corresponding laws	60
cl. 19 : powers of inspectors	61
cl. 20 : investigations deemed to be a proceeding	63
cl. 21 : record of examination	64
cl. 22 : record to accompany report	66
cls. 23 to 27 : admissibility, credibility and weight of evidence	67
cl. 23 : admissibility of record of examination in evidence in proceedings against person examined	68
cl. 24 : admissibility in other proceedings of questions and answers at an examination	69
cl. 25 : weight of evidence	70
cl. 26 : credibility of person who answered questions	71
cl. 27 : determination of objection to admissibility of question and answer	72
cl. 28 : delegation by inspector	74
cl. 29 : reports of investigations	75
cl. 30 : report of inspector	76
cl. 31 : NCSC's power in respect of books	78
cl. 32 : privileged communications	80
cl. 33 : expenses of investigation	81
cl. 34 : concealing, etc. of books relating to securities	83

(iii)

cl. 35 : power of NCSC to make certain orders	85
cl. 36 : certain powers not to be delegated	87
PART III - STOCK EXCHANGES	89
cl. 37 : establishment etc. of stock exchanges	90
cl. 38 : power of Ministerial Council to approve stock exchanges	91
cl. 39 : NCSC to be notified of amendments to rules	93
cl. 40 : power of NCSC to prohibit trading in particular securities	95
cl. 41 : stock exchanges to provide assistance to the NCSC	97
cl. 42 : power of Court to order observance or enforcement of business rules or listing rules of stock exchange	98
PART IV - LICENCES	99
cl. 43 : dealers licence	100
cl. 44 : dealer's representative	101
cl. 45 : investment advisers	102
cl. 46 : investment representatives	103
cl. 47 : application for grant of licence	104
cl. 48 : grant of dealers licence or investment advisers licence	105
cl. 49 : grant of representatives licence	107
cl. 50 : change of principals of representative	108
cl. 51 : conditions to which licences subject	110
cl. 52 : holder of licence to notify NCSC of breach of condition or restriction applicable to licence	115
cl. 53 : furnishing of information and statements to NCSC	116

(iv)

cl. 54 : register of licence holders	117
cl. 55 : notification of change in particulars	119
cl. 56 : annual statement to be lodged with NCSC	120
cl. 57 : time for lodging annual statement	122
cl. 58 : NCSC may extend period for lodging statement	123
cl. 59 : revocation and suspension of licences	124
cl. 60 : further provisions relating to revocation and suspension of licences	126
cl. 61 : holder of licence to be deemed not to be holder while licence suspended	128
cl. 62 : opportunity for hearing	129
PART V - CONDUCT OF SECURITIES BUSINESS	130
cl. 63 : certain representations prohibited	131
cl. 64 : issue of contract notes	132
cl. 65 : certain persons to disclose certain interests	134
cl. 66 : dealings as principal	136
cl. 67 : use by dealer of clients' money	138
cl. 68 : short selling	139
PART VI - ACCOUNTS AND AUDIT	141
cl. 69 : interpretation	142
cl. 70 : application of Part	143
cl. 71 : accounting records to be kept by dealers	144
cl. 72 : security documents in custody of dealer	146
cl. 73 : dealers' trust accounts	148
cl. 74 : purposes for which money may be withdrawn from a trust account	150
cl. 75 : appointment of auditor by dealer	152
cl. 76 : removal and resignation of auditors	154

cl. 77 : fees and expenses of auditors	156
cl. 78 : dealers accounts	157
cl. 79 : auditor to report to NCSC in certain cases	159
cl. 80 : certain matters to be reported to NCSC	160
cl. 81 : defamation	161
cl. 82 : right of stock exchanges to impose obligations etc., on members not affected by this Part	162
cl. 83 : power of Court to restrain dealings with dealers' bank accounts	163
cl. 84 : duty of banker to make full disclosure	164
cl. 85 : power of Court to make further orders and give directions	165
cl. 86 : power of Court to make order relating to payment of moneys	166
 PART VII - REGISTERS OF INTEREST IN SECURITIES	 168
cl. 87 : interpretation	169
cl. 88 : application of Part	170
cl. 89 : register to be maintained	171
cl. 90 : place where register kept	173
cl. 91 : defences	174
cl. 92 : power of NCSC to require production of register	175
cl. 93 : power of NCSC to require certain information to be supplied to NCSC	176
cl. 94 : power of NCSC to supply copy of register	177
 PART VIII - DEPOSITS WITH STOCK EXCHANGES	 178
cl. 95 : deposits to be lodged by sole traders and member firms	179
cl. 96 : deposit to be proportion of certain balances	181

cl. 97 : deposits to be invested by stock exchange	183
cl. 98 : accounts of deposits	185
cl. 99 : claims etc. not affected by this Part	187
PART IX - FIDELITY FUNDS	188
cl. 100 : establishment of fidelity funds	189
cl. 101 : moneys constituting fidelity fund	190
cl. 102 : fund to be kept in separate bank account	191
cl. 103 : payments out of fidelity fund	192
cl. 104 : accounts of fund	193
cl. 105 : management sub-committee	194
cl. 106 : contributions to fund	196
cl. 107 : provisions where fund exceeds \$2,000,000	197
cl. 108 : levy in addition to annual contribution	199
cl. 109 : power of stock exchange to make advances to fund	200
cl. 110 : investment of fund	201
cl. 111 : application of fund	203
cl. 112 : claims against the fund	205
cl. 113 : rights of innocent partner in relation to fund	207
cl. 114 : notice calling claims against fund	209
cl. 115 : power of committee to settle claims	211
cl. 116 : form of order of Court establishing claim	213
cl. 117 : power of committee to require production of securities etc.	215
cl. 118 : subrogation of stock exchange to rights, etc., of claimant on payment from fund	216
cl. 119 : payment of claims only from fund	217
cl. 120 : provision where fund insufficient to meet claims or where claims exceed total amount payable	218

cl. 121 : power of stock exchange to enter into contracts of insurance or indemnity	219
cl. 122 : application of insurance moneys	221
PART X - TRADING IN SECURITIES	222
cl. 123 : stock market manipulation	223
cl. 124 : false trading and market rigging	226
cl. 125 : false or misleading statements	228
cl. 126 : fraudulently inducing persons to deal in securities	229
cl. 127 : dissemination of information about illegal transactions	230
cl. 128 : prohibition of dealings in securities by insiders	231
cl. 129 : penalties	233
cl. 130 : compensation for loss etc.	234
cl. 131 : dealer to give priority to clients' orders	236
cl. 132 : dealings by employees of holders of licences	237
PART XI - MISCELLANEOUS	239
cl. 133 : restrictions on use of titles "stockbroker" and "sharebroker"	240
cl. 134 : appeal	241
cl. 135 : false and misleading statements	242
cl. 136 : preservation and disposal of records	243
cl. 137 : concealing etc. of books relating to securities	245
cl. 138 : falsification of records	247
cl. 139 : precautions against falsification of records	248

(viii)

cl. 140 : obstructing or hindering NCSC etc.	249
cl. 141 : general penalty provisions	250
cl. 142 : continuing offences	252
cl. 143 : offences by bodies corporate	254
cl. 144 : certain persons to assist in prosecutions	255
cl. 145 : reciprocity in relation to offences	257
cl. 146 : offences committed partly in and partly out of the Territory	258
cl. 147 : power of Court to prohibit transfer of moneys, securities or other property	259
cl. 148 : power of NCSC to intervene in proceedings	260
cl. 149 : injunctions	262
cl. 150 : regulations	264
cl. 151 : rules of Court	266
 SECURITIES INDUSTRY (FEES) BILL 1980	 267
cl. 1 : short title	268
cl. 2 : commencement	269
cl. 3 : interpretation	270
cl. 4 : Act to bind Crown	271
cl. 5 : fees payable	272
cl. 6 : regulations	273

ATTACHMENT

A : Summary of main differences between exposure draft and present S.I. Bill	Page 143
---	----------

INTRODUCTION

The purpose of this explanatory memorandum is to explain the contents of the substantive legislation to regulate the securities industry under the co-operative companies and securities scheme as set out in the Securities Industry Bill 1980 (hereafter referred to as 'the Bill' or 'the S.I. Bill'), and the Securities Industry (Fees) Bill 1980 (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 S.I. Bill and its relationship to the co-operative companies and securities scheme (ex memo paras 3 to 14);
- (b) mentions other matters that may be relevant to the proposed legislation for the regulation of the securities industry (ex memo paras 15 to 17);
- (c) deals sequentially with each clause of the S.I. Bill (ex memo paras 18 to 266); and then
- (d) deals sequentially with each clause of the Fees Bill (ex memo paras 267 to 273).

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 to become a party to the Agreement (Agreement cl. 49) and to enable the Agreement to be extended to the various external Territories (Agreement cl. 50).

National Companies and Securities Commission Act

4. The National Companies and Securities Commission Act ('NCSC Act') is the first of a series of enactments 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 Act).

5. A brief outline of the NCSC Act and the co-operative scheme is as follows:-

- (a) The NCSC Act established the National Companies and Securities Commission (hereafter referred to as the 'NCSC') which will have responsibility for the companies and securities laws covered by the Formal Agreement subject to directions from the Ministerial Council for Companies and Securities which is established by the Agreement. 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'). One part of this legislation will be the proposed new take-over code. The administration of the co-operative scheme legislation within each State and Territory will, so far as practicable, be carried out by the relevant registering authority in that State or Territory under delegations from the NCSC.

- (b) The content of the substantive laws under the scheme will be set out in legislation that will apply to the Australian Capital Territory. Each other jurisdiction that is covered by the Formal Agreement will then pass legislation which will apply the relevant Commonwealth law as the law of that jurisdiction to the exclusion of its present legislation as from the date of commencement of the Commonwealth law. Subsequently, any amendments to the Commonwealth law that are approved by the Ministerial Council will have automatic effect in those jurisdictions without the necessity of further and separate legislation in each other jurisdiction.
- (c) The aim is that, as far as possible any person or company in a particular Australian jurisdiction should be able to deal on all general companies and securities matters as if that person or company were only subject to one system of law and administration throughout Australia.

6. The States will be introducing into their Parliaments National Companies and Securities Commission (State Provisions) Bills to support the NCSC Act in each State. Once these Bills are brought into operation, the NCSC will be able to start administering its first

substantive legislation: it is expected that this will be the proposed new code on the acquisition of company shares.

7. This will be followed by a securities industry code and a companies code.

Proposed legislation to regulate the securities industry

8. The proposed new legislation to regulate the securities industry is contained in two Bills:-

- the S.I. Bill; and
- the S.I. (Fees) Bill.

9. These two Bills will give effect to the legislative obligations of the Commonwealth under the Formal Agreement in relation to the regulation of the securities industry.

10. In accordance with the Formal Agreement the proposed new securities industry legislation is based on the Securities Industry Acts of the 4 States which are parties to the Interstate Corporate Affairs Agreement (these Acts are hereafter referred to as 'ICAC SIAs').

11. The draft legislation has, however, been modified to take account of:-

- (a) substantive amendments that were agreed to by the Ministerial Council for Companies and Securities;
- (b) the need to ensure that the S.I. Bill and the Fees Bill will be capable of application in each jurisdiction with a minimum of specific supporting provisions in that jurisdiction's application legislation;

- (c) any differences in the present ICAC SIAs; and
- (d) desirable changes in the light of experience with the operation of the existing ICAC Acts.

12. These modifications are set out in the relevant paras of this ex memo. Some of the more important modifications are as follows:-

- (i) provisions have been included to allow evidence gathered in an examination to be admissible in both civil and criminal proceedings against the person examined (see ex memo paras 67 to 72);
- (ii) a power vested in the NCSC to prohibit trading of securities on a stock market has been included (see ex memo paras 95 and 96);
- (iii) provisions dealing with conditions relating to a dealer's licence have been extended (see ex memo paras 110 to 114);
- (iv) a register of interests, required to be maintained under Part VII of the Bill, will be able to be kept at any place in Australia covered by the scheme (see ex memo para 171);
- (vi) provisions dealing with stock market manipulation have been redrafted and provisions relating to the dissemination of information about illegal transactions have been included (see ex memo paras 223 to 225 and para 230);

- (vi) provisions dealing with court orders prohibiting persons subject to investigations from taking property out of the relevant State or Territory, the power of the NCSC to intervene in proceedings and provisions dealing with injunctions, have been included (see ex memo paras 259 to 263).

13. An earlier draft of the S.I. Bill was exposed to the public in November 1979. Attachment 'A' to this ex memo lists the main differences between the exposure draft and the present Bill.

14. The Securities Industry Bill sets out the substantive provisions of the proposed code and applies those provisions in the A.C.T. (see Bill cl. 3). The substantive provisions of the legislation are in an appropriate form for application in any State or the Territory by an Act of that State or Territory adopting these provisions as law of that State or Territory. The legislation will be administered by the NCSC which, so far as practicable, will delegate its administrative responsibilities to the registering authority in each jurisdiction.

OTHER MATTERSFees

15. The fees that will be charged in connexion with the proposed legislation for the regulation of the securities industry will be set out in a separate Securities Industry (Fees) Bill 1980 (see ex memo paras 267 to 273).

State application legislation

16. The S.I. Bill is the Bill that will apply the proposed new legislation for the regulation of the securities industry 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;

17. Each State will have to pass application legislation to apply the provisions of the new 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;"

SECURITIES INDUSTRY BILL 1980

18. The Securities Industry Bill is divided into the following Parts:-

- Part I - Preliminary
- Part II - Administration
- Part III - Stock Exchanges
- Part IV - Licences
- Part V - Conduct of Securities Business
- Part VI - Accounts and Audit
- Part VII - Registers of Interests in Securities
- Part VIII - Deposits with Stock Exchanges
- Part IX - Fidelity Funds
- Part X - Trading in Securities
- Part XI - Miscellaneous

S.I. BILL : PART I : PRELIMINARY

19. Part I of the S.I. Bill (cls. 1 to 7) deals with various preliminary matters.

Cl. 1 : short title

20. The Act will be cited as the Securities Industry Act 1980 (Bill cl. 1).

Cl. 2 : commencement

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

Cl. 3 : object

22. This Bill will regulate the securities industry in the A.C.T. (Bill s-cl. 3(1)). The Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 will apply to this Bill (Bill s-cl. 3(2)).

23. This provision will be consistent with the provisions of s-cl. 6(1) of the NCSC Act 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').

Cl. 4 : interpretation

24. Cl. 4 of the Bill deals with various matters of interpretation and is based on s. 4 of the ICAC SIAs.

25. S-cl. 4(1) of the Bill contains a series of definitions. They are based on the definitions in s-sec 4(1) of the ICAC SIAs. The major changes are as follows:-

(a) The following definitions in the ICAC SIAs have been omitted:-

- "Commission";
- "Commissioner";
- "corresponding law";
- "Court";
- "declared law";
- "odd lot"; and
- "participating State".

(b) The following additional definitions have been inserted:-

- "accounting records" (e.g. see Bill paras 71(1) (a), (b) and (c));
- "executive officer" (e.g. see Bill paras 6(1) (a) and 65(9) (c));

- "function" (e.g. see Bill s-cl. 15(2) 28(1) and 41(1));
- "prescribed interest" (see definition of "securities")
- "registered company auditor" (e.g. see Bill para 75(2) (d));
- "voting share" (e.g. see Bill para 5(4) (e));

(Similar definitions will be included in the proposed Companies Bill).

- (c) There have also been some additions and drafting alterations to the existing definitions retained in s-cl. 4(1).

26. For example:-

books: altered to include any register or other record of information, however compiled, recorded or stored and any document, accounts and accounting records;

- business rules: in relation to a body corporate that maintains or provides, or proposes to maintain or provide, a stock market, altered to mean the provisions of the constituent documents of the body corporate and any other rules, regulations or by-laws made by the body corporate, but, excludes rules, regulations, and by-laws that are listing rules of the body corporate;

- director: expanded so that includes a person occupying or acting in the position of director whether or not validly appointed to occupy, or duly authorised to act in, the position;

- investment advisor: expanded to include 2 or more persons carrying on that business;

marketable parcel: altered to relate to securities that are listed for quotation on the stock market of a stock exchange;

officer: altered to include a receiver and manager of the property or any part of the property of the body corporate appointed under a power contained in an instrument, and expanded to include an executive officer of the body corporate and a trustee or other person administering a compromise or arrangement made between the body corporate and its creditors. The definition has also been altered to exclude a receiver who is not also a manager, a receiver and manager appointed by a court, or a liquidator appointed by a court;

- securities: excludes bills of exchange and promissory notes (similar definition as in cl. 3 of NCSC Act);

- stock exchange: altered to mean body corporate approved by Ministerial Council under cl. 38;

- stock market: the definition will not now apply to markets outside the jurisdiction - this will ensure, e.g., that the prohibition in s-cl. 37(1) only applies to stock markets in the A.C.T. (the law of each State or other Territory will then contain a similar prohibition in respect of its jurisdiction).

27. A personal representative of a deceased dealer will cease to be an exempt dealer 6 months after the death of the dealer, on being discharged or upon the final distribution of the estate, whichever occurs first (Bill s-cl. 4(2) - based on ICAC SIAs s-sec. 4(2) - see s-para (c)(iv) of definition of "exempt dealer").

28. Certain restrictions are placed on the circumstances in which the holder of a licence under the law of a State or Territory participating in the co-operative scheme will be regarded as a recognised licensee:-

(a) The holder of a dealers or investment advisers licence under such a law will not be a recognised licensee unless in the case of:-

- (i) an individual who is not a partner, he is ordinarily resident in that State or Territory;
- (ii) an individual who is a partner in a firm, that firm has its principal place of business in that State or Territory;
or
- (iii) a body corporate, that it was incorporated in that State.

(Bill s-cl. 4(3) - based on ICAC SIAs s-sec 4(3)).

(b) The holder of a representatives licence under such a law will not be a recognised licensee unless the dealer or investment adviser by whom he is employed holds a licence under that law
(Bill s-cl. 4(4) - based on ICAC SIAs s-sec 4(4)).

29. There are also other interpretive provisions:-
- (a) In determining whether a person is carrying on a business of dealing in securities, regard will not be had to an act done by a dealer, exempt dealer or recognised dealer on behalf of that person (Bill s-cl. 4(5) - based on ICAC SIAs s-sec 4(5)).
 - (b) A reference to a stock exchange permitting trading will include a reference to it:-
 - (i) listing the securities for quotation; or
 - (ii) otherwise permitting the securities to be quoted.

(Bill s-cl. 4(6) - new provision - see e.g. Bill para 128(5) (a)).
 - (c) The question of whether bodies corporate are related will be determined in the same manner as provided in the Companies Ordinance (Bill s-cl. 4(7) - new provision).
 - (d) A parcel of securities will constitute an odd lot if the number of securities in that parcel is less than one marketable parcel. If after excluding a marketable parcel from a parcel of securities a number remain, that remaining number constitutes an odd lot (Bill s-cl. 4(8)).
 - (e) A reference to a body corporate in relation to securities includes a reference to a government, unincorporate body or other person that issues or makes available those securities (Bill s-cl. 4(9) - based on ICAC SIAs s-sec 4(8)).

30. There are no provisions in the Bill equivalent to s-secs 4(6), (7), (9) and (10) of the ICAC SIAs. (There are some variations between these provisions in the different States).

Cl. 5 : relevant interests in securities

31. Cl. 5 of the Bill sets out the circumstances in which a person will be regarded as having a relevant interest in securities. The provision is based on s.5 of the ICAC SIAs but with substantial drafting alterations.

32. A brief outline of the provision is as follows:-

(a) A person will have a relevant interest in securities if:-

(i) he has the power to exercise a right to vote or to dispose of securities that carry a right to vote at a meeting of a body corporate or unincorporate;

(ii) in the case of other securities, he has power to dispose of or exercise control over them.

(Bill s-cl. 5(1)).

(b) The nature of the person's power to control or influence voting is immaterial (Bill s-cl. 5(2)). Power to control includes power or control that is direct or indirect or is being exercised as a result of, by means of, in breach of, or by revocation of, trusts, arrangements or understandings; a controlling interest includes a reference to such an interest as gives control (Bill s-cl. 5(3)).

(c) A person will be deemed to have the same voting and disposal powers (in relation to shares) as a body corporate if:-

- (i) the body corporate or its directors act in accordance with his directions in exercising the power;
- (ii) he has a controlling interest in the body corporate; or
- (iii) he has power to exercise or control the exercise of the voting power attached to at least 20% of the maximum number of votes that might be cast at a general meeting.

(Bill s-cl. 5(4)).

(d) A person will be deemed to have the power to exercise or control the exercise of the voting power referred to in Bill para 5(4) (e) if:-

- (i) an associate of his has that power;
- (ii) persons associated with him together have that power; or
- (iii) he and a person or persons associated with him together have that power.

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

- (e) A person will be deemed to have a relevant interest in securities if he has entered an agreement that is performed, has enforced a right, or has exercised an option in relation to those securities (Bill s-cl. 5(6)).
- (f) Where a body corporate has a relevant interest in a share in securities (under sub section (6)) and a person has:-
- (i) power to issue instructions to the officers of that body corporate in relation to those securities;
 - (ii) a controlling interest in that body corporate; or
 - (iii) power to exercise or control the voting power attached to not less than 20% of the voting shares in that body corporate
- that person shall be deemed to have a relevant interest in those securities (Bill s-cl. 5(7)).
- (g) A relevant interest will be disregarded if:-
- (i) powers are exercised because of a security given for the purpose of a transaction where the ordinary business of the person who has the relevant interest is money lending;
 - (ii) it arises because of the holding of a prescribed office;
 - (iii) the holder is a bare trustee and the beneficiary has a relevant interest under s-cl. 5(6);

- (iv) the holder is a dealer and is acting on instructions; or
- (v) the holder has been appointed as a proxy or representative to vote at a meeting and no valuable consideration was involved (sub-cl. 5(8)).
- (h) A trustee will not cease to be a bare trustee only because he is entitled to be paid out of the trust (Bill s-cl. 5(9)).
- (i) A relevant interest will not be disregarded only because of its remoteness or origin (Bill s-cl. 5(10) - based on ICAC SIAs s-sec 5(9)). Relevant interests or particular classes of relevant interests or relevant interests held by particular persons may be disregarded in circumstances specified in the regulations (Bill s-cl. 5(11) - cf. ICAC S.I. Regulation 8).

33. These provisions relating to relevant interests are relevant to the following provisions of the S.I. Bill:-

- s-cl. 89(2): register of interests to be kept by financial journalists;
- s-cl. 65(1): certain persons who send out circulars must disclose relevant interests.

Cl. 6 : associated persons

34. Cl. 6 of the Bill sets out the circumstances in which one person will be deemed to be associated with another person. The provision is based on s. 6 of the ICAC SIAs, and clause 7 of the Companies (Acquisition of Shares) Bill. It relates back to the concept of relevant interest in cl. 5 (see Bill s-cl. 5(5)).

35. In brief:-

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

- (i) related corporations, or a director or secretary of related corporations;
- (ii) where the matter relates to the power to exercise the voting power attached to shares, a person who has or proposes to enter an understanding etc. (which may be informal or may be express or implied) impinging on the exercise of the voting power attached to the share or otherwise influencing the management of the company;
- (iii) persons acting or proposing to act in concert;
- (iv) a trustee of a trust in relation to which the other person benefits otherwise than by transactions in connection with the lending of money in the ordinary course of business; and

(v) where the matter relates to the power to exercise the voting power attached to shares, subject to Bill s-cl. 6(2), co-directors and partners.

(Bill s-cl. 6(1)).

- (b) A person who is a partner or co-director of another person in a business other than a business of dealing in securities will not be deemed to be associated unless the person alleging the association proves that the first-mentioned person knew or ought reasonably to have known the material particulars of the relevant matter (Bill s-cl. 6(2)).
- (c) Where 2 or more persons constitute a dealer or investment adviser, a person will be associated with the dealer or investment adviser if he is associated with any of those persons (Bill s-cl. 6(3)).

S.I. BILL : PART II : ADMINISTRATION

36. Part II of the Bill (Cls. 7 to 36) deals with various administrative matters relating to inspections and investigations. It is divided into two Divisions:-

- Division 1 - General (which is concerned with inquiries other than by means of a special investigation);
- Division 2 - Investigations (which deals with special investigations by an inspector).

Division 1 - General

37. The provisions of Division 1 are designed to ensure that the NCSC will have adequate powers of inquiry when performing its functions in relation to the securities industry.

37A. These provisions differ in some ways from the provisions currently found in ICAC SIAs ss. 8 and 10:-

- (a) The limited powers of inspection in the present Acts are not expressed in a way that enables them to be used to investigate suspected criminal activity. In addition, they do not enable the registering authority to obtain the information and explanations that are needed to illuminate the records inspected. If enquiries do not produce voluntary co-operation, registering authorities have to abandon the case or else request a special investigation with all the ramifications that this entails.

- (b) It is considered that more appropriate provisions are those which are contained in ss. 109 to 116 of the United Kingdom Companies Act 1967. These provisions appear to have functioned satisfactorily over the past decade. Some of the main provisions are modelled on these UK provisions.
- (c) The provisions that are proposed are as follows:-
- (i) The NCSC to have a wide general authority to have books produced for inspection that relate to corporations or securities.
 - (ii) The authority should include power to require explanations in respect of the books.
 - (iii) Where attempts to exercise the foregoing authority are unsuccessful, a magistrate may issue a search warrant to be executed by the police, subject to normal warrant safeguards.
 - (iv) Information obtained by exercise of the authority should not be disclosed except for the purposes prescribed by the Acts.
 - (v) Falsification of relevant books, or of explanations given in respect of them should be an offence.

Cl. 7: interpretation

38. In this Division "books" includes banker's books.

Cl. 8 : power of NCSC to require production of books

39. The NCSC will be able to require the production of various books relating to the securities industry (Bill cl. 8 - cf. ICAC SIAs s. 8). The powers given to the NCSC by cl. 8 in relation to things and matters in and of the A.C.T. will be given to the NCSC in relation to things and matters in and of each State by the operation of cl. 8 as the law of each State. Thus one body, the NCSC, will have investigation powers in relation to things and matters in and of all the States and Territories.

40. A brief outline of the NCSC's powers under cl. 8 is as follows:-

(a) The NCSC will be able to give a direction if it considers there is sufficient reason to do so, to a stock exchange; a member of the committee of the exchange; a dealer, investment adviser or representative (or a nominee); or a person who is or has been an officer, agent, banker, solicitor or other person acting for or on behalf of any of these persons requiring the production of books to a person authorised by the NCSC to receive them relating to:-

- the business or affairs of the exchange;
- any dealing in securities (dealing will include dealing as trustee or carrying on business as trustee - see Bill s-cl. 8(3));

- any advice or the issuing or publication of a report concerning securities (they will cover the whole of the conduct of the business of investment advising);
- the character or financial position of a dealer, investment adviser or representative or one of their nominees;
- an audit or auditor's report concerning securities dealings or records of dealers or investment advisers.

(Bill para 8(1) (a)).

- (b) The NCSC will be able to direct any person to produce to a person authorised by the NCSC to receive them any books relating to matters mentioned above (new provision - Bill para 8(1) (b)).
- (c) The NCSC will be able to authorise a person, on producing evidence of his authority, to require a stock exchange, a person referred to above, or any other person to produce books relating to the matters mentioned above (Bill s-cl. 8(2)). This authorisation may be general, or limited to a particular stock exchange or person (Bill s-cl. 8(4)).
- (d) Production of such books to the NCSC or person authorised by the NCSC will not prejudice any lien (Bill s-cl. 8(5));

- (e) Where the NCSC or person authorised by the NCSC requires the production of books, the person to whom the books are produced will be able, if the books are produced, to make copies of the books; to require a person who was a party to the compilation of the books to make an explanatory statement; to retain the books for three months, or until the conclusion of any proceedings instituted during that time (Inspection by persons otherwise entitled to inspect must be permitted). (Bill para 8(6) (a) - cf. s-cl. 9(4)). If the books are not produced the NCSC or authorised person may require the person to give his opinion both as to their location and custodian. (Bill para 8(6) (b)).
- (f) The provisions will apply in the case of a body corporate, to an officer or former officer (Bill s-cl. 8(7)). "Officer" is given a wide definition (Bill s-cl. 8(8)).

Cl. 9 : power of magistrate to issue warrant to seize books

41. A magistrate will be empowered to issue a warrant if satisfied that there are, on particular premises, books that have not been produced in compliance with cl. 8 (Bill cl. 9).

42. The provisions relating to these warrants are as follows:-

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

- (i) to enter those premises (defined widely - see Bill s-cl. 9(6));

- (ii) to search the premises;
- (iii) to take possession of any books; and
- (iv) to deliver the books to an authorised person.

(Bill s-cl. 9(1)).

(b) The warrant will remain in force for one month from date of issue and must be executed by day unless the magistrate authorises otherwise (Bill s-cl. 9(2)). Liens will not be prejudiced (Bill s-cl. 9(3)).

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

- (i) will be able to make copies of them; to require a person who took part in their compilation to make an explanatory statement; and to retain the books for 3 months, or until the conclusion of any proceedings instituted during that time; and
- (ii) must permit inspection by persons otherwise entitled to inspect them at reasonable times.

(Bill s-cl. 9(4)).

Cl. 10 : offences

43. Failing to comply without reasonable excuse with a requirement made under cls. 8 or 9 will be an offence (Bill s-cl. 10(1)). Furnishing a false or misleading statement in purported compliance with cls. 8 or 9 will be an offence (Bill s-cl. 10(2)). The occupier of premises entered pursuant to a warrant must provide reasonable assistance (Bill s-cl. 10(4)). It will be no excuse that an explanation under cls. 8 or 9 might incriminate a person, but where a person claims before making a statement that it may incriminate him the explanation is not admissible evidence in criminal proceedings other than proceedings under this provision (Bill s-cl. 10(5)).

44. Subject to s-cl. 10(5), a statement made by a person in compliance with cls. 8 or 9 may be used in evidence in any civil or criminal proceedings against him (Bill s-cl. 10(6)).

Cl. 11 : privilege

45. A lawyer will be able to refuse to comply with a requirement under cl. 8 or 9 in respect of a book that contains a privileged communication unless the person to whom or by or on behalf of whom the communication was made agrees. If he refuses, he must furnish the NCSC with the name and address of the person to whom or by whom the communication was made (Bill s-cl. 11(1)).

46. The NCSC must not require a "banking corporation" to produce a book relating to the affairs of one of its customers unless it appears to the NCSC that it is necessary for the purpose of investigating that customer's affairs (Bill s-cl. 11(2)). "Banking corporation" is defined in s-cl. 11(3) as:-

- (a) a bank as defined in s. 5 of the Banking Act;

- (b) the Primary Industry Bank of Australia; or
- (c) a bank constituted under the law of a State or Territory.

Cl. 12 : disclosure to NCSC

47. The NCSC will be able to require a dealer or recognised dealer to disclose the name of the person from or through whom securities were acquired or disposed of and the nature of any instructions given (Bill s-cl. 12(1). Other disclosures that may be required by the NCSC are set out in Bill s-cl. 12(2) and (3)). (cf. ICAC SIAs s. 9).

Cl. 13 : investigation of certain matters

48. The NCSC may investigate where it suspects an offence has been committed (Bill cl. 13 - same as ICAC SIAs s. 11).

Cl. 14 : power of court to make certain orders

49 Where it appears to the Supreme Court that a person has committed (or is about to commit) an offence relating to trading in securities or has contravened a condition of a licence or the stock exchange business rules or listing rules the Court will be able to make various orders (Bill cl. 14 - based on ICAC SIAs s. 12).

50. Details of the provision are as follows:-

- (a) Orders can be sought by the NCSC or a stock exchange.

(b) The orders that can be made are as follows:-

- where there are persistent breaches:
restraining a person from carrying on a
business of dealing in securities,
acting as an investment adviser or
representative;
- restraining a person from acquiring,
disposing of or dealing in specified
securities;
- appointing a receiver of the property
('property' is widely defined - see Bill
s-cl. 14(5)) of a dealer or property
held by a dealer on behalf of another
person;
- declaring a contract relating to
securities void or voidable;
- directing a person to do or refrain from
doing a specified act;
- make any ancilliary order desirable in
consequence of another order.

(Bill s-cl. 14(1)).

(c) The Court must satisfy itself that such an order would not unfairly prejudice a person (Bill s-cl.14(2)). Before making an order the Court may direct that notice of an application be given to certain persons (Bill s-cl. 14(3)).

- (d) A person appointed by the Court as a receiver under this provision will be able to:-
- (i) require the dealer to deliver property which he has been appointed receiver of;
 - (ii) acquire any property that he has been appointed receiver of;
 - (iii) deal with the property as the dealer could lawfully have dealt; and
 - (iv) exercise such other powers as the Court specifies in the order.

(Bill s-cl. 14(4)).

- (e) It will be an offence to fail to comply with a Court order or the requirement of a receiver (Bill s-cl. 14(6)), but this will not affect the powers of the Court in relation to punishment of contempt (Bill s-cl. 14(7)).

- (f) The Court will be able to rescind, vary or discharge an order made by it under this provision (Bill s-cl. 14(8)).

Obligations on staff of registering authorities

51. The S.I. Bill does not contain provisions equivalent to ICAC SIAs ss. 13 to 15 which impose certain obligations of good conduct on the staff of registering authorities. These matters are now dealt with in the NCSC Act (see, in particular, NCSC Act cls. 47 to 59).

Division 2 - Investigations

52. Division 2 deals with special investigations by a duly appointed inspector. While it is based generally on ICAC SIAs ss. 16 to 26, those provisions have been substantially re-drafted to incorporate the system of control and allocation of powers set out in Part VI and the First Schedule of the Formal Agreement.

53. Part VI of the Formal Agreement is as follows:-

PART VI - SPECIAL INVESTIGATIONS

"16. The principles that will be adopted in the legislation of the Commonwealth and of the States with respect to special investigations shall be -

- (a) that the power to order special investigations shall be exercisable exclusively by the members of the Ministerial Council either collectively as the Ministerial Council or individually; and
- (b) that the National Commission shall have responsibility for the appointment of inspectors and for the direction and co-ordination of investigatory activities.

17. The principles in respect of special investigations shall be applied by the legislation to the following effect:

- (a) the Minister responsible for the administration of the State Acts in respect of a State or the Commonwealth Acts in respect of a Territory shall be empowered to order a special investigation where it appears to that Minister in the public interest in respect of the State or the Territory to do so;
- (b) the Minister responsible for the administration of the Commonwealth Acts shall be empowered to order a special investigation where it appears to the Minister to be in the national interest to do so;

- (c) the Ministerial Council shall be empowered to order a special investigation where in the circumstances it thinks fit;
- (d) the National Commission, in performing its function as appointing authority either where it will undertake the special investigation or will appoint an inspector to do so, will be required -
 - (i) where the special investigation has been ordered by a Minister without any request by the National Commission for the Minister to do so, to act in accordance with the wishes of that Minister as to the identity of the inspector and the terms and conditions of the appointment;
 - (ii) in any other case, to have regard to the views of the individual Minister or of the Ministerial Council, as the authority by which the special investigation was ordered, as to the identity of the inspector and the terms and conditions of the appointment; and
 - (iii) in the event of a disagreement with the Minister or the Ministerial Council on a matter coming within sub-paragraph (ii), to accept the decision of the Ministerial Council in the relevant respect;
- (e) the National Commission shall be entitled to request an individual Minister or the Ministerial Council, as the appropriate authority, to order a special investigation;
- (f) the power to publish the report of an inspector shall reside -
 - (i) in a case where the costs of the investigation are to be met by the National Commission - in the Ministerial Council;

(ii) in any other case - in the Minister who ordered the investigation, but where an opinion of the relevant Law Officer of the Commonwealth or of a State advising that the publication of the report would be prejudicial to the administration of justice in a Territory or the State has been made available to the Ministerial Council or the Minister having the power to publish the report as the case may be, the power shall not be exercised until a further opinion by the relevant Law Officer is similarly made available to the effect that publication would no longer be prejudicial to that administration of justice;

(g) where a special investigation has been ordered by a Minister without any request by the National Commission for the Minister to do so, that Minister, not the National Commission, shall unless and until the Ministerial Council subsequently approves the investigation, have in relation to that investigation those powers and functions of "the Minister" presently expressed in Part VIA of the Companies Act 1961 or Division 2 of the Securities Industry Act 1975 of the State of New South Wales, whichever is relevant, which are referred to in Part 2 of the First Schedule.

18. (1) The costs and expenses of and in connection with the carrying out of a special investigation shall be borne -

(a) where the investigation was ordered by -

(i) the Ministerial Council;

(ii) an individual Minister at the request of the National Commission; and

(iii) an individual Minister but subsequently approved by the Ministerial Council,

by the National Commission;

(b) in all other cases - by the party to this agreement whose Minister ordered the investigation.

(2) Moneys which are recovered in respect of the costs and expenses of a special investigation shall be paid or credited to the National Commission or to the party to this agreement according to the allocation under sub-clause (1) of responsibility for those costs and expenses".

Cl. 15 : interpretation

54. There are various special interpretation provisions for the purposes of Division 2 (Bill cl. 15 - cf. ICAC SIAs s. 16):-

(a) New definitions of "prescribed direction" and "relevant authority" are inserted to reflect other changes to the Division:-

- "Prescribed direction" refers to directions that an investigation be undertaken where an individual Minister decides upon a special investigation without the agreement of the Ministerial Council, and is, and remains, responsible for the cost of the investigation.
- "Relevant authority" takes account of the need to differentiate between a case where a Minister is to be responsible for the cost of a special investigation or where it is to be met out of NCSC funds. This is particularly important in view of Clause 17(g) of the Formal Agreement.

(b) There are provisions to ensure the NCSC has the necessary powers to conduct special investigations itself as provided for in cl. 17 of the Formal Agreement (Bill s-cl. 15(3) and (4)).

- (c) Where a special investigation is ordered by an individual Minister and he is to bear the cost of the investigation, the powers in relation to that investigation remain vested in that Minister (Bill s-cl. 15(5)).

Cl. 16 : investigations

55. The powers of the local Minister, the Commonwealth Minister (when read with application State legislation) and the Ministerial Council to order special investigations are set out in Bill s-cl. 16(1) to (3) (cf. ICAC SIAs s-sec 17(1)). These provisions reflect paras 17(a) to (c) of the Formal Agreement.

56. The NCSC will be able to request the Minister or the Ministerial Council to order a special investigation (Bill s-cl. 16(4) and (5) - see Formal Agreement para 17(e)).

57. The Ministerial Council will be able to approve a direction of the Minister for a special investigation (Bill s-cl. 16(6)). This reflects the provision for subsequent approvals by the Ministerial Council contained in clauses 17(g) and 18 of the Formal Agreement. It is relevant to the vesting of powers under Division 2 (see the definition of "relevant authority" in cl. 15(1)), and the question of who bears the cost of a special investigation in accordance with cl. 18 of the Formal Agreement.

Cl. 17 : conduct of investigations

58. Cl. 17 of the Bill deals with the conduct of special investigations : it is based on s-secs 17(2) to (8) of the ICAC SIAs amended as required by cl. 17(d) of the Formal Agreement.

59. A brief outline of cl. 17 is as follows:-
- (a) Where an individual Minister decides upon a special investigation without the approval of the Ministerial Council and will be required to meet the costs of the investigation (see the definition of "prescribed direction" in Bill s-cl. 15(1)) that Minister will be able to specify the terms of reference of the investigation and to dictate the identity of the inspector (including the NCSC itself), in line with s-para 17(d) (i) of the Formal Agreement (Bill s-cl. 17(1)).
 - (b) Where the costs of an investigation will be met by the NCSC (again see the definition of "prescribed direction" in Bill s-cl. 15(1)) the ordering authority will be able to specify the terms of reference, but will only be able to state its views as to the identity of the investigator (see para 17(d) (ii) of the Formal Agreement) (Bill s-cl. 17(2)).
 - (c) The NCSC will be required to comply with the directions of a Minister who decides upon a special investigation without the approval of the Ministerial Council (Bill para 17(3) (a)). Where the costs of the special investigation are to be met from NCSC funds, the Ministerial Council will be able to dictate the identity of the inspector if the NCSC decides that issue contrary to the wishes of the ordering authority (Bill para 17(3) (b) - this reflects cl. 17(d) (iii) of the Formal Agreement).

- (d) The NCSC will be compelled to act when it receives a direction. The NCSC will be able to determine the terms and conditions of appointment (as distinct from the terms of reference of the investigation itself) of an inspector where the costs are to be met from NCSC funds (Bill s-cl. 17(4)).

- (e) The power to require variation of the terms of reference, termination of the investigation or variation in the terms and conditions of the appointment of an inspector will remain in Ministerial hands (as the "relevant authority") (Bill s-cl. 17(5)).

- (f) The NCSC must notify in the Gazette a direction for an investigation, the identity of the inspector and the termination of an investigation (Bill s-cl. 17(6) to (8)).

Cl. 18 : powers of NCSC and inspectors appointed under corresponding laws

60. The NCSC, or a person appointed as an inspector, undertaking a special investigation under the law of a participating State or Territory will be able to exercise all the powers he would have in the jurisdiction as if the investigation had been ordered under the law of the jurisdiction (Bill cl. 18 - this provision replaces s-secs 17(3) and (14) of the ICAC SIAs and confers reciprocal powers automatically, without the need for additional appointments in other jurisdictions).

Cl. 19 : powers of inspectors

61. The powers of inspectors (Bill cl. 19) will be basically the same as under the ICAC SIAs s. 18. The major changes are as follows:-

- the inclusion of references to affirmation in s-cl. 19(1);
- the deeming of examinations under the provisions to be judicial proceedings for the purposes of the Commonwealth Crimes Act 1914 in s-cl. 19(2); and
- a minor drafting change in s-cl. 19(9).

62. A brief outline of cl. 19 is as follows:-

- (a) An inspector will be able to require a person to produce books, to assist in the investigation and to answer questions on oath or affirmation (Bill s-cl. 19(1)). The NCSC may pay such costs and expenses as it thinks reasonable that are incurred by a person complying with these requirements (Bill s-cl. 19(12)).

- (b) An inspector will be able to take possession of books, but is required to allow reasonable access to the books whilst in his possession (Bill s-cl. 19(3) - see also Bill cl. 31).
- (c) There will be penalties for failing to comply with the requirements of an inspector without reasonable excuse, for giving false or misleading information or refusal to take an oath or make an affirmation (Bill s-cl. 19(4), (5), (6) and (7)).
- (d) A lawyer will be able to attend his client's examination by an inspector and participate, to the extent permitted by the inspector, in the proceedings (Bill s-cl. 19(8)).
- (e) A person will not be entitled to refuse to answer questions on the grounds of self-incrimination but will have the right to ensure that the answers he gives are not used in evidence against him in later criminal proceedings other than proceedings under this clause or other proceedings in respect of the falsity of the answer (Bill s-cl. 19(9)).
- (f) Persons who comply with the requirements of an inspector will be protected from actions by third parties based on compliance (Bill s-cl. 19(10)). Expenses will be paid to persons attending for examination (Bill s-cl. 19(11)).
- (g) The Supreme Court will be able to compel a person to comply with a requirement of an inspector (Bill s-cl. 19(13) and (14)).

Cl. 20 : investigation deemed to be a proceeding

63. An investigation under this Division will be a proceeding for the purposes of Part V of the Evidence Ordinance 1971 (Bill cl. 20 - based on s-sec 18(10) of the NSW SIA). Part V of the A.C.T. Evidence Ordinance deals with Bankers' Books. "Proceeding" is defined in s. 6 of that Ordinance to mean a matter or inquiry, whether civil or criminal, heard or conducted by a court in which evidence is, or may be, received. "Court" is defined in the same provision to include any tribunal or person having authority under a law in force in the Territory or by consent of parties to receive evidence. Cl. 20 has been included to enable copies of bank accounts, records etc. to be admissible as evidence in proceedings. All jurisdictions have provisions dealing with Bankers' Books or Books of Account.

These are as follows:-

- . NSW - Part IV Evidence Act 1898
- . TAS - Part III Div II Evidence Act 1910
- . SA - Part IV Evidence Act 1929 - 1976
- . WA - Sections 89-96 Evidence Act 1906 - 1976
- . NT - Sections 43-47, Evidence Ordinance 1939 - 1960
- . QLD - Part IV Division 6 - Evidence Act 1977

. VIC - Part II, Division 3A - Evidence Act
1958.

These provisions are not identical.

Cl. 21 : record of examination

64. An inspector will be able to make a written record of an examination (Bill cl. 21 - based on s. 19 of the ICAC SIAs but recast to refer to a "written record" rather than "notes" of an examination).

65. A brief outline of these provisions is as follows:-

- (a) Questions and answers at an examination may be recorded, and if authenticated will constitute prima facie evidence of those questions and answers (Bill s-cl. 21(1)). A person examined will be entitled, on request, to a free copy of the record (Bill s-cl. 21(2)).
- (b) The provisions will not affect the admissibility of other evidence of questions and answers in an examination. (Bill s-cl. 21(3)).
- (c) The NCSC will be able to give a copy of the record and any related book to a lawyer representing a person conducting or contemplating legal proceedings relevant to matters into which the investigation has been or is being made (Bill s-cl. 21(4)). However, the use of the record or book for any other purposes by such a lawyer or any other person who comes into possession of them will be prohibited (Bill s-cl. 21(5)).

Cl. 22 : record to accompany report

66. The record of questions and answers given at an examination must be submitted with the final report of the investigation (Bill cl. 22).

Cls. 23 to 27 : admissibility, credibility and weight of evidence

67. Cls. 23 to 27 of the Bill are new provisions to allow evidence given in an examination to be admissible in both civil and criminal proceedings against the person examined and other persons.

Cl. 23 : admissibility of record of examination in evidence in proceedings against person examined

68. Evidence of a question asked and an answer given at an examination of a person is admissible in evidence against the person examined in civil or criminal proceedings. However the person may object to the evidence of an answer being admitted on certain grounds which, in general terms, relate to self-incrimination and relevance (Bill cl. 23).

Cl. 24 : admissibility in other proceedings of questions and answers at an examination

69. Questions and answers at an examination will be admissible in proceedings other than proceedings against the person examined. However, such evidence will not be admissible in criminal proceedings unless the party seeking to admit the evidence calls the person examined as a witness if required to do so by the opposing party, or it is unreasonable or impractical to call the party examined as a witness if required to do so by the opposing party, or it is unreasonable or impracticable to call the party examined as a witness (Bill cl. 24).

Cl. 25 : weight of evidence

70. The weight of any evidence admitted under cl. 24 in any proceedings will be judged against the background of any inferences which can be drawn as to its accuracy or otherwise (Bill cl. 25).

Cl. 26 : credibility of person who answered questions

71. Where evidence is admitted under cl. 24 in proceedings against a person other than the person examined but the person is not called as a witness, other evidence relevant to the credibility of that person will be admissible (Bill s-cl. 26(1) and (2)). There will, however, be limitations on admissibility based on aspects of the law of evidence relating to cross-examination (Bill s-cl. 26(3)).

Cl. 27 : determination of objection to admissibility of question and answer

72. Cl. 27 of the Bill deals with objections to the admissibility of the written record of an examination.

73. A brief outline of cl. 27 is as follows:-

- (a) A party may give 14 days notice of intention to tender as evidence in any proceedings the record, or part of the record, of an examination (Bill s-cl. 27(1)).
- (b) A party who receives such a notice will have a basic period of 14 days in which to object to the admission of such evidence (Bill s-cl. 27(2)).

- (c) The Court or tribunal will be able to determine the question of admissibility as a preliminary matter or await hearing of proceedings themselves (Bill s-cl. 27(5)).
- (d) A party will not be able to object at the hearing of the proceedings if he did not object to the admissibility of that evidence under s-cl. (2) (Bill s-cl. 27(6)).
- (e) Any existing laws under which evidence would have been admissible are preserved (Bill s-cl. 27(7)).

Cl. 28 : delegation by inspector

74. An inspector will have the usual powers of delegation (Bill cl. 28 - based on ICAC SIAs s. 20). However, an inspector (other than a State or Territory registering authority) will not be able to sub-delegate his power to examine on oath or affirmation (Bill s-cl. 28(2)).

Cl. 29 : reports of investigations

75. An inspector, whether appointed pursuant to a prescribed direction or not, and the NCSC may (and must if required by either the relevant authority or NCSC) make interim reports to the relevant authority or the NCSC. A report of the opinion and the facts on which it is based must also be made to the relevant authority or NCSC on the completion or termination of the investigation (Bill cl. 29). This provision was not necessary under the ICAC SIAs as para 17(1)(a) of that legislation empowered the Minister to appoint an inspector "to report on the investigation in such manner as the Minister directs".

Cl. 30 : report of inspector

76. The availability of a report and the initiation of proceedings as a result of a report are dealt with in cl. 30 of the Bill (based on ICAC SIAs s. 21).

77. A brief outline of these provisions is as follows:-

- (a) A copy of the report must be given to each person who in the opinion of the NCSC ought to receive a copy by reason that it relates to his affairs (Bill s-cl. 30(1)). A report must be withheld if proceedings might be prejudiced (Bill s-cl. 30(2)). A Court will be able to order that a copy of the report or part of the report be given to a person against whom legal proceedings are brought (Bill s-cl. 30(3)).
- (b) The Ministerial Council will be able to publish a report if the cost of the investigation is being borne by the Commission (Bill para 30(4) (a)). The Minister may likewise publish where the Commonwealth is bearing the cost (Bill para 30(4) (b)). However, where a Minister or the Council receives a certificate from the Attorney-General of the Commonwealth or a State stating that publication of the report would be prejudicial to the administration of justice in a Territory or in a State, a Minister or the Council must not publish the report (Bill s-cl. 30(5)).

- (c) The NCSC will be able to cause a prosecution to be initiated if it appears from a report or examination under this Division that an offence may have been committed (Bill s-cl. 30(6)). The NCSC will be able to order a person (except a likely defendant) who may be able to assist with the prosecution to do so (Bill s-cl. 30(7)) and the Supreme Court may direct a person to comply with such an order (Bill s-cl. 30(8)).
- (d) The NCSC will be able to bring proceedings in the name of a person for the recovery of damages in relation to matters connected with an investigation (Bill s-cl. 30(9)).

Cl. 31 : NCSC's power in respect of books

78. An inspector will be able to give the NCSC any books he has taken possession of under cl. 19.

The NCSC:-

- (a) will be able:-
- (i) to retain the books for such time as is necessary to decide whether to institute proceedings;
 - (ii) to permit other persons to inspect the books;
 - (iii) to permit the books to be used in legal proceedings instituted as a result of the investigations; and
- (b) must permit inspection by a person who would otherwise be entitled to inspect the books.

(Bill s-cl. 31(1) - based on ICAC SIAs s. 22).

79. If the NCSC itself takes possession of books under cl. 19, it has such powers as it would have had if they had been given to it by an inspector under s-cl. 31(1) (Bill s-cl. 31(2) - new provision).

Cl. 32 : privileged communications

80. A lawyer will be able to refuse to comply with the requirement of an inspector under cl. 19 to disclose a privileged communication unless the person to whom or by or on behalf of whom the communication was made agrees: where the legal practitioner refuses, he must furnish the name and address of the person to whom or by whom the communication was made (Bill cl. 32 - based on ICAC SIAs s. 23 with drafting alterations).

Cl. 33 : expenses of investigation

81. Subject to the exceptions contained in cl. 18 of the Formal Agreement and cl. 33 of the Bill, the expenses of an investigation will be paid by the NCSC (Bill cl. 33 - based on ICAC SIAs s. 24).

82. A brief outline of the provision is as follows:-

- (a) Expenses will include proceedings brought in the name of a person (under s-cl. 30(9)) and expenses incurred before a direction is approved by the Ministerial Council (under s-cl. 16(6)) (Bill s-cl. 33(2)).
- (b) Where an investigation has been carried out under Division 2 and proceedings are instituted (under s-cl. 30(9) or otherwise) as a result of the

investigation the NCSC will be able to make one or more of the following orders:-

- (i) that a specified person pay in the time and manner specified in the order, all or part of the expenses of the investigation;
- (ii) that a specified person reimburse the NCSC in the time and manner specified in the order; or
- (iii) that a specified person pay in the time and manner specified in the order, or reimburse the NCSC the whole or a specified part of the cost of carrying out the investigation including the remuneration of any officer or employee of the NCSC concerned with the investigation.

(Bill s-cl. 33(3)).

(c) The NCSC will be able:-

- (i) to order a person to whose affairs the investigation relates to pay a specified amount (Bill s-cl. 33(4));
- (ii) to take proceedings to recover this amount as a debt due (Bill s-cl. 33(5)).

(d) If a party to the Agreement bears the cost of the investigation, expenses recovered by the NCSC are used to reimburse that person (Bill s-cl. 33(7) - new provision).

Cl. 34 : concealing, etc., of books relating to securities

83. It will be an offence:-

- to conceal, destroy or alter a book that is the subject of investigation; or
- to send that book out of the Territory (if it is in the Territory) or to send it out of Australia (if it is outside the Territory but inside Australia);

(Bill s-cl. 34(1) - based on ICAC SIAs s-sec 25(1) - 'books' is widely defined in Bill s-cl. 4(1)).

84. There will be a defence if the defendant proves that he did not act with intent to defeat the purposes of Division 2 or to delay or obstruct the investigation (Bill s-cl. 34(2) - based on ICAC SIAs s-sec 25(2)).

Cl. 35 : power of NCSC to make certain orders

85. Where it appears that facts relevant to an investigation cannot be ascertained because of prescribed person has failed to comply with the requirements of an inspector, the NCSC will be able to make certain orders by written instrument published in the Gazette (Bill cl 35 - based on ICAC SIAs s-secs 26(1) to (4)). The matters covered in ICAC SIAs s-sec 26(5) are now covered in cl. 145 of the Bill.

86. A brief outline of cl. 35 is as follows:-

- (a) The orders will be one or more of the following:-
 - (i) restraining the disposal or acquisition of an interest in specified securities;

- (ii) restraining the exercise of voting rights;
- (iii) directing the registered holder of securities subject to an order under this clause to notify that order to any person entitled to exercise a right to vote attached to those securities;
- (iv) directing a body corporate not to make a payment in respect of those securities (except in a winding up);
- (v) directing a body corporate not to register a transfer;
- (vi) directing a body corporate not to issue shares to a person who holds shares in it.

(Bill s-cl. 35(1)).

- (b) The NCSC will be able to vary or revoke an order (Bill s-cl. 35(2) - new provision).
- (c) A copy of an order must be served on any person to whom the order is directed (Bill para 35(3)(a)).
- (d) Where an order relates to specified securities it must be served on:-
 - (i) the body corporate by which the securities were issued;

- (ii) where the securities are rights or options, on the body corporate against which the right or option is enforceable; or
- (iii) on the body corporate that will issue the securities.

(Bill para 35(3) (b)).

- (e) A person aggrieved by an order will be able to apply to the Supreme Court for its revocation or variation and the Court will be able to do either if satisfied it is reasonable to do so (Bill s-cl. 35(4)).
- (f) It will be an offence not to comply with an order of the NCSC (Bill s-cl. 35(5) and (6)).

Cl. 36 : certain powers not to be delegated

87. The NCSC must not delegate its powers:-

- (i) to appoint an inspector to carry out an investigation;
- (ii) to determine the terms and conditions of such an appointment;
- (iii) to terminate such an appointment; or
- (iv) to make an order (under cl. 35 where a prescribed person fails to comply with the requirement of an inspector).

(Bill cl. 36 - new provision).

88. The prohibition on delegation contained in this provision has been included:-

- (a) because of the importance of the power; and
- (b) to ensure that the NCSC is directly responsible to the Ministerial Council.

S.I. BILL : PART III : STOCK EXCHANGES

89. Part III of the S.I. Bill (Cls. 37 to 42) deals with the registration and regulation of stock exchanges.

Cl. 37 : establishment etc. of stock exchanges

90. It will be an offence to establish, maintain or provide a stock market that is not the stock market of a stock exchange (Bill s-cl. 37(1) - based on ICAC SIAs s. 27). The conduct of an auction of forfeited shares at a stock exchange by a person holding an auctioneer's licence will not contravene this prohibition (Bill s-cl. 37(2) - new provision).

Cl. 38 : power of Ministerial Council to approve stock exchange

91. A body corporate that proposes to establish or maintain a stock market will be able to lodge an application with the NCSC for approval by the Ministerial Council (Bill s-cl. 38(1) - based on ICAC SIAs s-sec 28(1)).

92. The Ministerial Council will be able to approve a body corporation as a stock exchange if it is satisfied that:-

- (i) its business rules make satisfactory provision for matters relating to internal management (s-paras 38(a)(i) - (vi));
- (ii) it has made or adopted listing rules;

- (iii) such listing rules make satisfactory provision for the trading of securities and the protection of the public; and
- (iv) the interests of the public will be served by the approval.

(Bill s-cl. 38(2) - based on ICAC SIAs s-sec 28(2)).

Cl. 39 : NCSC to be notified of amendments to rules

93. The NCSC must be notified of any amendments to a stock exchange's business rules or listing rules (Bill cl. 39 - based on ICAC SIAs s. 29).

94. A brief outline of these provisions is as follows:-

- (a) An amendment will cease to have effect if it is not notified within 21 days (Bill s-cl. 39(3)).
- (b) A copy of the notification must be sent by the NCSC to each member of the Ministerial Council (Bill s-cl. 39(4)) which may disallow all or part of an amendment within 28 days (Bill s-cl. 39(5)).
- (c) The NCSC notifies the stock exchange of any disallowance and the amendment ceases to have effect on receipt of that notice (Bill s-cl. 39(6)).

Cl. 40 : power of NCSC to prohibit trading in particular securities

95. Where it is necessary to protect investors or the public the NCSC will be able to prohibit trading in

particular securities for up to 21 days. (Bill cl. 40 - new provision - based on cl. 60 of the CSI Bill with the adjustments proposed by the Australian Associated Stock Exchange to the Georges Committee).

96. A brief outline of these provisions is as follows:-

- (a) The NCSC must firstly notify the stock exchange that it has formed the relevant opinion (Bill s-cl. 40(1) - this provision refers not only to securities of a body corporate but also to securities made available by a body corporate to deal with the case of listed property trusts).
- (b) If the stock exchange takes no action to prevent trading, the NCSC will be able to suspend trading for up to 21 days (Bill s-cl. 40(2)).
- (d) The NCSC must notify the relevant company of the suspension, giving reasons, and must report to the Ministerial Council (Bill s-cl. 40(3)).
- (d) The relevant company will be able to request the NCSC to refer the matter to the Ministerial Council (Bill s-cl. 40(4)), which may revoke the notice (Bill s-cl. 40(5)).
- (e) Contravention of a notice by the stock exchange is prohibited (Bill s-cl. 40(6)).

Cl. 41 : stock exchanges to provide assistance to the NCSC

97. A stock exchange must assist the NCSC or a person authorised by the NCSC in the performance of NCSC functions (Bill s-cl 41(1) - cl. 41 is based on ICAC SIAs s. 30 - although the NSW Act has some variations). Any disciplinary action taken by a stock exchange

against a member must be notified to the NCSC (Bill s-cl. 41(2)). A person authorised by the NCSC is entitled to access to the stock exchange floor (Bill s-cl. 41(3)) - access to books kept by a stock exchange is now dealt with in cl. 8 (previously a right of access to the exchange's books was included in ICAC SIAs s-sec 30(3)). It will be an offence to refuse to allow a person authorised by the NCSC to have access to the stock exchange floor (Bill s-cl. 41(4)).

Cl. 42 : power of Court to order observance or enforcement of business rules or listing rules of stock exchange

98. The Supreme Court will be able to give directions, on the application of the NCSC, the stock exchange or a person aggrieved, where a person has failed to comply with observe, enforce or give effect to business rules or listing rules (Bill s-cl. 42(1) - cl. 42 is based on ICAC SIAs s. 31). A body corporate whose securities are listed on the stock exchange, or which makes securities available is deemed to be obliged to observe the listing rules of that stock exchange for the purposes of this provision (Bill s-cl. 42(2) - cf. Bill cl. 14).

S.I. BILL : PART IV : LICENCES

99. Part IV of the S.I. Bill (cls. 43 to 62) deals with the different licences that are required to be held by:-

- a dealer;
- a dealer's representative;
- an investment adviser; or
- an investment representative.

(Each of these terms is defined in the Bill - see s-cl. 4(1)).

Cl. 43 : dealers licence

100. A person will be prohibited from carrying on a business of dealing in securities unless he has a dealers licence or is a recognised dealer (Bill s-cl. 43(1) - cl 43 is based on ICAC SIAs s. 32). The prohibition will not apply to an exempt dealer (Bill s-cl. 43(2)).

Cl. 44 : dealers representative

101. A person who is employed by, or acts for or by arrangement with a dealer (who is not an exempt dealer) will be prohibited from acting on behalf of the dealer in relation to dealing, giving advice or issuing reports concerning securities unless he holds a dealers licence, is a recognised dealer, holds a dealer's representatives licence or is a recognised dealer's representative (Bill cl. 44). This prohibition is based on s. 33 of the ICAC

SIA's except that the prohibition extends to the giving of advice and the issuing or publishing of analyses or reports: the prohibition does not extend to work done by accountants, clerks or cashiers.

Cl. 45 : investment advisers

102. A person will be prohibited from acting as an investment adviser unless he is the holder of an investment advisers licence or is a recognised investment adviser (Bill s-cl. 45(1) - cl. 45 is based on ICAC SIA's s. 34). The prohibition will not apply to the holder of a dealers licence, an exempt dealer or a recognised dealer (Bill s-cl. 45(2)).

CL. 46 : investment representatives

103. A person who is employed by or acts on behalf of an investment adviser (who is not an exempt dealer) will be prohibited from doing an act on behalf of the investment adviser in his business of advising persons concerning securities (including issuing reports) unless he holds a particular licence (Bill cl. 46). This prohibition is based on s. 35 of the ICAC SIA's except that the categories have been expanded to include recognised dealers representatives and recognised investment representatives in certain situations.

Cl. 47 : application for grant of licence

104. An application for a licence will be made to the NCSC (Bill cl. 47 - based on ICAC SIA's s. 36). It will be lodged with the local registering authority (see Bill cl. 7).

Cl 48: grant of dealers licence or investment advisers licence

105. Subject to the regulations, the NCSC shall grant a dealers licence or an investment advisers licence if:-

- (a) where the applicant is a natural person:-
 - (i) the applicant is not an undischarged bankrupt;
 - (ii) the applicant has not been convicted during the preceeding ten years of an offence of fraud or dishonesty punishable by imprisonment for three months or more;
 - (iii) the NCSC is satisfied that the applicant's educational qualifications or experience;
 - (iv) the NCSC has no reason to believe that the applicant is not of good fame and character; and
 - (v) the NCSC has no reason to believe that the applicant will not perform his duties as a holder of a dealers licence or an investment advisers licence efficiently, honestly and fairly.
- (b) where the applicant is a body corporate:-
 - (i) the corporation is not under official management or in the course of being wound-up;

- (ii) the corporation is not a corporation in respect of the property or part of the property of which a receiver, or a receiver and manager has been appointed;
- (iii) the corporation has not entered into a compromise or scheme of arrangement with its creditors and that compromise or scheme of arrangement is still in operation;
- (iv) the NCSC is satisfied as to the educational qualifications or experience of the officers or employees of the applicant corporation who are to perform duties in connection with the holding of the dealers licence or investment advisers licence; and
- (v) the NCSC has no reason to believe the applicant will not perform the duties of a holder of a dealers licence or an investment advisers licence efficiently, honestly and fairly.

Otherwise, the NCSC shall refuse the application.

106. The NCSC must not refuse to grant a licence (otherwise than during a disqualifying period) without giving the applicant an opportunity for a hearing (See Bill cl. 62).

Cl. 49 : grant of representatives licence

107. If the NCSC has no reason to believe that the applicant will not act efficiently, honestly and fairly, and is a fit and proper person to hold a representatives licence and to act on behalf of the person named in the application it must (subject to cl. 62 and the regulations) grant such a licence. Otherwise, the NCSC shall refuse the application (Bill s-cl. 49(1) - cl. 49 is based on ICAC SIAs s. 38).

108. A dealer's representatives licence must specify the licensed dealer on whose behalf the representative may act (Bill s-cl. 49(2)) and an investment representatives licence must specify the licenced investment adviser on whose behalf the representative may act (Bill s-cl. 49(3)). A representative's application for a licence may refer to the business name where 2 or more persons constitute the dealer or investment adviser (Bill s-cl. 49(4) - new provision - see also Bill s-cl. 54(3) and s-para 54(2) (b) (iv)).

Cl. 50 : change of principals of representative

109. The holder of a representatives licence will be able to apply to the Commission to alter the name of the dealer or investment adviser on whose behalf he may act (Bill s-cl. 50(1) - cl. 50 is based on ICAC SIAs s. 39 with substantial drafting alterations). Where he seeks the inclusion of the name (or names) of a licensed dealer or investment adviser in the licence, the NCSC must vary the licence if it is of the opinion that he is a fit and proper person to act on their behalf (Bill s-para 50(2) (a) (i)). Where a deletion is sought, the NCSC must vary the licence accordingly (Bill para 50(2) (b)).

Cl. 51 : conditions to which licence is subject

110. A licence granted by the NCSC may be subject to conditions and restrictions (Bill cl. 51 - cf. ICAC SIAs s. 40).

111. The conditions and restrictions will be of two types:-

- (a) Such conditions or restrictions as are prescribed (Bill para 51(1) (a) - same as ICAC SIAs para 40(1) (a)) - the regulations will make it clear that these prescribed conditions or restrictions may be imposed on individual licencees; and
- (b) Such conditions or restrictions as the NCSC imposes (Bill para 51(1) (b) - same as ICAC SIAs para 40(1) (b)).

112. In either case the conditions and restrictions may relate to:-

- (a) the limitation of liability incurred by the holder of a dealer's licence, either in the business of dealing in securities or not; and on the incurring or disclosure of liabilities arising otherwise (Bill paras 51(2) (a) and (b) - same as ICAC SIAs paras 40(2) (a) and (b));
- (b) the financial position of the holder of a dealer's licence whether relating to the business of dealing in securities or not (Bill para 51(2) (c) - new provision - see also Bill s-cl. 51(3) to (6)); and

- (c) the lodging and maintaining with the NCSC of a bond not exceeding \$20,000 by the holder of a dealers or investment advisers licence (Bill para 51(2) (d) - based on ICAC SIAs para 40(2) (c)).

113. The conditions relating to the financial position of a dealer (see Bill para 51(2) (c)) may include:-

- (a) a condition that his assets include or do not include a particular kind of asset (Bill para 51(3) (a)); and
- (b) a condition that the sum value of particular assets be not less or greater than an amount ascertained in accordance with that condition (Bill para 51(3) (b)). The condition may specify how the assets are to be valued (Bill s-cl. 51(4)). It may also specify asset ratios and require that an amount should be a specified percentage of:-
 - (i) the sum of the values of all assets;
 - (ii) a specified class of asset;
 - (iii) all liabilities; or
 - (iv) a specified class of liabilities.

(Bill s-cl. 51(5) - based generally on s. 13 of the Financial Corporations Act).

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

- (a) The reference to assets is to all assets, not

merely those used in dealing in securities (Bill s-cl. 51(6)).

- (b) The NCSC will be able, subject to cl. 62, to vary conditions or restrictions imposed under para 51(1)(b) (Bill s-cl. 51(7) - based on ICAC SIAs s-sec 40(3)).
- (c) The NCSC must notify the stock exchange, and the member firm if the member is a partner, in relation to the imposition and variation of conditions in licences (Bill s-cl. 51(8) - based on ICAC SIAs s-sec 40(4)).
- (d) Any security lodged with the NCSC (under para 51(2)(d)) must be dealt with as prescribed (Bill s-cl. 51(9) - new provision).

Cl. 52 : holder of licence to notify NCSC of breach of condition or restriction applicable to licence

115. A licensee must notify the Commission within one day of a breach of a condition or restriction; a licensee who fails to notify is guilty of an offence (Bill s-cl. 52(1) - cl. 52 is a new provision). A defence of ignorance is included (Bill s-cl. 52(3)).

Cl. 53 : furnishing of information and statements to NCSC

116. The holder of a dealers licence shall furnish written statements in respect of his business to the NCSC if required (Bill s-cl. 53(1)). The NCSC will be able to require such a statement to be audited (Bill s-cl. 53(2)). The period for furnishing a statement if a deadline has been set can be extended (Bill s-cl. 53(3)).

Cl. 54 : register of licence holders

117. The NCSC must keep a Register of Licence Holders (Bill cl. 54 - based on ICAC SIAs s. 41).

118. A brief outline of cl. 54 is as follows:-

- (a) The information to be entered in the register is set out in s-cl. 54(2). The Register will include the name, address etc. of each dealer and adviser on whose behalf a representative may act (Bill s-para 54(2) (b) (iii)).
- (b) The name of a person who ceases to be the holder of a licence must be removed from the register (Bill s-cl. 54(3)).
- (c) The register may be inspected on payment of the prescribed fee (Bill s-cl. 54(4)).
- (d) Particulars of recognised licences may be entered in the register (Bill s-cl. 54(5)), and the name and particulars of a person who ceases to be a recognised licence holder shall be removed from the register (Bill s-cl. 54(6)).

Cl. 55 : notification of change in particulars

119. The holder of a licence must notify the NCSC within 21 days when he ceases to carry on the business to which the licence relates, or a change occurs in particulars that are required to be entered in the register (Bill cl. 55 - based on ICAC SIAs s. 42).

Cl. 56 : annual statement to be lodged with the NCSC

120. The holder of a dealer's licence or an investment

adviser's licence must lodge with the NCSC each year a statement containing prescribed information (Bill s-cl. 56(1) - based on ICAC SIAs s. 44. There is no equivalent in the Bill to s. 43 of the ICAC SIAs. It is proposed that all fees will be dealt with in separate regulations under the Fees Bill).

121. On a prescribed date each year the holder of a representative's licence must lodge with the NCSC a statement in the prescribed form containing prescribed information (Bill s-cl. 56(2)).

Cl. 57 : time for lodging annual statement

122. The annual statement by a licensee must be lodged:-

- (a) when the profit and loss account and balance sheet referred to in cl. 78 are required to be lodged in the case of the holder of a dealer's licence (para 57(a));
- (b) within one month before the anniversary of the date on which the licence was granted in the case of the holder of an investment advisers licence (para 57(b)); and
- (c) within the period prescribed after the date referred to in s-cl. 56(2) in the case of a representatives licence (para 57(c)).

Cl. 58 : NCSC may extend period for lodging statement

123. The NCSC will be able to extend or further extend the period for lodging a statement under cl. 56 (Bill s-cl. 58(1) - based on ICAC SIAs s. 45). An application may be made and the power exercised notwithstanding that the period has expired (Bill s-cl. 58(2) - new provision).

Cl. 59 : revocation and suspension of licences

124. The NCSC will be able to revoke or suspend a licence in certain specified circumstances (Bill cl. 59 - based on ICAC SIAs s. 46) without giving the licensee an opportunity to be heard (see Bill para 62(1)(b)). A holder of a licence is deemed not be a holder for the purposes of cls. 43 to 46 while the licence is suspended (see Bill cl. 61). The NCSC will also have powers of revocation or suspension in other circumstances (see Bill cl. 60), but those powers will be subject to appeal (see Bill para 62(1)(b)).

125. A brief outline of the provisions in cl. 59 of the Bill is as follows:-

(a) The NCSC will be able to revoke a licence in the following situations:-

(i) where the holder is a natural person if he:-

- . becomes bankrupt, applies to take the benefit of a law for the relief of bankrupt or insolvent debtors etc;
- . is convicted of a fraudulent or dishonesty offence;
- . becomes mentally incapable of managing his affairs;

(ii) where the holder is a body corporate if it:-

- . is commenced to be wound up, is under official management or has ceased to carry on business;

- . has a receiver or receiver and manager appointed; or
 - . has entered a compromise or scheme of arrangement.
- (iii) where the holder fails to comply with cls. 56, 57 or 78; or
- (iv) where the holder requests.

(Bill s-cl. 59(1) - ICAC SIAs s-para 46(1)(b)(ii) does not enable revocation where the receiver is not a manager).

- (b) The NCSC will also be able to revoke a dealers or investment representatives licence of a body corporate where a director, secretary or person concerned with its management fails to comply with the Bill because he does not hold a licence or his licence has been suspended (Bill s-cl. 59(2)).
- (c) The NCSC will be able to suspend rather than revoke a licence where para 59(1)(a) or (b) or sub-cl. 59(2) applies (Bill s-cl. 59(3)).
- (d) A representative will be prohibited from acting on behalf of a dealer or investment adviser whose licence has been revoked or during the period of any suspension (Bill s-cl. 59(4)).

Cl. 60 : further provisions relating to revocation and suspension of licences

126. The NCSC will also be able to revoke a licence in certain circumstances provided that the licensee is given an opportunity for hearing under cl. 62 (Bill cl. 60 - based on ICAC SIAs s. 47). A person 'aggrieved' by such a

revocation also has certain rights of appeal (see Bill cl. 134).

127. A brief outline of cl. 60 of the Bill is as follows:-

- (a) The NCSC will be able to revoke a licence (subject to cl. 62) if:-
- (i) the holder contravenes a condition in the licence;
 - (ii) it is satisfied that the holder is not a fit and proper person to hold the licence; or
 - (iii) in the case of a body corporate it is satisfied that:-
 - . a director, secretary or person concerned with the management is not a fit and proper person to hold such a position; or
 - . a person who has a controlling interest or a person associated with him would not be a fit and proper person to be a director.

(Bill s-cl. 60(1) - s-s-para 60(1)(b)(ii)(B) is new).

- (b) The NCSC will be able to suspend a licence rather than revoking it where there has been a failure to comply with a condition (Bill s-cl. 60(2)).
- (c) The NCSC will be able to apply to the Supreme Court where it revokes a licence under s-cl. 60(1) for an order disqualifying the person either permanently or for such period as the Court specifies from holding a licence (Bill s-cl. 60(3)). The Court will have a discretion in relation to the order (Bill s-cl. 60(4)).
- (d) A person disqualified from holding a licence under a corresponding law is deemed to be disqualified from holding a licence under this Bill (Bill s-cl. 60(5)).

Cl. 61 : holder of licence to be deemed not to be holder while licence suspended

128. The holder of a licence will be deemed not to be the holder for any period during which the licence is suspended (Bill cl. 61 - same as ICAC SIAs s. 48).

Cl. 62 : opportunity for hearing

129. The NCSC is prohibited from refusing to grant a licence, revoking or suspending a licence (except under cl. 59) or imposing conditions on a licence unless it has given the holder or applicant an opportunity to appear at a hearing before it and make submissions and give evidence (Bill s-cl. 62(1) - cl. 62 is based on ICAC SIAs s. 49). A licence cannot be granted to a person during a period in which he is disqualified (Bill s-cl. 62(2)).

S.I. BILL : PART V : CONDUCT OF SECURITIES BUSINESS

130. Part V of the S.I. Bill (cls. 63 to 68) deals with the conduct of a securities business.

Cl. 63 : certain representation prohibited

131. A licence holder will be prohibited from representing that his abilities or qualifications have been approved by the NCSC (Bill s-cl. 63(1) - Cl. 63 is the same as ICAC SIAs s. 50). A statement that a person holds a licence will not contravene the prohibition (Bill s-cl. 63(2)).

Cl. 64 : issue of contract notes

132. A contract note must be issued by a dealer (who is not an exempt dealer) in respect of a transaction of sale and purchase of securities to the following persons:-

- (a) his client, where the transaction took place in the ordinary course of business at a stock market and the dealer was not a principal;
- (b) his client and the person with whom he entered the transaction, where the transaction did not take place in the ordinary course of business at a stock market and the dealer was not a principal; and
- (c) the person with whom he entered the transaction, where he was a principal and the transaction did not take place in the ordinary course of business at a stock exchange (Bill s-cl. 64(1) - cf. Rule 3.6 of the Sydney Stock Exchange).

133. The contract note must include the particulars set out in Bill s-cl. 64(2). A dealer must not include in a contract note a name that he knows or could reasonably be expected to know is not the name of the person with or for whom he has entered the transaction (Bill s-cl. 64(3)).

Cl. 65 : certain persons to disclose certain interests in securities

134. Cl. 65 of the Bill requires a dealer etc. who recommends securities to disclose his interests in those securities and also contains certain other provisions in relation to the making of recommendations in respect of securities (based on ICAC SIAs s. 52).

135. A brief outline of the provision is as follows:-

- (a) If a dealer, investment adviser or representative sends circulars or other similar written communications in which he makes representations with respect to securities, he must include a concise statement of the nature of any relevant interest he has in the securities or in their acquisition or disposal (Bill s-cl. 65(1)). (Cl. 5 of the Bill deals with the circumstances in which a person is to be regarded as having a relevant interest in securities).
- (b) It will be a defence to a prosecution (for a breach of s-cl. 65(1)) that the defendant was not aware and could not reasonably be expected to be aware that, he or a person associated with him had a relevant interest in those securities (Bill s-cl. 65(2)). (Cl. 6 of the Bill deals with the circumstances in which one person is to be regarded as associated with another).

- (c) An interest in the disposal of securities will include any financial benefit or advantage that will accrue directly or indirectly upon the disposal. A person who has entered an underwriting agreement in respect of securities will be deemed to have an interest (Bill para 65(3) (a) and (b)). A person will not be associated with another person in relation to the sending of a circular etc. if he is a partner of the dealer in a business other than dealing in securities or is a co-director with the other person unless they are acting jointly or under an arrangement made between them (Bill para 65(3) (c)).
- (d) A person who has subscribed for or purchased securities for the purpose of offering them to the public for purchase will be prohibited from making a recommendation in respect of them unless he discloses that purpose to each person to whom he makes a recommendation (Bill s-cl. 65(4)).
- (e) Where securities have been offered for subscription and acquired by a person under an underwriting agreement because some or all of them have not been purchased, he must disclose this in an offer to sell (other than in ordinary trading on the stock market) or in any recommendation he makes in relation to the securities within 90 days after the initial offer (Bill s-cl. 65(5)).
- (f) The way in which circulars or other recommendations are to be signed is set out in

Bill s-cl. 65(6). A copy of the communication must be sent to the stock exchange if the sender is a member, or an employee of a member or of a member firm of a stock exchange or to the NCSC in any other case (Bill s-cl. 65(7)), and this copy must be kept for 7 years (Bill s-cl. 65(8)). The requirements in relation to signature (in s-cl. 65(6)) apply to copies of communications lodged pursuant to s-cl. 65(7) (Bill s-cl. 65(9)).

- (g) A reference to an offer will include an express or implied invitation (Bill s-cl. 65(10)). A communication signed by one of the partners will be deemed to have been signed by each of the partners. A communication signed by a director, executive officer or secretary of a body corporate will be deemed to have been sent by the body corporate (Bill s-cl. 65(11)).

Cl. 66 : dealings as principal

136. A dealer will be prohibited from dealing with another person as a principal without first informing the other person of that fact (Bill cl. 66 - based on ICAC SIAs s. 53 except that there is a new provision (s-cl. 66(7)) to ensure that any existing common law right to rescind a contract is preserved).

137. A brief outline of cl. 66 is as follows:-

- (a) The meaning of dealing or entering into a transaction as principal extends to dealing or entering into a transaction on behalf of an associated person or dealing in securities on behalf of a body corporate in which he has a controlling interest. If the dealer is in partnership and his interest and that of his partners constitutes

a controlling interest, the dealer will also be acting as principal for the purposes of the clause (Bill s-cl. 66(2)).

- (b) The statement must be made on the contract note (Bill s-cl. 66(3)).
- (c) Subject to the regulations a dealer who deals as principal with a person who is not a dealer must not charge that person brokerage or fee (Bill s-cl. 66(4)). This does not apply to a dealer who as principal enters into a transaction under an approved deed within the meaning of Division 5 of Part IV of the Companies Ordinance 1962 and charges brokerage in accordance with that deed (Bill s-cl. 66(6)).
- (d) Where a dealer has failed to comply with s-cl. 66(1), (3) or (4), the purchaser or vendor is entitled to rescind the contract by giving notice to the dealer in writing within 14 days after receipt of the contract note (Bill s-cl. 66(7)). Commercial law rights to rescind a contract will also be preserved (Bill s-cl. 66(7) - new provision).
- (e) The prohibitions in s-cl. 66(1) and (4) do not apply to a sale of securities to a dealer or a recognised dealer who specialises in odd lots (see Bill s-cl. 66(5)).

Cl. 67 : use by dealer of client's money

138. Where a client deposits with, or lends money to a dealer, the dealer must:-

- (a) pay that money into an account which contains only moneys deposited with or lent to the dealer;

- (b) furnish the client with a document in the prescribed form setting out terms and conditions on which the deposit or loan is made and accepted;
- (c) keep the moneys in the account until the client has given written acknowledgement that the document (referred to in (b)) has been received; and
- (d) use the moneys only for the purpose set out in the document or for another purpose agreed to by the client subsequently and in writing.

(Bill cl. 67 - new provision).

Cl. 68 : short selling

139. Subject to the Bill and to the regulations, short selling will be prohibited. (Bill cl. 68 - based on ICAC SIAs s. 54 except that:-

- sales slips will no longer be required to be marked short in arbitrage transactions; and
- there is an additional provision - s-cl. 68(6)).

140. A brief outline of these provisions is as follows:-

- (a) A person will be prohibited from selling securities unless he or his principal has, or believes on reasonable grounds that he has, a presently exercisable and unconditional right to vest the securities in the purchaser (Bill s-cl. 68(1)).

- (b) A person who has a presently exercisable and unconditional right to have securities vested in him or in accordance with his directions will be deemed to have at that time a presently exercisable and unconditional right to vest the securities in another person (Bill para 68(2)(a)). A right to vest securities in another person may be unconditional despite the fact that the securities are charged or pledged in favour of another person to secure the repayment of money (Bill para 68(2)(b)).
- (c) The prohibition does not apply to:-
- (i) a sale of securities by or to a dealer or a recognised dealer who specialises in odd lots and who is acting as principal;
 - (ii) a sale as part of an arbitrage transaction;
 - (iii) a sale by a purchaser whose right to have the securities vested in himself is conditional only upon payment by him of the consideration of his purchase and receipt of the necessary transfer and document of title;
 - (iv) a sale of securities where:-
 - . the seller is not associated with the issuer of the securities;

- . arrangements are made before the sale that will enable delivery of the securities to be made to the purchaser within 3 business days of the sale;
- . the sale is effected on a stock market, the price per unit is not lower than the price at which the immediately preceding ordinary sale was effected, and the stock exchange is immediately informed that the sale has been made short.

(Bill s-cl. 68(3)).

- (d) A person who effects a sale or requests a dealer to effect a sale referred to in paras 68(3) (b) or (d) must inform the dealer that the sale is a short-sale (Bill s-cl. 68(4)). A person who effects a sale referred to in para 68(3) (d) must include an endorsement that the sale was short on any document evidencing the sale (Bill s-cl. 68(5)).
- (e) Sales slips will no longer need to be marked short in the case of arbitrage transactions (cf. ICAC SIAs s-sec 54(5)). A similar exemption is contained in the stock exchange rules. The essence of arbitrage is that competitors do not know whether the arbitrageur is long or short. Further, if an arbitrageur is dealing simultaneously in 2 markets he may not be aware whether he is short of stock at a particular moment.

- (f) A person who purports to sell, offers to sell, holds himself out as entitled to sell or instructs a dealer to sell is deemed to sell the securities for the purposes of the provision (Bill s-cl. 68(6) - new provision - this will overcome a problem that the existing ICAC SIAs do not contain a definition of 'sell').

S.I. BILL : PART VI : ACCOUNTS AND AUDIT

141. Part VI of the S.I. Bill (cls 69 to 86) deals with the accounts to be kept by the holder of a dealers licence and with the auditing and supervision of those accounts. The application of this Part is dealt with in cl. 70.

Cl. 69 : interpretation

142. A reference in this Part to a book etc. of a dealer who carries on business in partnership is to be read as a reference to a book etc. of the partnership (Bill cl. 69 - same as ICAC SIAs s. 55).

Cl. 70 : application of Part

143. Part VI of the Bill will apply to or in relation to the holders of a dealer's licence and to the business of dealing in securities carried on by him, but will not apply to a recognised dealer or his business of dealing in securities (i.e. a dealer licensed under a corresponding law within the co-operative scheme - see definition in s-cl. 4(1)). (Bill cl. 70 - same as ICAC SIAs s. 56).

Cl. 71 : accounts to be kept by dealers

144. Cl. 71 of the Bill sets out the accounting records to be kept by a dealer (based on ICAC SIAs s. 57 which is based generally on s. 161A of the ICAC Coy As and is substantially the same as cl. 89 of the CSIB).

145. A brief outline of cl. 71 is as follows:-

- (a) A dealer must keep accounting records that

correctly record and explain the transactions and financial position of his securities business. He must keep accounting records that enable true and fair profit and loss accounts and balance sheets to be made up and conveniently audited (Bill s-cl. 71(1)).

- (b) Particular matters that must be recorded are set out in Bill s-cl. 71(2).
- (c) A dealer must keep records in sufficient detail to show separately particulars of all his transactions with his clients, himself or the partners (if appropriate), other dealers (inside and outside the Territory) and his employees (Bill s-cl. 71(3)).
- (d) An entry in the records will be deemed to have been made by or with the authority of the dealer (Bill s-cl. 71(4)).
- (e) A dealer must convert a record not kept in writing in the English language to such a form within a reasonable time if required (Bill s-cl. 71(5)).
- (f) If records are kept outside the A.C.T. the dealer must send to and keep in the A.C.T. such particulars as will enable true and fair profit and loss accounts and balance sheets to be prepared (Bill s-cl. 71(7) - similar provisions in the application legislation will ensure that these particulars are kept in the 'home' jurisdiction of any dealer).

Cl 72 : security documents in custody of dealer

146. A dealer must keep in safe custody documents of title to securities which are the property of the client. (Bill cl. 72 - based on ICAC SIAs s. 58, which is based generally on cl. 90 of the CSIB).

147. A brief outline of cl. 72 is as follows:-

- (a) The dealer must register the documents in the name of the client if this has not been done. The client may request that the documents be registered in the name of the dealer's nominee or that they be deposited with the dealer's bankers (Bill s-cl. 72(1)).
- (b) If an amount is owed by the client, the dealer may deposit documents as security with his creditors if he gives a written notice to the client identifying the documents and stating that he intends to deposit them as a security (Bill s-cl. 72(2)). Where the money owed to the dealer is paid the dealer must withdraw the documents from deposit forthwith (Bill s-cl. 72(3)).
- (c) If the documents are maintained as security for more than 3 months the dealer must give the client written notice of this fact, and at 3 monthly intervals thereafter (Bill s-cl. 72(4)).

Cl. 73 : dealers' trust accounts

148. A dealer will be required to open and maintain a trust account (Bill cl. 73 - based on ICAC SIAs s. 59 - which is based generally on cl. 91 of the CSIB). The

following moneys are required to be paid into a trust account:-

- 'all moneys held by him in trust for a client' (see Bill s-cl. 73(2)); and
- any amount deposited with a stock exchange under Bill cl. 95 and paid back to a sole trader or member firm under s-cl. 97(4) (see Bill s-cl. 97(6)).

149. A brief outline of cl. 73 is as follows:-

- (a) A dealer must open and maintain with a bank one or more trust accounts (Bill s-cl. 73(1)) and he must pay into this any money held by him in trust for a client no later than the next business day after receipt (Bill s-cl. 73(2)). Money received outside the Territory that must be paid into a trust account may be paid into a trust account in the place of receipt (Bill s-cl. 73(3)).
- (b) Money received by a dealer from a client other than brokerage fees etc., payment for securities delivered to the dealer before moneys are received or moneys to which cl. 67 applies will be deemed to be held in trust for that client (Bill s-cl. 73(4)). A cheque, bank cheque, bank draft or money order payable to or to the order of a specified person or bearer (not being a cheque etc. in which the payee is the dealer) received from a client with instructions to deliver it to the person to whom it is payable, will not have to be paid into a trust account (Bill s-cl. 73(5)).

- (c) It will be an offence to contravene or fail to comply with cl. 73 (Bill s-cl. 73(6)) or to contravene or fail to comply with intent to defraud (Bill s-cl. 73(7)).

Cl 74 : purposes for which money may be withdrawn from a trust account

150. Cl. 74 of the Bill sets out the purposes for which the dealer can use moneys from the trust account (based on ICAC SIAs s. 60 - cf. cl. 92 of the CSIB).
151. A brief outline of the provisions of cl. 74 is as follows:-
- (a) It will be an offence to withdraw money from a trust account except to:-
- (i) make a payment to or in accordance with the written directions of a person entitled to the moneys;
 - (ii) make a payment to a stock exchange in accordance with cl. 95;
 - (iii) defray brokerage and proper charges;
 - (iv) pay a dealer moneys to which he is entitled (being moneys that were paid, but were not required to be paid, into the trust account); and
 - (v) make a payment that is otherwise authorised by law.
- (Bill s-cl. 74(1)).

- (b) It will be an offence to withdraw moneys from a trust account with intent to defraud.
- (c) Trust moneys will not be available to the dealer's creditors (Bill s-cl. 74(3)), but lawful claims or liens will not be affected (Bill s-cl. 74(4)).
- (d) A dealer may withdraw from a trust account an amount which is the whole or part of a cheque that has not been cleared if it has not been refused payment (Bill s-cl. 74(5)) but must pay this back if clearance of the cheque is subsequently refused (Bill s-cl. 74(6)).
- (e) Failure to comply with s-cl. 74(6) will be an offence and will be deemed to be a defalcation for the purposes of Part IX (Bill s-cl. 74(7)). (See Bill s-cl. 111(1) which provides for the fidelity fund of a stock exchange to be applied for the purpose of compensating persons who suffer pecuniary loss, among other things 'by reason of a defalcation' by certain persons).

Cl. 75 : appointment of auditor by dealer

152. A person who holds a dealer's licence will be required to have an auditor (Bill cl. 75 - based on ICAC SIAs s. 61 except that appointments under s-cl. 75(9) must also be notified to the NCSC - see Bill s-cl. 75(13)).

153. A brief outline of cl. 75 is as follows:-

- (a) Any person who holds a dealer's licence must appoint an auditor within one month of becoming a licence holder (Bill s-cl. 75(1)).

- (b) A person or firm cannot be an auditor unless certain conditions set out in Bill s-cl. 75(2) and (3) are satisfied. The appointment of a firm as auditor is taken as the appointment of all members of the firm (Bill s-cl. 75(4)) and a newly constituted firm (due to death or retirement etc.) is deemed to be appointed as auditor if not disqualified by s-cl. 75(3) (Bill s-cl. 75(5)). Each member of a firm that consents to be appointed as the auditor of a firm will be guilty of an offence if this appointment is in breach of this clause (Bill s-cl. 75(6)).
- (c) A person will be prohibited from wilfully disqualifying himself or a firm (if he is a member) from acting as auditor of the dealer (Bill s-cl. 75(7)). An auditor will hold office till death, removal, resignation or incapacity (Bill s-cl. 75(8)).
- (d) A dealer must appoint an auditor within 14 days if there is no surviving or continuing auditor (Bill s-cl. 75(9)).
- (e) Any initial appointment of an auditor and any appointment following a vacancy must be notified to the NCSC (Bill s-cl. 75(13) - cf. ICAC SIAs s-sec 61(13) which only requires notification of the initial appointment).

Cl. 76 : removal and resignation of auditors

154. Cl. 76 of the Bill deals with the removal and resignation of a dealer's auditor (same as ICAC SIAs s. 62 - cf. ICAC Coy As s. 166B and CSIB cl. 94).

155. A brief outline of cl. 76 is as follows:-

- (a) A dealer will be able to remove an auditor if he has the consent of the NCSC (Bill s-cl. 76(1)). An auditor will be able to resign if he has the consent of the NCSC (Bill s-cl. 76(2)).
- (b) A statement made in an application by an auditor or an answer to an inquiry by the NCSC is not admissible evidence in civil or criminal proceedings (except in relation to cl. 135) and may not be the ground of a prosecution (other than in relation to cl. 135) (Bill s-cl. 76(4)).
- (c) S-cl. 76(5) deals with the date the resignation takes effect.
- (d) Where a firm is no longer capable of being auditor by reasons of para 75(3) (d) on the retirement or withdrawal from a firm of a member, the member (if not disqualified) is deemed to be auditor until the NCSC consents to his retirement or withdrawal (Bill s-cl. 76(6)).
- (e) A dealer must lodge notice of the resignation or removal of the auditor within 14 days with the NCSC (Bill s-cl. 76(7)). A person aggrieved where the Commission does not consent to the removal or resignation of an auditor, will be able to appeal to the Supreme Court which may confirm or reverse the decision or make such further order as it thinks appropriate (Bill s-cl. 76(8)).

Cl. 77 : fees and expenses of auditors

156. A dealer will be liable for the reasonable fees and expenses of his auditor (Bill cl. 77 - same as ICAC SIAs s. 63)

Cl. 78 : dealers' accounts

157. A dealer must prepare a yearly profit and loss account and balance sheet containing prescribed information and lodge these with the NCSC (Bill cl. 78 - based on ICAC SIAs s. 64). (See also Bill cl. 57 which requires a dealer's annual statement to the NCSC to be lodged during the same period as is required for the lodgment of the accounts).

158. A brief outline of cl. 78 is as follows:-

- (a) The terms 'financial year' and 'prescribed day' are defined for the purposes of the provision (Bill s-cl. 78(1)).
- (b) An auditor's report must also be lodged (Bill s-cl. 78(2)).
- (c) The NCSC will be able to extend and further extend the time for lodgments (Bill s-cl. 78(3)). Any conditions attached to such an extension must be complied with (Bill s-cl. 78(4)).

Cl. 79 : auditor to report to NCSC in certain cases

159. An auditor must lodge with the NCSC within 7 days a written report of any prescribed matter: a copy must be sent to the dealer and each exchange of which the dealer is a member (Bill s-cl. 79(1) - cl. 79 is the same as ICAC SIAs s. 65 - cf. CSIB cl. 97). 'Prescribed matter' is

defined as a matter that, in the opinion of the auditor:-

- (a) has adversely affected, is adversely affecting or adversely affects the ability of the dealer to meet his obligations as a dealer; or
- (b) constitutes or may constitute a breach of cls. 71, 72, 73, 74, Part VIII or any breaches of licence conditions.
- (c) constitutes or may constitute a breach of a licence condition.

(Bill s-cl. 79(2)).

Cl. 80: certain matters to be reported to NCSC

160. A stock exchange must notify the NCSC of a prescribed matter in relation to a dealer of that exchange (Bill s-cl. 80(1) - cl. 80 is the same as ICAC SIAs s 66). 'Prescribed matter' has the same definition as in cl. 79 (Bill s-cl. 80(2)).

Cl. 81 : defamation

161. An auditor will not be liable, in the absence of malice, to a defamation action in respect of an oral or written statement made or issued by him in the course of his duties as an auditor (Bill s-cl. 81(1) - cl. 81 is based on Vic. SIA s. 67). Protection will also be given (in the absence of malice) to the publisher of a document prepared by an auditor and required to be lodged under this Bill or a corresponding law of a State or another Territory (Bill s-cl. 81(2)). Nothing in the clause affects any other right, privilege or immunity that an auditor or other person has as defendant in a defamation action (Bill s-cl. 81(3)).

Cl. 82 : right of stock exchange to impose obligations etc., on members not affected by this Part

162. Nothing in Part VI of the Bill will prevent a stock exchange from imposing on members any obligations dealing with auditing of accounts, furnishing information in auditors' reports or the keeping of books provided they are not inconsistent with the Bill (Bill cl. 82 - same as ICAC SIAs s. 68).

Cl. 83 : power of Court to restrain dealings with dealers' bank accounts

163. The Supreme Court will be able to make an order restraining dealing in relation to an account where the NCSC shows to the satisfaction of the Court that:-

- (a) there are reasonable grounds for believing there is a deficiency in a trust account;
- (b) there has been undue delay or unreasonable refusal by a dealer in paying or accounting for trust moneys as required by the Bill;
- (c) a person who is or has been a dealer has not paid moneys into the trust account as provided by cl. 73; or
- (d) where a business is or was carried on otherwise than in partnership - that the dealers' licence of that person has been revoked or suspended, that he is mentally or physically incapable of managing his affairs, that he has ceased to carry on a business of dealing in securities or that he has died.

(Bill cl. 83 - based on ICAC SIAs s. 69).

Cl. 84 : duty of banker to make full disclosure

164. Where an order made under cl. 83 is directed to a banker, he must make full disclosure to the NCSC (Bill cl. 84 - same as ICAC SIAs s. 70).

Cl. 85 : power of Court to make further orders and give directions

165. The NCSC or a person affected by an order under cl. 83 will be able to apply to the Supreme Court which will be able to make further orders (Bill cl. 85 - same as ICAC SIAs s. 71)

Cl. 86 : power of Court to make order relating to payment of moneys

166. The Court in making an order under cl. 85 will be able to include directions directing the person to whom the moneys are to be paid:-

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

(Bill s-cl. 86(1) - cl. 86, with some drafting alterations, is based on s. 72 of the ICAC SIAs).

167. A scheme prepared pursuant to s-cl. 86(1) must be approved by the Court (Bill s-cl. 86(2)) The Court will be able to give such directions as it thinks fit in relation to moneys held in a separate trust account under s-cl. 86(1).

(Bill s-cl. 86(3)).

S.I BILL : PART VII : REGISTERS OF INTERESTS IN SECURITIES

168. Part VII of the S.I. Bill (Cls. 87 to 94) deals with the establishment and maintenance of a register of interests in securities by licence holders and by financial journalists (see Bill cl. 88).

Cl. 87 : interpretation

169. Cl. 87 of the Bill (based on ICAC SIAs s. 73) contains a number of interpretative provisions:-

- (a) 'Financial journalist' is defined for the purposes of the Part (Bill s-cl. 87(1)).
- (b) A reference to securities in this Part is a reference to the securities of a public company or securities quoted or dealt in at a stock market (Bill s-cl. 87(2)).
- (c) The Register is that required to be maintained under s-cl. 89(1) (Bill s-cl. 87(3)).
- (d) A member of the exchange specialising in odd lots is exempted from the operation of this Part in relation to any relevant interest he acquires as a result of an odd lot transaction (Bill s-cl. 87(4)).

Cl. 88 : application of Part

170. Part VII will apply to the holder of a licence and a financial journalist who does not maintain a register under a corresponding law within the co-operative scheme (Bill cl. 88 - based on ICAC SIAs s. 74).

Cl. 89 : register to be maintained

171. A financial journalist and a licence holder must maintain a Register in the prescribed form and manner and must keep it in the Territory or in a participating State or Territory (Bill s-cl. 89(1) - cl. 89 is based on ICAC SIAs s. 75 except that the register can now be kept outside the home jurisdiction.)

172. Particulars of securities and the nature of the relevant interest must be entered in the Register within 7 days by a person who is or who becomes a person with a relevant interest (Bill s-cl. 89(2) and (3)). Particulars of any change must also be entered within 7 days (Bill s-cl. 89(4)). The particulars to be entered include:-

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

(Bill s-cl. 89(6)).

Cl 90 : place where register kept

173. An applicant for a licence must give notice in writing to the NCSC of the place at which he intends to keep the Register (Bill s-cl. 90(1) - cl. 90 is based on ICAC SIAs s. 76 except that s-secs 76(4) and (5) have been omitted). Within 14 days of commencing to maintain the Register, a financial journalist must give written notice to the NCSC stating where the Register is kept, the name and business address of his employer and the publications to which he contributes (Bill s-cl. 90(2)). Notice must be given of any change in the place at which the Register is kept (Bill s-cl. 90(3)).

Cl. 91 : defences

174. There will be a defence of ignorance to a prosecution under cls. 89 or 90 (Bill s-cl. 91(1) - cl 91 is based on ICAC SIAs s. 77). The awareness of a servant or agent will be imputed to his master or principal (Bill s-cl. 91(2)).

Cl. 92 : power of NCSC to require production of register

175. The NCSC will be able to require a licence holder or financial journalist to produce the Register at a specified place and within a specified time for inspection by a person authorised by the NCSC. Where a Register is kept outside the Territory, the time for producing the Register must be at least 7 days. (Bill cl. 92 - based on ICAC SIAs s. 78).

Cl. 93 : power to NCSC to require certain information to be supplied to NCSC

176. The NCSC will be able, by written notice, to require the proprietor or publisher of a newspaper or

periodical to supply the name and address of a person who contributed to or prepared any article, analysis or report concerning securities (Bill s-cl. 93(1) - cl. 93 is based on ICAC SIAs s. 79). A proprietor or publisher of a newspaper must not wilfully fail to comply with such a notice (Bill s-cl. 93(2)).

Cl. 94 : power of NCSC to supply copy of register

177. The NCSC will be able to supply a copy of an extract from a Register to any person who in its opinion should be informed of the matters disclosed (Bill cl. 94 - same as ICAC SIAs s. 80).

S I BILL : PART VIII : DEPOSITS WITH STOCK EXCHANGES

178. Part VIII of the S.I. Bill (Cls. 95 to 99) deals with the deposits that each sole trader and member firm is required to lodge with the home stock exchange. (See Bill para 74(1)(b) which permits a dealer to withdraw money from a trust account to lodge and maintain the deposit required by this Part).

Cl. 95 : deposits to be lodged by sole traders and member firms

179. Each sole trader and each member firm must lodge and maintain with the exchange a deposit required by this Part (Bill s-cl. 95(1) - cl. 95 is based on ICAC SIAs s. 81 except that a defence is now provided in s-cl. 95(5)). This deposit is payable out of moneys in a trust account (Bill s-cl. 95(2)). Money lodged as a deposit from a trust account continues to be money in that trust account even though it is lodged (Bill s-cl. 95(3)). It will be an offence to fail to lodge and maintain this deposit (Bill s-cl. 95(4)).

180. It will be a defence to a prosecution for such an offence if the defendant establishes that the failure was due to the making of a payment out of the trust account authorised by para 74(1)(a), (c), (d) or (e) that would not have been able to be made if the obligation under s-cl. 95(1) had been met (Bill s-cl. 95(5) - new provision).

Cl. 96 : deposit to be proportion of certain balances

181. The deposit required will be two-thirds of the lowest balance in the trust account during the three

months period ending on the previous quarter day or such lesser proportion as is prescribed (Bill s-cl. 96(1) - s-cl. 96(1) - (3) are based on ICAC SIAs s. 82). Where there are two or more trust accounts, the amount of deposit will be determined on the basis of the aggregate of the balances (Bill s-cl. 96(2)). No deposit will have to be lodged where the amount is less than \$3,000 (Bill s-cl. 96(3)).

182. A sole trader or member firm required to increase the amount lodged with an exchange must lodge the additional amount within 5 trading days of that stock exchange after the relevant quarter day (Bill s-cl. 96(4) and (5) - new provision). These provisions were introduced to cover specifically the situation where the exchange requires a deposit to be increased. In the absence of these provisions, there would be an immediate obligation to lodge the additional amount with the exchange.

Cl. 97 : deposits to be invested by stock exchange

183. Cl. 97 of the Bill sets out what a stock exchange is to do when it receives a deposit from a sole trader or member firm (based on ICAC SIAs s. 83 - except for s-cl. 97(5) which is new). The fidelity fund of the stock exchange will consist, among other things, of the interest on moneys invested by the stock exchange under Part VIII (see Bill para 101(c)).

184. A brief outline of cl. 97 is as follows:-

- (a) Deposits received by a stock exchange must be held on trust for the sole trader or member firm lodging it and must be invested:-

- (i) on interest-bearing term deposit in a bank (defined by Bill s-cl. 97(2) which is the same as the definition in Bill s-cl. 11(3) - see ex memo para 46); or
- (ii) on deposit with a corporation declared to be an authorised dealer in the short term money market under para 38(7)(b) of the Companies Ordinance 1962.

(Bill s-cl. 97(1)).

- (b) Interest received from deposits will be paid into the Fidelity Fund (Bill s-cl. 97(3) - see also Bill para 101(c)).
- (c) The amount deposited with the stock exchange under cl. 95 will be repayable by it but this will not affect the obligations of the sole trader or member firm under that provision (Bill s-cl. 97(5) - new provision). The amount repaid by a stock exchange (under s-cl. 97(4)) must be paid into a trust account maintained under cl. 73 (Bill s-cl. 97(6)).
- (d) The fidelity fund of a stock exchange will guarantee repayment of a deposit (Bill s-cl 97(8)).

Cl. 98 : accounts of deposits

185. A stock exchange must establish and keep proper accounts of all deposits received under this Part, and must cause a balance sheet to be made out within one month after each quarter day (s-cl. 98(1) - cl. 98 is based on ICAC SIAs s. 84).

186. Accounts must be audited by a registered company auditor (Bill s-cl. 98(2)) and this auditor must lay a report on the accounts and balance sheet before the committee of the stock exchange within one month after the balance sheet is made out (Bill s-cl. 98(3)). A stock exchange must give the NCSC a copy of each report and balance sheet within 14 days after the report has been laid before the committee (Bill s-cl. 98(4)).

Cl. 99 : claims etc., not affected by this Part

187. No claims or liens of a member of a stock exchange or rights of other persons are affected by anything done under this Part (Bill cl. 99 - same as N.S.W. SIA s. 85).

S.I. BILL : PART IX : FIDELITY FUNDS

188. Part IX of the S.I. Bill (cls. 100 to 122) deals with the fidelity fund which must be established by each stock exchange.

Cl. 100 : establishment of fidelity funds

189. Each stock exchange must establish a fidelity fund which is administered by its committee (Bill s-cl. 100(1) - cl. 100 is based on ICAC SIAs s. 86). The assets of the fund will be the property of the stock exchange, but must be kept separately from other property and must be held in trust for the purposes of Part IX (Bill s-cl 100(2)).

Cl. 101 : moneys constituting fidelity fund

190. The fidelity fund will consist of:-

- (a) not less than \$100,000 paid to the credit of the fund on its establishment by the stock exchange;
- (b) moneys paid by sole traders or member firms to the exchange in accordance with this Part;
- (c) the interest on moneys invested by the exchange under Part VIII;
- (d) the interest and profits accruing from the investment of the fidelity fund;
- (e) moneys paid into the fund by the exchange;
- (f) moneys recovered by or on behalf of the exchange

in the exercise of a right of action conferred by this Part;

- (g) moneys paid by an insurer pursuant to an insurance or indemnity contract entered into by the stock exchange under cl. 121; and
- (h) all other moneys lawfully paid into the fund.

(Bill cl. 101 - based on ICAC SIAs s. 87).

Cl. 102 : fund to be kept in separate bank account

191. Fidelity fund moneys must be kept in a separate bank account (Bill cl. 102 - based on ICAC SIAs s. 88).

Cl. 103 : payments out of fidelity fund

192. The following payments will be payable out of the fidelity fund in such order as the committee determines:-

- (a) claims allowed by the committee or established against the stock exchange;
- (b) legal and other expenses incurred in investigating or defending claims or in the exercise by the stock exchange or committee of rights, powers and authorities under this Part;
- (c) premiums payable in respect of insurance or indemnity contracts entered into under cl. 121;
- (d) expenses incurred in administering the fund, including wages and salaries; and

- (e) all other money payable out of the fund in accordance with the Bill.

(Bill cl. 103 - based on ICAC SIAs s. 89).

Cl. 104 : accounts of fund

193. A stock exchange must establish and keep proper accounts of its fidelity fund, prepare a balance sheet (s-cl. 104(1) - cl. 104 is based on ICAC SIAs s. 90) and have the accounts audited (s-cl. 104(2)). The auditor must lay a report before the committee (s-cl. 104(3)) and a copy of this report and the balance sheet must be given to the NCSC (s-cl. 104(4)).

Cl. 105 : management sub-committee

194. The committee of a stock exchange may, by resolution appoint a management sub-committee of not more than 5 nor less than 3 members one of whom is a member of the committee (Bill s-cl. 105(1) - cl. 105 is based on ICAC SIAs s. 91).

195. Other provisions (in cl. 105) relating to this management sub-committee are as follows:-

- (a) The stock exchange committee will be able to delegate its powers etc. under Part IX other than:-

- this power of delegation;
- cl. 108 (imposition of a levy);

- s-cl. 111(6) to (8) (payment out of fund of amounts in excess of those authorised by cl. 111); or
- cl. 113 (recompense of an innocent partner).

(Bill s-cl. 105(2)).

(b) A delegation by the committee of a stock exchange will be able to be varied or revoked at any time by resolution of the committee (Bill s-cl. 105(4)).

(c) The committee may, by resolution remove a member or fill a vacancy in a sub-committee appointed by it (Bill s-cl. 105(5)).

Cl. 106 : contributions to fund

196. A person must not be admitted to membership of a stock exchange (or to partnership in a member firm) unless he has paid at least \$500 to the stock exchange as a contribution to the fidelity fund (Bill s-cl. 106(1) - cl. 106 is based on ICAC SIAs s. 92). An annual amount of at least \$100 must also be contributed on or before 31 March each year (Bill s-cl. 106(2)). The stock exchange will be able to increase either of these amounts.

Cl. 107 : provisions where fund exceeds \$2,000,000

197. Cl. 107 of the S.I. Bill deals with the situation where the amount in a fidelity fund exceeds \$2,000,000 or such lesser amount as is prescribed (based on ICAC SIAs s. 93 - the amount specified in the Qld. SIA is \$1 million).

198. A brief outline of the provisions of cl. 107 is as follows:-

- (a) Where the amount in a fidelity fund exceeds \$2,000,000 (or a prescribed lesser amount):-
- (i) a person who is a member of the exchange who has made 20 or more annual contributions and in respect of whom a payment from the fund has not been made (or if made has been repaid) will not be required to make further contributions;
 - (ii) on the retirement of a person in (i), he may have all or a proportion of his annual contributions refunded at the discretion of the committee; and
 - (iii) on the death of such a person where no payment has been made, the committee will have a discretion to pay his personal representative, widow or person dependent on him.
- (Bill s-cl. 107(1)).
- (b) The stock exchange will be able to suspend the operation of paras 107(1)(b) or (c) by notice in the Gazette, or revoke the suspension (Bill s-cl. 107(3)).
- (c) The committee will be able to require a member referred to in s-cl. 107(1) to recommence annual contributions if the fund is less than \$1,000,000 or a prescribed lesser amount (Bill s-cl. 107(4)).

and such a member will be liable to contribute accordingly (Bill s-cl. 107(5)).

Cl. 108 : levy in addition to annual contributions

199. A stock exchange will be able to impose a levy on each contributor if the fidelity fund is insufficient to pay all amounts required to be paid under cl. 103 (Bill s-cl. 108(1) - cl. 108 is the same as ICAC SIAs s. 94). The amount will be payable in the time and manner specified by the exchange (Bill s-cl. 108(2)) but a person will not be required to pay more than \$5,000 in the aggregate or more than \$1,000 in any 12 month period (Bill s-cl. 108(3)).

Cl. 109 : power of stock exchange to make advances to fund

200. A stock exchange will be able to give or advance money to its fidelity fund (s-cl. 109(1) - cl. 109 is the same as ICAC SIAs s. 95) which may be repaid at any time (Bill s-cl. 109(2)).

Cl. 110 : investment of fund

201. Moneys in a fidelity fund not immediately required may be invested in any manner in which trust funds may lawfully be invested or on deposit with a corporation declared to be an authorised dealer in the short-term money market under para 38(7)(b) of the Companies Ordinance 1962 (Bill cl. 110 - same as ICAC SIAs s. 96).

202. The following 9 companies are currently authorised dealers in the official short-term money market

(having lender of last resort facilities with the Reserve Bank):

All-States Discount Limited
A.M.P. Discount Corporation Limited
Capel Court Securities Limited
Delfin Discount Company Limited
First Federation Discount Company Limited
National Discount Corporation Limited
Short Term Acceptances Limited
Trans City Discount Limited
United Discount Company of Australia Limited

Cl. 111 : application of fund

203. Cl. 111 of the Bill deals with the payment of moneys out of the fidelity fund where a person has suffered pecuniary loss or where there is a deficiency in an insolvency situation (based on ICAC SIAs s. 97 except that s-secs 97(2) and 97(3) are amended and s-cl. 111(3) is new).

204. A brief outline of cl. 111 is as follows:-

- (a) The fund will be applied to compensate persons who suffer loss because of defalcation or fraudulent misuse of money, securities or documents of title to securities by a member of the stock exchange who, when the loss is suffered, is a sole trader or partner in a member firm of a stock exchange who is liable to contribute to the fidelity fund, or an employee or servant of that sole trader or firm (Bill s-cl. 111(1)).

- (b) If there is no right to compensation under s-cl. 111(1) a payment from the fund will be able to be made to an official receiver or trustee in bankruptcy from the fund. The amount of such a payment will be limited to the amount the official receiver or trustee certifies is required to make up or reduce the deficiency in the bankrupt members estate to satisfy debts arising from dealing in securities (Bill s-cl. 111(2)).
- (c) These provisions for payment where the defaulter is bankrupt will now also apply where a member or partner in a member firm of a stock exchange who has made a composition with his creditors or has executed a deed of assignment or deed of arrangement under Part X of the Bankruptcy Act (Bill s-cl. 111(3) - new provision).
- (d) The total liability of a stock exchange in relation to the defalcations etc. of one member or one firm will be \$500,000 (Bill s-cl. 111(4) - wording has been changed from that in ICAC SIAS s-sec 97(3) to make it clear that the total liability is \$500,000).
- (e) The stock exchange will be able to increase the amount of this total liability by notice in the Gazette (Bill s-cl. 111(6)). This notice may be revoked or varied (Bill s-cl. 111(7)).
- (f) The exchange will also be able to apply out of the fidelity fund such sums in excess of the amount limited by this clause as it thinks fit in the compensation of persons who have suffered loss, or in payment to a trustee or official receiver (Bill s-cl. 111(8)).

- (g) Where money, securities, documents of title to securities or other property has or have been entrusted to or received by a person who has been, but has ceased to be a member of a stock exchange or an employee or servant of such a person, and by reason of a defalcation or a fraudulent misuse of the securities, documents of title or other property by the above person, or his employees or servants, the person by or from whom the money, securities, documents of title or other property were entrusted or received suffered pecuniary loss, and that person had at the time the money, securities, documents of title or other property were entrusted or received, reasonable grounds for believing and did believe that the first-mentioned person was a member of the stock exchange concerned, the reference in this section to a member of a stock exchange includes a reference to the first-mentioned person.

(Bill s-cl. 111(9)).

Cl. 112 : claims against the fund

205. A person who suffers pecuniary loss will be entitled to claim compensation from the fidelity fund and to take Supreme Court proceedings to establish his claim (Bill s-cl. 112(1) - cl. 112 is based on ICAC SIAs s. 98).

206. Other provisions of cl. 112 are as follows:-

- (a) A person will not have a claim against the fund if:-
- (i) the pecuniary loss was suffered before the commencement of the Bill; or
 - (ii) the pecuniary loss was suffered after the money or property had, in due course of administration of a trust, ceased to be under the sole control of a member or partner in a member firm.

(Bill s-cl. 112(2)).

- (b) The claimant will be able to claim the actual pecuniary loss suffered by him including the reasonable costs in making and proving his claim less any benefit received by him from any other source in reduction of the loss (Bill s-cl. 112(3)).

- (c) Interest will be payable on the amount of the compensation at the rate of 5% per annum or such rate as is prescribed (Bill s-cl. 112(4)).

Cl. 113 : rights of innocent partner in relation to fund

207. An innocent partner who has made payments to persons who have suffered loss will be able to make a claim against the fidelity fund in certain circumstances (Bill cl. 113 - based on ICAC SIAs s. 99 - there are differences in the wording of s-secs 99(2) - (4) of the N.S.W. SIA when compared with the corresponding provisions in the other ICAC SIAs).

208. A brief outline of cl 113 is as follows:-

- (a) Where all claimants have been fully compensated for loss suffered in relation to money or other property entrusted to or received by a partner in a member firm, any other partner in that firm who has made a payment to a person in relation to that compensation will be subrogated to the rights and remedies of that person against the fund. This will occur only if the Committee determines that the partner was in no way a party to the loss and acted honestly and reasonably in relation to the matter (Bill s-cl. 113(1)).
- (b) A partner aggrieved by the Committee's decision may appeal to the Supreme Court within 28 days (Bill s-cl. 113(2) and (3)).
- (c) The Court, will be able, if it is of the relevant opinion, to direct that the partner be subrogated to the rights and remedies against the fund of the person to whom he made the payment (Bill s-cl. 113(4)).

Cl. 114 : notice calling claims against fund

209. A stock exchange will be able to call for claims in relation to a particular person (Bill cl. 114 - based on ICAC SIAs s. 100 - the N.S.W. SIA does not contain a s-sec 100(3)).

210. A brief outline of cl. 114 is as follows:-

- (a) A stock exchange will be able to publish in a daily newspaper a notice specifying a date (not earlier than 3 months after the date of the notice) by which compensation claims must be made (Bill s-cl. 114(1)).

- (b) A claim must be made in writing before the specified date or where there is no notice within 6 months of the claimant becoming aware of the loss: other claims are barred unless the stock exchange determines otherwise (Bill s-cl. 114(2)).
- (c) It is a defence to an action for damages against the exchange, a member or employee if the defendant establishes that the notice (published under Bill s-cl. 114(1)) was published in good faith for the purposes of the provision (Bill s-cl. 114(3)).

Cl. 115: power of committee to settle claims

211. The procedure for the settlement of claims for compensation by the committee of the stock exchange is set out in cl. 115 (based on ICAC SIAs s. 101).

212. A brief outline of cl. 115 is as follows:-

- (a) The exchange committee will be able to allow and settle a compensation claim against the fund (Bill s-cl. 115(1)).
- (b) A claimant is barred from commencing proceedings against a stock exchange without leave of the committee unless his claim has been disallowed and he has exhausted other remedies (Bill s-cl. 115(2)). A person refused leave may apply to the Supreme Court for leave to commence proceedings (Bill s-cl. 115(3)).
- (c) Notice of disallowance of a claim must be served on the claimant (Bill s-cl. 115(4)), and proceedings against the stock exchange must be commenced within 3 months of this notice (Bill s-cl. 115(5)).

- (d) The admissibility of certain evidence is dealt with in Bill s-cl. 115(6).
- (e) The Committee or Court will be able to allow a claim if satisfied there was defalcation or fraudulent misuse even though the person against whom the allegation is made was not convicted or prosecuted (Bill s-cl. 115(7)).

Cl. 116 : form of order of Court establishing claim

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

214. Cl. 116 is based on ICAC SIAs s. 102 except that:-

- the N.S.W. SIA does not have provisions equivalent to s-secs 102(2) and (3) in the other ICAC SIAs; and
- Cl. 116 does not contain an equivalent to s-sec. 102(3).

Cl. 117 : power of committee to require production of securities etc.

215. The stock exchange committee will be able to require any person to produce any securities, documents or statements of evidence necessary to support a claim, to enable criminal proceedings to be taken or to enable the committee to exercise its rights against a member or partner in a member firm (Bill cl. 117 - same as ICAC SIAs s. 103).

Cl. 118 : subrogation of stock exchange to rights, etc.,
of claimant on payment from fund

216. The stock exchange will be deemed to be subrogated to the rights and remedies of a claimant on payment being made out of the fund (Bill cl. 118 - same as ICAC SIAs s. 104).

Cl. 119 : payment of claims only from fund

217. Moneys or other property of the stock exchange other than the fidelity fund will not be available for the payment of a claim under this Part (Bill cl. 119 - same as ICAC SIAs s. 105).

Cl. 120 : provision where fund insufficient to meet claims
or where claims exceed total amount payable

218. Where the amount of the fund is insufficient to satisfy all claims allowed, the amount of the fund will be apportioned among the claimants in such manner as the committee thinks equitable and the remaining unpaid amount will be a charge against future receipts to be paid when available (Bill s-cl. 120(1) - cl. 120 is based on ICAC SIAs s. 106). Where the aggregate of claims allowed exceeds the total amount in the fund, the total amount will be apportioned among the claimants and after this apportionment all such claims are discharged (Bill s-cl. 120(2)).

Cl. 121 : power of stock exchange to enter into contracts
of insurance or indemnity

219. A stock exchange will be able to insure itself against liability in respect of claims under this Part (Bill cl. 121 - based on ICAC SIAs s. 107).

220. The fidelity fund will consist, among other things, of moneys paid by the insurer pursuant to a contract of insurance or indemnity entered into by the stock exchange under cl. 121 (see Bill para 101(g)). Premiums payable in respect of contracts of insurance or indemnity entered into by the stock exchange under cl. 121 may be paid out of the fidelity fund (see Bill para 103(c)).

Cl. 122 : application of insurance moneys

221. A claimant against a fidelity fund has no right of action against a person with whom a contract of insurance is taken out in respect of any money paid by the insurer under such a contract (Bill cl. 122 - same as ICAC SIAs s. 108).

S.I. BILL : PART X : TRADING IN SECURITIES

222. Part X of the S.I. Bill (cls. 123 to 132) regulates trading in securities. 'Securities' are defined in s-cl. 4(1) of the Bill as follows:-

"Securities" means -

- (a) debentures, stocks or bonds issued or proposed to be issued by a government;
- (b) debentures, stocks, shares, bonds or notes issued or proposed to be issued by a body corporate or unincorporate;
- (c) any right or option in respect of any such debentures, stocks, shares, bonds or notes; or
- (d) a prescribed interest,

but does not include -

- (e) bills of exchange;
- (f) promissory notes; or
- (g) certificates of deposit issued by a bank.

Cl. 123 : stock market manipulation

223. Stock market manipulation will be prohibited (Cl. 123 - new provision - comparable provisions are contained in s. 9(a)(2) and (6) of the U.S. Securities Exchange Act of 1934 - cf. also CSI Bill cl. 119).

224. A brief outline of cl. 123 is as follows:-

- (a) A person will be prohibited from being concerned in or carrying out two or more transactions that have the effect of raising, lowering or maintaining the price of the stock. His purpose must be to induce others to sell, purchase or subscribe for securities (Bill s-cl. 123(1), (2) and (3)).
- (b) A transaction will include an offer or invitation (Bill s-cl. 123(4) - a similar provision is included in s-cl. 124(7)).

225. The effect of this provision in the context of the co-operative scheme will be that the legislation of each jurisdiction will deal with transactions, wherever entered into or carried out that have, or are likely to have, the relevant effect on the price of securities on a stock market in that jurisdiction. There is also a prohibition against the dissemination of information to the effect that the price of securities is likely to be affected by transactions by a person or benefiting that person if those transactions contravene this prohibition (see Bill cl. 127).

Cl. 124 : false trading and market rigging

226. False trading and market rigging will be prohibited (Bill cl. 124 - based on ICAC SIAs s. 109 except that s-cl. 124(1) has been amended and s-cl. 124(6) is a new provision - cf. also CSI Bill cl. 120).

227. A brief outline of cl. 124 is as follows:-

- (a) A person will be prohibited from creating a false

or misleading appearance of active trading, or creating a false and misleading appearance with respect to the market for securities ('false trading' - Bill s-cl. 124(1)). The effect of this provision in the context of the co-operative scheme will be that the legislation of each jurisdiction will prohibit actions, wherever done, that have, or are likely to have, the relevant appearance in relation to securities traded on a stock market in that jurisdiction.

(b) A person will be prohibited from maintaining, inflating, depressing or causing fluctuations in the market price of securities by:-

(i) buying or selling any securities where no change in the beneficial ownership occurs (see also Bill s-cl. 124(5)); or

(ii) any fictitious transactions or devices. ('market rigging' - Bill s-cl. 124(2)).

(c) False trading will include:-

(i) being concerned either directly or indirectly in a transaction involving any securities where there is no change in the beneficial ownership ('wash sales' - also prohibited by s. 9(a)(1)(A) of the U.S. Securities Exchange Act of 1934);

(ii) making an offer to sell securities at a specified price where he or a person associated with him makes an offer to

purchase substantially the same number at substantially the same price ('matched orders' - also prohibited by s. 9(a)(1)(B) of the U.S. Securities Exchange Act of 1934); or

- (iii) making an order to purchase securities at a specified price where he or a person associated with him makes an offer to sell substantially the same number at substantially the same price ('matched orders'). (Bill s-cl. 124(3)).

- (d) It will be a defence to a prosecution under s-cl 124(3) and a prosecution under s-cl. 124(2) for the purchase or sales of securities that do not involve a change in the beneficial ownership of those securities, thereby maintaining, inflating, depressing, or causing fluctuations in the market price of any securities, if the defendant establishes that his purpose was not to create a false or misleading appearance of active trading (Bill s-cl. 124(4)).

- (e) No change occurs in beneficial ownership, for the purposes of these prohibitions, if a person who had an interest in the securities before the purchase or sale (or a person associated with him) has an interest after the purchase or sale (Bill s-cl. 124(5)).

- (f) A defendant has a defence if he establishes that his actions were not intended to create a false or misleading market (Bill s-cl. 124(6)).

- (g) Transaction for the purpose of the prohibition on 'wash sales' in para 124(3)(a) will include offer or invitation (Bill s-cl. 124(7) - new provision - a similar provision is also contained in s-cl. 123(4)).

Cl. 125 : false or misleading statements

228. A person will be prohibited from making a false or misleading statement that is likely to induce the sale or purchase of securities or affect their market price if, when he makes the statement, he does not care whether it is true or false or he knows or ought reasonably to have known that it is false or misleading (Bill cl. 125 - based on ICAC SIAs s. 110 except that it also prohibits the dissemination not only of false information that is likely to have the effect of raising or lowering the market price of securities but also of false information that is likely to have the effect of maintaining or stabilizing that price).

Cl. 126 : fraudently inducing persons to deal in securities

229. A person will be prohibited from inducing another person to deal in securities by making a statement, promise or forecast he knows to be misleading, by dishonestly concealing material facts or by recklessly making a misleading statement, promise or forecast (Bill cl. 126 - based on ICAC SIAs s. 111).

Cl. 127 : dissemination of information about illegal transactions

230. A person will be prohibited from disseminating information to the effect that the price of securities is likely to rise or fall or be maintained by reason of transactions by him or benefiting him if the transactions

were in contravention of the prohibitions against:-

- stock market manipulation (see Bill cl. 123);
- false trading or market rigging (see Bill cl. 124);
- false or misleading statements (see Bill cl. 125); or
- fraudulently inducing persons to deal in securities (see Bill cl. 126).

(Bill cl. 127 - new provision - cf. CSI Bill cl. 122 - the provision is to the same effect as s. 9(a)(3) and (5) of the U.S. Securities Exchange Act of 1934).

Cl. 128 : prohibition of dealings in securities by insiders

231. Insider trading will be prohibited (Bill cl. 128 - based on ICAC SIAs s. 112). ICAC SIAs s-sec 112(11), which deals with related bodies corporate, has been omitted: the question of related bodies corporate is dealt with in s-cl. 4(7) of the Bill. Compensation will be payable in certain circumstances to persons who suffer loss as a result of insider trading (see Bill cl. 130). An amendment has been made in s-cl. 128(3) (based on ICAC SIAs s-sec. 112(3)) following the report of the Victorian Commissioner for Corporate Affairs on Beach Petroleum N.L.

232. A brief outline of cl. 128 is as follows:-

- (a) A person will be prohibited from dealing in securities in three sets of circumstances:-
 - (i) if he is or has been in the past 6 months, connected with a body corporate and has price sensitive information in relation to

that body corporate, as a result of his connection he must not deal in its securities (Bill s-cl. 128(1));

(ii) if he is or has been in the past 6 months connected with a body corporate and, as a result of his connexion, has price sensitive information in relation to a second body corporate, he must not deal in securities of the second body corporate (Bill s-cl. 128(2));

(iii) if he is not otherwise prohibited, he must not deal in securities where he has price sensitive information about them if:

- he obtained the inside information from another person and is aware or ought to be aware that that person is prohibited from dealing; and
- when the information was obtained he was associated with the other person or had an arrangement with him for the communication of such information with a view to dealings by him and/or the other person.

(Bill s-cl. 128(3)).

(b) A person who is prohibited, because of inside information, from dealing in securities must not:-

- (i) cause or procure any other person to deal in those securities (Bill s-cl. 128(4)); or
- (ii) communicate his relevant inside information to another person if:

- the securities in question can be traded on a stock market; and
- the first-mentioned person knows, or has reasonable grounds for believing, that the other person will make use of the information for the purpose of dealing himself in the securities or causing another person to deal in them.

(Bill s-cl. 128(5)).

(c) A corporation will be prohibited from dealing in securities if one of its officers would be so prohibited because of inside information (Bill s-cl. 128(6)) unless there are arrangements to ensure that the officers take no part in the decision to deal: specifically, if:-

- (i) the decision to enter the transaction was taken by someone other than that director or officer;
- (ii) it had arrangements to ensure that the information was not communicated to that person and that no advice with respect to the transaction was given to him by a person in possession of the information; and
- (iii) the information was not communicated and such advice was not given.

(Bill s-cl. 128(7)).

- (d) A person will be connected with a body corporate for the purpose of the provisions relating to insider trading if, being an individual -
- (i) he is an officer of that body corporate or a related body corporate;
 - (ii) he is a substantial shareholder (within the meaning of Division 3 A of Part IV of the Companies Ordinance 1962) of that corporation or a related corporation; or
 - (iii) he occupies a position that may reasonably be expected to give him, by virtue of a professional or business relationship or by virtue of being an officer of a substantial shareholder, access to information of a kind to which s-cl. 128(1) and (2) apply.

(Bill s-cl. 128(8)).

(Note: for the purposes of s-cl. 128(8), 130(1)(b) and 144(2), "officer" in relation to a body corporate, now includes a trustee or other person administering a compromise or arrangement made between the body corporate and its creditors (Bill s-cl. 128(11)).

- (e) A licensed dealer will be able to enter into a transaction as agent for, and on the specific instruction of, a person with whom he is not associated and without giving advice to that other person (Bill s-cl. 128(9)).

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

Cl. 129 : penalties

233. A person who contravenes the preceding provisions of Part X (cls. 123, 124, 125, 126, 127, or 128) will be guilty of an indictable offence (Bill cl. 129 - based on ICAC SIAs s. 113).

Cl. 130 : compensation for loss etc.

234. Compensation will be payable in certain circumstances to persons who suffer losses from some of the contraventions of the basic prohibitions in relation to trading in securities (Bill cl. 130 - based on ICAC SIAs s. 114).

235. A brief outline of cl. 130 is as follows:-

- (a) A person who contravenes the prohibitions on insider trading (see Bill cl. 128 - other than prohibition in s-cl. 128(5) on the communication of insider information) will be liable (whether he has been convicted of an offence in relation to the contravention or not):-
- (i) to compensate the other party for any loss sustained, being the difference between the price at which the securities were transacted and that at which they would have been transacted had the inside information been generally known; and

(ii) to account to the body corporate that issued the securities for any profit accruing to the insider.

(Bill s-cl. 130(1)).

- (b) A person who contravenes cls. 123, 124, 125, 126 or 127 (whether convicted of an offence or not) will also be liable to pay compensation to any other person who suffers loss in a transaction entered into with the first-mentioned person (Bill s-cl. 130(2)).
- (c) The amount of compensation or profit for which a person is liable (under s-cl. 130(1) or (2)) will be reduced by any award made under this Part or para. 124(3)(a) of the Companies Ordinance 1962 by reason of the same act or transaction (Bill s-cl. 130(3)). The onus will lie on the person liable to pay the amount to prove that the liability arose from the same act or transaction (Bill s-cl. 130(4)).
- (d) An action under this clause must be commenced within 2 years from the day the transaction was completed (Bill s-cl. 130(5)).
- (e) The NCSC will be able to bring an action in the name of a body corporate or other person for the recovery of a loss or profit, if it considers it is in the public interest to do so (Bill s-cl. 130(6)).

- (f) Any liability under any other laws will not be affected (Bill s-cl. 130(7)). Liability for making a false statement etc. (under cl. 125) could arise under the Trade Practices Act (s 52) or under the Hedley Byrne v. Heller doctrine (negligent statement etc.)

Cl. 131 : dealer to give priority to clients' orders

236. A dealer must give priority to his client's orders (Bill s-cl. 131(1) - cl. 131 is based on ICAC SIAs s. 115). This requirement will not apply where the client has specified conditions that the dealer is unable to comply with, or the transaction is entered into in prescribed circumstances (Bill s-cl. 131(2)).

Cl. 132 : dealings by employees of holders of licences

237. Cl. 132 of the Bill regulates dealings by employees of dealers or investment advisers (based on ICAC SIAs s. 116).

238. A brief outline of cl. 132 is as follows:-

- (a) A dealer or an investment adviser, and an employee of either will be prohibited from jointly purchasing securities as principals (Bill s-cl. 132(1)). A similar prohibition will apply where a partnership is a dealer or an investment adviser in relation to its employees (Bill s-cl. 132(2) and (3)).

- (b) A dealer or an investment adviser will be prohibited from giving credit to an employee or a person he knows is associated with the employee if the purpose is to assist the employee to purchase securities (Bill s-cl. 132(4)). A similar prohibition will apply where a partnership is a dealer or investment adviser (Bill s-cl. 132(5) and (6)).
- (c) Employees of stockbrokers will be prohibited from purchasing securities as principal unless the stockbroker acts as agent in the transaction (Bill s-cl. 132(7)).

S I BILL : PART XI : MISCELLANEOUS

239. Part XI of the S.I. Bill (cls. 133 to 151) deals with various miscellaneous matters. Cl. 151 relates only to the A.C.T.

Cl. 133 : restrictions on use of titles "stockbroker" and "sharebroker"

240. A person will be prohibited from using the title "stockbroker" or "sharebroker" if he is not a member of the stock exchange or a partner in a member firm (Bill cl. 133 - same as ICAC SIAs s. 117).

Cl. 134 : appeal

241. A person aggrieved by the refusal of the NCSC to grant a licence or by the revocation of a licence or by any other act or decision of the NCSC will be able to appeal to the Supreme Court (Bill s-cl. 134(1) - based on ICAC SIAs s. 118 with minor drafting alterations). This right of appeal will not be available in relation to an act or decision in respect of which an appeal or review procedure is provided, or which is declared to be conclusive (Bill s-cl. 134(2) - see e.g., cl. 62 of the Bill and s-cl. 35(4), 40(4) and 76(2) of the Bill).

Cl. 135 : false and misleading statements

242. A person will be prohibited from making a false or misleading statement in an application for a licence (Bill s-cl. 135(1) - same as ICAC SIAs s. 119) and from lodging a document that contains a false or misleading statement (Bill s-cl. 135(2)).

Cl. 136 : preservation and disposal of records

243. Cl. 136 of the Bill deals with the preservation and disposal of records (based on ICAC SIAs s. 120). It will also be an offence to falsify those records (see Bill cl 138).

244. A brief outline of cl. 136 is as follows:-

- (a) Anyone required to keep a register or record under the Bill must keep it for the prescribed period even if they cease to carry on business before the expiration of that period (Bill s-cl. 136(1)).
- (b) The prescribed period for a register or record other than an accounting record is 5 years from the day on which the last entry was made. For an accounting record the period is 7 years after the last day of the accounting period to which the record relates (Bill s-cl. 136(2)).
- (c) These provisions do not apply to a contract note received or issued by a dealer if the matters referred to in s-cl. 64(2) are recorded by the exchange or (subject to any conditions imposed by the NCSC) by the dealer in a manner approved by the NCSC and the record is retained for 5 years (Bill s-cl. 136(3)).
- (d) The NCSC will have certain powers regarding disposal of documents (Bill s-cl. 136(4)).

Cl. 137 : concealing etc. of books relating to securities

245. Concealment etc. of books relating to securities will be prohibited (Bill cl. 137 - based on ICAC SIAs s. 121 with certain drafting alterations). Falsification of records will also be prohibited (see Bill cl. 138).

246. A brief outline of cl. 137 is as follows:-

- (a) a person must not conceal, or alter or destroy books relating to the business carried on by a dealer or required under legislation to be kept by a licence holder or financial journalist (Bill para 137(1) (a)).
- (b) If such a book is within a particular jurisdiction it must not be sent out of that jurisdiction (Bill para 137(1) (b)). If such a book is outside the particular jurisdiction it must not be sent out of Australia (Bill para 137(1) (c)).
- (c) There will be defences, including proving that there was no intent to defraud or defeat the purposes of the Bill (Bill s-cl. 137(2)).

Cl. 138 : falsification of records

247. A person will be prohibited from recording false material, destroying recorded matter or not recording matter that is required to be used in connection with the keeping of a book under this Bill and such matter is stored in an illegible form by means of a mechanical device, an electronic device or other device (Bill s-cl. 138(1) - based on ICAC SIAs s. 122). It will be a defence if the person proves he acted honestly and that in all the circumstances the act or omission constituting the offence should be excused (Bill s-cl. 138(2)).

Cl. 139 : precautions against falsification of records

248. A person required by the Bill to keep records must take reasonable precautions to guard against any falsification (Bill cl. 139 - same as ICAC SIAs s. 123).

Cl. 140 : obstructing or hindering NCSC etc.

249. A person will be prohibited, without lawful excuse, from hindering the NCSC or another person in the performance of its or his duties under the Bill (Bill cl. 140 - based on ICAC SIAs s. 124).

Cl. 141 : general penalty provisions

250. The general penalty for a breach of the Bill will be \$1,000 (Bill cl. 141 - based on ICAC SIAs s. 125 with substantial drafting alterations and additions).

251. A brief outline of cl. 141 is as follows:-

- (a) The maximum penalty will be the penalty applicable to the offence (Bill s-cl. 141(2) - new provision).
- (b) The penalty set out at the foot of the clause or sub-clause will be the applicable penalty (Bill s-cl. 141(3), (4) and (5) - new provisions).
- (c) The penalty for an offence against the Bill will be \$500 except as provided by s-cl. 141(3), (4) and (5) (Bill s-cl. 141(6) - new provision).

Cl. 142 : continuing offences

252. It will be an offence in certain circumstances to continue to fail to do an act or thing that is required to be done by the Bill (Bill cl. 142 - based on ICAC SIAs s. 131).

253. A brief outline of cl. 142 is as follows:-

- (a) Where an offence is created for failing to do an act or thing required to be done within a particular period or before a particular time:-
 - (i) the obligation to do that act or thing will continue until it is done notwithstanding that the relevant period has expired;
 - (ii) a person convicted of an offence due to the failure to do that act or thing after the expiration of the relevant period will be guilty of a separate and further offence in respect of each day after the day of the conviction until that act or thing is done; and
 - (iii) the penalty applicable to each separate offence will be \$50 (Bill s-cl. 142(1)).
- (b) Where:-
 - (i) there is no time period specified;
 - (ii) the failure to do an act or thing constitutes an offence; and
 - (iii) a person who fails to do that act or thing has been convicted in respect of that failure,

that person commits a separate and further offence in respect of each day after the day of the conviction during which the failure continues. The penalty applicable for each separate and further offence will be \$50 (Bill s-cl. 142(2)).

- (c) Charges against the same person for a number of offences under s-cl. 142(1) or (2) will be able to be joined in the same information or complaint if they relate to the same act or thing (Bill s-cl. 142(3)).
- (d) The court will be able to impose one penalty on a person convicted of more than one offence under s-cl. 142(1)(e) or (2) (Bill s-cl. 142(4)).

Cl. 143 : offences by bodies corporate

254. An officer of a body corporate who was in any way knowingly concerned in the commission of an offence by the body corporate is also guilty of that offence (Bill cl. 143 - based on ICAC SIAs s. 126).

Cl. 144 : certain persons to assist in prosecutions

255. The NCSC will be able to require an officer, servant or agent of an individual or body corporate defendant to assist in a prosecution and such a person must give all assistance he is reasonably able to give (Bill s-cl. 144(1) - cl. 144 is based on ICAC SIAs s. 129 with certain amendments to take account of s-cl. 32(3) of the Formal Agreement).

256. Other provisions of cl. 144 are as follows:-

- (a) A person who is or is likely to be a defendant in the proceedings or a person who is or has been a duly qualified legal practitioner acting for that person will be exempted from this requirement (Bill s-cl. 144(2)).
- (b) It will be an offence to fail to give assistance and the Supreme Court will be able to order a person, on the application of the NCSC, to comply with the NCSC's request for assistance (Bill s-cl. 144(3)).
- (c) "Agent" is defined to include a banker of and an auditor employed by the defendant (Bill s-cl. 144(4)).

Cl. 145 : reciprocity in relation to offences

257. Reciprocity is provided for in relation to offences between jurisdictions (Bill cl. 145 - based on ICAC SIAs s-sec 130(1)).

Cl. 146 : offences committed partly in and partly out of the Territory

258. This clause provides that where any act, omission or thing done partly inside and partly outside the Territory would have constituted an offence against the Act if done wholly within the Territory, then that act, omission or thing is deemed to constitute an offence against the Act.

Cl. 147 : power of court to prohibit transfer of moneys, securities or other property

259. The Supreme Court will be able to ensure that a person who is subject to investigation or to legal proceedings does not transfer all his property out of the jurisdiction (Bill cl. 147 - cf. CSI Bill cl. 273 - no opposition was expressed to this provision in any submission to the Senate Select Committee on the CSI Bill). Situations can arise where a person removes all his property from the jurisdiction so that creditors and investors are left without recompense. The present provision, which is within the control of the Supreme Court, attempts to take account of their interests without preventing the person himself from leaving Australia.

260. A brief outline of cl. 147 is as follows:-

- (a) Where an investigation is being carried out or where a prosecution or civil proceeding has been instituted under this Bill, the Supreme Court will be able, by order, to prohibit the taking out of the Territory or Australia of property, money or securities of the relevant person or a person associated with him. The Supreme Court will also be able to prohibit a person who is indebted to the relevant person or a person associated with him from making a payment in total or partial discharge of the debt. (This order will apply even if the payment or partial discharge of the debt was made at the direction or request of, the person to whom the debt is owed.) An order may also be made by the Supreme Court prohibiting a person holding money, securities, or other property on behalf of the relevant person, or on behalf of any person associated with him from paying all or any of the

money, or transferring or otherwise parting with possession of, the securities or other property, to, the relevant person, or to another person at the direction or request of, the person on whose behalf the money or the securities or other property, is or are held (Bill s-cl. 147(1)).

- (b) The Court will be able to rescind or vary an order on the application of the NCSC or any person affected (Bill s-cl. 147(2)).
- (c) An order under this provision will operate for the period specified in the order (Bill new s-cl. 147(3)).

Cl. 148 : power of NCSC to intervene in proceedings

261. Clause 148 is a new provision. A brief outline of this clause is as follows:-

- (a) The NCSC may intervene in any proceeding under the Bill and will be deemed to be a party to the proceeding (Bill s-cl. 148(1) and (2)).
- (b) The NCSC may appear and be represented in such proceedings by an employee of the NCSC, by a natural person, by an officer or employee of a person to whom or to which the NCSC has delegated its powers or by a solicitor or counsel (Bill s-cl. 148(3)).

Cl. 149 : injunctions

262. The Supreme Court will be able to grant an injunction restraining a person from engaging in conduct that constitutes or would constitute an offence against the Bill on the application of the NCSC or a person whose

interests are or would be affected by the conduct (Bill s-cl. 149(1) - as to cl. 149 of Bill, cf. cl. 274 of the CSI Bill).

263. A brief outline of the remainder of cl. 149 is as follows:-

- (a) The Supreme Court will be able:-
 - (i) to grant an interim injunction (Bill s-cl. 149(2)); and
 - (ii) to rescind or vary an injunction granted under s-cl. 147(1) or (2) (Bill s-cl. 149(3)).
- (b) The Court will have a wide discretion in exercising its power to grant injunctions (Bill s-cl. 149(4)).
- (c) Where the NCSC makes an application for an injunction, the Court shall not require the NCSC or any other person to give any undertakings as to damages as a condition of granting an interim injunction (Bill s-cl. 149(5) - cf. Soil Conservation Authority v. Read (1979) V.R. 557).

Cl. 150: regulations

264. There will be the usual regulation-making power (Bill cl. 150 - based on ICAC SIAs s. 132 with certain additions and drafting alterations).

265. A brief outline of cl. 150 is as follows:-

- (a) The Governor-General will be able to make regulations prescribing all matters required or

permitted by this Bill to be prescribed (Bill s-cl. 150(1)). Particular matters that may be the subject of regulations are set out in paras 150(1) (a)-(g).

- (b) The regulations will be able to exempt specified persons or transactions from the operation of certain provisions of the Bill.
- (c) The regulations will be able to be general or specific (Bill s-cl. 150(3)). This provision only applies to the A.C.T.. Particular State (Application of Laws) Bills will provide for the impact of the Commonwealth regulations to be varied as required by the particular jurisdictions.
- (d) Regulations for allowances and expenses to be paid under s-cl. 19(11) to summoned persons may be made by reference to a scale of witness fees of a superior Court (Bill s-cl. 150(4)).
- (e) The regulation making power can only be exercised in accordance with advice that is consistent with resolutions of the Ministerial Council (Bill s-cl. 150(5) - new provision - same as s-cl. 53(4) of the NCSC Act).

Cl. 151 : rules of court

266. The rule making power conferred by s. 28 of the A.C.T. Supreme Court Act will extend to making rules of court with respect to proceedings and the practice and procedure of the A.C.T. Supreme Court under this Bill (Bill cl. 151). Similar provisions may be required in the State application legislation.

SECURITIES INDUSTRY (FEES) BILL 1980

267. The fees that will be charged in connexion with the proposed S. I. Bill will be set out in regulations to be made under the Fees Bill.

Cl. 1 : short title

268. The Act will be cited as the Securities Industry (Fees) Act 1980.

Cl. 2 : commencement

269 The Act will come into operation on a date to be fixed by proclamation (this provision is the same as cl. 2 of the S. I. Bill).

Cl. 3 : interpretation

270 Expressions used in the Fees Bill will have the same meanings as in the Securities Industry Bill.

Cl. 4 : Act to bind Crown

271. The Act will bind the Crown in right of the Commonwealth, of a State, or of a Territory.

Cl. 5 : fees payable

272. There will be payable to the Commonwealth such fees as are prescribed (Fees Bill s-cl 5 (1)). This Bill will relate to fees payable under the proposed Securities Industry Bill so far as the A.C.T. is concerned. The fees payable under the proposed Securities Industry Bill as in force in each State will be payable to that State by virtue of provisions in the State adopting Bills.

273. A document will not be deemed to be lodged until the fee has been paid (Fees Bill s-cl 5(2)) Neither the Ministerial Council nor the NCSC should deal with any application until the appropriate fee has been paid (Fees Bill s-cl. 5(3)).

274. The Commonwealth will be able to waive, reduce or refund fees that would otherwise be payable or paid under clause 5 (Fees Bill s-cl. 5(5)).

Cl. 6 : regulations

275. The Governor-General will be able to make regulations in accordance with advice consistent with Ministerial Council resolutions. (The provision in s-cl. 6(2) is the same as in s-cl. 53(4) of the NCSC Act 1979, s-cl. 59(2) of the Company (Acquisition of Shares) Bill 1980 and s-cl. 150(5) of the S. I. Bill 1980.)

ATTACHMENT 'A'

Summary of main differences between exposure draft and
present S.I. Bill

Provision Nature of Change

- general (a) References to a "receiver and manager of the undertaking of a body corporate" have been replaced by references to a "receiver and manager of the property of a body corporate".
- (b) References to "default penalty" have been deleted. See now cl. 143 relating to continuing offences.
- (c) References to the Companies Act 1980 have been replaced by references to the Companies Ordinance 1962.

Cl. 3 S-cl. 3(2) now provides that the Companies and Securities (Interpretation and Miscellaneous Provisions) Act, 1980 will apply to this Bill.

- Cl. 4 (a) Definitions of "accounting records", "executive officer" and "investment contract" have been included.
- (b) The definitions of "Agreement", "Commission", "constituent documents", "Court", "Ministerial Council", "participating State", "participating Territory", "principal executive officer" and "the Territory" have been excluded. Definitions of all these terms, except for "principal executive officer" may be found in cl. 9 of the Companies and Securities

(Interpretation and Miscellaneous
Provisions) Bill.

(c) The following definitions have been amended:

- "books": the definition has been redrafted and also altered to include any accounts or accounting records and any register.
- "business rules": the definition has been altered to mean the provisions of the constituent documents of the body corporate and any other rules, regulations or by-laws made by the body corporate, but does not include rules, regulations or by-laws that are listing rules of the body corporate.
- "director": the definition has been redrafted and altered to relate to a body corporate.
- "exempt dealer": the reference to "the Crown in right of the Commonwealth or of any State" has been replaced by a reference to "the Crown in right of the Commonwealth, of a State or of a Territory". The words "or in such other circumstances as are prescribed" have been inserted.
- "listing rules": the words "stock exchange" have been replaced by the words "body corporate". The words "that maintains or provides, or proposes to maintain or provide, a stock market" have been inserted.

- "marketable parcel": the reference to "the disposal or acquisition of securities by a member" has been replaced by a reference to "securities that are used for quotation on the stock market".

- "officer": the reference to "a receiver and manager of the undertaking or any part of the undertaking of the body corporate" has been replaced by a reference to "a receiver and manager of the property or any part of the property of the body corporate". The definition has also been altered to include an executive officer of the body corporate and a trustee or other person administering a compromise or a scheme of arrangement between the body corporate and its creditors, and excludes a receiver who is not also a manager, or a receiver and manager appointed by a court or a liquidator appointed by a court.

- the definitions of "prescribed interest", "share", and "voting share" have been set out in full so as to correspond with their definitions in the Companies Bill.

Cl. 5 A new s-cl. 5(7) has been inserted. This provides that a person shall be deemed to have a relevant interest in securities where a body corporate is deemed by s-cl. (6) to have a relevant interest in a share in securities and where the body corporate or its directors are accustomed or

under an obligation to act in accordance with the directions, instructions, or wishes of a person in relation to the exercise of or the control of the exercise of, any right to vote attached to those securities, or in relation to the disposal of or the exercise of control over the disposal of those securities, or where a person has a controlling interest in the body corporate, or where a person has power to exercise, or to control the exercise of, the voting power attached to not less than 20% of the voting shares in the body corporate.

Cl. 6 This clause has been redrafted so as to bring it into line with cl. 7 of the Companies (Acquisition of Shares) Bill. In sub-paras. 6(1)(a)(i) and (ii) the words "principal executive officer" have been omitted. In para. 6(1)(b) the words "a person who has" have been replaced by the words "a person with whom the other person has", and the words "with the other person" have been omitted. The words "he or the other person" have been replaced by the words "either of those persons" in sub-paras. 6(1)(b)(i) and (iii). In para. 6(1)(c), the words "who is acting or proposes to act, in concert with the other person in respect of" have been replaced by the words "in concert with whom the other person is acting, or proposes to act in relation to". A new para. 6(1)(e) has been inserted. It refers to "a person with whom the other person is, by virtue of the regulations, to be regarded as associated in respect of the matter to which the reference relates". In the former para. 6(1)(e) (now 6(1)(f)) the words "a person who is" have been replaced by the words "a person with whom the other person is". The words "with the other person" have been omitted. In the former para. 6(1)(f) (now 6(1)(g)), the words "a person who" have been replaced by the words "if

the other person" and the words "enabling him to become associated with the other person as mentioned in any of the preceding paragraphs" have been replaced by the words "becoming associated with a person as mentioned in any of the preceding paragraphs - that last-mentioned person".

Cl. 7 Cl. 7 of the exposure draft has been omitted. The new cl. 7 is based on s-cl. 8(1) of the exposure draft. The word "section" has been replaced by the word "Division".

Cl. 8 This has been amended to make it clear to whom books are to be produced pursuant to a direction by the NCSC, and to ensure that an authorisation by the NCSC of a person to require the production of books may be a general authorisation that need not refer to books of a specific stock exchange or person (s-cl. 8(2) and (4)).

Para. 8(1)(b) has been redrafted to bring Cl. 8 (power of NCSC to require production of books) into line with para. 7(1)(b) of the Companies Bill. The old para. 8(2)(b) is now incorporated in a redrafted s-cl. 8(2) to bring that sub-clause into line with s-cl. 7(2) of the Companies Bill.

The provisions of s-cl. 8(4) of the exposure draft (involving production of books by third persons) are now covered by paras. 8(1)(b) and 8(2)(b).

S-cl. 8(5) to (8) of the exposure draft are now renumbered s-cl. 8(5) to (8) respectively.

The definition of "officer" in s-cl. 8(8) has been expanded to include a trustee or other person administering a compromise or arrangement made between the body corporate and its creditors and an executive officer and a provisional liquidator of the body corporate.

Cl. 9 S-cl. 9(5) and 9(7) of the exposure draft now appear in s-cl. 10(3) and 10(4) with some drafting changes.

Cl. 10 This clause has been redrafted and the penalties have been increased to accord with the corresponding penalties in the Companies Bill.

(a) S-cl. 10(1) has been redrafted. The words "without reasonable excuse" have been included.

(b) S-cl. 10(2) has also had minor drafting changes made to it.

(c) The words "neither the requirement nor" have been deleted from s-cl. 10(3) which is now renumbered s-cl. 10(5).

S-cl. 10(4) and (7) of the exposure draft have been omitted. S-cl. 10(5) of the exposure draft is now to be found in s-cl. 10(6). New s-cl. 10(3) and (4) were inserted in the print dated 1/2/1980.

Cl. 11 The penalty in s-cl. 11(1) has been altered so as to include a term of imprisonment. In two cases the words "or on behalf of" have been included. The reference in s-cl. 11(1) to a body corporate which is "in liquidation" has been replaced by a reference to a body corporate which "is in the

course of being wound-up". References to the word "document" have been replaced by references to the word "book" in both s-cl. 11(1) and (2).

- Cl. 12 There is a new s-cl. 12(4) which makes it an offence to fail to comply with the disclosure provisions of s-cl. 12(1), (2) or (3).
- Cl. 14 S-cl. 14(1) has been amended so as to include the listing rules of the stock exchange. The penalty in s-cl. 14(6) has been altered to \$10,000 or imprisonment for 2 years or both.
- Cl. 19 Para. 19(1) (c) now gives power to an inspector to require a prescribed person to answer questions put to him.

S-cl. 19(4) has been redrafted.

- (a) Para. 19(4) (a) of the exposure draft is now to be found in s-cl. 19(4) with minor drafting changes. The penalty has been increased to \$10,000 or imprisonment for 2 years or both.
- (b) Para. 19(4) (b) of the exposure draft is now to be found in s-cl. 19(5) with minor drafting changes. The penalty has been increased to \$10,000 or imprisonment for 2 years or both.
- (c) Para. 19(4) (c) of the exposure draft is now to be found in s-cl. 19(6) and (7) with minor drafting changes. The penalty for making a false or misleading statement has been increased to \$10,000 or imprisonment for 2 years or both. The penalty for refusing to take an oath or

make an affirmation has been altered so as to include a term of imprisonment.

- (d) S-cl. 19(6) of the exposure draft is now to be found in s-cl. 19(9) with minor drafting changes. Reference to evidence of a question asked by an inspector has been excluded. The reference to "proceedings in relation to a charge of perjury in respect of the answer" have been replaced by a reference to "proceedings in respect of the falsity of the answer".
- (e) S-cl. 19(9) of the exposure draft is now to be found in s-cl. 19(13) with minor drafting changes.
- (f) S-cl. 19(10) of the exposure draft is now to be found in s-cl. 19(14) with minor drafting changes.
- (g) S-cl. 19(12), which enables the NCSC to pay such costs and expenses incurred by a person in complying with 19(1), is a new provision designed to bring cl. 19 into line with s-cl. 174(10) of the Companies Bill.

Cl. 21

- (a) The penalty has been increased to accord with the penalty in the corresponding provision of the Companies Bill.
- (b) The words "and a copy of any related book" and "has been or is being" have been included in s-cl. 21(4).

- (c) The words "or a related book", "or book", "and any other person who comes into possession of the copy" and "of" have been included in s-cl. 21(5). The word "purpose" has been replaced by the word "purposes".

Cl. 23 References to evidence of a question asked of a person at an examination have been omitted from s-cl. 23(2). The reference to "proceedings in relation to a charge of perjury in respect of the answer" in para. 23(2) (a) has been replaced by a reference to "other proceedings in respect of the falsity of the answer".

Cl. 27 The words "or tribunal" have been included in s-cl. 27(2), (4) and (5).

Cl. 30 The words "or of a part of the report" have been included in s-cl. 30(3).

Paras. 30(5) (b) and (c) have been altered. Para. 30(5) (b) has been re-drafted and it now refers to a certificate of the Attorney-General of the Northern Territory stating that the publication of the report would be prejudicial to the administration of justice in that Territory. In para. 30(5) (c) the words "in that Territory or State" have been replaced by the words "in the relevant State or Territory".

The reference to "fraud, misfeasance or other misconduct" in s-cl. 30(9) has been replaced by a reference to "fraud, negligence, default, breach of duty, breach of trust or other misconduct".

- Cl. 32 The penalty has been altered so as to include a reference to a period of imprisonment. The words "or on behalf of" have been included. The reference to a body corporate which is "in liquidation" has been replaced by a reference to a body corporate which is "in the course of being wound-up". The reference to "the requirement" replaces the reference to "a requirement".
- Cl. 33 The words "the expenses of and incidental to the investigation that led to the proceedings" in para. 33(3) (a) have been replaced by the words "the whole, or a specified part, of the expenses of and incidental to the investigation". Some minor drafting changes have been made to paras. 33(3) (b), (c) and (d).
- Cl. 34 (a) The penalty in s-cl. 34(1) has been raised to \$20,000 or imprisonment for 5 years or both to bring this penalty into line with that for similar offences under cl. 179A of the Companies Bill.
- (b) The word "establishes" has been replaced by the word "proves" in s-cl. 34(2).
- Cl. 35 Some minor drafting changes have been made to s-cl. 35(1), (2) and (5). The penalty in s-cl. 35(6) has been increased to \$2,500 or imprisonment for 6 months or both. The words "affected by the order" in para. 35(3) (a) have been replaced by the words "to whom the order is directed".
- Cl. 37 The penalty in s-cl. 37(1) has been altered so as to include a period of imprisonment.

- Cl. 41 The words " or to a person acting on behalf of, or with the authority of the Commission" have been inserted.
- Cl. 42 S-cl. 42(1) and (2) have been altered so as to refer to compliance with, or failure to comply with, the business rules or listing rules of the stock exchange. The words "in relation to those securities" have been omitted from s-cl. 42(2).
- Cl. 47 The words "and shall be accompanied by the prescribed fee" have been omitted from s-cl. 47(4).
- Cl. 48 This clause has been altered so that the NCSC must grant the application for a dealers licence or an investment advisers licence if, in the case of an applicant who is a natural person, he is not an undischarged bankrupt, he has not been convicted within 10 years immediately preceding the date of the application of an offence involving fraud or dishonesty punishable on conviction with imprisonment for three months or more, the NCSC is satisfied as to his education qualifications or experience having regard to the nature of the duties of the holder of the licence, and the NCSC has no reason to believe the applicant is not of good fame and character and has no reason to believe that he will not perform the duties of a holder of the licence efficiently, honestly, and fairly. Where the applicant is a body corporate, the NCSC must grant the application if the applicant is not under official management or in the course of being wound-up under the Companies Ordinance 1962 or under the corresponding law of a State or of another Territory, the applicant is not a body corporate in respect of the property, or part of the property, of which a receiver, or a receiver and manager, has been appointed under the

Companies Ordinance 1962 or under the corresponding law of a State or of another Territory, the applicant has not entered into a compromise or scheme of arrangement with its creditors which is still in operation, the NCSC is satisfied as to the educational qualifications or experience of the officers of the applicant who are to perform duties in connection with the holding of the licence, and the NCSC has no reason to believe that the applicant will not perform the duties of a holder of the licence efficiently, honestly, and fairly. Otherwise, the NCSC shall refuse the application.

- Cl. 49 S-cl. 49(1) has been altered so that it now provides that subject to cl. 62 and the regulations, where an application is made for the grant of a dealer's representative licence or an investment representatives licence, the NCSC shall grant the application if it has no reason to believe the applicant will not perform the duties of the holder of the licence efficiently, honestly, and fairly. Otherwise, the NCSC shall refuse the application.
- Cl. 51 Some minor drafting changes have been made to para. 51(2) (d).
- Cl. 56 The word "year" in s-cl. 56(2) has been replaced by the words "period of 12 months".
- Cl. 58 The heading to this clause has been altered to "Commission may extend period for lodging statement".

- Cl. 65 References in s-cl. 65(6), (9) and (11) to "principal executive officer" have been replaced by references to "executive officer". The words "or an employee of a member or of a member firm" have been added to para. 65(7) (a). The words "if he is not a member of a stock exchange or of a body corporate referred to in paragraph (a)" have been replaced by the words "in any other case".
- Cl. 66 The words "Subject to sub-section (5)" have been inserted in s-cl. 66(1). S-cl. 66(4) is now expressed to be subject to s-cl. (5) and (6); formerly it was expressed to be subject to s-cl. (5) and the regulations. A new s-cl. 66(5) provides that s-cl. (1) and (4) do not apply in relation to a transaction entered into by a dealer who is a member of a stock exchange and specialises in transactions relating to odd lots of securities, being a transaction of sale or purchase of an odd lot of securities.
- Cl. 67 The penalty has been increased to \$2,500 and a period of imprisonment has been inserted.
- Cl. 74 S-cl. 74(7) has been altered so as to ensure that the penalty provisions in cl. 142 will apply.
- Cl. 79 A new para. 79(2) (c) has been inserted. It refers to a matter that, in the opinion of the auditor, "constitutes or may constitute a breach of a condition of a licence issued to the dealer under this Act".
- Cl. 80 A new para. 80(2) (c) has been inserted. It refers to a matter that, in the opinion of the stock exchange concerned, "constitutes or may constitute a breach of a condition of a licence issued to the dealer under this Act".

- Cl. 92 This has been amended to provide for inspection by an authorised person of a register produced under that clause.
- Cl. 93 In s-cl. 93(1) the word "advice" has been replaced by the words "an article". In para. 93(1) (a) the words "any advice specified in the notice or prepared any analysis or report so specified" have been replaced by the words "or prepared any article, analysis or report specified in the notice". In para. 93(1) (b) the words "contributed any advice or prepared any analysis or report" have been replaced by the words "contributed or prepared any article, analysis or report".
- Cl. 105 This has been amended to provide for all powers under the section to be exercisable by resolution of a committee of a stock exchange.
- Cl. 111 In para. 111(1) (a) the words "when the loss is suffered" have been inserted and the words "and is liable, or would, but for section 107, be liable, to contribute to the fund" have been omitted. In para. 111(1) (b) the words "a partner in a member firm recognised by the stock exchange any of the partners in which are liable, or would, but for section 107, be liable, to contribute to the fund" have been replaced by the words "a person who, when the loss is suffered, is a partner in a member firm". S-cl. 111(9) has been altered so as to provide that where any money, securities, documents of title to securities or other property has or have been entrusted to or received by, a person who has at any time been, but has ceased to be, a member of a stock exchange or entrusted to, or received by, an employee or servant of such a person and by reason of a defalcation, or the

fraudulent misuse of the securities, documents of title or other property by the former member or by an employee or servant of the former member, the person by or from whom the securities, documents of title or other property was or were so entrusted or received suffered pecuniary loss, and at the time the money, securities, documents of title or other property was or were so entrusted or received, the person suffering the pecuniary loss had reasonable grounds for believing and did believe that the former member was at that time a member of the stock exchange concerned, a reference in this section to a member of a stock exchange shall be read as a reference to that former member.

Cls. 120 and 121 The headings to cls. 120 and 121 had accidentally been reversed; this has now been corrected.

Cl. 124 A defence to a prosecution for an offence against sub-section (2) has been provided in a new s-cl. 124(6). It provides that in a prosecution for an offence against s-cl. (2) in relation to a purchase or sale of securities that did not involve a change in the beneficial ownership of those securities, it is a defence if the defendant establishes that the purpose or purposes for which he purchased or sold the securities was not, or did not include, the purpose of creating a false or misleading appearance with respect to the market for, or the price of, securities.

Cl. 128 The definition of "officer" in s-cl. 128(11) has been expanded to include a trustee or other person administering a compromise or arrangement made between the body corporate and its creditors.

- Cl. 130 The definition of "officer" in s-cl 130(8) has been expanded to include a trustee or other person administering a compromise or arrangement made between the body corporate and its creditors.
- Cl. 136 In s-cl. 136(4) the words "Subject to the Archives Act 1980" have been omitted.
- Cl. 138 This has been brought into line with the corresponding provisions of cl. 374FA of the Companies Bill.
- Cl. 141 This clause has been omitted. Refer to cl. 39 of the Companies and Securities (Interpretation and Miscellaneous Provisions) Bill which replaces this clause.
- Cl. 142 This clause is now cl. 141. This provision has been brought into line with cl. 379 of the Companies Bill.
- Cl. 143 This clause is now cl. 142. This provision has been brought into line with cl. 380 of the Companies Bill.
- Cl. 144 This clause is now cl. 143. A reference to "executive officer" has been inserted in the definition of "officer" in s-cl. 143(2).
- Cl. 145 This clause has been omitted - refer to cl. 36 of the Companies and Securities (Interpretation and Miscellaneous Provisions) Bill which replaces this clause.
- Cl. 146 This clause has been omitted - refer to cl. 35 of the Companies and Securities (Interpretation and Miscellaneous Provisions) Bill which replaces this clause.

- Cl. 147 This clause is now cl. 144. The words "or is or has been a duly qualified legal practitioner acting for such a person" have been added to s-cl 144(2). A minor drafting change has been made to s-cl. 144(4).
- Cl. 148 This clause is now cl. 145.
- Cl. 149 This clause is now cl. 146.
- Cl. 150 This clause has been omitted - refer to cl. 37 of the Companies and Securities (Interpretation and Miscellaneous Provisions) Bill which replaces this clause.
- Cl. 151 This clause is now cl. 147. Para. 151(1)(d) of the exposure draft is now to be found in para. 147(1)(f) of the latest print. Para. 151(1)(e) of the exposure draft is now to be found in para. 147(1)(g) of the latest print. New paras. 147(1)(d) and (e) have been inserted in the latest print.
- Cl. 152 (of the print dated 1/2/1980) This clause is now cl. 148 (this clause is along the lines of cl. 366A of the Companies Bill) authorising the NCSC to intervene in proceedings arising under the Act.
- Cl. 152 This clause is now cl. 149.
- Cl. 153 This clause is now cl. 150. Para. 150(1)(b) has been omitted.
- Cl. 154 This clause is now cl. 151.

Notes

1. References to the Companies Bill are to the Bill that is expected to be publicly exposed shortly.









