

1980-81

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

COMPANIES BILL 1981

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for
Business and Consumer Affairs, the Honourable J. Moore, M.P.)

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ABBREVIATIONS

The following is a list of abbreviations used:

- August CB - draft of companies legislation introduced into House of Representatives on 27 August 1980.
- A.B.L.R. - Australian Business Law Review
- ACT CO - Australian Capital Territory Companies Ordinance 1962 as amended
- CASA - Commonwealth Companies (Acquisition of Shares) Act
- CB - Commonwealth Companies Bill 1981
- CSIB - Companies and Securities Industry Bill 1975
- C & S - Commonwealth Companies and Securities (I & MP) A (Interpretation and Miscellaneous Provisions) Act 1980
- C(TP)B - Commonwealth Companies (Transitional Provisions) Bill 1981
- ex memo - the explanatory memorandum
- exposure - draft of companies legislation exposed for public comment in April 1980
- ED
- Eggleston - Company law Advisory Committee appointed by the Committee Standing Committee of Commonwealth and State Attorneys-General in August 1976 and chaired by Sir Richard Eggleston.

ABBREVIATIONS

- Ford - H.A.J. Ford : 'Principles of Company Law' 2nd edition. Butterworths 1978.
- Formal Agreement - Agreement entered into by the Commonwealth and all States on 22 December 1978 to provide the framework for the co-operative companies and securities scheme, as amended by the First Amending Agreement dated 24 February 1981
- ICAC CAs - Companies Acts of the States which are parties to the Interstate Corporate Affairs Agreement
- ICAC SIAs - Securities Industry Acts of the States which are parties to the Interstate Corporate Affairs Agreement
- NCB - National Companies Bill 1975
- NCSC - National Companies and Securities Commission
- NCSC Act - Commonwealth National Companies and Securities Commission Act 1979
- NT CO - Northern Territory Companies Ordinance
- SA CA - South Australian Companies Act
- SIA - Commonwealth Securities Industry Act 1980
- SULS sem - Notes of a seminar held on 10 October 1980 by the University of Sydney Committee for Post-graduate studies in the Department of Law.
- VIC CA - Victorian Companies Act 1961 as amended
- VIC MSA - Victorian Marketable Securities Act
- WA CA - Western Australian Companies Act

OUTLINE

Companies Bill 1981

1. The Companies Bill 1981 will contain the proposed new Australian companies code under the co-operative companies and securities scheme.

2. In accordance with the Formal Agreement between the Commonwealth and the 6 States on the co-operative companies and securities scheme, the Companies Bill is based on the Companies Acts in force in the four States which are parties to the Interstate Corporate Affairs Agreement. The major modifications to this existing legislation are set out at para 23 and paras 40 to 43 of this explanatory memorandum.

3. The Bill will come into effect on a date to be fixed by Proclamation. The Ministerial Council for Companies and Securities is working towards an implementation date of 1 January 1982 for the companies code.

INTRODUCTION

4. The remainder of this explanatory memorandum
- (a) contains a brief introduction to the co-operative companies and securities scheme (paras 7 to 36);
 - (b) contains a brief outline of the proposed new companies code and mentions some other matters that may be relevant to this code (paras 37 to 43); and
 - (c) deals sequentially with each clause of the Companies Bill (paras 50 to 1267E).
5. Separate explanatory memoranda have been circulated in relation to the following Bills which are consequential in whole or in part on the Companies Bill :
- the Companies (Fees) Bill 1981
 - the Companies (Transitional Provisions) Bill 1981
 - the Companies (Acquisition of Shares) Amendment Bill (No. 2) 1981
 - the Securities Industry Amendment Bill (No. 2) 1981
 - the Companies and Securities (Interpretation and Miscellaneous Provisions) Amendment Bill (No. 2) 1981.

6. Separate explanatory memoranda have also been circulated in relation to the following two Bills which, although related to the Companies Bill, are not part of the co-operative scheme legislation and therefore do not require the approval of the Ministerial Council:

- the Companies (Miscellaneous Amendments) Bill 1981
- the Crown Debts (Priority) Bill 1981.

CO-OPERATIVE COMPANIES AND SECURITIES SCHEME

Formal Agreement

7. 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. (A copy of this Agreement is set out in the Schedule to the National Companies and Securities Commission Act 1979). The Formal Agreement also provides a procedure to enable the Northern Territory to become a party to the Agreement (see Formal Agreement cl. 49) and to enable the Agreement to be extended to one or more of the various external Territories (see Formal Agreement cl. 50).

8. The Commonwealth and the six States also executed on 24 February 1981, the First Amending Agreement to the Formal Agreement. This Amending Agreement clarifies the manner in which the Formal Agreement may be amended (see cl. 3); enables the making of "translator" amendments by State regulation where necessary to ensure the meaningful application of the amending Commonwealth legislation in a particular State (see cl. 5) and provides additional procedures for the extension of the Formal Agreement to the external territories (see cl. 6).

9. The Formal Agreement sets out, among other things, the four basic elements of the co-operative scheme that were identified by the then Minister for Business and Consumer Affairs (the Honourable Mr J.W. Howard, M.P.) in his statement to the House of Representatives on March 1977:-

- (a) The establishment of a Ministerial Council comprising Ministers of the Commonwealth and each of the six States.
- (b) The establishment of a full-time National Companies and Securities Commission to have responsibility in the entire area, subject to directions from the Ministerial Council.
- (c) The continuation of existing State and Territory corporate affairs offices.
- (d) The adoption of a proposal for legislative uniformity which recognises that the States are not required to surrender or refer any constitutional power.

10. Each of these basic elements is discussed below.

The Ministerial Council for Companies and Securities

11. The first of the four basic elements of the co-operative scheme is the Ministerial Council for Companies and Securities, which is established by the Formal Agreement itself. The Council is composed of one Ministerial representative from each party to the Formal Agreement.

12. The functions of the Ministerial Council, as set out in s-cl. 21(1) of the Formal Agreement, are as follows:-

"(a) to consider and to keep under review the formulation and operation of the legislation and regulations provided for by this agreement; and

(b) to exercise general oversight and control over the implementation and operation of the scheme."

13. In exercising its review functions over legislation, the Ministerial Council will be responsible for approving all the legislation that is required to give effect to the co-operative scheme (discussed in paras 24 to 36, below). The initial legislation requires unanimous approval and amending legislation with certain exceptions requires approval by a simple majority (see cl. 29 of the Formal Agreement).

National Companies and Securities Commission

14. The second basic element in the co-operative scheme, the National Companies and Securities Commission hereafter referred to as the 'NCSC', was established by the Commonwealth's National Companies and Securities Commission Act 1979 (hereafter referred to as the 'NCSC Act') which came into operation on 1 February 1980.

15. The NCSC Act was the first of a series of enactments to give effect to the legislative obligations of the Commonwealth under the Formal Agreement.

16. Under the NCSC Act, the NCSC will have responsibility for the companies and securities laws covered by the Formal Agreement, subject to directions from the Ministerial Council. The NCSC will have such functions and powers as are conferred on it by the various pieces of Commonwealth, State and Territory legislation that are required to give effect to the co-operative companies and securities scheme (hereafter referred to as the 'co-operative scheme legislation'). The administration of the co-operative scheme legislation within each State and Territory will, so far as practicable, be carried out by the corporate affairs office in that State or Territory under delegation from the NCSC.

17. Each State is required, by virtue of cl. 9 of the Formal Agreement, to pass legislation to support the operation of the NCSC in its jurisdiction. Western Australia and South Australia have already passed this legislation in the form approved by the Ministerial Council. The remaining four States have also had their National Companies and Securities Commission (State Provisions) Bills approved by the Ministerial Council and it is expected that these Bills will be introduced into the relevant State Parliaments in the near future.

18. Once these NCSC (State Provisions) Bills, together with the Bills applying the Commonwealth substantive laws in the States, are brought into operation, the NCSC will be able to administer the new codes relating to the acquisition of company shares and the regulation of the securities industry.

Use of existing administrations

19. The existing State and Territory corporate affairs offices were identified by Mr Howard as the third basic element in the co-operative scheme.

20. Under the Formal Agreement, the NCSC is required to work through these local corporate affairs offices to the maximum extent practicable (see Formal Agreement cl. 37) and with due regard to the maximum development of a decentralized administrative capacity (see Formal Agreement cl. 35).

21. In recognition of these requirements, all documents that are required to be lodged with the NCSC under the law of a particular jurisdiction must be lodged with the local corporate affairs office in that jurisdiction. For example, s-sec 14(1) of the C & S (I & MP)A provides that:-

"A document that is required by a relevant Act to be lodged with the Commission (i.e. the NCSC) shall be lodged at the office of the Corporate Affairs Commission for the Territory (i.e. the A.C.T.) and any such document that is lodged, or submitted for lodgement, at that office shall be deemed to be lodged or submitted for lodgement, as the case may be, with the Commission."

22. The Companies and Securities (Interpretation and Miscellaneous Provisions) (Application of Laws) Bill for each jurisdiction other than the A.C.T. will ensure that s-sec 14(1) applies in that jurisdiction as if the reference to the office of the A.C.T. Corporate Affairs Commission were a reference to the local corporate affairs office in that jurisdiction.

The Legislative Framework

23. The final basic element of the co-operative scheme is the legislative framework. The basic features of the proposal for legislative uniformity (sometimes referred to as 'the legislative device' could be summarised as follows:-

- (a) The content of the substantive laws under the scheme will be set out in Commonwealth legislation that will apply to the Australian Capital Territory. The initial Bills and Regulations containing these laws require the unanimous approval of the Ministerial Council (see Formal Agreement s-cl. 8(1)).
- (b) Each other jurisdiction that is covered by the Formal Agreement will pass legislation which will apply the relevant Commonwealth (subject to any necessary local modifications) law as the law of that jurisdiction to the exclusion of its present legislation, as from the date of commencement of the Commonwealth law. (See Formal Agreement paras 9(a) and (b)).
- (c) Any amendments to the Commonwealth Acts must be approved by the Ministerial Council, and then submitted by the Commonwealth to the Commonwealth Parliament. Once

enacted, those amendments will, subject to the making of regulations for each jurisdiction other than the ACT to effect any necessary local modifications to the amendments (sometimes referred to as "translator regulations") have automatic effect in particular jurisdictions without the necessity for further and separate substantive legislation in each other jurisdiction. In the event of the Commonwealth Parliament not enacting, within six months, an amendment approved by the Ministerial Council, each State will have the right to take action separately to implement the decision of the Ministerial Council. (See Formal Agreement cl. 44).

- (d) Similar provisions apply in relation to the making of amendments to the initial Commonwealth Regulations (see Formal Agreement cl 45).

The context of the legislation to give effect to the scheme

24. The initial Commonwealth legislation is to be based on the general companies and securities legislation in force in the States which are parties to the Inter-State Corporate Affairs Agreement (the ICAC States) except to the extent that amendments are agreed upon by the Ministerial Council or are required to give effect to the Agreement (see Formal Agreement para 8(2)(b)).

25. The initial Commonwealth legislation modifies the legislation of the ICAC States to take account of:-

- (a) the requirements of the Formal Agreement and the nature of the scheme: for example, one of the basic assumptions of the scheme (as recognized in para (A) of the recitals to the Formal Agreement) was that a person should be able to act in relation to general companies and securities matters as if he were subject to only one system of law and administration throughout Australia;
- (b) substantive amendments that have been agreed to by the Ministerial Council;
- (c) the need to ensure that the substantive legislation under the co-operative scheme will be capable of application in each jurisdiction with a minimum of specific supporting provisions in that jurisdiction's application legislation;

(d) any differences in the present ICAC legislation;
and

(e) other desirable changes in the light of experience
with the operation of the existing ICAC legislation.

26. All these modifications in the initial legislation
require the unanimous approval of the Ministerial Council.

27. The Commonwealth legislation relating to each code
can be divided into five groups:-

- the NCSC Act (which has already been discussed) and
the regulations made thereunder;
- that relating to the interpretation code;
- that relating to the new Australian share acquisition
code;
- that relating to the new Australian securities industry
code; and
- that relating to the new Australian companies code.

28. The first three codes are discussed, briefly, below.

The interpretation code

29. The initial substantive provisions of the
interpretation code for the companies and securities scheme are
set out in the Companies and Securities (Interpretation and

Miscellaneous Provisions) Act 1980 which was passed by the Commonwealth Parliament during the Autumn Session 1980 and received Royal Assent on 28 May 1980.

30. The interpretation code will provide for the interpretation of the Commonwealth Acts under the co-operative scheme to be governed by the laws in force in the A.C.T. relating to the interpretation of Ordinances at the commencement of the Companies and Securities (Interpretation and Miscellaneous Provisions) Act except for:-

- the matters covered by the provisions in Parts II and IV of the Companies and Securities (Interpretation and Miscellaneous Provisions) Act (except for ss. 14, 24 and 30, these provisions in Parts II and IV are expressed to apply in the absence of a contrary intention); and
- the provisions of the Commonwealth Acts Interpretation Act 1901 that are expressly saved see Companies and Securities (Interpretation and Miscellaneous Provisions) Act s-sec. 4(2)).

New Australian share acquisition code

31. The initial substantive provisions for the new Australian share acquisition code are contained in the Companies (Acquisition of Shares) Act 1980 which was passed by the Commonwealth Parliament during the Autumn Session 1980 and received Royal Assent on 28 May 1980.

32. The policy of the new code is very different from that of the existing take-over legislation in that it is aimed at regulating acquisitions by a person who holds between the prescribed percentage (at present 20%) and 90% of the voting shares of a company, or whose holding would increase to more than the prescribed percentage through acquisition.

New Australian securities industry code

33. The initial substantive provisions for the new Australian securities industry code are contained in the Securities Industry Act 1980 which was passed by the Commonwealth Parliament during the Autumn Session 1980 and received Royal Assent on 28 May 1980.

34. The purpose of the securities industry code is to regulate persons and institutions involved in dealing in securities. This includes investors, stockbrokers, investment advisers, stock exchanges and corporations whose securities, are listed on any stock exchange in Australia.

Commonwealth and State legislation

35. The Commonwealth legislation for each of the codes (see para 27) consists of several parts:-

- (a) The main Commonwealth Act which (together with any later amendments to that Act) contains the main code and then applies that code in the A.C.T.
- (b) The Regulations made under the Commonwealth Act. (No Commonwealth Regulations can or will be made in relation to the interpretation code).
- (c) The Commonwealth Fees Act which provides for the making of Fees Regulations to set out the fees that will be payable to the Commonwealth in the A.C.T. in relation to the substantive Commonwealth Act and the Regulations made thereunder (There will be no separate Fees Act in relation to the interpretation code).
- (d) Any miscellaneous legislation. The only code in relation to which there will be any such miscellaneous legislation is the companies code where there will be a Companies (Transitional Provisions) Bill and Regulations to be made thereunder. These transitional provisions will apply in relation to the A.C.T. Similar provisions appropriate to the jurisdiction concerned will be contained in a separate Part of the Companies (Application of Laws) Bill for that jurisdiction.

36. The legislation for each State in relation to each code also consists of several parts:-

- (a) The (Application of Laws) Act relating to each code.
This Act will, in effect:-
 - (i) apply the Commonwealth Code, the Regulations under the Code and the Fees Regulations;
 - (ii) enable to be printed as they apply in that jurisdiction, the Code, the Regulations under the Code and the Fees Regulations.

- (b) The Regulations that will be made if the Commonwealth fails to amend its initial legislation within 6 months of the amendments being approved by the Ministerial Council.

- (c) Any regulations effecting necessary local modifications which will be made as and when needed to ensure that particular amendments to the Commonwealth Regulations will have a meaningful application in a particular jurisdiction other than the A.C.T.

COMPANY LAW

Proposed new Australian companies code

37. The proposed new Australian companies code will be set out in the Companies Bill (hereafter referred to as 'CB').

38. In accordance with the Formal Agreement the CB is based on the Companies Acts of the four States which are parties to the Interstate Corporate Affairs Agreement (these Acts are hereafter referred to as the 'ICAC CAs').

39. The ICAC CAs have, however, been modified in the same way as the other existing ICAC legislation (see para 23).

One place of registration

40. The most important of these modifications are those that are required to ensure that an Australian company incorporated in a jurisdiction covered by the co-operative scheme (referred to in the CB as a 'participating State' or 'participating Territory') can lodge all its documents with the local corporate affairs office in its jurisdiction of incorporation ('home jurisdiction') without the need to lodge documents anywhere else. A company incorporated in a participating State or another participating Territory is referred to as a "recognized company" in the CB (see definition in s-cl. 5(1)).

41. Similarly, overseas corporations will only have to register in one of the jurisdictions covered by the co-operative scheme. An overseas corporation that is registered as a foreign company in a participating State or another participating Territory is referred to as a "recognized foreign company" in the CB (see definition in sub-cl. 5(1)).

42. Any Australian body which is not a company in its jurisdiction of formation and any Australian company incorporated in a non-participating Australian jurisdiction will still be required to register as a 'foreign company' in each other Australian jurisdiction covered by the co-operative scheme in which that body wishes to carry on business or to establish a place of business.

Other modifications

43. Some of the more important of the other modifications are as follows:

- (a) An attempt has been made to provide a more appropriate monetary penalty for some offences and to resolve a large number of anomalies that exist in the penal provisions of the existing companies legislation. Further details are contained at Appendix A.
- (b) Provisions requiring companies to publish notices in newspapers and the Gazette have been examined and

rationalised so that there are similar requirements where the different provisions reflect similar policies. A list of all the requirements for publication in a newspaper and the Gazette and the type of publication required is set out in Appendix B.

- (c) New powers of inspection are contained in Division 1 of Part II to ensure that the NCSC will have adequate powers of inquiry when performing its functions under the CB.
- (d) A national system of registration for auditors, liquidators and official liquidators has been formulated (see CB Division 2 of Part II).
- (e) More flexibility will be able to be exercised in determining the upper limit to the size of accounting and other professional partnerships see CB s-cl. 33(4)).
- (f) A company will be permitted to alter any condition in its memorandum that might have been included in its articles (see CB cl. 73).

- (g) The law in relation to pre-incorporation contract is reformed (see CB cl. 81).
- (h) There are new provisions dealing with the transfer of incorporation of companies and of certain corporations (see CB Division 4 of Part III).
- (i) The content of prospectuses and statements made under cl. 170 will now be prescribed in the regulations (i.e. the provisions contained in the Fifth and Seventh Schedules to the ICAC CAs are generally not contained in the CB).
- (j) Provisions dealing with statements in lieu of a prospectus have been omitted from the CB.
- (k) The existing provisions of the ICAC CAs relating to the power of a company to pay commissions etc. have been amended (see CB cl. 117).
- (l) Comprehensive amendments have been made to the existing provisions of the ICAC CAs relating to the prohibition of a company financing and dealing in its own shares (see CB cls 129 and 130).

- (m) A company will now be required to keep a register of options (see CB cl. 131).
- (n) The State and Territory Marketable Securities Acts and Ordinances will be repealed as similar provisions are contained in CB Division 8 of Part IV.
- (o) Comprehensive reforms are made of the provisions relating to the registration of charges (see CB Division 9 of Part IV.)
- (p) S 124 of the ICAC CAs which imposes duties of honesty and diligence on directors has been extended to all officers (see definition in s-cl. 229(5)).
- (q) A number of amendments have been made to the provisions prohibiting loans to directors (see CB cl 230).
- (r) A number of amendments have been made to the provisions which deal with payments by a company to persons for loss of or retirement from office, to give effect to recommendations in the UK Jenkins Committee Report (see CB cl 233).
- (s) There are new provisions which will enable a company to obtain information as to the beneficial ownership of its shares (see CB Cl 261).

- (t) Significant amendments have been made to the provisions relating to the preparation and laying of accounts to remedy defects in the existing provisions of the ICAC CAs that were identified in Jensen v. Viney [1979] VR 597 (see CB Part VI and definition of "financial year" in s-cl. 5(1)).

- (u) S-sec 162(12) of the ICAC CAs, which imposes an obligation on principal accounting officers of companies to state whether to the best of their knowledge and belief the accounts give a true and fair view of the matters required to be dealt with, has been deleted.

- (v) The special investigation provisions, while based generally on Part VIA of the ICAC CAs, have been substantially redrafted to incorporate the system of control and the allocation of powers set out in Part VI of the First Schedule to the Formal Agreement (see CB Part VII).

- (w) A person appointed to administer a compromise or arrangement will now have a number of the obligations that are imposed on a receiver (see CB s-cl. 315(7) to (11)).

- (x) There are new provisions designed to overcome jurisdictional problems that exist under the ICAC CAs in relation to schemes of arrangement (see CB cl 315) These new provisions are consistent with the "one place of registration" concept (see paras 40 to 42, above).
- (y) Expenses of an auditor in certain circumstances will now be accorded priority in a receivership (see CB cl. 331).
- (z) Consistent with the "one place of registration" concept, provisions have been included in Part XII to ensure that there is only one winding up in all participating jurisdictions in relation to the affairs of a company incorporated in a participating jurisdiction or an overseas corporation registered as a foreign company in a participating jurisdiction (see CB Division 5 of Part XII).
- (aa) There is a new provision that rationalizes existing provisions in the ICAC CAs relating to reports by a liquidator and now applies to all forms of winding up (see CB cl 418 cf. s. 235 of the ICAC CAs).
- (ab) New powers have been given to the NCSC in relation to the supervision of liquidators (see CB cl 420).

- (ac) A new provision has been included which gives a liquidator the right to recover from an officer of a corporation in certain circumstances (see CB s-cl. 453(5)).
- (ad) More flexibility has been given to the NCSC in relation to the exercise of its powers concerning investment companies under Division 2 of Part XIII (see CB cl 490).
- (ae) A general power has been given to the NCSC to intervene in any proceeding relating to a matter arising under the legislation (see cl. 540).
- (af) There are comprehensive examination provisions which replace a number of existing provisions (e.g. ss 249 and 250) in the ICAC CAs, (see CB cl 541).
- (ag) The provisions which deal with the form and inspection of books contain new provisions to take account of the fact that many company records are now kept in computerized form (see CB cls 544 to 546).
- (ah) A number of amendments have been made to the "defaulting officers" provisions (see generally CB Division 2 of Part XIV).

(a1) Consistent with the 'one place of registration' concept, various minute books and registers will be able to be kept at the registered office of the company, at its principal place of business in its home jurisdiction or at such other place in Australia as has been approved by the NCSC (see ex. memo paras 609 to 611).

Fees

44. The fees that will be charged in connection with the proposed new companies code will be set out in Regulations under a separate Companies (Fees) Bill 1980.

Companies (Transitional Provisions) Bill

45. It will be necessary for the Commonwealth to pass a Companies (Transitional Provisions) Bill (hereafter referred to as the C(TP)B) which will contain necessary transitional provisions consequent upon the enactment of the CB and the repeal of the ACT CO.

Companies (Miscellaneous Amendments) Bill

46. It will be necessary for the Commonwealth Parliament to pass a Companies (Miscellaneous Amendments) Bill to effect consequential amendments to specified Commonwealth Acts containing references, whether expressed or implied, to the ACT Companies Ordinance 1962 (hereafter referred to as the ACT CO) which will be repealed by the CB. There will also be a separate A.C.T. Companies (Miscellaneous Amendments) Ordinance containing consequential amendments to ACT Ordinances.

Previous exposure

47. Earlier drafts of the CB and C(TP)B were exposed to the public in April 1980 and August 1980. Appendix C to the ex memo lists the main differences between the two earlier drafts of the CB and Appendix D highlights the changes between the August CB and the Companies Bill 1981. Appendix E to the ex-memo is a concordance that compares the re-numbered clauses of the CB with the clause numbers of the two exposure drafts of the CB.

COMPANIES BILL 1981

48. The Companies Bill 1981 is divided into the following Parts:

PART I	-	PRELIMINARY
PART II	-	ADMINISTRATION
PART III	-	CONSTITUTION OF COMPANIES
PART IV	-	PROSPECTUSES, SECURITIES AND CHARGES
PART V	-	MANAGEMENT AND ADMINISTRATION
PART VI	-	ACCOUNTS AND AUDIT
PART VII	-	SPECIAL INVESTIGATIONS
PART VIII	-	ARRANGEMENTS AND RECONSTRUCTIONS
PART IX	-	CONDUCT OF AFFAIRS OF COMPANY IN OPPRESSIVE MANNER
PART XV	-	RECEIVERS AND MANAGERS
PART X	-	OFFICIAL MANAGEMENT
PART XII	-	WINDING UP
PART XIII	-	VARIOUS TYPES OF COMPANIES
PART XIV	-	MISCELLANEOUS

49. The remainder of this ex memo deals sequentially with the separate clauses in each of these Parts.

CB : PART I : PRELIMINARY

50. Part I of the CB (cls 1 to 9) deals with various preliminary matters.

Cl. 1 : Short title

51. When enacted the CB will be cited as the Companies Act 1981 (CB cl. 1).

Cl. 2 : Commencement

52. The CB will come into operation on a date to be fixed by Proclamation by the Governor-General published in the Commonwealth Gazette (CB cl. 2 - see also C & S (I & MP) A s.9 for definition of Proclamation)

53. The following Bills are also expressed to come into operation on the day on which the Companies Act 1981 comes into operation:-

Companies (Transitional Provisions) Bill 1981;

Companies (Fees) Bill 1981;

Companies (Acquisition of Shares) Amendment Bill (No. 2) 1981;

Securities Industry Amendment Bill (No. 2) 1981;

Companies and Securities (Interpretation and Miscellaneous Provisions) Amendment Bill (No. 2) 1981;

Companies (Miscellaneous Amendments) Bill 1981 (other than Part I and Division 1 of Part XI);

Crown Debts (Priority) Bill 1981;

(see, in each case, cl 2 of these Bills).

Cl 3 : Objects and application

54. The object of the CB will be to make provision for the formation of companies in the A.C.T., the general regulation of such companies, and the registration of certain bodies as foreign companies in the A.C.T. (CB s-cl 3(1)). See also CASA s. 3 and SIA s.3 which set out the objects of each of those Acts.

55. This provision is consistent with the provisions of s-sec 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').

56. Each jurisdiction other than the ACT covered by the co-operative scheme will pass a Companies (Application of Laws) Bill which, among other things (see paras 23 and 36 of this ex memo), will apply the CB (other than CB cls 1, 2, 3 and 4) as amended by a Schedule to its Application Bill and subject to the interpretation code (see para 29 of this ex memo), as a law of that jurisdiction.

57. The CB in its application to ACT companies will apply generally to all acts and persons within or without the ACT (CB s-cl. 3(2)).

58. The interpretation of the CB will be governed by the C & S (I & MP) A (CB s-cl. 3(3)).

Cl 4 : Repeal

59. The ACT Companies Ordinance 1962 and the ACT Marketable Securities Ordinance 1971 (similar provisions to which are contained in Division 8 of Part IV) will be repealed (CB cl 4 and Schedule 1).

Cl. 5 : Interpretation

60. There will be a series of definitions for the purposes of the proposed new Australian companies code (CB s-cl. 5(1)). A full list of those defined terms and the particular provisions of the CB in which they are used is set out in Appendix E. Further definitions etc appear in the interpretation code set out in the C & S (I & MP) A.

61. Some of the terms defined in the CB (with examples of their use) are set out below:-

- Companies Ordinance 1962: new definition

- debenture - defined to include debenture stock, bonds, notes and any other document acknowledging indebtedness but excluding:-

- (a) a document acknowledging receipt of money issued in compliance with CB s-cl. 97(2) (document issued following prospectus) - cf. ICAC s-sec. 5(5);
- (b) a cheque, order for the payment of money or bill of exchange;
- (c) a promissory note with a face value of not less than \$50,000;
- (d) for certain provisions of the CB where regulations provide that the word debenture does not include a prescribed document - that document.

- director - modified to include a person "whether or not validly appointed to occupy or duly authorised to act in the position" to take account of NSW Court of Criminal Appeal decision in R v Drysdale (1978) 3 ACLR 680 (Note that the Appeal Court's decision was set aside by the High Court (1978-79) 22 ALR 161).
- executive officer: this definition replaces "manager" in the ICAC CAs, but is more broadly defined and includes all executive officers, not only "principal executive officers" (note the definition of "principal executive officer" in CB s-cl. 5(1) - similar to ICAC CAs definition of "manager").

- financial year: new definition inserted to enable the obligation to prepare accounts under cl. 269 to be expressed as a requirement to cause accounts to be made out in respect of an identifiable period, namely a "financial year" - the definition takes account of the decision of the VIC Supreme Court in Jensen v. Viney [1979] VR 597.

- industrial instrument: new definition based on cl. 412 of NCB: this definition is particularly relevant to the provisions dealing with the order of payment of debts in corporate insolvency; see, e.g., definition of "wages" in CB s-cl. 5(1).

- injury compensation: new definition: this definition is particularly relevant to the provisions dealing with the order of payment of debts in corporate insolvency; see e.g. CB para 441(f).

- insolvent under administration this definition replaces the definition of undischarged bankrupt in ICAC CAs s-sec 5(1) but has been modified to give effect to the decision that the provisions of the companies code applying to undischarged bankrupts within the meaning of Part IV of the Commonwealth Bankruptcy Act 1966 should also apply to:-
 - (a) persons who are undischarged bankrupts under the laws in force in any country which has bankruptcy provisions similar to those in force in Australia;

(b) persons whose financial affairs still are subject to an administration under Part X of the Commonwealth Bankruptcy Act 1966 other than an administration based on a deed of assignment or under the corresponding provisions of a law of an external territory or a country other than Australia.

- investment contract: based on definition in CB s-sec. 76(1) of ICAC CAs.
- leave of absence: new definition: this definition is particularly relevant to the provisions dealing with the order of payment of debts in corporate insolvency; see e.g. CB para 441(g).
- machine-copy: existing definition modified to take account of definition of "machine-copy" in s. 53 of the VIC Evidence Act 1958.
- marketable securities: based on existing definition in VIC CA but "funds" is omitted and reference is made to "any prescribed interest" in lieu of "any interest as defined in section seventy-six".
- negative: new definition based on corresponding definition in s. 53 of VIC Evidence Act 1958.
- officer: based on ICAC CAs s-sec 5(1) but expanded to include executive officers and trustees or other persons administering a compromise or arrangement between the corporation and its creditors (see CB Part VIII).

- official liquidator: modified definition - refers to a person registered as an official liquidator under CB cl. 21, or deemed to be registered under the CB.
- prescribed interest: definition based on definition in ICAC CAs s-sec 76(1) (Note cl. 17 of C(TP)B which deals with interests in partnership agreements issued prior to the commencement of the CB).
- recognized company: modified definition to take account of co-operative scheme.
- recognized foreign company: new definition to take account of co-operative scheme; see, e.g. CB cl. 507.
- registered company auditor: based on existing definition in VIC CA.
- registered foreign company: new definition; see, e.g. CB cl. 513.
- registered liquidator: modified definition; see, e.g., CB cl. 417.
- reproduction: modified definition based on s. 53 of VIC Evidence Act 1958.
- sheriff: new definition; see, e.g., CB para. 455(6)(a).

- stock exchange: this definition allows different stock exchanges to be prescribed for the purposes of the whole Act and the SIA where a stock exchange is defined as one which must be approved by the Ministerial Council.
- stock market: similar to the CASA and SIA definitions.
- unit: this definition is based on the corresponding provision in ICAC CAS s-sec 5(1) but has been amended to make it clear that it refers to equitable as well as legal interests in shares; see e.g. CB s-cl. 36(1A) and paras 129(1)(b) and (c). This change was made to counter the effect of the decision in the case of Bond Corporation v. White Industries 1980 CLC which raised questions as to whether beneficial interests in shares, as opposed to legal interests, would be caught by the CB unless it specifically provided otherwise. A consequence of the decision was to open up avoidance possibilities in the cases of the prohibition on subsidiaries acquiring shares in their holding companies (CB cl. 36) and of the prohibition on companies financing dealings in their own shares (CB cl. 129).
- wages: new definition from cl. 412 of NCB: see, e.g. CB para 441(e).

62. There are also various other interpretative provisions for the purposes of the companies code (CB s-cl. 5(2) to (9)).

63. Among other things, a reference to an offer to the public is defined in CB s-cl. 5(4). This definition is based on s-sec. 5(6) of the ICAC CAs except that:-

- (a) the words "offering shares or debentures to the public" are replaced by "an offer to the public". When read with s-cl. 5(3), the effect will be to overcome the anomaly shown up in CAC (NSW) v. David Jones [1975] 2 NSWLR 710; and
- (b) the following words have been added "notwithstanding that the offer is capable of acceptance only by each person to whom it is made or that an offer or application may be made pursuant to the invitation only by a person to whom the invitation is issued." This is to take account of Lee v. Evans [1964] 112 CLR 276 which suggests that to be regarded as an offer to the public an offer would need to be made generally and therefore capable of being acted upon by any member of the public, not just those to whom it is addressed.
- (c) para 5(4)(d) is new. It will ensure that offers of interests of the kind dealt with in Part IV Division 6 of the Bill to pre-existing holders of such interests will not be deemed offers to the public.

64. Where a regulation is made including certain partnership agreements within the definition of a prescribed interest, the regulation will not apply to a partnership

agreement for the sole purpose of carrying on a profession or trade that is otherwise regulated under ACT law (CB s-cl. 5(8)) - based on s-sec 76(1A) of the ICAC CAs).

Cl 6 : References to affairs of a corporation

65. 'Affairs' is defined for the purposes of the provisions relating to

- production of books to NCSC (see CB cl. 12) and the admissibility in evidence of copies of or extracts from such books (see CB cl. 15).
- special investigations (see CB Part VII)
- the remedy in cases of oppression (see CB cl. 320).
- the winding up on the ground of the actions of the directors (see CB para 364(1)(f));
- the arrest of an absconding contributory (see CB cl. 388);
- the examination of persons concerned with corporations (see CB cl. 541);
- the falsification of books (see CB s-cl. 560(1));
- the making of false reports (see CB cl. 564).

(CB cl. 6).

66. This definition expands on the corresponding definition in ICAC CAs s. 168.

Cl. 7 Subsidiaries, holding companies and related companies

67. The terms "subsidiary", "holding company" and "related company" will be defined for the purposes of the proposed new code (CB cl. 7).

68. This provision is based on ICAC CAs s. 6 with the following changes:

- (a) CB sub-para 7(1)(a)(ii) refers to a corporation that is in a position to cast, or control the casting of more than one-half of the maximum number of votes that might be cast at a general meeting of another corporation.
- (b) In CB para 7(1)(b) the words "including a corporation that is that other corporation's subsidiary by another application or other applications of this paragraph" have been added at the end of the provision.
- (c) In CB s-cl. 7(2) a corporation will be taken to control the composition of a board of directors of another corporation if it can appoint or remove directors "with or without" the consent of a third person. In ICAC CAs s-sec 6(2) the power to appoint or remove directors in order to constitute control, has to be exercisable without the consent of another person.

(d) There is a new provision defining "ultimate holding company" (CB s-cl. 7(6)). This term is used in CB s-cl. 129(10), and cls. 230 and 270.

(e) The definition of "wholly owned subsidiary" will not apply generally in the proposed new code (CB s-cl. 7 - based on ICAC CAs s-sec. 162A(11)). This term is used in CB cls. 231, 269, 270 and 364.

Cl. 8 : Relevant interests in shares

69. In certain circumstances a person will be regarded as having a relevant interest in securities for the purposes of the proposed new code (CB cl. 8).

70. This provision is based on ICAC CAs s. 6A but with substantial drafting alterations. A similar provision is contained in SIA s. 5 (based on ICAC SIAs s. 5) and in CASA s.9 which set out the circumstances in which a person will be regarded as having a relevant interest in securities for the purposes of the securities industry code, the share acquisition code respectively.

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

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

- (i) for the purposes of the substantial shareholding provisions (CB Part IV Division 4) or of the provision allowing a company to obtain information about the beneficial ownership of shares (CB cl. 261), if he can exercise or control the exercise of the right to vote attached to that share (CB s-para 8(1)(a)(i)) or if he can dispose of, or exercise control over the disposal of, that share (CB s-para 8(1)(a)(ii); and
- (ii) for the purposes of CB cls. 230, 231 and 232, if he has power to dispose of or to exercise control over the disposal of that share (CB para 8(1)(b) - this additional test only applies for the purposes of the substantial shareholding provisions and after obtaining information about beneficial ownership).
- (b) The nature of the person's power to control or influence voting will be immaterial (CB s-cl. 8(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 (CB s-cl. 8(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 its directions in exercising the power;

(ii) he has controlling interest in the body corporate;
or

(iii) he has power to exercise, or control the exercise of, the voting power attached to not less than the prescribed percentage of votes that might be cast at general meeting. (See CB s-cl. 8(11) for the prescribed percentage).

(CB s-cl. 8(4)).

(d) A person will be deemed to have the power to exercise or control the exercise of the voting power referred to in CB para 8(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.

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

(e) A person will be deemed to have a relevant interest if, on the performance of an agreement to which he is a party or on the enforcement of a right or an option that he holds, he would have such a relevant interest (CB s-cl. 8(6)).

(f) Where a body corporate is deemed to have a relevant interest in a share under CB s-cl. 8(6), a person will be deemed to have a relevant interest in the share if he has -

(i) power to issue instructions to the body corporate or its directors in relation to that share;

(ii) a controlling interest in the body corporate;
or

(iii) power to exercise or control the voting power attached to not less than the prescribed percentage of the voting shares in the body corporate

(CB s-cl. 8(7) - corresponding provision in SIA s-sec 5(7)).

(g) A relevant interest will be disregarded in certain circumstances (CB s-cl. 8(8)).

- (h) A trustee will not cease to be a bare trustee only because he is entitled to remuneration paid out of the trust (CB s-cl. 8(9)).
- (j) A relevant interest will not be disregarded only because of its remoteness or origin (CB s-cl. 8(10) - based on ICAC CAs s-sec. 6A(8) - but cf ACT CO para 6A(10)(c)).
- (k) Relevant interests or particular classes of relevant interests or relevant interests held by particular persons will be able to be disregarded in circumstances specified in the regulations (CB s-cl. 8(11) - cf. ICAC S.I. reg. 8 and SIA s-sec. 5(11)).
- (l) The prescribed percentage (referred to in s-cl. 8(4) and (7)) will be 20% or such lesser percentage as is prescribed by the regulations made under CASA s. 11 (CB s-cl. 8(12)).

72. These provisions relating to relevant interests are relevant to the following provisions of the CB:- cls. 9, 136-40, 146, 230-232 and 261.

Cl. 9 : Associated persons

73. In certain circumstances, one person will be deemed to be associated with another for the purposes of the proposed new Companies code (CB cl. 9). These circumstances are related to the concept of "relevant interest" (see CB s-cl. 8(5)).

74. The provision is based on S.6 of the ICAC SIAs (see also ICAC CAS s-sec. 6A(5) which has been expanded upon). Cl. 9 differs in a number of respects from SIA s. 6 and CASA s. 7, largely because of the different purpose of each piece of legislation. The CASA, for example, contains two methods of determining association: CASA s-sec. 7(4) relates to calculating the shares to which a person is entitled because of the entitlements of an associate, and CASA s-sec. 7(5) contains the test (as similar as practicable to CASA s-sec. 7(4) for the purposes of the rest of the CASA. The SIA contains additional provisions, e.g. s-sec 6(2) requires proof of knowledge of a relevant matter before a partner or co-director in a non-securities related business will be deemed to be associated, and s-sec. 6(3) which deals with association with a dealer or investment adviser constituted by two or more persons. Further differences are referred to in the next paragraph.

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

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

(i) where the other person is a corporation - a director or secretary, a related corporation, or a director or secretary of a related corporation (CB para 9(1)(a) - similar to SIA para 6(1)(a) and CASA paras 7(4)(a) and 7(5)(a);

- (ii) where the matter relates to the power to exercise or control the voting power attached to shares - a person with whom the other person has or proposes to enter into, an agreement or understanding (which may be informal or may be express or implied) affecting the exercise or control of the voting power attached to the shares, or otherwise influencing the management of the company (it is immaterial if the power to exercise or control, or influence the exercise of, voting power is qualified in any way: CB s-cl. 9(3)) - similar to CASA s-cl. 7(7), no equivalent provision in SIA) (CB para 9(1)(b) - similar to SIA para 6(1)(6) and CASA para 7(4)(b); cf. CASA para 7(5)(b) which also includes matters relating to take-over offers or announcements);
- (iii) persons acting or proposing to act in concert (CB para 9(1)(c) - similar to SIA para 6(1)(c) and CASA para 7(5)(c), cf. CASA para 7(4)(c) which refers to action relating to the acquisition of shares in a company referred to in CASA s-sec. 7(3)); and
- (iv) persons who are or propose to become associated, or who propose to do anything with a view to becoming associated (CB para 9(1)(c) and (d) - similar to SIA paras 6(1)(f) and (g), and CASA paras 7(4)(f) and (g), and 7(5)(e) and (f)

respectively, cf. also CASA para 7(4)(d) which relates to association with a view to controlling or influencing the board of directors of a company referred to in CASA s-sec. 7(3)).

CB s-cl. 9(1) will not contain a provision similar to SIA para 6(1)(e) and CASA paras 7(4)(e) and 7(5)(d) which allows regulations to be made treating persons as associated.

The SIA also contains an additional provision, para 6(1)(d), which includes as associates, where a matter is involved which does not relate to the exercise or control of the voting power attached to shares, partners and co-directors (subject to SIA s-sec. 6(2), and trustees and beneficiaries where the trust does not involve the lending of money in the ordinary course of business.

(b) A person will not be taken to be associated with another person if the only reason for the association is that:-

(1) one advises or acts for the other in a professional or business relationship (including the situation where instructions are given to a dealer in securities to acquire shares in the ordinary course of business : CB para 9(2)(b) - similar to CASA para 7(6)(b), not considered necessary in SIA (CB para 9(2)(a) - cf. SIA s-sec. 6(4) and CASA para 7(6)(a) which do not

include the phrases "in the proper performance of functions attaching to" and "or to his business relationship with" : to be the subject of later amendment to SIA); or

- (ii) the other person is appointed by a shareholder to act as his voting proxy at a meeting of members where that other person's relevant interest in the shares would be disregarded under CB cl. 8 because he was appointed without valuable consideration and because his interest arises only by reason of being appointed as a proxy (CB s-cl. 9(2)(c) - no equivalent provision in SIA or CASA, cf. however CASA para 7(6)(c) which provides that a person will not be associated with another by reason only that he dispatches a take-over offer or makes a take-over announcement relating to shares held by the other).

CB : PART II : ADMINISTRATION

76. Part II of the CB (cls 10 to 32) deals with three separate administrative matters:

Division 1 - Powers of inspection (which is concerned with enquiries otherwise than by means of a special investigation);

Division 2 - Registration of auditors and liquidators;
and

Division 3 - Registers and registration of documents.

DIVISION 1 : POWERS OF INSPECTION

77. The provisions of Division 1 of Part II of the CB (10 to 16) are designed to ensure that the NCSC will have adequate powers of enquiry in relation to the matters covered in this Division when performing its functions or exercising its powers under the co-operative scheme legislation (see also A B Green 'powers of inspection' SALS sem).

78. The provisions of Division 1 will replace the general inspection provisions in s-secs 7(6) to 7(10A) and s. 368 of the ICAC CAs. They differ in some ways from the present ICAC provisions:

- (a) The limited powers of inspection in the present ICAC CAs are not expressed in a way that enables them to be used to investigate suspected criminal activity. In addition, they do not enable a corporate affairs office to obtain the information and explanations that are needed to explain the records inspected. If enquiries do not produce voluntary co-operation, a corporate affairs office either has to abandon the case or else has to 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 UK 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.

79. The provisions that are proposed in the CB are as follows:

- (a) The NCSC will be able to require the production of books that relate to corporations where the purpose of requiring the production is in furtherance of the function and powers of the NCSC under the scheme legislation (except the power to make recommendations to Ministerial Council for new laws), concerns a possible contravention of scheme legislation, or may involve certain offences relating to a company.
- (b) The power of the NCSC will include power to require explanations in respect of the books.
- (c) Where attempts to exercise these powers are unsuccessful, a magistrate will be able to issue a warrant to be executed by the police, subject to warrant safeguards modelled on the Australian Law Reform Commission recommendations and the Commonwealth Criminal Investigation Bill 1977.

- (d) Information obtained by exercise of these powers will not be able to be disclosed except for the purpose prescribed by the relevant scheme legislation. Stringent provisions regarding secrecy have been included in the NCSC Act s. 47 and in the proposed NCSC (State Provisions) Bills to ensure this.
- (e) Falsification of relevant books, or of explanations given in respect of them, will be an offence.

80. The provisions of Division 1 follow as closely as possible the comparable provisions in ss 7 to 11 of the SIA. In some cases these provisions of the SIA will be amended by the Securities Industry Amendment Bill (No. 2) to take account of changes to the CB since the August CB.

Cl. 10 : Interpretation

81. There is an interpretative provision for the purposes of the Division that:

- defines 'books' to include banker's books (the same definition as in SIA s.7) : banker's books are widely defined in CB s-cl 5(1) (with a similar definition in SIA s-sec. 5(1)); and
- provides a wide definition of 'premises' (similar definition in s-sec. 9(6) the SIA).

(CB cl 10).

Cl. 11 : NCSC may inspect books without charge

82.- A person authorized by the NCSC may inspect without charge any book required to be kept by the CB (CB cl 11 - no equivalent provision in the SIA since there are no books required to be kept by the SIA which are to be open for public scrutiny on payment of a prescribed sum).

Cl. 12 : Power of NCSC to require production of books

83. The NCSC will be able to require the production of various books relating to the affairs of a corporation provided that the production is for a purpose that:-

- (a) is relevant to scheme legislation;
- (b) relates to a possible offence against scheme legislation;
- (c) relates to an offence concerning the management of, or fraud or dishonesty involving, a company; or
- (d) relates to a possible contravention of the ACT CO or a law corresponding thereto.

(CB s-cl. 12(1) - cf. SIA s. 8 which contains similar powers in relation to various books relating to the securities industry).

83A. There is now no right to demand books for the purpose of exercising the power given to the NCSC under s-sec. 6(3) of the NCSC Act. This exclusion from the August Bill was made in response to public submissions that the previous provision was too wide in that it could have allowed the NCSC to require the production of company books for the purpose of making recommendations to the Ministerial Council for the reforms of legislation (see, eg, GFK Santow, SULS sem).

84. The powers given to the NCSC by CB cl. 12 in relation to things and matters in and of the ACT will be given to the NCSC in relation to things and matters in and of each other jurisdiction covered by the co-operative scheme by the operation of CB cl. 12 as a law of each other jurisdiction (by virtue of that jurisdiction's application of laws legislation). Thus one body, the NCSC, will have inspection powers in relation to things and matters in and of all the jurisdictions covered by the co-operative scheme. (There are no provisions corresponding to s-sec. 7(7B) and 7(7C) of the ICAC CAs, which enable an officer of one jurisdiction to carry out inspections in another jurisdiction with the authorisation of the corporate affairs office in that jurisdiction. This same end will be achieved through the system of delegations that will apply under the co-operative scheme).

85. A brief outline of the NCSC's powers under CB cl. 12 is as follows:

- (a) The powers will extend to banker's books (see CB cl. 10).

- (b) The powers will be subject to a purpose test (CB s-cl. 12(1)).
- (c) The NCSC will be able to give a written direction to a corporation or an officer, agent, banker, solicitor or other person acting for or on behalf of any of these persons requiring the production of books relating to affairs of the corporation (CB s-cl. 12(2)).
- (d) The NCSC will be able to authorise a person, on producing evidence of his authority, to require the production of these books (s-cl. 12(3)). This authorisation may be general or limited to a particular corporation or other person (CB s-cl. 12(4) - cf SIA s-sec 8(4) which provides that the corresponding authorisation may be general or limited to a particular stock exchange or other person).
- (e) "Affairs" of the corporation is widely defined for the purposes of this clause (see CB cl. 6 - which expands on the definition in ICAC CAs s-sec. 168(')).
- (f) The NCSC or the authorised person will be able:
 - (i) to require, by written notice, a third person to produce books (CB paras. 12(2)(b) and 12(3)(c)). Any person who complies with such a requirement will be protected from liability

whether or not the requirement itself is a valid exercise of power (see CB s-cl. 12(8) - this is a new provision since the August Bill to meet submissions that persons complying with such a requirement might otherwise be in breach of their common law duties to other persons if the requirement was beyond power). Production of the books will not prejudice any lien (s-cl. 12(5) - similar protection for liens will also apply where a magistrate issues a warrant to seize books : see CB s-cl 13(5)).

- (ii) 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 any explanatory statement that he is able to, and to retain the books for the time needed for inspection or for copies to be made (CB para. 12(6) (a)).
- (iii) if the books are not produced, to require the person to give his opinion as to both the location of the books and their custodian (CB para. 12(6)(b)); and
- (iv) to compel the identification of property of the corporation, insofar as the person compelled is able to identify it (CB para. 12(7)).

(g) The provisions will apply in the case of a body corporate (including a body corporate that is being wound up) and will apply to an officer or former officer (CB s-cl. 12(9)). "Officer" is given a wide definition (CB s-cl. 12(10)).

Cl. 13 : Power of magistrate to issue warrant to seize books

86. A magistrate will be empowered to issue a warrant if he is satisfied on an information laid before him that there are reasonable grounds for believing that on particular premises, there are books that have not been produced in compliance with cl. 12 (CB cl 13 - cf. SIA s. 9 which differs by not containing the reforms mentioned immediately below; these are proposed to be inserted in the SIA by the Securities Industry Amendment Bill (No. 2)).

86A. CB cl. 13 also contains provisions which are based, with a number of modifications, upon the recommendations on warrant powers in relation to the law of search and seizure contained in the Australian Law Reform Commission's Report No. 2 "Criminal Investigation" (see paras 188-210 of that report), and upon cl. 61 of the Commonwealth Criminal Investigation Bill 1977. These provisions are designed to place appropriate safeguards on the issue of warrants to search for and seize company books.

87. The provisions relating to the issue of a warrant are as follows:

(a) The warrant will authorize any member of the Australian Federal Police (in jurisdictions other than the ACT the relevant application of laws legislation will provide for this to be the police force of that jurisdiction) and any other person named in the warrant:

(i) to enter premises (defined widely - see CB cl. 10);

(ii) to search the premises;

(iii) to take possession of any books (defined widely - see CB cl. 10 and s-cl. 5(1)); and

(iv) to deliver the books to a person authorized by the NCSC to receive them.

(CB s-cl. 13(1)).

(b) The information to be laid before the magistrate will, in addition to stating that the informant suspects that the relevant books are on particular premises, contain the specific grounds for that belief (CB s-cl. 13(12)). This provision is based on the Criminal Investigation Bill 1977 s-cl. 61(3) except that:

- The grounds for suspicion are to be stated in the information itself rather than in a separate affidavit.

- The CB provision does not contain a formal procedure for examination of the informant by the magistrate concerning the grounds on which the warrant is to issue.
- (c) Where the magistrate issues a warrant he will endorse on the warrant which of the grounds contained in the information that he has relied on, and he will also include particulars of any other grounds that he has relied on (CB s-cl. 13(3) - based on Criminal Investigation Bill 1977 s-cl. 61(4)).
- (d) The warrant will state the time for which it is to remain in force (7 days after the date of issue) and whether the entry is to be made by day or night or during specified hours of the day or night (CB s-cl. 13(4) - cf. Criminal Investigation Bill 1977 s-cl. 61(5), which provides in addition that the purpose of the entry and a description of the nature of the goods to be seized be contained in the warrant - it was considered unnecessary to include these additional requirements in the CB provision having regard to the nature of the powers in the CB).
- (e) Liens will not be prejudiced (CB s-cl. 13(5) - similar provision in CB s-cl. 12(4) in relation to production following a notice from the NCSC or an authorized person).

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

(i) will be able to make copies of them; to require a person who took part in their compilation to make such explanatory statement that he can make; and to retain the books for the time needed for inspection or for copies to be made; and

(ii) will be required to permit inspection of the books by persons otherwise entitled to inspect them at reasonable times.

(CB s-cl. 13(6)).

Cl. 14 : Offences

88. Failure to comply without reasonable excuse, with a requirement made under CB cl. 12 or 13 will be an offence (CB s-cl. 14(1) - cf. SIA s-sec 10(1)). Furnishing a false or misleading statement in purported compliance with CB cl. 12 or 13 will be an offence (CB s-cl. 14(2)). There will be a defence to prosecution for false and misleading statements : the defendant must be able to prove that he reasonably believed the statement to be true and not misleading (CB s-cl. 14(3) - no similar provision in the SIA but see cl. 8 of the Securities Industry Amendment Bill (No. 2)).

89. It will be an offence to hinder the NCSC or other person exercising power under CB cl. 12 or a person executing

a warrant issued under CB cl. 13 (CB s-cl. 14(4)). The occupier of premises entered pursuant to a warrant must provide reasonable assistance (CB s-cl. 14(5)). It will be no excuse that an explanation of any matter relating to the books or their compilation made in accordance with CB cls. 12 or 13 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 (CB s-cl. 14(6)). Subject to such a claim a statement made by a person in compliance with CB cl. 12 or 13 may be used in evidence in any civil or criminal proceedings against him (CB s-cl. 14(7)).

Cl. 15 : Copies or extracts of books to be admitted in evidence

90. A copy of any book relating to the affairs of a corporation will be admissible in evidence in any legal proceedings as if it were the original (CB s-cl. 15(1)), provided that the copy is proved to be a true copy (CB s-cl. 15(2)). Evidence that the copy is a true copy will be able to be given by a person who has compared the copy with the original and may be stated orally, or by affidavit or statutory declaration (CB s-cl. 15(3)). There is no equivalent provision in the SIA (but see s. 8 of the Securities Industry Amendment Act 1981 which inserts s. 10A).

Cl. 16 : Privilege

91. A lawyer will be able to refuse to comply with a requirement of the NCSC or an authorized person (see CB cls.

12 and 13) in respect of a document that contains a privileged communication unless the person to whom or by whom or on behalf of whom the communication was made agrees to the lawyer's complying with the requirement (CB s-cl. 16(1) - similar provisions in SIA s-sec 11(1)). The lawyer will also be able to refuse to provide a statement explaining any matter relating to the books or their compilation if the statement would disclose a privileged communication, (CB s-cl. 16(2) - no equivalent provision in SIA although one will be introduced by later amendment to SIA).

92. If the lawyer refuses to produce the document or provide the explanation of the books he must, if he knows the name and address of the person to whom or by whom the communication was made, furnish that name and address to the NCSC. This requirement is based on ICAC CAs s.367 (see also CB cl. 308). The obligation has been placed on lawyers so that (inter alia) the NCSC will be able to ascertain whether the lawyer is acting for the company or is claiming the privilege on behalf of particular officers of the company. See also the recent High Court decision Re Bell : ex parte Lees 30 ALR where Stephen J recognised that at common law the identity of a client is not capable of being the subject of a privileged communication (cf. however the address).

93. The CB contains no equivalent to SIA s-secs. 11(2) and (3) in relation to banking corporations, which have now been omitted by para 9(b) of the Securities Industry Amendment Act 1981.

DIVISION 2 : REGISTRATION OF AUDITORS AND LIQUIDATORS

94. Division 2 of Part II of the CB (cls. 17 to 30) contains provisions permitting, in effect, the registration of auditors, liquidators and official liquidators on an Australia-wide basis (cf. CSIB cls. 137 to 146 and NCB cls 334 to 337).

95. The basic elements of the proposed new scheme are as follows:

- (a) NCSC responsibility: The NCSC will be the body responsible for the registration of auditors, liquidators and official liquidators. This function will not be carried out by the existing Companies Auditors Boards which will be retained for a different function under the proposed companies code. Where the function of registering auditors and liquidators is carried out by a body with other functions (e.g., the NSW and QLD Public Accountants Registration Boards) then that body will continue in existence in relation to those other functions except insofar as other functions in relation to the States' companies codes are conferred by State legislation. (For the future role of the existing bodies see para 95(6), below).

(b) Companies Auditors and Liquidators Disciplinary Board:

The proposed ACT Companies Auditors and Liquidators Disciplinary Board ("the Board") will be the body responsible for the cancellation and suspension of the registration of, and the taking of other disciplinary action against, auditors and liquidators registered under the companies code as it applies in the ACT. The existing Companies Auditors Boards will be reconstituted in each jurisdiction as disciplinary bodies only, to exercise these responsibilities in that particular jurisdiction. In NSW and QLD these responsibilities will be exercised by the existing Public Accountants Registration Boards in those 2 States.

(c) Auditors: Suitably qualified natural persons will be able to apply to the NCSC for registration as auditors. In addition, the Auditors-General of the Commonwealth and of States and Territories of the Commonwealth will be deemed to be registered as auditors.

(d) Liquidators: Suitably qualified natural persons (not only registered auditors, as under the ICAC CAs) will be able to apply to the NCSC for registration as liquidators. The scheme also provides for the registration of a liquidator of a specified corporation.

- (e) Registers: The NCSC will maintain registers of auditors, liquidators and official liquidators containing specified information.
- (f) No requirement to renew registration: The registration of a person as an auditor or a liquidator will remain in force until the registration is revoked, or until the person dies.
- (g) Notification of changes: Where a registered auditor or liquidator ceases to practise, or where a change occurs in particulars to be entered in the NCSC's register, the NCSC must be notified within 21 days.
- (h) Triennial requirements: Each third year, registered auditors and liquidators will have to lodge with the NCSC a statement containing such information as is prescribed. (To simplify administration, the dates at which registered auditors and liquidators will have to lodge their statements will be staggered over the three year period and throughout each of the 3 years.)
- (j) Cancellation or suspension of registration: The relevant Companies Auditors and Liquidators Disciplinary Board will be able to cancel or suspend the registration of an auditor or liquidator in appropriate circumstances, and take certain other disciplinary action. The NCSC will retain the

responsibility it had under the August Bill for cancelling or suspending the registration of official liquidators, and for the cancellation of registration of persons who request that their registration be cancelled.

- (k) Opportunity for hearing: The NCSC will not be able to refuse to register a person as an auditor or liquidator, and the relevant Companies Auditors and Liquidators Disciplinary Board will not be able to cancel or suspend his registration or take other disciplinary action, without first affording the person the opportunity of a hearing.
- (l) Appeals: A person aggrieved by a decision of the NCSC to refuse his application for registration as an auditor or liquidator, or by a decision of the relevant Companies Auditors and Liquidators Disciplinary Board to cancel or suspend his registration or take other disciplinary action, will be able to appeal against the decision to the Supreme Court of the jurisdiction in which that person is registered. The NCSC will also be able to appeal to the Supreme Court against a decision (including a refusal to make an order) of the relevant Companies Auditors and Liquidators Disciplinary Board.

(m) Official liquidators: The NCSC will be able to register as many registered liquidators as it thinks fit to assist the relevant Supreme Court as official liquidators, and may cancel the registration of such liquidators.

(n) Bonds: Registered liquidators and liquidators of specified corporations will be required to give a security.

(o) Registration in other participating jurisdictions: A person registered as an auditor, liquidator, or official liquidator in one participating jurisdiction will be deemed to be registered in all other participating jurisdictions.

96. Each of the new provisions is dealt with separately below.

Cl. 17 : Application for registration as auditor or liquidator

97. A natural person will be able to apply to the NCSC for registration as an auditor, a liquidator, or a liquidator of a specified corporation (CB cl 17).

Cl. 18 : Registration of auditors

98. The provisions relating to the registration of auditors distinguish:

(a) persons already registered as auditors under the existing companies legislation: the NCSC will be required to grant the application of any existing registrant unless it is satisfied that the applicant is not "a fit and proper person" (CB s-cl. 18 (1)); and

(b) persons not already registered : these persons will also have to comply with the requirements as to qualifications, experience and character (CB s-cl. 18(2) - based on CSIB cl. 139).

99. There will be two new requirements for such persons:

(a) If the applicant relies on university or other qualifications in accountancy those courses must include a course in auditing (s-para. 18(2)(a)(ii)).

(b) The NCSC will have to be satisfied that the applicant has had such practical experience in auditing as is prescribed. It is envisaged that the Regulations will provide that, unless the NCSC deems otherwise, "sufficient practical experience" means:

(i) work in auditing under the direction of a registered company auditor at a level acceptable to the NCSC for a period of three years; and

(ii) at least one continuous year within the past five years, in the supervision of the audits of companies.

(100. Other provisions relating to the registration of auditors are as follows:

- (a) Registration will be refused to the persons who are prohibited from acting as a director or promoter of, or from being concerned in or taking part in the management of, a corporation pursuant to CB cl. 562 or an equivalent provision of a past or present territory law.
(CB s-cl. 18(3)).
- (b) The NCSC will be able to refuse to register as an auditor a person who is not resident in Australia (CB s-cl. 18(4) -based on CSIB s-cl. 139(3) - cf. ICAC CAs sub-s. 9(7A)).
- (c) The NCSC will have to issue a certificate of registration to a person registered as an auditor (CB s-cl. 18(5)).
- (d) Registration as an auditor will remain in force until the registration is cancelled or the person dies (s-cl. 18(7)).

- (e) The NCSC will be obliged to offer a person the opportunity of a hearing before refusing to register the person as an auditor (CB s-cl. 18(8) - based on CSIB cl. 142).
- (f) Within 14 days of a refusal of registration, the NCSC will have to provide an unsuccessful applicant with a notice of the decision, setting out the findings on material questions of fact by reference to the evidence and giving the reasons for the decision (CB s-cl. 18(9) - cf. CSIB cl. 143). This proposed provision follows, for the purposes of the companies legislation to apply in the ACT, the Commonwealth Administrative Appeals Tribunal Act 1975. In accordance with the decision on other aspects of scheme legislation not relating to companies and securities matters, the States will be able to include in their application of laws legislation provisions which differ from this Commonwealth provision. Consequently, it will be up to each State to decide whether the NCSC will be required, under the companies code as in force in that State, to give reasons for its decision.

Cl. 19 : Auditor-General deemed to be registered as auditor

101. The Commonwealth Auditor-General will be deemed to be a registered auditor (CB cl. 19 - based on ICAC CAs sub-s. 9(19)). The Auditor-General of a participating State or Territory will also be deemed to be a registered auditor

(see CB s-cl. 29(2) - the State application legislation will amend cl. 19 so that it refers to the Auditor-General of that State).

Cl. 20 : Registration of liquidators

102. The provisions relating to the registration of liquidators will distinguish:

- (a) persons already registered as liquidators under the existing companies legislation: the NCSC will have to grant the application of an existing registrar unless it is satisfied that the applicant is not "a fit and proper person to be registered as a liquidator" (CB s-cl. 20(1)); and
- (b) persons not already registered: such applicants will have to have one of the following qualifications:
 - . membership of a specified accounting body or other prescribed body (CB sub-para 20(2)(a)(i));
 - . a degree or diploma from a prescribed university or tertiary institution that consists of a course in accountancy and in commercial law (including company law) of a specified duration (CB s-para 20(2)(a)(ii)); or
 - . equivalent qualifications to either of the above (CB s-para 20(2)(a)(iii)).

103. These qualifications correspond to those required for registration as an auditor when not already registered under present legislation (see CB para. 18(2)(a)), except that there will be no requirement here that the course in accountancy include study in auditing (cf. CB s-para. 18(2)(a)(i)). These provisions differ from the qualification requirements for registration as a liquidator under ICAC legislation in that it will not be necessary for the applicant to be already a registered company auditor (cf. ICAC CA s-sec 9(3)). In addition to being suitably qualified, the applicant will have to satisfy the NCSC that he has sufficient experience (CB para 20(2)(b)) and is capable of performing the duties of a liquidator and is otherwise a "fit and proper person" (CB para 20(2)(c)).

104. Where a person applies to be the liquidator of a specified corporation, the NCSC will have to be satisfied that the applicant has sufficient experience and ability and is a fit and proper person to act as liquidator of the corporation, having regard to the business of the corporation and the interests of creditors and members (CB s-cl. 20(3)). This provision differs from s-sec. 9(5) of the ICAC CAs by:

- (a) not requiring that the person be qualified to be appointed as a registered company auditor;
- (b) imposing a "fit and proper person" test;
- (c) linking the experience and ability of the person to the specific winding up; and

- (d) omitting the requirement in ICAC CAs para. 9(5)(b) that the nature of the business and the interests of creditors and members require the appointment of a specified person.

105. Other provisions as to the registration of liquidators will be as follows:

- (a) Registration will be refused to persons who are subject to an order made under CB cl. 562 from being concerned in corporate management. This provision also applies to persons in respect of whom orders have been made pursuant to provisions equivalent to CB cl. 562 in existing or past laws of a State or Territory.
- (b) The NCSC will be able to refuse to register a person not resident in Australia (CB s-cl. 20(5) - based on ICAC CAs s-sec.9(4)).
- (c) The NCSC will be required to issue a certificate to a person registered as a liquidator or liquidator of a specified corporation (CB s-cl. 20(6)).
- (d) The NCSC will have to offer a person a hearing before refusing registration (CB s-cl. 20(10)).
- (e) Within 14 days of a refusal of registration, the NCSC will have to provide an unsuccessful applicant with a notice of the decision, setting out the findings

on material questions of fact by reference to the evidence and giving the reason for the decision (CB s-cl. 20(11) - cf. CSIB cl. 143 - see para 100(f) of the ex memo dealing with CB s-cl. 18(9) for the possibility that the States may adopt a different provision to that in the CB).

Cl. 21 : Registration of official liquidators

106. The NCSC will be able to register as an official liquidator a natural person who is a registered liquidator. This provision differs from ICAC CAs s-sec. 231(1) as follows:

- (a) It is the NCSC, not the Minister, that will register official liquidators (CB s-cl. 21(1)).
- (b) Official liquidators will be entitled to be issued with a certificate of registration (CB s-cl. 21(2)).

Cl. 22 : Security to be given by liquidators

107. Liquidators and liquidators of specified corporations will be required to lodge and maintain with the local corporate affairs office a security for the due performance of their duties in such form and for such amount as the NCSC from time to time requires in relation to that liquidator (CB cl. 22) - cf. Securities Industry Amendment Act s. 16 which provides for a security in relation to a dealer's licence to be lodged with the local corporate affairs office.

108. This provision differs from the ICAC CAs s. 231 as follows:

- (a) All liquidators, not merely official liquidators, will have to provide a security (CB s-cl. 22(1)). There is no specific security requirement for official liquidators as all official liquidators will have to be registered liquidators (see CB s-cl. 21(1)).
- (b) The NCSC will have power to determine different securities for individual liquidators.
- (c) The NCSC will have greater discretion than individual Ministers have at present over the type of security that it will accept.
- (d) The regulation-making powers in relation to the application and discharge of securities and the release of sureties in CB s-cl. 22(2) and (3) will be more comprehensive than the existing provisions in ICAC CAs s. 231.

C1 23 : Register of Auditors

109. The NCSC will be required to maintain a Register of Auditors containing specified matters (CB s-cl. 23(1)). A person will be able to inspect and make copies of the Register (CB s-cl. 23(3)).

Cl 24 : Registers of Liquidators and Official Liquidators

110. The NCSC will be required to maintain a Register of Liquidators containing specified matters (CB s-cl. 24(1)), and a Register of Official Liquidators (CB s-cl. 24(2)). Persons will be able to inspect and make copies of these Registers (CB s-cl. 24(4)).

Cl. 25 : Notification of certain matters

111. Where a registered auditor or liquidator, including a liquidator of a specified corporation, ceases to practise, or where a change occurs in any matter particulars of which are entered in the appropriate Register, the NCSC will have to be notified within 21 days (CB s-cl. 25(1) to (3)). Details of certain other matters (relating to insolvency, prohibitions under CB s-cl. 227(2) and Court orders under CB cl. 562) must be notified within 3 days (CB s-cl. 25(4)).

Cl. 26 : Triennial statements by registered auditors and liquidators

112. The legislation contains no requirements for renewal of registration. However, every three years a registered auditor or liquidator will be required to lodge with the NCSC a statement setting out such information as is prescribed (CB s-cl. 26(3)). The provisions in CB s-cl. 26(1) and (2) permit the NCSC, in the case of persons registered in the first year of operation

of the Act, to stagger over a 3 year period the dates on which statements under s-cl. 26(3) are to be submitted. The starting date of the 3 year period will be able to be varied (see CB s-cl. 18(6) and 20(7)).

Cl. 27 : Cancellation or suspension of registration

113. If requested, the NCSC will be able to cancel the registration of a person as an auditor, liquidator, or liquidator of a specified corporation (CB s-cl. 27(1)).

114. The NCSC will also be able, in its discretion and without right of appeal, to cancel or suspend the registration of an official liquidator (CB s-cl. 27(2)). Where the NCSC does so it must, within 14 days of the decision under the companies code as in force in the ACT, provide the affected person with a notice of the decision, setting out the findings on material questions of fact by reference to the evidence and giving the reasons for the decision (CB s-cl. 27(3) - see para 100(f) of this ex memo dealing with CB s-cl. 18(9) for the possibility that the States may adopt a different provision to that in the CB).

115. Upon an application by the NCSC, the relevant Companies Auditors and Liquidators Disciplinary Board ("the Board") will be able after a hearing, to cancel or suspend the registration of an auditor, a liquidator, or a liquidator of a specified corporation in circumstances that relate to:

- (a) being insolvent or under administration;
- (b) convictions for offences referred to in CB s-cl. 227(2);
- (c) prohibitions by virtue of a Court order under CB cl. 562 or under an equivalent provision in a previous law of a Territory;
- (d) lack of capacity to carry out functions;
- (e) failure to submit a triennial statement (cf. CB s-cl. 26(3));
- (f) failure to comply with residential requirements; and
- (g) failure to carry out adequately and properly the relevant duties

(CB s-cl. 27(2) to (6) - based on ICAC CAs paras 9 (11)(a) and (b)).

116. Where the NCSC makes an application and the Board is satisfied at a hearing that a person has shown a lack of capacity to act as an auditor, liquidator or liquidator of a specified corporation it will be able, in addition to or instead of cancelling or suspending the registration of a person, to deal with the person by:

- (a) imposing a fine not exceeding \$1000;
- (b) reprimanding the person;
- (c) requiring the person to engage in or refrain from engaging in specified conduct;

(CB s-cl 27(10)). This provision is based on ICAC CAs paras 9(11) (b) to (f) but expanded to enable a positive undertaking to be obtained (CB para. 27(10)(c)).

117. The Board will not be able to cancel or suspend the registration of an auditor, liquidator, or liquidator of a specified corporation, or otherwise deal with him under CB s-cl. 27(10), without first affording him the opportunity of a hearing (CB s-cl. 27(11)).

118. The Board will be able to require a person to pay all or part of the costs of a hearing where the person's registration as an auditor, liquidator or liquidator of a specified corporation is cancelled or suspended by the Board or where the Board fines, reprimands, or requires an undertaking from, a person (CB s-cl. 27(12) - cf. ICAC CAs para 9(11)(f) which does not specify that part of the costs of the hearing may be required to be paid). Where the Board take none of the above action against a person it will be able to require the NCSC to pay all or part of the costs of the hearing (CB s-cl. 27(13) - new provision).

119. Where the Board exercises its power under this provision as it applies in the ACT in relation to a person, it must notify the person of the decision within 14 days, setting out in the notice the findings on material questions of fact by reference to the evidence and giving the reasons for the decision (CB s-cl. 27(15) - cf. ICAC CAs s-sec. 9(12) which has no provision for the findings or reasons to be given and which does not stipulate the time in which the person is to be notified - see para 100(f) of the ex memo dealing with CB s-cl. 18(9) for the possibility that the States may adopt a different provision to that in the CB).

120. The time at which the decision of the Board is to come into effect is dealt with in CB s-cl. 27(16) - (18). Special provision is made where there are appeals to the Supreme Court from a decision of the Board (CB s-cl. 27(19)).

121. A person whose registration is suspended will be deemed not to be registered except to the extent that he is to remain on the relevant register of auditors, liquidators or official liquidators, and he is not to be released from the obligation to lodge a triennial statement with the NCSC (CB s-cl. 27(20)).

122. The recovery of penalties and cash imposed by the Board is to be dealt with in CB s-cl. 27(21) - (24).

123. The Board will be able to exercise any of its powers under this provision whether or not the conduct engaged in by the person might constitute an offence and whether or not any proceedings have been brought or are pending (CB s-cl. 27(14)).
(A statement made by a person in a hearing held by the Board will not be admitted in evidence in criminal proceedings against the person, except in respect of the falsity of the statement (CB s-cl. 27(25)).

124. Rights of appeal to the relevant Supreme Court from decisions of the relevant Board are given to aggrieved persons and to the NCSC (CB s-cl. 27(26) and (27)).

Cl. 28 : Certain persons not to apply for registration as auditor or liquidator

125. The following persons will not be entitled to apply for registration as an auditor or liquidator under the CB:

- (a) a person who has applied for registration in a participating jurisdiction and has not been notified of the result of the application (CB s-cl. 28(1));
- (b) a person whose application for registration in a participating jurisdiction has been refused, unless he has the leave of the Supreme Court of that jurisdiction (CB s-cl. 28(2)); and

- (c) a person whose registration in a participating jurisdiction has been cancelled or suspended, unless he has the leave of the Supreme Court of that jurisdiction (CB s-cl. 28(3)).

126. CB s-cl 29(1) provides that a person registered in another jurisdiction is deemed to be registered under this Act. The purpose of CB cl. 28 is to prevent a person whose application in another jurisdiction is pending or has been refused, or whose registration has been cancelled or suspended, from applying for registration under this Act to benefit from the "deeming" provision in CB cl. 29.

Cl. 29 : Certain persons deemed to be registered under this Act

127. The following persons will be deemed to be registered as an auditor, liquidator, or official liquidator, as the case may be, under this Act:

- (a) a person who is registered as an auditor, liquidator, or official liquidator in a participating jurisdiction (CB s-cl. 29(1)). The effect of this provision and the corresponding provisions of participating jurisdictions is that a person will need be registered in only one jurisdiction to be registered in all participating States and Territories. This provision is the basis of a national system for the registration of auditors, liquidators and official liquidators. Under existing legislation a person must apply and be registered in every State and Territory in which he wishes to carry on business; and

- (b) a person who is deemed to be registered as an auditor under cl. 19 of the companies codes of participating jurisdictions (i.e. Auditors-General).

(128. Note also cl. 26 of the C(TP)B which contains transitional provisions in relation to a person who was, immediately before the commencement of the CB, registered as an auditor or as a liquidator or appointed as an official liquidator under the ACT CO.

Cl. 30 : Auditors and other persons to enjoy qualified privilege in certain circumstances

129. Qualified privilege under the laws of defamation will be given to auditors and certain other persons in respect of statements and reports of auditors made in the course of their duties and the sending of accounts and reports to the NCSC (CB cl 30 - based generally on s. 167B of the VIC CA and WA CA). This provision differs from the present legislation in that the privilege of the auditor is not restricted to comment on the accounts but extends to the directors' report under CB cl. 270 (CB para. 30(1)(b)). The subject of verification of directors reports by auditors was discussed in two working papers received from Mr D.J. Stokes of the Department of Commerce in the University of Newcastle. The two papers are entitled "An A Priori Case for Verification of Disclosure in Directors Reports" and "The Nature and Extent of Contemporary Audit" and the former paper is expected to be published in a forthcoming edition of the ABLR.

DIVISION 3 : REGISTERS AND REGISTRATION OF DOCUMENTS

130. Division 3 of Part II of the CB (cls. 31 and 32) deals with registers and the registration of documents.

Cl. 31 : Registers

131. The NCSC will be able to keep appropriate registers and the public will have access to most documents lodged with the NCSC (CB cl. 31). This provision is based on ICAC CAS s. 12 except that:-

- (a) The classes of documents of which copies may be required by the public have been limited to documents that can be inspected by the public or and to certificates that can be issued by the NCSC (CB para 31(2)(c)).
- (b) The appeal provision in s-sec 12(6) of the ICAC CAS has been omitted from CB cl. 31 and has been included as part of a general appeal provision in Part XIV of the CB (see CB cl. 537).

132. A register kept under the ACT CO immediately before the proposed new companies code comes into operation will be deemed to be part of a register kept by the NCSC under the corresponding provision of the CB (See C(TP)B cl 11). Similar transitional provisions will probably be included in the Companies (Application of Laws) Bills of the other jurisdictions.

Cl. 32 : Relodging of lost registered documents

133. The procedures to be followed when a document lodged with the NCSC has been lost are set out in CB cl. 32 (based on ICAC CAs s. 13, except that CB s-cl. 32(1) has been broadened to permit any person - not merely the corporation - to lodge copies with the NCSC).

CB : PART III : CONSTITUTION OF COMPANIES

134. Part III of the CB (cls. 33 to 93) contains the following provisions dealing with the constitution of companies:

- Division 1 - Incorporation
- Division 2 - Names
- Division 3 - Powers and Status
- Division 4 - Transfer of Incorporation.

DIVISION 1 : INCORPORATION

135. Division 1 of Part III of the CB (cls 33 to 37) deals with the incorporation of a company.

136. Except where it provides otherwise, the CB uses the term 'company' to refer to a body incorporated under the Bill or under a corresponding previous law of the Territory. This term should be distinguished from the following terms that are used in the CB:

- 'body corporate' : used to refer to any incorporated body;

- 'corporation' : used to refer to any body corporate formed or incorporated within or outside the ACT. It includes any foreign company and any recognised company but excludes:
 - (a) public authorities, agents or instrumentalities of the Crown in right of the Commonwealth or of a Territory (see C & S (I & MP) A s.9);
 - (b) corporations sole;
 - (c) co-operative societies; or

(d) associations incorporated under the Associations Incorporations Ordinance, 1953.

(see CB s-cl. 5(1) - these exclusions will be modified by the application legislation in each jurisdiction.

- 'foreign company' : used to refer to:-

(a) a body incorporated outside the ACT, not being a recognized company, a corporation sole or public authority or instrumentality or agency of the Crown;

(b) an unincorporated society, association or other body which under the law of its place of origin may sue or be sued or hold property in the name of an officer of the society etc., and which does not have its head office or principal place of business in the ACT.

(see CB s-cl. 5(1)).

- 'recognized company' : used to refer to a body incorporated under the Companies Act of a participating jurisdiction (see CB s-cl. 5(1)).

- 'recognized foreign company' : used to refer to a company formed outside Australia and registered as a foreign company in a participating jurisdiction (see CB s-cl. 5(1)).

Cl. 33 : Formation of companies

137. The general requirements of the companies code for forming a company, the type of company, that may be formed, and certain restrictions on the size of associations and partnerships are set out in CB cl 33 (based on ICAC CAs s.14).

138. The size of associations and partnerships that can be formed for profit making purposes will be restricted to 20 persons (CB s-cl. 33(3)). However, where a profession or calling has been declared by notice in the Gazette, a partnership of more than 20 but not more than the number of members specified in the notice may be formed (CB s-cl. 33(4)). The Ministerial Council for Companies and Securities has not yet made a final decision on the professions that will be proclaimed or on the size restriction that will apply to these professions.

139. It will now be an offence for a person to participate in the purported formation of a profit making association or partnership that has more than 20 members. (CB para 33(3)(b) - new provision).

140. Omitted.

Cl. 34 : Proprietary companies

141. In certain circumstances a company will be able to be formed as a proprietary company (CB cl 34 - based on ICAC CAs s.15). For the definition of proprietary company see CB s-cl. 5(1).

142. The major advantages enjoyed by a proprietary company under the existing law are set out in Ford para 128.

Cl. 35 : Registration and incorporation

143. On receipt of the appropriate documents the NCSC will be able to register a company by registering the memorandum and articles (CB s-cl. 35(1)). As and from the date specified in the certificate of incorporation the subscribers and subsequent members are an incorporated company by the name set out in the memorandum (CB s-cl. 35(4)).

144. This clause is based on ICAC CAs s.16 except that:

- (a) There is no equivalent in the CB to s-sec. 16(2) of the ICAC CAs, which enables the registering authority to require a statutory declaration that the requirements of the legislation have been complied with (see Macarthur Report para. 75).

- (b) The entity created under this provisions is now referred to as an 'incorporated company' (CB s-cl. 35(4)) instead of as a 'body corporate' (ICAC CAs s-sec. 16(4) - see also Ford para 101).
- (c) A company will now have power under CB para 35(5)(d) to acquire, hold and dispose of "property" (rather than "land" as in ICAC CAs sub-s. 16(4)); and
- (d) There is a new provision that a company shall not be registered unless the proposed name of the company has been reserved under CB cl. 40 (CB s-cl. 35(9)).

Cl 36 : Membership of holding company

145. Except in certain circumstances, a corporation will not be able to be a member of, or hold a beneficial interest in shares in, a company that is its holding company (CB cl 36)

146. This provisions is based on ICAC CAs s.17 except that the CB provision has been widened (through the definition of "unit" see CB s-cl 5(1)) to ensure that a subsidiary cannot avoid the operation of the provisions by not taking a legal title to a share in the holding company, even though the subsidiary acquires a beneficial interest in the share (CB s-cl 36(2)). This should overcome the doubts raised by Bond Corporation Pty Limited v. White Industries Limited 1980 C.L.C. 34, 365 as to

the effectiveness of s. 17 of the ICAC CAs in this area. In that case Needham J said that s-sec. 17(1) 'refers to registered interests and does not attach contracts or unregistered transfers'. See also D.E. Harding (SULS sem).

Cl. 37 : Requirements as to memorandum

147. The requirements as to the memorandum of a company are set out in CB cl. 37.

148. This provision is based on ICAC CAs s. 18 except that:

- (a) The manner in which a body corporate should subscribe is expressly dealt with (CB s-cl. 37(4)).
- (b) A subscriber will no longer be required to use his own handwriting to indicate the number of shares being subscribed for.
- (c) Each subscriber to the memorandum will now be required to state, if the shares of the company are divided into classes, the class or classes of shares that he agrees to take (CB s-para. 37(2)(a)(ii) - new provision).

DIVISION 2 : NAMES

149. Division 2 of Part III of the CB (cls 38 to 66) sets out the provisions of the legislation governing the names of companies.

150. These provisions seek to give effect to Part V of the Formal Agreement so far as that Part relates to the names of companies:

PART V - NAMES AND REGISTRATION

11. The legislation of the Commonwealth and of the States provided for by Part IV (in this Part referred to as "the Commonwealth and State legislation") shall include provisions under which, except with the consent of the Ministerial Council -

- (a) a company shall not be incorporated in any State or Territory under a name which is undesirable or is a name of a kind which the Ministerial Council has directed to be unacceptable;
- (b) a body formed outside Australia shall not be registered as a foreign company in any State or Territory under a name which is undesirable or is a name or a name of a kind which the Ministerial Council has directed to be unacceptable; and
- (c) a body formed within Australia other than a company shall not be entitled to be registered as a foreign company in any State or Territory under a name which is undesirable or is a name or a name of a kind which the Ministerial Council has directed to be unacceptable.

12. The Commonwealth and State legislation shall include provisions under which -

- (a) a body which immediately before legislation provided for by clauses 8 and 9 comes into force is -
 - (i) a company incorporated in a State or Territory;

- (ii) a body formed outside Australia and registered as a foreign company in a State or Territory;
 - (iii) a body formed within Australia other than a company and registered as a foreign company in any State or Territory, may carry on business or establish a place of business under the name by which, and in any State or Territory in which, it is so incorporated or is registered as a foreign company or in which it is a recognised company and has reserved that name;
- (b) a company incorporated in any State or Territory and a body formed outside Australia which is registered as a foreign company in any State or Territory may reserve its name in any other State or Territory if its name is, in that other State or Territory, not undesirable and not a name of a kind which the Ministerial Council has directed to be unacceptable;
- (c) a company of body which has reserved its name in a State or Territory other than the State or Territory of its incorporation or formation will not be required -
- (i) to register in that other State or Territory in order to carry on business or establish a place of business in that other State or Territory; or
 - (ii) to lodge any documents in that other State or Territory for the purpose of carrying on business or establishing a place of business in that other State or Territory; and
- (d) a body formed within Australia other than a company shall not be entitled to carry on business or establish a place of business in any State or Territory other than the State or Territory in which it is formed unless it is registered in that other State or Territory as a foreign company.

13. The Commonwealth and State legislation shall include provisions by virtue of which -

- (a) a company incorporated in a State or Territory;
- (b) a body formed outside Australia and registered as a foreign company in any State or Territory;

- (c) a body formed within Australia other than a company and registered as a foreign company in any State or Territory,

shall not, except with the consent of the Ministerial Council, change its name to a name which, in any State or Territory in which it is incorporated or in which its name is reserved, as a recognised company, is undesirable or is a name or a name of a kind which the Ministerial Council has directed to be unacceptable.

151. The basic scheme for the reservation of names as set out in Division 2 of Part III of the CB is as follows:

- (a) A company or foreign company will not be able to register a name that is undesirable, etc. (CB s-cl. 38(1)).
- (b) A company or foreign company will not be able to be registered, or change its name unless its name has been reserved (CB s-cl. 35(9), 65(2), and 520(1) and 520(2)).
- (c) A person may apply for the reservation in the ACT of a name of a company or a foreign company (CB s-cl. 40(1), 46(1) and 46(2)).
- (d) Subject to (e), if the name is one by which the company or foreign company could be registered (see CB s-cl. 38(1)), the NCSC will reserve the name for two months (CB s-cl. 40(2) and 46(3)). The reservation can be extended (CB cl. 58).

- (e) Where the application states that it is desired to reserve the name or new name of a (proposed) company or (proposed) foreign company in a participating jurisdiction (see (f)), and the corporation could not be registered by that name in that jurisdiction, the NCSC will not be able to reserve the name (CB s-cla. 40(3), 43(3), 46(4) and 49(3)).

- (f) The prescribed form for the reservation of a name in the ACT will require specification of each jurisdiction in which it is desired to reserve the name or new name of a (proposed) company or (proposed) foreign company (CB s-cla. 40(1), 43(1), 46(1), 46(2) and 49(1)).

- (g) Where a name has been reserved under the legislation of a participating jurisdiction (see CB s-cla. 40(2), 43(2) and 46(3)) and the application for reservation stated that it was desired that the name be reserved in the ACT, the name will be reserved in the ACT until the reservation ceases, or until cancelled by the NCSC in the ACT, or cancelled under the law of that participating jurisdiction (CB cls 41, 44 and 47).

- (h) The reservation of a name will be cancelled in respect of the name or new name of a company or (intended)

foreign company, or in respect of the proposed transfer of incorporation of a recognized company or foreign company, where:

- (i) the name is not available in a participating jurisdiction requested in the application for reservation (CB paras 40(5)(a), 43(5)(a), 46(6)(a), 49(5)(a), 52(5)(a) and 55(5)(a)); or
- (ii) the NCSC is notified in writing that the reservation is no longer required (CB paras 40(5)(b), 43(5)(b), 46(6)(b), 49(5)(b), 52(5)(b) and 55(5)(b)).

(i) The registration of a name will be cancelled:

- (i) if the name was the name by which a company or registered foreign company was registered before it changed its name to a new name (CB paras 43(4)(d) and 49(4)(d));
- (ii) if, on transfer of incorporation of a recognized company or foreign company into the ACT the name was registered in the ACT under other provisions than those applying to reservation and registration on such transfer of incorporation (CB paras 52(4)(d) and 55(4)(d));

- (iii) if, on transfer of incorporation of a recognized company or foreign company to a participating jurisdiction, the name was registered in the ACT under other provisions than those applying to reservation and registration on such transfer of incorporation (CB paras 54(d) and 57 (d));
- (iv) if a recognized company or recognised foreign company notifies the NCSC that the registration is no longer required in the ACT, or if the NCSC is notified under a law of a participating jurisdiction that the registration is no longer required in the ACT (CB cl. 62);
- (v) if a registered foreign company ceases to be registered under Division 5 of Part XIII (CB cl. 63); or
- (vi) if a name was registered by mistake in respect of a recognized company or recognized foreign company, when it was not available for reservation (CB cl. 64).

152. The content of CB cls 38 to 66 is outlined below.

Cl. 38 : Interpretation

153. Except with the consent of the Ministerial Council, a name shall not be taken to be available for reservation and registration if it is likely to be mistaken for a name already reserved or registered, or is undesirable, or is a name or kind of name that the Ministerial Council has directed the NCSC not to register (CB cl. 38).

154. Note s-cl. 13(2) of the C(TP)B which deals with a consent given under s-sec. 22(1) of the ACT CO for the registration of a company by a specified name.

Cl. 39 : Names of particular classes of companies

155. The names and abbreviated forms of particular classes of companies are dealt within CB cl. 39 (cf ICAC CAs s-secs 22(3) and (6)).

Cl. 40 : Reservation and registration of name of intended company

156. If the NCSC is satisfied that an application is made in good faith, the name of an intended company may be reserved in the ACT for two months from the date of lodgement of the application with the NCSC (CB s-cl. 40(2)). Where the application also requires the name to be reserved in a participating State or Territory and the name is not available for reservation in any of the required jurisdictions, then the NCSC will not reserve the name (CB s-cl. 40(3)).

157. Where the NCSC registers a company under CB cl. 35 (the company being required by CB s-cl. 35(9) to first reserve it under CB cl. 40) the name is registered by the NCSC and ceases to be reserved (CB s-cl. 40(4)). This registration remains in force until the registration is cancelled by the NCSC (see CB s-cl. 40(7)).

158. If the name is reserved and it is found that the name was not available for reservation in the ACT or in any of the required jurisdictions, the NCSC will cancel the reservation of the name (CB para 40(5)(a)). The NCSC will also cancel the reservation where the applicant notifies the NCSC in writing that he no longer desires the name to be reserved (CB para 40(5)(b)). Reservation of a name does not of itself entitle an intended company to be registered by that name (CB s-cl. 40(6)).

Cl. 41 : Reservation of name of intended recognized company

159. The NCSC will reserve in the ACT a name that has been reserved in a participating State or Territory where the application asks for reservation of the name in the ACT. The reservation remains in force until it ceases to be reserved or is cancelled by the NCSC under the provision in the participating jurisdiction corresponding to CB cl. 40 (CB cl. 41 - see also cl. 44 dealing with the reservation of the proposed new name of a recognized company).

Cl. 42 : Registration of name of recognized company

160. Where a name is reserved in the ACT as the name of an intended recognized company (see CB cl. 41) it will be registered in the ACT by the NCSC once it is registered in the participating State or Territory where that recognized company is incorporated. Such registration remains in force until cancelled by the NCSC or until the registration in the participating jurisdiction is cancelled (CB cl 42 - see also cl. 45 dealing with the registration of a new name of a recognized company).

Cl. 43 : Reservation and registration of proposed new name of company

161. A company will be able to have reserved and registered a proposed new name (CB cl 43 - which follows the same pattern as CB cl 40 relating to the reservation and registration of the name of an intended company).

Cl. 44 : Reservation of proposed new name of recognized company

162. A recognized company will be able to reserve a proposed new name which has been reserved in a participating State or Territory where that recognized company is incorporated (CB cl. 44 - which follows the same pattern as CB cl. 41 relating to the reservation of the name of an intended recognized company).

Cl. 45 : Registration of new name of recognized company

163. A recognized company will be able to register in the A.C.T. a new name which

- has been reserved in the A.C.T. (see CB cl. 44); and
- registered in the participating State or Territory where that company is incorporated

(CB cl 45 - which follows the same pattern as CB cl 42 dealing with the registration of the name of a recognized company).

Cl. 46 : Reservation and registration of name of intended foreign company or foreign company

164. An intended foreign company or foreign company will be able to reserve and register its name (CB cl 46).

165. This provision follows the pattern of CB cl. 40, with the additional provision that notwithstanding CB para 38(1)(a) a name is not to be taken as unavailable for reservation by reason only that the name is already reserved or registered in respect of the foreign company that has applied for the reservation under this clause. (CB s-cl. 46(9)).

Cl. 47 : Reservation of name of intended recognized foreign company or recognized foreign company

165A. An intended recognized foreign company or recognized foreign company will be able to reserve its name in the ACT (CB cl. 47 - which follows the pattern of CB cl. 41 relating to the reservation of a name of an intended recognized company).

Cl. 48 : Registration of name of recognized foreign company

166. A recognized foreign company will be able to register its reserved name in the ACT once that name is registered in its 'home' jurisdiction (CB cl 48 - which follows the pattern of CB cl 42 relating to the registration of a name of a recognized company).

Cl. 49 : Reservation and registration of proposed new name of registered foreign company

167. A registered foreign company will be able to apply for the reservation and registration of a new name in the ACT (CB cl 49).

168. This provision (like CB cl. 43) follows basically the same pattern as CB cl. 40 relating to the reservation and registration of the name of an intended company - except that CB cl. 49 contains no equivalent to CB s-cl. 40(6)).

Cl. 50 : Reservation of proposed new name of recognized foreign company

169. A recognized foreign company will be able to register in the ACT a proposed new name which has been reserved in a participating State or Territory which is the 'home jurisdiction' of that recognized foreign company (CB cl. 50 - which is basically the same as CB cls. 41 and 44).

Cl. 51 : Registration of new name of recognized foreign company

170. A recognized foreign company will be able to register in the ACT a new name which it has reserved in the ACT and which has been registered (under a provision corresponding to CB cl. 49) in a participating jurisdiction which is the 'home jurisdiction' of that recognized foreign company (CB cl. 51).

Cl. 52 : Reservation and registration of name of recognized company proposing to transfer incorporation to the Territory

171. A recognized company (i.e., a body incorporated as a 'company' in another jurisdiction covered by the co-operative scheme) proposing to transfer its incorporation to the ACT will be able to apply to reserve and register its name in the ACT (CB cl. 52).

172. This provision follows the pattern of CB cl. 40, with the additional provision (as in CB cl. 46) that notwithstanding CB para. 38(1)(a) a name is not to be taken as unavailable for reservation by reason only that the name is already reserved or registered in respect of the recognized company that has applied for reservation under this clause (CB s-cl. 52(8)). Also, if the registration of the name in respect of the recognized company is already in force the NCSC will cancel that last-mentioned registration (CB para. 52(4)(d)).

Cl. 53 : Reservation of name of company or recognized company proposing to transfer incorporation to participating State or Territory

173. CB cl 53 deals with the reservation of names where a company or recognized company proposes to transfer its incorporation to another participating State or Territory:-

- (a) Where an ACT registered company has reserved a name in a participating State or Territory under a provision corresponding to CB s-cl. 52(2), the NCSC will reserve the name in the ACT (CB s-cl. 53(1)).

- (b) Similarly, where a recognized company in the ACT has reserved a name in a participating jurisdiction and the application states that the name of the recognized company is registered in the ACT, the NCSC will have to reserve that name applied for in the ACT, and such reservation remains in force until it ceases or is cancelled by the NCSC (CB s-cl. 53(2)).

Cl. 54 : Registration of name of recognized company after transfer of incorporation to participating State or Territory

174. The following provisions will apply to registration of the name of a recognized company after the transfer of its incorporation.

- (a) Where a company or recognized company has reserved a name and the name is then registered under the law of a participating State or Territory, the NCSC will be required to register the name in the ACT and such registration remains in force until cancelled by the NCSC.

- (b) Also, if the registration of the name in respect of that company or recognized company is already in force the NCSC will have to cancel that last-mentioned registration.

(CB cl. 54).

Cl. 55 : Reservation and registration of name of foreign company proposing to transfer incorporation to the Territory

175. CB cl. 55 deals with the reservation and registration of the name of a foreign company proposing to transfer incorporation (and follows the pattern of CB cl. 52).

Cl. 56 : Reservation of name of foreign company proposing to transfer incorporation to participating State or Territory

176. CB cl. 56 deals further with the reservation of a name where a foreign company proposes to transfer incorporation (and is along the lines of CB s-cl. 53(2)).

Cl. 57 : Registration of name of foreign company that has become a recognized company after transfer of incorporation to participating State or Territory

177. CB cl. 57 deals with registration of the name of a foreign company that has become a recognized company after transfer of incorporation. The provision follows the pattern

of CB cl. 54 which deals with the registration of the name of a recognized company after it has transferred its incorporation to a participating State or Territory.

Cl. 58 : Extention of reservation

178. Where an application is made in good faith during the currency of a reservation the NCSC may extend the reservation of a name for up to two months (CB cl. 58).

Cl. 59 : Notification that registration of name desired in a State or another Territory

179. A company or registered foreign company will be able to notify the NCSC that it desires a name it has registered to be registered in a State or another Territory as well (CB cl. 59).

Cl. 60 : Registration of name of recognized company or recognized foreign company in the Territory

180. The NCSC will be required to register in the ACT a name notified by a recognized company or recognized foreign company to the NCSC under a provision in another jurisdiction corresponding to CB cl. 59. Before the name is registered in the ACT it has to be available for reservation, but once registered it remains in force until cancelled by the NCSC. (CB cl. 60).

Cl. 61 : Notification that registration of name no longer desired in a participating State or Territory

181. The NCSC will have to be notified where registration of a name is no longer desired in a participating State or Territory. Notification is to be in writing. CB s-cl. 61(1) deals with the case where the name has been registered in respect of a company, whilst CB s-cl. 61(2) deals with the case of a registered foreign company.

Cl. 62 : Cancellation of registration where registration in the Territory no longer desired

182. Where registration of a name is no longer desired the NCSC will be required to cancel the registration of a name in respect of:-

- (a) a recognized company (CB s-cl. 62(1)) and
- (b) a recognized foreign company (CB s-cl. 62(2)).

Cl. 63 : Cancellation of registration where company or foreign company dissolved or foreign company ceases to be registered

183. The NCSC will be required to cancel the registration of a name where a company or registered foreign company is dissolved or where a registered foreign company ceases to be registered under Division 5 of Part XIII (CB cl 63).

Cl. 64 : Cancellation of registration where name registered by mistake

184. The NCSC will be able to cancel the registration of a name of a recognized company or recognized foreign company in the ACT, where the name has been registered by mistake because at the time it was reserved or registered it was not in fact available for reservation (CB cl. 64).

Cl. 65 : Change of name

185. A company will be able, by special resolution and with the approval of the NCSC, to change its name to a name reserved under cl. 43 (CB s-cl. 65(1) and (2)).

186. The NCSC will be able to direct a company to change its name if the name of the company, for whatever reason, is a name not available for reservation in the ACT (CB s-cl. 65(3)). This power will not be able to be exercised without Ministerial Council approval where an A.C.T. company has used the same name since before 1 July 1962 (the date of commencement of the ACT CO) (CB s-cl. 65(4)).

187. These provisions are based on ICAC CAs s. 23.

Cl. 66 : Omission of "Limited" in names of charitable and other companies

188. The NCSC will be able to license a limited company

to be registered without the word "Limited" as part of its name if the NCSC is satisfied that the company is being formed for charitable or certain other purposes (based on ICAC CAs s.24).

189. This clause differs from s. 24 of the ICAC CAs as follows:

- (a) It is the NCSC rather than the individual Minister who will authorize the omission of the word "Limited" (see s-cl. 32(3) of Formal Agreement).
- (b) The term "principal executive officer" is used in place of "manager".
- (c) In CB s-cl. 66(7) (corresponding to ICAC CAs s-sec. 24(4C)), the words "or a company included in a class of companies" have been omitted after the second occurrence of the word "company."
- (d) Any alteration in the memorandum or articles of a company (except a change of name) will not have effect unless the alteration has been approved by the NCSC. Provided that approval is obtained, the alteration has effect notwithstanding a failure to obtain any consent or approval required to be obtained by virtue of a provision contained in the licence or in the memorandum of the company (CB s-cl. 66(11) and (12) - cf ACT Ordinances Revision (Administrative Arrangements) Ordinance 1976 para 17(b)).

190. See also s-cl. 13(3) of the C(TP)B which deals with a licence issued under a corresponding previous law of the ACT).

DIVISION 3 : POWERS AND STATUS

191. Division 3 of Part III of the CB (cls. 67 to 82) contains various provisions dealing the powers and status of companies.

Cl. 67 : Powers

192. The general powers that will be conferred on companies are set out in CB cl. 67 (based on ICAC CAs s.19 - cf NCB cls. 32 and 33 which took a different approach). See also Schedule 2 which is based on ICAC CAs Schedule 3.

Cl. 68 : Ultra vires transactions

193. No act of a company will be invalid by reason only that the company did not have the capacity or power to do the act (CB cl. 68 - based on ICAC CAs s.20 - cf NCB cls. 34 to 36 which took a different approach).

Cl. 69 : Change of status

194. The requirements of the legislation in relation to a change of status by a company are set out in CB cl. 69.

195. This provision is based on s. 25 of the ICAC CAs except that:

- (a) The additional words "or any corresponding provision of a previous law of the Territory" have been inserted at the end of CB para. 69(1)(a).
- (b) A company limited by shares will now be able to convert to a company limited both by shares and guarantee (CB para. 69(1)(c) - new provision).

196. This second amendment will enable a non-profit company limited solely by shares to convert to a company limited by both shares and guarantee so that such a company will pay a reduced fee under a proposed item in the Companies (Fees) Regulations that will correspond to item 28(b) of the Second Schedule to the existing ICAC CAs.

Cl. 70 : Change from public to proprietary company or from
proprietary to public company

197. Subject to certain conditions, a public company will be able to convert to a proprietary company and vice versa (CB cl. 70).

198. This provision is based on ICAC CAs s. 26 but with the following amendments:

- (a) The requirement under ICAC CAs para 26(2)(b) to lodge a statement in lieu of a prospectus has been omitted.

(b) ICAC CAs para 26(2)(c), dealing with statutory declarations, has been omitted.

(c) It will now be possible for the Supreme Court to review a proposed conversion in the same way and to the same extent as it can review (see CB s-cl. 73(6) to (13)) a proposed alteration of the memorandum (CB s-cl. 70(4)).

Cl. 71 : Default in complying with requirements as to proprietary companies

199. If a proprietary company does not comply with CB para 34(1)(c) or (d), the Supreme Court or the NCSC will be able to determine that the company has ceased to be a proprietary company (CB cl 71 - based on ICAC CAs s.27).

200. It is proposed that the Supreme Court of each other jurisdiction covered by the co-operative scheme, will exercise in relation to its jurisdiction's law, the powers and functions vested in the ACT Supreme Court by the CB.

Cl. 72 : General provisions as to alteration to memorandum

201. The general requirements of the legislation in relation to alterations to the memorandum of association are set out in CB cl. 72.

202. This provision is based on ICAC CAs s. 21, but with the following amendments:-

- (a) Registration will not be required of a resolution for cancellation of a registered name under CB cl. 121 (CB s-cl. 72(5)) and, if requested, the NCSC must certify the registration of a resolution or document (CB para 72(6)(b)) in addition to the automatic certification of Court orders (CB para 72(6)(a)) - cf. ICAC CAs s-sec 21(3)).
- (b) The NCSC will now be required to keep a copy of any certificate issued and such copy will be treated as a document lodged with the NCSC (CB s-cl. 72(10) - new provision).

Cl. 73 : Alterations of provisions of memorandum

203. The requirements of the legislation in relation to alterations to the memorandum of association are set out in CB cl. 73.

204. This provision is based on ICAC CAs s. 28 except that:

- (a) It is made clear that the company's ability to alter its memorandum will extend to the powers as well as the objects of the company (CB s-cl. 73(1)).

- (b) A company will be able, by a special resolution, to alter a provision of its memorandum that could lawfully have been contained in the articles of the company (CB s-cl 73(1) and (5) - in relation to CB s-cl 73(5) see CB s-cl 125(3)). This provision is based on s. 23 of the UK Companies Act 1948 except that the CB requires the alteration to be made by special resolution. Amendments consequential to these new provisions are made in CB s-cl 73(6), (8) and (11).

- (c) The memorandum will be able to provide that a special resolution will have no effect unless a further condition has been complied with (CB s-cl 73(3) and (4) - corresponding provisions in CB cl. 76 dealing with alteration of articles).

- (d) CB para 73(6)(c), corresponding to sub-s. 28(3) of the VIC CA, has been redrafted to cover the situation where there are no trustees for debenture holders, as well as the situation where there are no trustees for a class of debenture holders.

- (e) CB s-cl 73(8), corresponding to VIC CA s-sec 28(5), has been redrafted so that the new para 73(8)(a), corresponding to para 28(5)(b) of the VIC CA, is now limited to an alteration of the memorandum with respect to the objects of the company.

Cl. 74 : Articles of association

205. The requirements as to the articles of a company are set out in CB cl. 74.

206. This provision is based on ICAC CAs s.29 apart from CB s-cl 74(4) which is new and deals with the corporate subscriber.

Cl. 75 : Adoption of Table A or B

207. A company other than a no liability company will be able to adopt all or any of the regulations in Table A; a no liability company will be able to adopt all or any of the regulations in Table B (CB cl 75 - based on ICAC CAs s. 30). These Tables are set out in Schedule 3.

208. See cl. 15 of the C(TP)B which deals with the continued application of Tables A and B of the ACT CO in certain circumstances.

Cl. 76 : Alteration of articles

209. A company will be able, subject to its memorandum and the CB, to alter or add to its articles by special resolution (CB cl. 76).

210. This provision is based on ICAC CAs s. 31 except that the memorandum of the company will be able to include a provision to the effect that a special resolution altering the articles will not have any effect unless a further condition has been complied with (CB s-cl. 76(2) and (3) - corresponds to CB s-cl. 73(3) and (4) in provisions dealing with alteration of memorandum).

Cl. 77 :Memorandum and articles of companies limited by
guarantee

211. A company limited by guarantee, registered on or after 1 October 1954, cannot give a person who is not a member a share in the divisible profits of the company by any provision in its memorandum or articles or by any resolution of the company (CB cl. 77 - based on ICAC CAs s.32).

212. The date specified above will differ in the legislation of other participating jurisdictions. For example, in Victoria the date will be 31 January 1911.

Cl. 78 : Effect of memorandum and articles

213. The memorandum and articles will bind the company and the members of the company as if they had been signed and sealed by each member (CB s-cl. 78(1)). No member will be bound by an alteration to the memorandum or articles which is made after he became a member and which requires him to subscribe to more shares unless he agrees in writing to be so bound (CB s-cl. 78(3)).

214. This provision is based on ICAC CAs s. 33.

Cl. 79 : Copies of memorandum and articles

215. The requirements relating to the issuing by the company of copies of the memorandum and articles are set out in CB cl. 79.

216. This provision is based on ICAC CAs s.34 except that:

(a) The NCSC will be able to require a company to lodge with the NCSC a printed copy of the articles of association as altered (CB s-cl. 79(3) - new provision).

(b) CB s-cl. 79(4) differs from the corresponding ICAC CAs s-sec. 34(3) in that the words "and a copy of the articles shall not be lodged with the Commission" have been inserted after "shall not be issued".

Cl. 80 : Confirmation of contracts and authentication and execution of documents

217. There will be provisions dealing with:

- (a) the formalities for making, varying or discharging a contract by a company (CB s-cl. 80(1) to (6)): these provisions amend s-sec. 35(1) of the ICAC CAs and some are based on s-secs. 31A(1) to (5) of the VIC Instruments Act and s-cl. 69(1) to (4) of the NCB; and
- (b) the authentication and execution of documents (CB s-cl. 80(7) to (12)): s-cl. 80(7) to (11) are based on s-secs. 35 (2) to (5) of the ICAC CAs; s-cl 80(12) is new and is based on NCB s-cl. 69(10).

218. The principal new provisions are as follows:

- (a) A person acting under the authority of a company will be able to make, vary or discharge a contract on behalf of the company in the same manner as if the contract were made, varied or discharged by a natural person (CB s-cl. 80(1)).

- (b) Such a contract will bind the company and other parties to the contract (CB s-cl. 80(2)).
- (c) A contract or document executed under the common seal of the company will not be invalid by reason only that a person attesting the affixing of the common seal was interested in that contract or document or in the matter to which it related (CB s-cl 80(3)). See Sutherland 'Effron Tie - a brief revisit', Law Institute Journal (Victoria) December 1979, pp. 729 to 732.
- (d) The new provisions do not prevent a company being able to make, vary or discharge a contract under its common seal (CB s-cl. 80(4)).

Cl. 81 : Ratification of contracts made before formation of company

219. CB cl. 81 is a new provision intended to reform the existing common law in relation to "pre-incorporation contracts". This clause is based on a Report by the Victorian Law Reform Commissioner entitled "Pre-Incorporation Contracts" (No. 8, published 30 April 1979).

220. The first three paragraphs of the Report provide a concise statement of the existing law:

"1. The law lies within a small compass and can be stated briefly. A limited liability company is an artificial creature created by the law. It is both elementary and axiomatic that until the act of creation is performed it has no existence and can neither acquire nor give rights and thus be subject to obligations. Prior to its coming into existence it can have no "agent" acting for it, and consequently cannot be held liable on the basis that any person, such as the promoter of the company, contracted as "agent" for it. This is so even if the promoters are in fact the only members of the company after its formation.

2. Since 1866 it has been clear in English, Canadian and Australian law that a company when formed cannot adopt or ratify any act performed or obligations incurred on its behalf before incorporation and all that can be done to give binding force to such acts or obligations is to enter into a new contract on the same terms as the old.

3. Attempts to imply new contracts from the conduct of a company after registration have generally not met with success. Nor is it easy to attach the obligations arising under these what are loosely called "pre-incorporation contracts" to the promoters or other individuals who purported to act on behalf of companies yet to be formed. Only if it is clear that all parties to the contract knew that the company on whose behalf the contract was made was not in existence, is it likely that these company "agents" will be held personally liable (and by the same token entitled to the benefits of the contract). But generally a court will have to try to spell out from the manner in and circumstances under which the contract was signed (if a contract in writing) or from the conduct of the parties (if not in writing) what their real intention was. This is usually neither an easy nor satisfactory course."

221. The difficulty that arises from the present law is that, during the time that it takes for a company to be

incorporated (a period that may take months), the promoters of the proposed company may undertake many actions intended to have legal effect and directed to the successful launching into the commercial world of the fledgling company. At least some of these actions may require legally binding agreements. In the case of large enterprises with the services of specialised commercial lawyers, most of these legal difficulties can be overcome.

222. Small companies are in a different position, however, and the law is far less satisfactory for them. The promotions are sometimes executed by persons who are unaware of all the pitfalls. The result is that "the overwhelming majority of cases concerning pre-incorporation contracts have arisen in connection with small non-listed companies" (Canadian study cited with approval, VIC L.R.C. Report para. 15). That the present state of the law is unsatisfactory was made clear by Windeyer J in Black v Smallwood 117 CLR 52 when he said of the decision in the case, which was in conformity with the requirements of the law: "...I do not think that it accords with a belief that bargains should be kept."

(See also Austin, SULLS Sem 34 to 56; Baxt, 1980 A.B.L.R. 408 to 411, Ford paras 544 to 550),

223. Reform of the law relating to pre-incorporation contracts has been carried out or recommended elsewhere in the world (e.g. U.K. Jenkins Committee para 44, s. 13 of Ghana Company Code, s.14 of Canada business Corporations Act). The general approach has been to permit a company to adopt or ratify a contract made on its behalf before its incorporation, but to provide that, until a pre-incorporation contract is ratified, the person who entered into the contract is, unless otherwise agreed, personally bound by the contract and entitled to the benefit of it.

224. Although there has been no known judicial interpretation of them, the Victorian Report believes such provisions for personal responsibility and entitlement are a "potential source of difficulty and uncertainty" (para. 34). The difficulties relate to the fact that this provision may impose on a person wishing to contract with the company contractual obligations to a person with whom he had no intention of contracting. These difficulties are accentuated when the agreement is one for employment or the allowing of credit (para. 35). The Victorian Report sets out some hypothetical circumstances by way of the difficulties and uncertainties that could arise from statutory provisions for a promoter or "agent" of a company not yet incorporated to be "liable on the contract" or that he shall be "entitled to the benefits the contract" (paras 36 - 40).

225. The alternative approach proposed by the Report and included in the CB is to make a person who purports to execute a contract on behalf of a non-existent company bear the risk -

- (a) that the company will not be incorporated; or
- (b) that the company will not ratify the contract.

226. This is achieved in the following way:

- (a) a person purporting to contract in the name of the non-existent company will be liable for damages if, within a reasonable time, the company is not incorporated or, if incorporated, does not ratify the contract; and
- (b) the measure of damages shall be the same as on a discharge for breach by the company of the unperformed obligations under the contract had it been ratified.

227. The main provisions of the CB relating to the ratification of, and liability for, pre-incorporation contracts are as follows:

(a) Where a non-existent company (by a person, agent or trustee) purports to contract and the company is then formed within a reasonable time, the company will then, within a reasonable time, be able to ratify the contract (CB s-cl. 81(2)) and be entitled to the benefit of the contract as if the company had been formed and had been a party to the contract (CB s-cl. 81(3)).

(b) Where a non-existent company purports to contract, and either the company is not formed within a reasonable time thereafter or the contract is not ratified within a reasonable time after formation, any other party to the contract will be able to recover damages from the person who purported to execute the contract on behalf of the non-existent company. Those damages will be equivalent to damages which would have been obtainable if the company had been formed and had ratified the contract and the contract had been discharged by breach because of the refusal or failure of the company to perform any obligations under the contract (CB s-cl. 81(4)).

(c) Where proceedings for damages are brought under CB s-cl. 81(4) and the company has been formed, the court

may order the company to give up property or pay for any benefit received as a result of the contract and (or as an alternative) the court may order the company to pay all or some of the damages for which the defendant may be found liable under s-cl. 81(4)(CB s-cl. 81(5)).

- (d) Where proceedings are brought under CB s-cl. 81(4), and the court orders the company to give up property or pay for any benefit received, the court may refuse to award damages or may award lesser damages (CB s-cl. 81(6)).

- (e) Where the contract is ratified but breach of contract occurs due to a refusal or failure to perform, and proceedings are brought against the company, the court will be able, if it thinks it just and equitable, to order the person executing the contract on behalf of the company to pay part or all of the damages (CB s-cl.81(7)). This provision relates to circumstances where it is just and equitable that the promoter's liability should not cease on ratification and the promoter should remain liable: e.g. where the promoter is the major share holder of a company which, because it is undercapitalised, is unable to meet its contractual obligations. (Vic. Report Para 45).

- (f) A person will be exempt from liability in relation to a pre-incorporation contract where the other party or parties consent in writing to that person being exempted. (CB s-cl. 81(8)).
- (g) CB s-cl. 81(4) and 81(7) will not apply to allow a party to recover damages from a person in relation to a pre-incorporation contract where that party has consented to the person being exempted from liability under CB s-cl. 81(8) (CB s-cl. 81(8A)).
- (h) If the company is formed and it and the other parties to the contract substitute another contract for it, the person who executed the first contract on behalf of the company will be discharged from all liabilities in relation to it (CB s-cl. 81(9)). The purpose of this provision is to ensure that a novation by the company and the other contracting party will discharge the promoter's statutory liability.
- (i) Rights and liabilities under clause 81 in relation to a contract are in substitution for rights and liabilities in relation to the contract accruing apart from the clause (CB s-cl. 81(10)).

(j) For the purpose of clause 81, a trustee for a proposed company who purports to enter into a contract on its behalf will not have any right of indemnity against the company in respect of the contract where the company is formed within a reasonable time after the purported entry into the contract but the company does not ratify the contract within a reasonable time after it is formed (CB s-cl. 81(11)). The purpose of this provision is to prevent the operation of equitable principles by which the trustee may be able to avoid liability for statutory damages under CB s-cl. 81(4). (See Austin SULS sem).

(k) A contract will be able to be ratified by a company under clause 81 in the same manner as a contract may be made by a company under clause 80 (CB s-cl. 81(23)). The provisions of clause 80(3) relating to non-invalidity of contracts by reason that interested persons attested the affixing of the seal will also apply.

Cl. 82 : Prohibition on carrying on business with fewer than statutory minimum number of members

228. It will be an offence for a company (other than a wholly-owned subsidiary of a holding company) to carry on business for more than 6 months if the number of members of the company is reduced below 2 in the case of a proprietary company, or below 5 members in the case of any other company (CB cl 82 based on ICAC CAs s.36).

DIVISION 4 : TRANSFER OF INCORPORATION

Background

229. At present only NSW has general transfer of domicile legislation: Companies (Transfer of Domicile) Act 1968. This Act enables companies to transfer into NSW, but does not permit companies to transfer out of NSW. Other States (e.g. Victoria, South Australia) have passed private Acts to permit a transfer of domicile to those States by specific bodies corporate.

230. Division 4 of Part III (CB cls 83 to 93) contains provisions enabling a company incorporated in one jurisdiction to transfer its domicile to another jurisdiction. The provisions cover both 'transfer in' and transfers out' of jurisdictions covered by the Formal Agreement. They also permit a company incorporated outside Australia or in a non-participating Australian jurisdiction to transfer its domicile to a participating jurisdiction.

Cl. 83 : Certificate authorizing application for transfer of incorporation

231. A company will be able to apply to the NCSC for a certificate authorizing the company to apply for registration as a company under the corresponding law of a participating State or Territory (CB s-cl. 83(1)).

232. A company will not be entitled to make an application (under CB s-cl. 83(1)) if the company is being wound up, if an application to wind up the company has been lodged and has not been dealt with, if a receiver or receiver and manager has been appointed and is acting in respect of the whole or part of the company's property, if the company is under official management or if the company has entered into a compromise or arrangement with another person or persons (CB s-cl. 83(5)).

233. The NCSC will have to issue the certificate if:

- (a) the company has passed a special resolution approving the application for the certificate;
- (b) the company has given its creditors notice of its intention to apply for a certificate;
- (c) the company has complied with any conditions imposed by the Commission;
- (d) the name of the company is reserved in the other participating State or Territory;
- (e) the Commission is not aware of any failure of the company to comply with any requirement of the CB;
- (f) the Commission is not aware of any other reason why the certificate should not be granted; and

- (g) the Minsiter has consented to the issuing of the certificate (CB s-cl. 83(3)).

Cl. 84 : Application by recognized company for registration under Division

234. A recognized company will be able to apply to the NCSC to be registered as a company under the CB (CB s-cl. 84(1)). Certain documents must accompany the application (CB s-cl. 84(2)).

Cl. 85 : Application by foreign company for registration under Division

235. A corporation that is incorporated or formed outside Australia or in a non-participating jurisdiction in Australia will be able to apply for registration as a company under this Division (CB s-cl. 85(1) - cf. NSW Companies (Transfer of Domicile) Act s. 5).

236. A corporation will not be entitled to make an application (under CB s-cl. 85(1)) if, under the law of its place of incorporation, a winding up order has been made in respect of the corporation, or an application to wind up the corporation has been lodged and not withdrawn etc (CB s-cl. 85(2) - cf. NSW Companies (Transfer of Domicile) Act s. 5 and CB s-cl. 84(3) which contains a similar provision in relation to recognized companies).

237. Certain conditions will have to be satisfied if the NCSC is to grant the application (CB s-cl. 85(3) - based on s. 6 of the NSW Companies (Transfer of Domicile) Act).

238. The application under CB s-cl. 85(1) will have to be in the prescribed form, lodged with the NCSC and accompanied by specified documents, information and evidence that other conditions in CB s-cl. 85(1), (2) and (3) have been satisfied (CB s-cl. 85(4) to (6) - based on s. 7 of the NSW Companies (Transfer of Domicile) Act).

Cl. 86 : Registration of corporations as companies

239. A corporation that has made an application under CB cl. 84 or 85 for registration under the transfer of incorporation provision will have to be registered as a company under this Division if the NCSC is satisfied that it has complied with the requirements of CB cl. 84 or 85 and is not disqualified by either provision (CB s-cl. 86(1) and (2)).

240. A corporation will be registered as a proprietary company or a public company in accordance with its previous status or constituent documents (CB s-cl. 86(3)).

241. Where an application is granted, the NCSC will be required to register the corporation as a company of one of a number of different specified classes, the class being that which

is equivalent to the class under which the corporation is included in its jurisdiction of incorporation (CB s-cl. 86(4)).

242. The NCSC will have to issue a certificate to a company registered under this Division (CB s-cl. 86(5)). The NCSC must keep a register for the purposes of CB cl. 86 and set out the details that must be entered in the register (CB s-cl. 86(6)). There are provisions dealing with a company registered under this Division that was already registered as a foreign company under Division 5 of Part XIII (CB s-cl. 86(7) - based on s.11 of the NSW Companies (Transfer of Domicile) Act).

Cl. 87 : Effect of registration

243. At the date of commencement of the registration of a corporation as a company under this Division, the corporation will be deemed to be a company duly incorporated under the CB (CB-cl. 87(1) - based on s-sec 9(1) of the NSW Companies (Transfer of Domicile) Act).

244. The legal personality of the corporation will continue and registration will not affect the property of the corporation or, except as provided by this Division, any powers, rights, actions, obligations etc. of the corporation or of any other person (CB-cl. 87(2): Paras (a), (b), (c), (d) and (e) are based on s-sec 9(2) of the NSW Companies (Transfer of Domicile) Act. No legal proceedings will be defective (CB s-cl. 83(3)). The purpose of s-cl. (3) is similar to that of s.12 of the NSW Companies (Transfer of Domicile) Act - but see also CB s-cl. 90(6)).

245. For the purposes of the company's memorandum and articles under the CB, the constituent documents of a corporation registered pursuant to CB s-cl. 86(2) are dealt with in CB s-cl. 87(4) (based on s. 10 of the NSW Companies (Transfer of Domicile) Act)) and in CB s-cl. 87(5).

Cl. 88 : Alterations to constituent documents of foreign companies

246. There will be certain obligatory alterations of the constituent documents of a corporation registered under CB s-cl. 86(2) (CB cl 88 based on s. 25 of the NSW Companies (Transfer of Domicile) Act).

Cl. 89 : Effect of registration of company under corresponding law

247. Where a company has applied to register as a company in another participating jurisdiction under the provision of a law corresponding to CB cl. 84, and the NCSC has registered that company as a company under the law of that participating jurisdiction, then the company shall be deemed not to be incorporated under this Act from the time it is deemed to be a company duly incorporated under the companies legislation of the participating jurisdiction (CB cl 89).

248. There is no equivalent provision in the NSW Companies (Transfer of Domicile) Act as that Act does not contemplate a company transferring out of the jurisdiction (see para 229 of the ex memo).

Cl. 90 : Application of this Act to corporations registered under this Division

248. The application of certain provisions of the CB to a corporation registered under this Division will be qualified as follows:

- (a) Table A or B of Schedule 3 can be adopted (CB s-cl. 90(1) - based on s. 15 of the NSW Companies (Transfer of Domicile) Act).
- (b) Cl 239 (statutory meeting and statutory report) will not apply to a corporation registered under this Division (CB s-cl. 90(2) - based on s. 16 of the NSW Companies (Transfer of Domicile) Act).
- (c) The application of CB cl. 240 (annual general meeting) to a corporation registered under this Division is dealt with in CB s-cl. 90(3) (based on s. 18 of the NSW Companies (Transfer of Domicile) Act).

(d) Where a corporation registered under CB s-cl. 86(2) is a holding company, the financial years of any subsidiaries of the corporation at the commencement of the corporation's registration under this Division will be as set out in CB s-cl. 90(4) (based on s. 19 of the NSW Companies (Transfer of Domicile) Act).

(e) The application of CB cl. 360 (liability of contributories) to a corporation registered under this Division is dealt with in s-cl. 90(5) (based on s. 21 of the NSW Companies (Transfer of Domicile) Act).

249. The provisions of the C(TP)B will apply to a corporation registered under this Division as if it had been incorporated under the companies legislation in force immediately before the commencement of the Companies Act, and as if the Companies Act commenced on the date of commencement of the registration of the corporation under this Division (CB s-cl. 90(6) - based on s.12 of the NSW Companies (Transfer of Domicile) Act). The purpose of the provision is to ensure that the general transitional provisions of the C(TP)B will apply to the corporation.

Cl. 91 : Establishment of registers and minute books

250. Within 14 days of registration under this Division, the company must comply with all requirements of the CB relating to the maintenance of registers (see cls 131, 143, 147, 172, 209, 231, 238 and 256) and to books of minutes (see cls 253 and

254) (CB s-cl. 91(1)). Where the CB provides that a member or any person may request copies of a register or of any minutes of the company, and the company is required to provide the copy within a prescribed period of time, the prescribed period will be deemed to begin at the end of the fourteen day period mentioned above (CB s-cl. 91(2)).

Cl. 92 : Share warrants

251. Share warrants issued by a corporation before its registration under CB s-cl. 86(2) are dealt with in CB cl. 92 (based on s. 26 of the NSW Companies (Transfer of Domicile) Act). The purpose of this provision is, to protect the bearers of warrants issued prior to registration by requiring the corporation to enter them on the register of members on surrender and cancellation of the warrant (CB s-cl. 92(1)) and to compensate other persons who suffer loss by reason of the bearer being entered on the register before the warrant has been cancelled (CB s-cl. 92(2)). For further discussion of share warrants see under CB cl. 115.

Cl. 93 : Certificate of registration conclusive evidence

252. A certificate of registration under this Division given under the common seal of the NCSC will be conclusive evidence of registration under this Division (CB cl 93 - based on s. 27 of the NSW Companies (Transfer of Domicile) Act).

CB : PART IV : PROSPECTUSES, SECURITIES AND CHARGES

253. Part IV of the CB (cls 94 to 215) deals with prospectuses, shares, debentures and charges:

- Division 1 - Prospectuses;
- Division 2 - Restrictions on Allotment and
Variation of Contracts;
- Division 3 - Shares;
- Division 4 - Substantial Shareholdings;
- Division 5 - Debentures;
- Division 6 - Prescribed Interests;
- Division 7 - Title to and Transfer of Securities;
- Division 8 - Transfer of Marketable Securities;
- Division 9 - Registration of Charges.

DIVISION 1 : PROSPECTUSES

254. Division 1 of Part IV of the CB (cls. 94 to 109) regulates the use of prospectuses (for the definition of prospectuses see CB s-cl.5(1)).

Cl. 94 : Interpretation

255. A statement included in a prospectus is deemed to be untrue if it is misleading in the form or context in which it is included (CB s-cl 94(1)).

256. For the purposes of the prohibition on the issue of certain documents in relation to proposed corporations (see CB cl. 95) and the provisions regulating the forms of applications for shares or debentures to be attached to a prospectus (see CB cl. 96), each form is deemed to be issued to the public irrespective of the method used to select the recipient and irrespective of the fact that each form can only be used by the person to whom it is issued.

257. Forms will not be taken to be issued to the public if they are only issued to -

- (a) persons whose ordinary business is buying and selling shares, debentures or prescribed interests;
- (b) existing members or debenture holders of the corporation;

- (c) holders of prescribed interests made available by the corporation pursuant to a deed that is an approved deed for the purposes of Division 6 of Part IV; and
- (d) existing members in connection with a proposal under cl. 409.

(CB-cl. 94(2) - cf. s-cl. 5(4)).

Cl. 95 : Prohibition of issue of certain documents in relation to proposed corporations

258. It will be unlawful to issue:

- (a) a form of application for shares in, or debentures of;
or
- (b) a form to accompany a deposit of money with, or loan of money to,

a corporation that is to be formed (CB s-cl. 95(1)).

259. This prohibition will not apply if:

- (a) the form is not issued to the public; and
- (b) the invitation or offer to which the form relates is not issued or made to the public.

(CB s-cl. 95(2)).

Cl. 96 : Forms of application for shares or debentures to be attached to prospectus

260. A person must not issue a form of application for shares or debentures, or issue a form to accompany a deposit with or loan to a corporation unless the form is attached to a prospectus, and a copy of both the prospectus and the form have been registered by the NCSC (CB s-cl. 96(1) - cf. ICAC CAs s.37).

261. The restriction will not apply if the form is not issued to the public and the invitation or offer to which the form relates is not issued or made to the public (CB s-cl. 96(2)).

262. There will be a penalty for contravention of the provisions of \$20,000 or imprisonment for 5 years, or both (CB s-cl. 96(3)).

Cl. 97 : Invitations or offers in relation to borrowings by a corporation

263. A corporation will be required to register a prospectus with the NCSC before making a public offering of debentures (CE cl. 97). A corporation is widely defined (see CB s-cl. 5(1)).

264. This provision is based on ICAC CAs s.38 except that:-

- (a) Because of the interpretative provisions in s-cl. 5(3) the clause extends not only to invitations to the public to deposit money with or lend money to a

corporation but also to offers to the the public by a corporation to accept money deposited with, or lent to, the corporation (CB s-cl. 97(1)).

- (b) CB s-cl. 97(4) is based on ICAC CAs s-sec 38(4) but also incorporates the requirements set out in para. 32 of the Fifth Schedule to the ICAC CAs.
- (c) CB s-cl. 97(5) is based on ICAC CAs s-sec. 38(5) but also incorporates in a substantially similar form the requirements set out in para. 33 of the Fifth Schedule to the ICAC CAs. The bracketed words at the end of s-s-para 97(5)(b)(ii)(I) have been added to ensure that the net position as between guarantors need not be disclosed.
- (d) The formerly discretionary nature of paras 33(2)(c) and (d) of the Fifth Schedule is now mandatory and is contained in s-s-paras 97(5)(b)(ii)(F) and (G) of the CB.
- (e) CB s-cl. 97(6) to (13) are based on s-secs 38(6) to (12) of the VIC CA. There are some minor differences in the other ICAC CAs and more substantial differences in the SA and TAS CAs. The following differences are noted:

(i) There is a machinery provision in CB para. 97(7)(b) and CB s-cl 97(8) giving to the NCSC, rather than to the Minister, the power to declare corporations to be authorized dealers in the short term money market (and thus prescribed corporations). (Note s-cl 13(4) and (5) of the C(TP)B which deal respectively with a declaration made under para. 38(7)(b) or (c) of the ACT CO and with a notice published under sub-s. 38(8) of the ACT CO).

(ii) The penalties in CB s-cl. 97(10) for breach of the provision have been increased from \$2,000 or 6 months imprisonment to:

(a) \$20,000 or 5 years gaol, or both for a breach of sub-cl. 97(1) arising from failure to comply with para 97(1)(a);

(b) \$2,500 or 6 months gaol, or both in any other case

Cl. 98 : Contents of prospectuses

265. The requirements as to the contents of prospectuses are set out in CB cl. 98.

266. S-cl. 98(1) of the CB lists a series of requirements that must be met if a prospectus is to comply with the CB:

- (a) Paras (a), (b) and (c) are based on ICAC CAS paras 39(1)(a), (b) and (c).
- (b) Para (d) incorporates certain requirements at present set out in para. 4 of Part I of the Fifth Schedule.
- (c) Para (e) is based on ICAC CAS paras 39(1)(d) and (e) and para 31 of Part III of the Fifth Schedule, except that various matters and reports to be set out in a prospectus which are presently specified in the Fifth Schedule will now either be prescribed by regulation or, in those cases not covered by the regulations, be specified by the NCSC.
- (d) Para (f) is based on ICAC CAS para 42(2)(e).
- (e) Para (g) and (h) are similar to ICAC CAS paras 39(1)(f) and (g).
- (f) Para (j) is similar to ICAC CAS para 39(1)(h) except that the prohibition on naming certain persons without a prescribed consent has been extended to any person performing any function in a professional, advisory or other capacity for the corporation or in relation to the issue. These additional persons will not, for

that reason alone, have any civil liability based on the authorizing of the issue of the prospectus (see CB para 107(3)(c)).

(g) Para (k) deals with material contracts and incorporates requirements at present set out in para. 15 of Part I of the Fifth Schedule.

(h) Para (l) is new. This requires a prospectus to disclose whether or not it is intended to have securities listed for quotation. (See also CB cl. 105).

(i) Para (m) deals with the disclosure of certain interests and incorporates requirements at present set out in para. 17 of Part I of the Fifth Schedule.

(j) Paras (n) and (o) are similar to ICAC CAs paras 39(1)(i) and (j).

267. The date of issue of a prospectus will be taken to be the date of the prospectus, unless the contrary is proved (CB s-cl. 98(2) - based on ICAC CAs para. 39(1)(b)).

268. The NCSC will be able to require observance in the investigating accountant's report of whatever requirements set out in the regulations pursuant to CB s-cl. 269(8) which it considers appropriate (CB cl. 98(4) - new provision).

269. CB s-cl. 98(5) to (10) are based on ICAC CAs s-secs. 39(2) to (7).

Cl. 99 : Certain notices, &c., not to be published

270. The publication of certain notices amounting to an invitation to the public to subscribe for shares or to purchase debentures will be prohibited unless the conditions set out in the clause are satisfied (CB cl. 99 - based on ICAC CAs s. 40).

Cl. 100 : Certain reports referring to prospectuses not to be published

271. The publication of certain reports referring to prospectuses will be prohibited except in specified circumstances (CB cl. 100 - based on ICAC CAs s. 40A).

Cl. 101 : Evidentiary provisions &c.

272. Evidentiary provisions for the two preceding provisions are contained in cl. 101 (based on ICAC CAs s. 40B).

Cl. 102 : Retention of over-subscriptions in debenture issues

273. The retention of over-subscriptions will be prohibited unless the corporation specifies in the prospectus -

- (a) that it reserves the right to retain over-subscriptions; and

(b) a limit on the amount of over-subscriptions that may be retained.

(CB cl. 102 - based on ICAC CAs s. 41).

Cl. 103 : Registration of prospectuses

274. The issue of a prospectus will be prohibited unless a copy has been registered by the NCSC: registration will not be effected unless certain conditions as to form and content are complied with (CB cl 103 - based on ICAC CAs s. 42).

275. Note s-cl. 14(1) of the C(TP)B which deals with a prospectus that has been registered under the ACT CO within the period of 6 months before the commencement of the CB.

Cl. 104 : Document containing offer of shares for sale deemed to be prospectus

276. Any document that directly or indirectly offers securities for sale to the public will be deemed to be a prospectus and all provisions relating to prospectuses and offering shares to the public will apply to such a document (CB cl 104).

276A. CB cl. 104 is based on ICAC CAs s. 43 except that new para 104(1)(b) has been added to broaden the range of enactments and rules of law applicable.

Cl. 105 : Allotment or issue of shares or debentures where prospectus indicates application for quotation on stock market

277. Application moneys must be repaid if the prospectus indicates that an application has been, or is proposed to be made for listing of the shares or debentures, and the listing is not achieved within the specified time (CB cl 105 - based on ICAC CAs s. 44).

278. Note s-cl. 13(6) of the C(TP)B which deals with an exemption given under sub-s. 44(3) of the ACT CO.

Cl. 106 : Expert's consent to issue of prospectus containing statement by him

279. A prospectus that contains a statement by an expert must not be issued unless the expert has given and not withdrawn written consent to the issue of the prospectus with the statement included in the form and context in which it is included (CB cl. 106 - based on ICAC CAs s. 45).

Cl. 107 : Civil liability for untrue statement or non-disclosure in prospectus

280. Any person who is named in or who knowingly authorized or caused the issue of a prospectus that contains an untrue statement or that fails to disclose a material matter is liable to compensate subscribers who, as a consequence, suffer loss or damage (CB cl. 107 - based on ICAC s. 46).

281. A statement is deemed to be included in a prospectus if it is contained in any report or memorandum appearing on the fact of, issued with or incorporated by reference in the prospectus, whether the reference occurs in the prospectus or in any other document (CB s-cl. 107(4) - an identical provision is in CB s-cl. 108(2)).

Cl. 108 : Criminal liability for untrue statement or non-disclosure in prospectus

282. A person will be guilty of an indictable offence for authorizing or causing the issue of a prospectus containing an untrue statement or wilful non-disclosure (CB cl. 108).

283. This provision is based on ICAC CA s.47 except that:

- (a) Para 108(1)(c) is new and provides an additional defence; and
- (b) S-cl. 108(2) which deems certain statements to be included in prospectuses is new (see s-cl. 107(4) para 281 of the ex memo).

Cl. 109 : Power to exempt from compliance with Division or to declare that Division applies as if modified

284. CB cl. 109, will allow the NCSC to grant exemptions from compliance with the fund raising provisions in Division

1 of Part IV and to modify the operation of the provisions to suit particular circumstances.

285. These provisions will give the NCSC greater flexibility, for example, in dealing with the fund raising activities of borrowing corporations.

286. The NCSC will be able to grant exemptions from compliance with any provision of Division 1 (CB s-cl. 109(1)). Persons must comply with any conditions attaching to an exemption (CB s-cl. 109(2)) and the Supreme Court, on the application of the NCSC, will be able to order a person to comply with the conditions (CB s-cl. 109(3)).

287. The NCSC will be able, by instrument in writing, to declare that provisions of Division 1 apply in a particular case as if modified or varied, and where such a declaration is made, the provisions have effect accordingly (CB s-cl. 109(4)). All instruments executed under CB cl. 109 must be published in the Commonwealth Gazette (CB s-cl. 109(5)).

DIVISION 2 : RESTRICTIONS ON ALLOTMENT AND VARIATION OF
CONTRACTS

288. Division 2 of Part IV of the CB (cls. 110 to 112) places restrictions on the allotment of shares and the variation of contracts.

289. Ss. 50 to 52 of the ICAC CAs, which deal with statements in lieu of prospectuses, have been omitted from the Bill as a result of recommendations by the Jenkins Committee (UK) and the Eggleston Committee (Fifth Interim Report - paras 16 to 84).

Cl. 110 : Prohibition of allotment unless minimum subscription
received

290. Shares that have been offered to the public will not be able to be allotted until the appropriate minimum subscription and the sum payable on application have been received (CB cl. 110 - based on ICAC CAs s. 48).

Cl. 111 : Application moneys to be held in trust until allotment

291. All moneys received from an applicant pursuant to a prospectus must be held in trust until securities have been allotted to that applicant (CB cl. 111 - based on ICAC CAs s. 49).

Cl. 112 : Restriction on varying contracts referred to in prospectus

292. The terms of a contract referred to in a prospectus cannot be varied before the statutory meeting unless the variation is made subject to the approval of the statutory meeting (CB cl. 112 - based on ICAC CAs s. 53).

DIVISION 3 : SHARES

293. The provisions of Division 3 of Part IV of the CB (cls. 113 to 133) set out the requirements of the legislation with regard to shares. They follow closely ss 56 to 69 of the ICAC CAs. The major changes from the existing legislation are found in CB cl. 129 (company financing dealings in its shares) and in three new provisions:

- (a) CB cl. 116, which restricts the application of the capital of a company;
- (b) CB cl. 130, which deals with the consequences of a contravention of the prohibitions on a company financing dealings in its shares (see CB cl. 129);
and
- (c) CB cl. 131, which requires the creation of a register of options over unissued shares.

Cl. 113 : Return as to allotments

294. Within one month of making an allotment of its shares, a company will have to lodge with the NCSC a return setting out particulars of the allotment (CB cl. 113 - based on ICAC CAs s. 54).

Cl. 114 : Differences in calls and payments, reserve liability,
&c.

295. If authorized by its articles, a company will be able:

- (a) to vary the amounts and times of payment of calls as between shareholders;
- (b) to accept from a member the whole or part of the amount unpaid on shares, although no call has been made;
- (c) to pay dividends in proportion to the amount paid on each share, except in the case of a no liability company.

(CB s-cl. 114(1) - based on ICAC CAs s. 55).

296. A limited company will be able by special resolution to determine that any portion of its share capital that has not been called up cannot be called up except in the event of the company being wound up (CB s-cl. 114(2) - based on ICAC CAs s.56).

Cl. 115 : Share warrants

297. Companies will be prohibited from issuing share warrants (CB cl. 115 - based on ICAC CAs s. 57). Under the VIC CA of 1928, and comparable legislation in other jurisdictions, companies could issue share warrants, i.e., certificates that the bearer was entitled to the shares represented by them. These certificates were negotiable instruments.

Cl. 116 : Restriction on application of capital of company

298. There will be provisions imposing restrictions on the application of the capital of the company. These provisions are intended to strengthen the provisions relating to:

- (a) the making of certain payments (see CB cl. 117 - cf ICAC CAS s. 58); and
- (b) the issue of shares at a discount (see CB cl. 118 - cf ICAC CAS s. 59).

299. These restrictions are based on ICAC CAS s-sec 58(2) but expanded to include certain provisions based on cls 129 and 229 of the NCB. See also D.E. Harding (SULS sem) and ss. 20 to 31 of the U.K. Companies Act 1980 which made extensive modifications to the existing U.K. law.

300. The main provisions are as follows:

- (a) Except as provided by CB cls. 117 or 118, a company will not be able to apply any shares or capital to make a payment to a person in consideration of his subscribing or procuring subscriptions for shares in the company (CB s-cl. 116(1) - based on ICAC CAS s-sec 58(2)). See also Ooregum Gold Mining v. Roper [1892] A.C. 125.

- (b) If a company contravenes this provision, the company will not be guilty of an offence but each officer in default will be guilty of an offence (CB s-cl. 116(3) - cf. CB s-cl. 129(2) which contains a similar provision in relation to the prohibition on a company financing dealings in its shares.)
- (c) The court may, in addition to imposing a penalty, order that a person guilty of an offence under this provision pay compensation to the company (CB s-cl. 116(4) - based on ICAC CAS s-para. 124(3)(a)(ii) - cf. CB s-cl. 129(3)) and 229(5)).
- (d) Where this provision has been contravened, the company may recover from any person who has made a profit from the contravention, or, where it has suffered a loss, the company may recover from an officer in default (CB-cl. 116(5) - cf. ICAC CAS s-sec. 67(3) and CB s-cl. 229(6)).

Cl. 117 : Power to make certain payments

301. Provided that certain conditions are met, and that the payment does not exceed 10% of the amount payable on shares upon their allotment or such lesser amount as authorized by the articles, a company will be able to make a payment to a person in consideration of his subscribing or procuring subscriptions for shares (CB cl. 117).

302. This provision deals, in effect, with the payment of commissions and brokerage. It is based on ICAC CAs s. 58 except that:-

- (a) it has been amended to cover all payments - cf. Fifth Interim Report of Eggleston Committee, para. 87, and cl. 167 of NCB; and
- (b) it now refers to payments which are "not prohibited by the memorandum or articles" in recognition of the fact that there is now power in the Third Schedule to make these payments.

Cl. 118 : Power to issue shares at a discount

303. A no liability company will be able to issue shares at a discount. Any other company may issue shares at a discount provided that certain conditions are met and that the issue is confirmed by an order of the Court (CB cl. 118).

304. This provision is based on ICAC CAs s. 59 except that:-

- (a) The CB does not contain the restriction that the date of the issues must be not less than one year since the date on which the company was entitled to carry on business (see ICAC CAs para 59(1)(c)).
- (b) The provision has been re-organized (e.g. ICAC CAs s-sec. 59(4) is now in CB para 118(1)(d)).

Cl. 119 : Issue of shares at premium

305. A company that issues shares at a premium will have to transfer a sum equal to the value of the premiums to a "share premium account" which is subject to the provisions of the CB relating to reduction of capital (except s-cl. 123(6) which specifies some of the information to be included in the order) as if the share premium account were paid up capital (CB s-cl. 119(1) - based on ICA CAs s-sec. 60(1)). The share premium account may be applied only for certain specified purposes (CB-cl. 119(2) -based on ICAC CAs s-sec. 60(2)).

Cl. 120 : Redeemable preference shares

306. If authorized by its articles, a company will be able to issue preference shares that can be redeemed by the company out of profits or out of the proceeds of a fresh issue of shares made for the purposes of the redemption (CB s-cl. 120(1)(2) and (3) - based on ICAC CAs s-secs. 61(1) and (2)). Where a premium is payable on redemption it will have to be paid out of profits or the share premium account (CB s-cl. 120(4) - cf. s-sec. 61(4) ICAC CAs).

307. Where redeemable preference shares are redeemed otherwise than out of the proceeds of a fresh issue of shares, a sum equal to the nominal value of the shares redeemed will have to be transferred from profits otherwise available for dividend to a "capital redemption reserve" which is subject to the provisions of the Act relating to the reduction of share

capital (except CB s-cl. 123 (6)) as if the reserve were paid up share capital (CB s-cl. 120(5) - based on ICAC CAs s-sec. 61(5)). The capital redemption reserve may be used to pay up unissued shares of the company to be issued to members as bonus shares (CB s-cl. 120(7) - same as ICAC CAs s-sec. 61(7)).

308. Where a company redeems any preference shares it will be able to issue shares to the nominal value of the redeemed shares as if the preference shares had never been issued (CB s-cl. 120(6) - cf. ICAC CAs s-sec. 61(6)). Shares will be considered redeemed despite the fact that the redemption payment is by a cheque which has not been presented for payment (CB s-cl.120(9) - no equivalent provision in ICAC s. 61).

Cl. 121 : Power of company to alter its share capital

309. If authorized by its articles, a company will be able to pass an ordinary resolution altering its memorandum by:

- (a) increasing share capital by the creation of new shares;
- (b) consolidating and dividing its share capital into shares of larger amounts;
- (c) converting paid up shares into stock, or stock into shares;

(d) sub-dividing its shares into shares of smaller amounts
or

(e) cancelling shares that have not been taken up and
reducing the share capital by that amount.

(CB cl. 121 - based on ICAC CAs s. 62).

Cl. 122 : Validation of shares improperly issued

310. Where a company has purported to issue or allot shares in a manner that was invalid or unauthorized, the Supreme Court will be able, upon the application of the company, a holder or mortgagee of those shares, or a creditor of the company, to make an order validating the issue or allotment of those shares and confirming the terms of issue or allotment (CB cl. 122 - based on ICAC CAs s. 63).

Cl. 123 : Special resolution for reduction of share capital

311. Subject to confirmation by the Supreme Court, a company will be able, if authorized by its articles, to reduce its paid up share capital in any way, including the manners specified (CB s-cl. 123 (1) and (2)). There are procedures to safeguard the interests of creditors who do not consent to the reduction (CB s-cl. 123(3) to (10)).

312. These provisions are based on ICAC CAs s.64 but differ from it as follows:

- (a) S-cl. 123(2) clarifies the existing law by providing that a reduction in the paid up share capital does not of itself reduce the nominal share capital.
- (b) Though a company will not be able to act on a resolution until copies of the resolution and Court order have been registered by the NCSC, the resolution may have retrospective effect provided that the date specified in the resolution is not earlier than the date of the resoltuion (CB s-cl. 123(7)).
- (c) S-cl. 123(13) and (14) (based on ICAC CAs s-secs 64(12) and (13)) dealing with the granting of rights of occupancy of land or building to a member have been extensively redrafted.

Cl. 124 : Commission to be informed of special rights carried by, or division or conversion of, shares

313. Where a company allots shares carrying rights that are not contained in the memorandum or articles, the company will have to notify the NCSC within one month of the allotment (CB s-cl. 124(1)). This is a new provision based on cl. 23 of the UK Companies Bill 1973.

314. The NCSC will also have to be notified of details relating to the division or conversion of shares (CB s-cl. 124(2)). This provision is based on ICAC CAs s-sec. 64A(1) (ICAC CAs s-sec. 64A(2) is a penalty provision which is covered by the general penalty provisions: see CB s-cl. 570(1) and (6)).

Cl. 125 : Rights of holders of classes of shares

315. There are provisions dealing with the variation of rights attached to classes of shares (CB cl. 125). These provisions are based on NCB cl. 179 rather than ICAC CAs s. 65. (See also JRF Lepane SULS sem pp. 66 to 69). There are separate provisions dealing with the variation of the rights:

- attached to shares where the share capital is not divided into classes (see CB cl. 126);
- of members of a company which does not have a share capital (see CB cl. 127).

316. Where there is nothing to the contrary in the memorandum or articles of a company, the rights attached to the holders of a class of shares will be able to be varied with the consent of the holders of 75% of those shares or with the sanction of a special resolution passed at a meeting of the holders of those shares (CB s-cl. 125(2) - recommended by Eggleston Committee, Fifth Interim Report para. 91).

317. To protect the rights of the holders of a particular class of shares, 10% of the members of that class will be able to apply to the Supreme Court to set aside the variation or abrogation of their rights (s-cl. 125(4)). The percentage of members who may apply is the same as in ICAC CAs s-sec. 65(1)

rather than the 5% in NCB s-cl. 179 (cf. also Jenkins Committee Report para. 193). In order to avoid problems that may be caused to nominees, a person who has assented to a variation will not be prevented from applying to the Court (recommended in the Jenkins Committee Report para. 193; cf. however ICAC CAs s-sec. 65(1)). This right to apply to the Court also applies where the memorandum or articles are altered by the insertion of a provision authorizing the variation or abrogation of those rights (CB para 125(4)(b) - based on NCB para 179(4)(b) which in turn was based on Eggleston Committee, Fifth Interim Report para. 91 and Jenkins Committee Report para 191).

318. The allotment of additional preference shares ranking pari passu with existing preference shares is deemed to be a variation or abrogation of those rights unless the further allotment was authorized by the original allotment or by the memorandum or articles (CB s-cl. 125(8) - based on NCB s-cl. 179(7) and ICAC CAs s-sec 65(6)).

319. There are new provisions dealing with the variation of rights attached to shares where the share capital is not divided into classes (CB cl 126).

Cl. 126 : Rights of holders of shares

320. There are also new provisions dealing with the rights of holders of shares where the share capital is not divided into classes of shares.

321. These provisions are similar to those in CB cl. 125 (rights of holders of classes of shares). However, 126(8) differs from s-cl. 125(8).

Cl. 127 : Rights of classes of members

322. There are also new provisions dealing with the variation of the rights of members of a company which does not have a share capital (CB cl. 127).

323. These provisions are similar to those in CB cl. 125 except that there is no equivalent to CB s-cl. 125(8).

Cl. 128 : Rights of holders of preference shares to be set out in memorandum or articles

324. A company will not be able to allot preference shares nor convert issued shares into preference shares unless the rights of the holders of those shares are set out in the memorandum or articles of the company (CB cl. 128 - based on ICAC CAs s. 66).

Cl. 129 : Company financing dealing in its shares &c

Cl. 130 : Consequences of company financing dealings in its shares &c

325. The provisions relating to the financing by a company of dealings in its shares are based generally on s. 67 of the ICAC CAs, but have been extensively redrafted following a detailed consideration of this matter by the Interstate Corporate Affairs Commission, and in the light of submissions received from the public. CB cl. 130 is new. See also R. Baxt (1980 A.B.L.R. 274 to 280 and 410 to 412); R.I. Barrett (54 A.L.J. 552 and 602); D.E. Harding (SULS sem); GFK Santow (SULS sem) UK Companies Act 1980 s. 35; 'the purchase by a company of its own shares' (Cmd 7944 - presented June 1980).

Clause 129

326. A company will be prohibited from giving financial assistance for or in connection with the acquisition by any person of shares in the company or its holding company, or from acquiring or lending money on the security of shares in the company or its holding company (CB s-cl. 129(1)).

327. This prohibition differs from ICAC CAs s-sec. 67(1) as follows:

- (a) The expression "directly and indirectly" has been extended and made to apply to the acquisition of shares ("acquisition" being broader than "purchase").

- (b) The provision will apply to "units" of shares which has been defined in the CB to include beneficial interests (see also CB s-cl. 5(1)).
- (c) It is made clear that the prohibition covers financial assistance given before or after the acquisition.
- (d) The prohibition on acquiring (formerly "purchasing") shares will be extended to the (actual or purported) acquisition of, and lending money on the security of, shares or units of shares in the holding company.

328. The meaning of "financial assistance" in CB s-cl. 129(1) includes the giving a loan, guarantee, or security, releasing an obligation, or forgiving a debt, or any other form of financial assistance. This provision is an inclusory definition and is not intended to be exhaustive of the methods of giving financial assistance which are to be prohibited (CB s-cl. 129(2) - no equivalent provision in ICAC CAs s.67). The inclusion of the words "the release of an obligation or the forgiving of a debt" make it clear that more than the giving of specie is to be prohibited throughout CB cl. 129.

329. There is a definition of "purpose" in relation to the giving of financial assistance in CB para 129(2). The relevant purpose may be one of a number of purposes for which the company gave the financial assistance, or may be a substantial purpose of the assistance (CB s-cl. 129(3) - based on s. 4F of the Trade Practices Act 1974 - no equivalent provision in ICAC CAs s. 67).

330. There is also a definition of "in connection with" for the purposes of CB s-cl. 129(2). A company gives financial assistance in connection with an acquisition of shares where it is aware that it will financially assist a person to acquire shares in the company, or will assist the person who has already acquired shares in the company to pay any unpaid amount for subscriptions or calls (CB s-cl. 129(4) - no equivalent provision in ICAC CAs s. 67).

331. If there is a contravention of CB s-cl. 129(1), the company will not be guilty of an offence but rather each officer in default will be guilty of an offence (CB s-cl. 129(5)). This is a new provision : the rationale for the provision is that, if the company is penalized under this section, it is the members and creditors who will suffer (see also CB s-cl. 116(4) which contains a similar provision in relation to the restrictions on the application of the capital of a company).

332. The Supreme Court will have power, unless it decides to relieve a convicted officer from liability under CB s-cl. 129(7), to order that officer to pay compensation to the company or other person suffering loss or damage as a result of the contravention (CB s-cl. 129(6)).

333. Nothing will prohibit a company:

- (a) paying a bona fide dividend in the ordinary course of commercial dealing (CB para. 129(8)(a));

- (b) making a payment pursuant to a reduction of capital under CB cl. 123 (CB para. 129(8)(b));
- (c) discharging a liability resulting from a bona fide commercial transaction (CB para. 129(8)(c));
- (d) giving a bona fide guarantee or security in the ordinary course of commercial dealing to a borrowing corporation of which it is a subsidiary company (CB para. 129(8)(d));
- (e) acquiring its own shares -
 - (i) where no consideration is provided for the acquisition by the company or a related corporation (CB para. 129(8)(e));
 - (ii) through a purchase ordered by a court (CB para 129(8)(f));
- (f) creating or acquiring a bona fide lien on its shares in the ordinary course of commercial dealing (CB para 129(8)(g));
- (g) making a bona fide agreement in the ordinary course of commercial dealing with a subscriber for the payment of shares by instalment (CB para 129(8)(h));

334. CB s-cl. 129(8) is a new provision and is not intended to be construed as an exhaustive list of the activities for which companies may be exempt from the prohibition under CB s-cl. 129(1) (CB para 129(j)). The effect of the common law rules allowing a company in particular circumstances to give financial assistance in relation to its own shares will be preserved (CB para 129(8)(k)).

335. A particular act of a company will also be exempt from the prohibition in CB s-cl. 129(1) where it consists of -

- (a) the lending of money, the giving of guarantees or securities in the ordinary course of the company's ordinary business where its business includes those activities and they are carried out on ordinary commercial terms (CB para 129(9)(a));
- (b) the giving of financial assistance for the acquisition of shares in the company or related corporation to be held by or for the benefit of employees (including salaried directors) of the company or related corporation provided that the scheme for financial assistance has been approved at a general meeting of the company, and, if it is a subsidiary of a listed corporation or corporations, or its ultimate holding company is incorporated in Australia (including the external territories), has been approved at a general meeting of the listed company or ultimate holding company (CB para 129(9)(b)).

336. CB s-cl 129(9) is based on s-sec 67(2) of the ICAC CAs but has been extended by the requirement that, in the case of employee benefits, the scheme for financial assistance in CB s-cl. 129(9) must have been approved at a general meeting of the company and, where appropriate, the listed corporation or corporations, or its ultimate holding company.

337. There is a new procedure in CB s-cl. 129(10) to (15) whereby a company may be exempted from the prohibition in CB s-cl. 129(1) relating to the giving of financial assistance for the acquisition of shares.

338. Major features of this new procedure are:

(a) The steps to be taken by a company in relation to the passing of a special resolution to give the financial assistance (CB s-cl. 129(10)) are as follows -

- (i) the company will have to resolve, by a special resolution, to give the financial assistance (CB para 129(10)(a));
- (ii) where the company is a subsidiary of a listed corporation or where its ultimate holding company is incorporated in Australia (including the external territories), that listed corporation or ultimate holding company will also be required to resolve to give the financial assistance (CB para 129(10)(b));

- (iii) the notice of intention of the company to propose the resolution will have to give particulars of the financial assistance and its effect on the company or, where relevant, the group of corporations, and will have to include a statement of the directors, stating whether, in their opinion, the assistance would be likely to materially prejudice the interests of the creditors or members (CB para 129(10)(c));
- (iv) this notice and the auditor's report or directors' statement will also have to accompany the notice of intention of the listed corporation or ultimate holding company to propose the resolution (CB para 129(10)(d)).
- (v) a copy of the notice of intention of the company and of the auditor's report or directors' statement will have to be lodged with the NCSC (CB para 129(10)(e));
- (vi) the notice of intention of the company must be given to all members, trustees for debenture holders, and all known debenture holders where there are not trustees (CB para 129(10)(f));
- (vii) a similar provision to the above also exists in relation to the listed corporation and the ultimate holding holding company (CB para 129(10)(g));

- (viii) within 21 days of the meeting of the company, or of the listed corporation or ultimate holding company, at which the resolution is passed, a notice setting out the terms of the resolution and mentioning the possibility of an application to the Court to oppose the assistance will have to be published in a daily newspaper (CB para 129(10)(h));
- (ix) there must be no outstanding applications opposing the giving of financial assistance (para 129(10)(j)) and the financial assistance must not be given either before the period allowed for applications to oppose the assistance expires, or before such applications have been withdrawn or dealt with by a court (CB para. 129(10)(k));
- (b) The Supreme Court on application by a company will be able to consider substantial compliance with CB s-cl. 129(10) to be sufficient compliance (CB s-cl. 129(11));
- (c) Where a special resolution to give financial assistance has been passed by the company, or if appropriate, by the listed corporation or ultimate holding company, an application to the Supreme Court opposing the resolution will be able to be made within 21 days by

members, trustees for debenture holders or creditors of the company, of a subsidiary company, or of the listed corporation or ultimate holding company (as the case may be), or by the NCSC (CB s-cl. 129(12)).

- (d) Where a resolution to give financial assistance has been opposed, the Court will be required to have regard to the rights and interests of the members and creditors of the company (CB para. 129(13)(a) and will not be able to approve the resolution unless it is satisfied that the company has disclosed all material matters and that the financial assistance would not unduly prejudice the interests of creditors or shareholders (CB para. 129(13)(b)). The Supreme Court will be able to approve or disapprove the resolution (CB para. 129(13)(f) and, if it thinks fit, make an order for the purchase by the company of the interests of dissentient members (CB para 129(13)(c)).

339. Except as provided by this clause, the validity of a contract or transaction will not be affected by reason of a contravention of:-

- (a) CB para 129(1)(a);
- (b) CB para 129(1)(b) unless the contract or transaction brings into being the acquisition or loan that constitutes the contravention (CB s-cl. 130(1));

(c) CB para 129(1)(c) unless the contract or transaction effects the loan that constitutes the contravention.

340. Where a company would, but for CB s-cl. 130(1), have contravened CB cl. 129, the contract or transaction, or any related contract or transaction will be voidable at the option of the company by a notice in writing to the other party (CB s-cl. 130(2)). This option will be subject to the remaining provisions of CB cl. 130 (see particularly CB s-cl. 130(6)).

341. Where the Supreme Court is satisfied on the application of the company or of any other person, that the company or that person has suffered, or is likely to suffer, damage as a consequence of the contract or transaction or any related contract or transaction being void by reason of CB cl. 129 or having become void or becoming void under CB cl. 130, the Court will be able to make such orders as it thinks just and equitable (including the orders for return of money or property, compensation or indemnification set out in CB s-cl. 130(5)) against any party to the contract, transaction, or related contract or transaction, or against any person who knowingly aided, was concerned in or party to the contravention (s-cl. 130(4)). This provision will allow a party to apply to the Court before the company is able to avoid the contract or transaction under CB s-cl. 130(2).

342. CB s-cl. 130(6) to (13) deal with the giving to a person of a certificate of directors stating that CB s-cl. 129(10) has been complied with in relation to an acquisition of shares. If this certificate is given to a person who relies on it, he is protected from an order of the Court under CB s-cl. 130(4) and the contract or transaction is not voidable under CB s-cl. 130(2) (CB s-cl. 130(6)). However, the person is not protected by the certificate if he was aware prior to the contract or transaction that CB s-cl. 129(10) had not been complied with (CB s-cl. 130(7)). For the purposes of CB s-cl. 130(7) a person is deemed to be aware of any matter of which his servant or agent having duties in relation to the contract or transaction is aware, unless that person can prove that he did not have personal knowledge of that matter (CB s-cl. 130(8)). A person who signs a certificate which falsely states (as at the time the certificate was signed) that CB s-cl. 129(10) has been complied with has committed an offence (CB s-cl. 130(11)).

Cl. 131 : Register of options

343. There is a new provision for a register of options to take up unissued shares (CB cl. 131). This provision is intended to support the operation of the CASA. A similar provision appeared in the NCB but covered all securities (NCB cl. 204).

344. A company will have to keep a register of options to take up unissued shares (CB s-cl. 131(1)). (Note that CB cl. 547

deals with the location of registers). The register will have to contain the particulars set out in CB s-cl. 131(2). The register is prima facie evidence in matters inserted in the register (CB s-cl. 131(3)) and must be open for inspection to members without charge and to any other person on the payment of a fee (CB s-cl. 131(4)). Subject to payment of a fee, the company will have to send a person a copy of the register if so requested (CB s-cl. 131(5)).

Cl. 132 : Options over unissued shares

345. Except where holders of debentures of a company have an option to take up shares by way of redemption of the debentures, an option that enables a person to take up unissued shares in a company more than five years after the option is granted is void (CB cl. 132 - based on ICAC CAs s. 68).

Cl. 133 : Power of company to pay interest out of capital in certain cases

346. Where shares are issued to raise capital for construction work or the provision of plant that cannot be made profitable for a long period, a company will be able to pay interest on the paid up share capital, charging the interest to capital, provided that the payment is authorized by the articles or by a special resolution, is approved by the Supreme Court and does not exceed 8% or the prescribed rate (CB cl. 133 - based on ICAC CAs s. 69)

DIVISION 4 : SUBSTANTIAL SHAREHOLDINGS

347. Division 4 of Part IV of the CB (cls. 134 to 146) deals with the notification of substantial shareholdings in listed companies and declared companies and bodies.

Cl. 134 : Application and interpretation

348. All listed companies and declared companies or bodies will be subject to the provisions of this Division (CB cl. 134 - based on ICAC CAs s.69A). (Note s-cl. 13(7) of the C(TP)B which deals with a declaration made by the Minister under para. 69A(2)(b) or (c) of the ACT CO.)

Cl. 135 : Persons obliged to comply with Division

349. This Division will apply to all natural persons, and to incorporated and unincorporated bodies (CB s-cl. 135(1)) and will extend to acts done or omitted to be done outside the Territory (CB s-cl. 135(2)) - based on ICAC CAs s.69B. - cf CASA s-sec 10(1)).

Cl. 136 : Substantial shareholdings and substantial shareholders

350. A person entitled to the prescribed percentage of the voting shares in a company or the prescribed percentage of a class of voting shares in a company will be deemed to have a substantial shareholding in that company (CB s-cl. 136(1) - based on ICAC CAs s.69C). The shares to which a person is "entitled" will include:

- (a) the voting shares in which the person has a relevant interest; and
- (b) the voting shares in which an associate of that person has a relevant interest except for:
 - (a) a nominee corporation in respect of which the NCS has issued a certificate under s-cl. 136(6); or
 - (b) voting shares in respect of which the associate has obtained a certificate from the NCSC under s-cl. 136(7).

(CB s-cl. 136(2) - note "associate" is defined in s-cl. 136(3) to (5) and "relevant interest" is defined in cl. 8).

351. "Entitled" has a similar meaning in CASA s-sec. 7(3). However, instead of disregarding certain voting shares of an associate by virtue of a certificate from the NCSC, the CASA contains exemption provisions for, inter alia, particular acquisitions (see CASA para 12(o)).

351A. A reference in CB cl. 136 to the prescribed percentage is a reference to 10%, or if a lesser percentage is presented by regulation that lesser percentage (CB s-cl. 136(9)).

Cl. 137 : Substantial shareholder to notify company of his interests

352. A substantial shareholder will be required to give the company written notice of the following matters:-

- (a) his name and address;
- (b) prescribed particulars of the voting shares in which he or an associate has a relevant interest (including, unless the interest cannot be related to particular shares, the name of the registered holder);
- (c) prescribed particulars of each such interest; and
- (d) prescribed particulars of any contract etc by reason of which he or an associate acquired that interest.

(CB cl. 137(1) - based on ICAC CAs s-sec. 69D(1)).

352A. Similar notices will be required by a substantial shareholder whose interest changes or ceases (CB cls. 138 and 139).

353. The period for notification will be reduced to 2 business days in order to ensure that there is no delay in notification during which time there may be substantial increases in shareholding (CB s-cl. 137(2) - cf. ICAC CAs s-sec. 69D(2) which specifies a period of 14 days).

Cl. 138 : Substantial shareholder to notify company of change in his interests

354. Written notice of a change in the relevant interest(s) of a substantial shareholder or his associates will have to be given to the company by the substantial shareholder (CB cl. 138

- based on ICAC CAs s.69E except that a change in an associate relevant interest(s) will have to be included and the period for notification has been reduced to 2 business days).

Cl. 139 : Person who ceases to be substantial shareholder to notify company

355. Written notice will be required from a person who ceases to be a substantial shareholder (CB cl. 139 - based on ICAC CAs s.69F except that the period for notification has been reduced to 2 business days).

Cl. 140 : References to operation of section 8

356. The circumstances under which a person has a relevant interest, changes his relevant interest or ceases to have a relevant interest by virtue of CB cl. 8 are circumstances which will be required to be stated in any notice under CB cls. 137, 138 and 139 (CB cl. 140 - based on ICAC CAs s. 69G).

Cl. 141 : Copy of notice to be served on stock exchange

357. If a person gives a notice of a substantial interest or a change in or cessation of that interest (under CB cls. 137, 138 or 139) to a company which is a listed company, the notice will have to be copied to the company's home exchange (CB cl. 141).

358. This is a new provision designed to ensure that the stock exchange is kept informed.

Cl. 142 : Commission may extend period for giving notice under this Division

359. The NCSC will have a discretion to extend the period for giving notice under CB cls. 137, 138 and 139. The extension will be able to be granted even after the period has expired (CB cl. 142 - based on ICAC CAS s. 69).

Cl. 143 : Company to keep register of substantial shareholders

360. A company will have to keep a register of all information relating to substantial shareholders and the register will have to be kept open for inspection by any person (CB cl. 143 - based on ICAC CAS s.69K).

Cl. 144 : Offences against certain sections

361. Failure to comply with the obligations relating to notice (see CB cl. 137, 138 or 139) will constitute an offence (CB cl. 144 - based on ICAC CAS s.69L).

Cl. 145 : Knowledge of servant or agent imputed to master or principal

362. Duties or actions of a servant or agent may constitute an offence by the master or principal. The burden of proof will lie on the principal to show that he was not aware of the actions of his servant or agent (CB cl. 145 - based on ICAC CAS s.69M).

Cl. 146 : Powers of court with respect to defaulting substantial shareholder

363. The Supreme Court will be able to make certain orders in respect of a failure to comply with the obligations relating to notice (see CB cls. 137, 138 or 139 (CB cl. 146 - based on ICAC CAs s.69N)).

DIVISION 5 : DEBENTURES

364. Division 5 of Part IV of the CB (cls. 147 to 163) deals with debentures.

Cl. 147 : Register of debenture holders and copies of trust deed

365. Companies that issue debentures will be required to keep a register of debenture holders. (CB s-cl. 147(1)). (Note that CB cl. 547 deals with the location of registers).

365A. This provision is based on ICAC CAs s. 70 except that the requirement to maintain a register will be extended to:-

- (a) a foreign company (incorporated overseas) registered as a foreign company under the CB that issues debentures to an applicant whose application has an address in the ACT or issues debentures following an application made pursuant to a prospectus registered under the CB; (CB s-cl. 147(2) - new provision); and
- (b) a foreign company formed in a non-participating Australian jurisdiction that issues debentures in the ACT or issues debentures following an application made pursuant to a prospectus registered under the CB (CB s-cl. 147(3) - new provision).

366. A registered holder of debentures will be entitled to a copy of the register and a copy of any trust deed relating to the issue of those debentures (CB s-cl. 147(6) and (7)).

367. For the purpose of this provision, "debenture" will be defined to exclude:-

- (a) a cheque, order for payment of money or bill of exchange;
- (b) a promissory note having a face value of not less than \$50,000; or
- (c) an acknowledgement issued by a banking corporation of the receipt of money deposited with that banking corporation (CB s-cl. 147(11)).

Cl. 148 : Branch registers

368. A local company or a registered foreign company that is formed outside Australia and its external Territories and that issues debentures with a specified Australian nexus will be able to keep a branch register of debenture holders outside the Territory (CB s-cl. 148(1)). The branch register must be kept in the same manner as the principal register is kept under CB cl. 147 (CB s-cl. 148(4)).

367. A debenture holder who is a resident of a participating State or Territory may make a written request to the company or relevant foreign company to register his debentures in a branch register in that State or Territory. The company or relevant foreign company must comply with that request forthwith; or, where it does not keep a branch register in that State or Territory and is carrying on business in that State or Territory, it shall within one month after receipt of the

request, cause a branch register to be so kept and shall register the debentures held by the person who made the request in that branch register (CB s-cl. 148(2)).

368. The branch register may be discontinued in certain circumstances (CB s-cl. 148(7) and (8)).

369. A branch register will be prima facie evidence of matters directed or authorized to be inserted in the register (CB s-cl. 148(9)).

370. It will be an offence to fail to comply with these provisions (CB s-cl. 148(10)).

371. The definition of debenture will be the same as in CB cl. 147 (see ex. memo. para 323A)(CB s-cl. 148(11)).

372. The clause relating to branch registers (cl 148) is a new provision.

Cl. 149 : Specific performance of contracts

373. A contract to take up and pay for debentures will be able to be enforced by an order for specific performance (CB cl. 149 - based on to ICAC CAs s.71).

Cl. 150 : Perpetual debentures

374. A condition contained in any debenture will not be invalid by reason only that the debenture is thereby made irredeemable or redeemable only on the happening of a contingency however remote or on the expiration of a period however long (CB cl. 150 - based on to ICAC CAs s.72).

Cl. 151 : Re-issue of redeemed debentures

375. A company will be able to re-issue redeemed debenture provided that :

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

(CB s-cl 151(1)).

376 After re-issue the new holder is deemed always to have had the same priorities that would have applied if the debenture had never been redeemed (CB s-cl. 151(2)).

377. This provision is based on ICAC CAs s.73. See also Palmer's Company Law (22nd edition) p. 463.

Cl. 152 : Qualifications of trustee for debenture holders

378. Only a Public Trustee, a company entitled to take a grant of probate of the will or letters of administration of the estate of a deceased person, a company registered under the Life Insurance Act 1945, a banking corporation and certain approved corporations will be qualified to act as a trustee for debenture holders (CB cl. 152 - based on ICAC CAS. s.74).

379. Note s-cl. 13(8) of the C(TP)B which deals with an approval given by the Minister under para. 74(1)(e) of the ACT CO and in force immediately before the commencement of the CB.

Cl. 153 : Retirement of trustees

380. A trustee for debenture holders will only be able to retire upon the appointment of a suitably qualified replacement (CB cl. 153 - based on ICAC CAS s.74A).

Cl. 154 : Contents of trust deed

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

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

(CB s-cl 154(1))

382. Similar provisions to those specified in (a) to (c) will also apply to guarantor corporations (CB s-cl. 154(2)) which, for the purposes of the application of those covenants will be deemed to be a party to the trust deed (CB s-cl. 154(3)).

383. This clause is based on ICAC CAs s.74B except that two new provisions, dealing with guarantor corporations, have been included (see ex. memo para 382).

Cl. 155 : Power of Court in relation to certain irredeemable debentures

384. In certain circumstances the Supreme Court will be able to order that the security for debentures be enforced (CB cl. 155 - based on ICAC CAs s.74C).

Cl. 156 : Duties of trustees

385. A trustee for debenture holders will be bound to exercise reasonable diligence etc. in protecting the interests of debenture holders (CB cl. 156 - based on ICAC CAs s.74D).

386. Note s-cl. 13(9) of the C(TP)B which deals with an order made by the Minister under s-sec. 74D(2) of the ACT CO and in force immediately before the commencement of the CB and s-cl. 13(10) of the C(TP)B which deals with a direction given under s-sec. 74D(4) of the ACT CO).

Cl. 157 : Powers of trustee to apply to the Court for directions, &c.

387. The trustee for debenture holders will be able to apply for and receive directions from the Supreme Court regarding any matter or question concerning the performance of his functions as trustee or the interests of debenture holders (CB cl. 157 - based on ICAC CAs s.74E).

Cl. 158 : Obligations of borrowing corporation

388. The borrowing corporation must submit periodical three monthly reports to the trustee for debenture holders and copies of those reports to the NCSC (CB s-cl. 158(1)). Matters to be included in these reports are set out in CB s-cl. 158(2) and (3). Particulars of any charge created by the borrowing corporation or any guarantor corporation must be furnished to the trustee for debenture holders (CB s-cl. 158(4)).

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

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

(CB s-cl. 158(5)).

390. A borrowing corporation that is a holding company must submit a set of consolidated accounts for itself and each of its subsidiaries that is a guarantor corporation, for the same periods, and within the same time periods stated in CB s-cl.

158(5) (CB s-cl. 158(6)). However, the trustee will be able to require guarantor subsidiary companies to also lodge accounts required under CB s-cl. 158(5) (CB s-cl. 158(7)). A copy of the notice under CB s-cl. 158(7) must be lodged with the NCSC (CB s-cl. 158(8)).

391. Nothing in CB s-cl. 158(5), (6) or (7) will apply to a pastoral company which has an exemption under s. 11 of the Banking Act and is declared by the NCSC to be a prescribed corporation for the purposes of this provision (CB s-cl. 158(9) and (10)).

392. In general, accounts prepared for the purposes of these three monthly reports must comply with certain accounts and audit provisions of the CB (s-cl. 158(13), (14), (15) and (16)).

393. The trustee will have certain powers and obligations regarding accounts prepared by borrowing corporations and guarantor corporations (s-cl. 158(18) to (21)).

394. CB cl. 158 is based on ICAC CAs 74F except that the provisions dealing with a borrowing corporation that is a holding company and guarantor subsidiary companies are new.

395. Note s-cl. 13(11) and (12) of the C(TP)B which deal respectively with declarations made and notices published under s-secs. 74F(7) and (8) respectively of the ACT CO.

Cl. 159 : Obligation of guarantor corporation to furnish information

396. A borrowing corporation will be able to require any of its guarantor corporations to furnish information for inclusion in three-monthly reports of the borrowing corporations (under CB cl. 158) (CB cl. 159 - based on ICAC CAs s.74G)

Cl. 160 : Loans and deposits to be immediately repayable on certain events

397. A borrowing corporation will be bound to repay loans and deposits received where the trustee for debenture holders considers that reports submitted by the company indicate that the purpose or project for which the moneys were raised has not been achieved or completed within the appropriate time (CB cl. 160 - based on ICAC CAs. s74H).

Cl. 161 : Invitations or offers by prescribed corporations

398. An invitation by a prescribed corporation (under CB cl. 97 - banking corporations, authorized dealers in short term money market, and declared corporations) will be deemed not to be an invitation or offer to the public for the purposes of Division 5 (CB cl. 161 - based on ICAC CAs s.74I).

Cl. 162 : Compliance with laws of State or other Territory
sufficient compliance for certain companies

399. A recognized (borrowing) company or its guarantor corporation will be deemed to have complied with Division 5 if it has complied with corresponding laws of its State or Territory of incorporation (CB cl. 162 based on ICAC CAS s.74J).

Cl. 163 : Liability of trustees for debenture holders

400. Any trust deed provision that exempts the trustee from a breach of trust where the trustee fails to show the required degree of care and diligence will be void (CB cl. 163 - based on ICAC CAS s.75).

DIVISION 6 : PRESCRIBED INTERESTS

Background

401. The provisions of Division 6 of Part IV of the CB (cl. 164 to 177 - based on Division 5 of the ICAC CAs) are designed to protect the public in relation to forms of investment other than company securities. This is done by regulating the public offering of "prescribed interests". These are defined in cl. 164 in such a fashion as to include almost any profit making scheme which does not fit within an exclusion relating to other interests (e.g. interests arising out of life insurance policies which are regulated under other Commonwealth legislation, interests under certain partnership agreements, or interests which are declared by regulation to be exempt interests) which are already regulated under the CB.

402. The CB restricts the right to issue prescribed interests to public companies or agents of public companies authorized for that purpose. The public can only be issued prescribed interests or invited to purchase such interests if the company has issued a statement in writing setting out the matters specified in cl. 170. There must also be in force a deed which has been approved by the NCSC.

Cl. 164 : Interpretation

403. There is an interpretative provision that sets out the meaning of "company", "declared State", "declared Territory", "financial year" and "management company" (CB cl. 164 - based on ICAC CAs s.76). The definition of "investment contract", which is also relevant to this Division, appears in CB s-cl. 5(1).

Cl. 165 : Approved deeds

404. Deeds will be regarded as approved deeds if approved under the CB in respect of a company, or, in the case of a recognized foreign company, if approved under the corresponding law of the participating State or Territory in which the recognized company is incorporated or the recognized foreign company is registered (CB cl. 165 - based on ICAC CAs s. 77).

Cl. 166 : Approval of deeds

405. The NCSC will be able to grant its approval of a deed if the deed makes provision for the appointment of a company as trustee for the holders of prescribed interests (CB s-cl. 166(1)); but it shall not do so unless the deed complies with all the requirements set out in the CB or the regulations (CB s-cl. 166(2)). The deed must be lodged with the NCSC within 7 days of approval being given to the deed (CB s-cl. 166(3)).

406. These provisions are based on ICAC CAs s. 8.

Cl. 167 : Approval of trustees

407. The NCSC will be able to grant approval, on such terms and conditions as it thinks fit, to a company acting as trustee for the purposes of the deed (CB s-cl. 167(1)). The NCSC will also be able to revoke the approval if terms or conditions subject to which the approval was granted have been breached (CB s-cl. 167(2)).

408. These provisions are based on ICAC CAs s.79 but with the power to grant and revoke approvals being conferred on the NCSC rather than the individual Minister.

Cl. 168 : Covenants to be included in deeds

409. The covenants to be contained in the deed which will bind the company issuing the prescribed interest (the management company) and the trustee are set out in this provision (CB cl. 168 - based on ICAC CAs s. 80).

410. The management company will be required to covenant that:

(i) it will conduct its business in a proper and efficient manner (CB para. 168(1)(a));

(ii) it will, within 30 days of receiving moneys payable to the trustee under the deed, pay the money to the trustee (CB s-para. 168(1)(b)(i));

(iii) sales or issues of prescribed interest will only be made or permitted to be made at a price calculated in accordance with the deed (CB s-para.168(1)(b)(ii));

(iv) if requested by holders of prescribed interests, it will re-purchase or cause to be re-purchased those interests at a price calculated in accordance with the deed (CB s-para. 168(1)(b)(iii));

(v) it will advertise the sale price of prescribed interests or their yield only with the approval of the trustee (CB s-para. 168(1)(b)(iv));

(vi) money available for investment will not be invested in or lent to the management company or the trustee or to a company related to any of them (CB para. 168(1)(d));

(vii) it will make its books available for inspection by the trustee or its auditor and give them such information as they require relating to the scheme of the company or any property of the company (CB para. 168(1)(e));
and

(viii) it will summon a meeting of prescribed interest holders on the application of 50 of them or of one-tenth of their number for the purpose of laying before the meeting the accounts that were laid before the last

annual general meeting of the management company, or the accounts of the trustee, and for the purpose of giving directions to the trustee (CB para. 168(1)(h)).

411. The trustee will be required to covenant that:

- (i) it will, with all due diligence, watch the rights and interests of the holders of prescribed interests (CB s-para. 168(1)(c)(i));
- (ii) it will keep proper books of account which it will have audited annually and that it will have statements of account and copies of the auditor's report sent to each holder of a prescribed interest (CB s-para. 168(1)(c)(ii) to (iv)); and
- (iii) money available for investment will not be invested in or lent to the management company or trustee or a company related to either of them (CB para. 168(1)(d)).

412. Both the management company and the trustee will also be required to covenant that they will not vote in an election of directors without the consent of the majority of the holders of the prescribed interests (CB para. 168(1)(g)).

413. The NCSC will be able by notice in the Gazette, to declare that certain of the above covenants need not appear in a particular deed (CB s-cl. 168(2)).

Cl. 169 : Prescribed interests to be issued by companies only

414. Persons other than a company or an agent of a company authorized for that purpose will be prohibited from issuing prescribed interests (CB cl 169).

415. This clause differs from the ICAC CAs s.81 only in that a saving provision has been omitted (ICAC CAs s-sec. 81(2)). The saving provision will be contained in the State application legislation but is not necessary for the CB since it does not appear in the equivalent provision in the ACT CO.

Cl. 170 : Statement to be issued

416. Prior to any issue, offer or invitation for subscription or purchase of any prescribed interest, a company or its agent will be required to issue a statement in connection with the issue, offer or invitation which is deemed for all purposes to be a prospectus. (CB cl 170 - based on ICAC CAs s. 82 although now split into 2 sub-sections).

417. Note s-cl. 16(2) of the C(TP)B which deals with a statement under s. 82 of the ACT CO that was registered as a prospectus under the ACT CO within a period of 6 months before the commencement of the CB.

Cl. 171 : No issue without approved deed

418. Persons will be prohibited from issuing or offering to the public for subscription or purchase any prescribed

interest unless an approved deed is in force. They will also be prohibited from referring to the approval of a deed or of a trustee in other documents (CB cl. 171 - based on ICAC CAS s. 83).

Cl. 172 : Register of holders of prescribed interests

419. The management company will be required to keep, at its registered office, its principal place of business in the ACT or at another place in the ACT approved by the NCSC (see ex memo para 611) a register of holders of prescribed interests in respect of each deed with which the company is concerned. The register will have to contain details of the names of holders of prescribed interests, the extent of their holdings and the dates during which time the interests were held (CB s-cl. 172(1)).

419A. A company which provides such a register in a declared State or Territory or in a participating State or Territory and keeps within the A.C.T. a register of holders of prescribed interests who are resident in the Territory will be deemed to comply with CB s-cl. 172(1) but it must make available for inspection to prescribed interest holders resident in the Territory a copy of the register kept under the law of the participating State or Territory or of the declared State or Territory (CB s-cl. 172(3)).

420. The provisions of Division 4 of Part V (except CB cl. 262) concerning inspection and rectification etc. of registers of members of a company will also apply to registers of

prescribed interest holders (CB s-cl. 172(4)). The NCSC will be able to exempt specified companies from total compliance with the section (CB s-cl. 172(6)).

421. This clause is based on ICAC CAs s.84.

422. Note sub-cl. 13(13) of the C(TP)B which deals with a direction given by the Minister under s-sec. 84(3) of the ACT CO.

Cl. 173 : Returns, information, &c., relating to prescribed interests

423. A management company will be required to lodge a return within 2 months after the end of each financial year applicable to a deed containing a list of interest holders and such other particulars as are prescribed (CB s-cl. 173(1) and 173(5)).

424. These provisions are based on s.85 of the ICAC CAs except that it has been made clear that a return setting out the above information must be lodged with the NCSC if the deed ceases to be in force. It must be lodged within 2 months of the deed ceasing to be in force (CB s-cl. 173(1)).

Cl. 174 : Penalty for breach of certain provisions or covenants

425. There are specific penalties for contravention of certain provisions relating to prescribed interests and for

failing to comply with a covenant contained in a deed. (CB cl 174 - based on ICAC CAs s.86).

Cl. 175 : Winding up of schemes, &c.

426. Where the management company goes into liquidation or, in the opinion of the trustee, it has ceased to carry on business or has failed to comply with a provision of the deed to the prejudice of holders of prescribed interests, the trustee will be required to convene a meeting of the holders (CB cl 175 - based on ICAC CAs s.87).

Cl. 176 : Power to exempt from compliance with Division and non-application of Division in certain circumstances

427. The NCSC will be empowered to exempt any company from complying with any or all of the provisions of the Division in relation to any prescribed interests (CB s-cl. 176(1)). The Division will not apply in the case of the sale of any prescribed interest by a personal representative, liquidator, receiver or trustee in bankruptcy in the normal course of realization of property (CB s-cl. 176(2)).

428. This clause is based on ICAC CAs s.88.

429. Note s-cl. 13(14) of the C(TP)B which deals with an exemption given under s.88 of the ACT CO that was in force immediately before the commencement of the CB.

Cl. 177 : Liability of trustees

430. With certain limited exceptions, a provision contained in an approved deed or in any contract with the holders of prescribed interests to which such a deed relates will be void in so far as it would have the effect of exempting a trustee under the deed from liability for breach of trust where the trustee fails to show the required care and diligence (CB cl 177 - based on ICAC CAs s.89).

DIVISION 7 : TITLE TO AND TRANSFER OF SECURITIES

431. Division 7 of Part IV of the CB (cls 178 to 188) deals with the title to and transfer of securities.

Cl. 178 : Nature of shares

432. A share will be:-

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

(CB s-cl. 178(1)).

433. Subject to the above, the laws applicable to ownership of and dealing with personal property will apply to shares or other interests of a member in a company, including equitable interests in respect of a share or other interest (CB s-cl. 178(2)).

434. For the purpose of any law, a share or other interest of a member in a company will be taken to be situated in the State or Territory in which the register of members of the company is kept. If the name of the member is entered on a

branch register, the interest will be taken to be situated in the State, Territory or country other than Australia in which that branch register is kept (CB s-cl 178(3)).

435. This clause is an expanded version of ICAC CAs s.90 (see also cl. 241 of NCB).

Cl. 179 : Numbering of shares

436. Each share in a company will be distinguished by an appropriate number (CB cl. 179 - based on ICAC CAs s.91).

Cl. 180 : Certificate to be evidence of title

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

- (a) the name of the company and the authority under which the company is constituted;
- (b) the class of shares; and
- (c) the nominal value of the shares and the extent to which the shares are paid up.

(CB cl. 180 - based on ICAC CAs s.92).

Cl. 181 : Company may have duplicate common seal

438. A company will be able, if authorized by its articles, to have a duplicate common seal, which must be a facsimile of the original with the addition on its face of the words "Share Seal" or "Certificate Seal" (CB cl 181).

438A. This provision is based on ICAC CAs s. 93 except that it has been expanded to allow the use of a duplicate seal on documents relating to securities of a company other than share certificates.

Cl. 182 : Loss or destruction of certificates

439. Where a certificate of title to shares, debentures or prescribed interests is lost or destroyed, the company will be required, on application by its owner, to issue a duplicate certificate to the owner (CB cl 182 - based on ICAC CAs s.94).

Cl. 183 : Instrument of transfer

440. A company will not be able to register a transfer of shares, debentures or interests unless a proper instrument of transfer has been delivered to the company. However, this will not prejudice the power of the company to register as a shareholder, debenture holder or interest holder a person to whom a right has devolved by will or by operation of law. (CB cl. 183).

441. This provision is based on ICAC CAs s.95 except that the one month period for the validity of a statutory declaration for the purposes of ICAC CAs para. 95(3)(b) has been extended to 3 months for the validity of a statement in writing (para. 183(4)(b)).

CL. 184 : Registration of transfer at request of transferor.

442. On the request in writing of a transferor of any share, debenture or interest in a company, the company will be required to enter the name of the transferee in the register in the same manner as if the application for entry were made by the transferee (CB cl 184 - based on ICAC CAs s.96).

CL. 185 : Notice of refusal to register transfer

443. If a company refuses to register a transfer of any share, debenture or interest in the company, it will have to, within 2 months of the date of lodgement of the transfer, send the transferee notice of the refusal (CB cl 185 - based on ICAC CAs s.97).

Cl. 186 : Remedy for refusal to register transfer or transmission

444. Where directors refuse to register a transfer without just cause the Supreme Court will be able to order the transfer

to be registered or may make such other order as it considers proper for the purchase of the shares.

445. This provision is based on NCB cl. 251 which in turn is based on the General Revision Bill para. 19(a). (Cf. also NCB s-para. 136(4)(b)(iv) giving a similar power to order a purchase of shares in oppression cases).

Cl. 187 : Certification of transfers

446. The certification by a company of any instrument of transfer in relation to any shares, debentures or interests made available by the company will be taken as a representation by the company that there have been produced to the company such documents as on the face of them show prima facie title to the shares, debentures or interests in the transferor named in the instrument of transfer (CB cl 187 - based on ICAC CAs s.98).

Cl. 188 : Duties of company with respect to issue of certificates

447. Within 2 months after the allotment of any shares etc. and within 1 month after the date on which a transfer of shares etc. is lodged with the company, the company will be required to complete and have ready for delivery all the appropriate certificates, debentures or other documents in connection with the allotment (CB cl 188).

448. This provision is based on ICAC CAs s.99, except that:

- (1) The Court now has the power when making an order pursuant to an application made under CB s-cl 188(4), to make provision for payment of the costs of the applicant by the company or a defaulting officer (CB s-cl 188(4)).

- (2) ICAC CAs s-sec 99(4) which was a transitional provision only for the ICAC CAs, has been deleted.

DIVISION 8 : TRANSFER OF MARKETABLE SECURITIES

449. Division 8 of Part IV of the CB (cls 189 to 198) contains provisions designed to facilitate the processing of stock exchange securities. Once the co-operative scheme is brought into operation, this Division will replace the existing State and Territory marketable securities legislation. Like the existing legislation, the Division does not apply to foreign corporations.

450. The main provisions of the existing marketable securities legislation which have been adopted are as follows:

- (a) The legislation provides simplified forms of transfers of securities when these are effected by brokers of Australian stock exchanges. The transferee's signature is rendered unnecessary in certain circumstances (see CB cl. 193), and the transferor's broker, when selling the securities to more than one buyer, can 'split' the original transfer by using a separate form for each transferee, thus eliminating the need for separate instruments signed by the transferor. Likewise a stock exchange will be able to expedite onward transfers from an initial purchaser to one or more subsequent buyers, before the registration of the initial purchase, by 'splitting' transfers in the same way as the transferor's broker.

- (b) The stamping of the instruments by the brokers for the parties to the transaction carries with it certain warranties and indemnities by the brokers that are necessary for the protection of the parties and the company concerned (see CB cl. 194).
- (c) Simplified forms are prescribed in Schedule 4. When used in accordance with the provisions of this Division, these are valid notwithstanding anything to the contrary contained in the rules of the company (see CB cls. 190 and 193).
- (d) This Division extends to transfers from authorized trustee corporations to the beneficial owners of securities held by those trustee corporations.

451. This Division is based on the VIC Marketable Securities Act 1970.

Cl. 189 : Interpretation

452. There will be an interpretation provision for the purposes of the Division which will set out the meaning of various expressions appearing in the Division (CB cl. 189).

453. This provision is based on VIC MSA s.3 with the following modifications:

- (a) The definition of "beneficial owner" has been changed to include a reference to an authorized trustee corporation holding shares for the beneficial owner either alone or with another person/s.
- (b) The definitions of "broker" and "corresponding law" have been changed (CB s-cl. 189(1)).
- (c) The definitions of "brokers agent", "prescribed corporation", "prescribed security", "prescribed stock exchange", "right to a marketable security" and "transfer" are all new.
- (d) There will now be a provision dealing with references in Division 8 of Part IV, to a form by number (CB s-cl.189(3) - not in the VIC MSA but based an NCB s-cl.255(2))).
- (e) A reference to the full name of a transferor in the forms in Schedule 4 to the CB will now include a reference to the holder of the shares as shown in the company's records (CB s-cl. 189(4) - not in VIC MSA but based on NCB s-cl. 255(3))).
- (f) With the exception of CB cl. 198, an instrument will now have to be stamped in ink. More flexibility is given to the type of stamps which may be used on documents stamped pursuant to CB cl. 198 (CB s-cl.

189(5) and (6). This change was made to ensure that stamps on documents were capable of being reproduced on microfilm.

Cl. 190 : Sufficient instrument of transfer

454. A sufficient instrument of transfer for Division 8 of Part IV purposes will be able to be used as an instrument of transfer for the purposes of CB cl. 183 and also for the requirements of any law other than the CB (CB cl. 190 - based on VIC MSA s. 4 and NCB cl. 256).

Cl. 191 : Transfer of marketable securities

455. A document will only be regarded as a sufficient instrument of transfer of marketable securities if the conditions set out in CB cl. 191 are complied with (CB cl. 191 - based on VIC MSA s. 5 and NCB cl. 257).

Cl. 192 : Transfers by authorized trustee corporations

456. Special rules will apply to deem a document a sufficient instrument of transfer where the transfer is by an authorized trustee corporation either by itself or with other persons and is to the beneficial owner of the marketable securities and the transfer is not a sale, gift or exchange of the securities. (CB s-cl. 192(1)). If the transfer is a sale, gift or exchange then the provisions of CB s-cl. 192(2) will apply.

457. CB cl. 192 is based on VIC MSA s.6 and NCB cl. 258 except that both CB s-cl. 192(1) and (2) now also apply where transfers are by authorized trustee corporations in combination with other persons.

Cl. 193 : Execution of transfer by transferee

458. The effects of the execution of a sufficient instrument of transfer on a transferee's rights and obligations in respect of the company whose shares have been transferred are set out in CB cl. 193.

459. CB cl. 193 is based on VIC MSA s.7 and NCB cl. 259 except that CB para 193 (4)(a) has been amended to take account of the new requirement that instruments of transfer be stamped with an ink stamp rather than one which makes an impression (see CB s-cl. 189 (5) and (6)).

Cl. 194 : Effect of certain stamps on prescribed instruments

460. Where an instrument of transfer is stamped by a broker or a prescribed stock exchange, the broker and his associates will:

- (a) be deemed to have warranted the accuracy of any statements in the instrument, and the right of the transferor to sell or dispose of the marketable securities.

- (b) be liable to indemnify the corporation that has, or proposes to issue, the securities to which the instrument relates, and the transferee and his broker against any loss or damage arising from a forged or unauthorized signature of the transferor.

- (c) be jointly and severally liable to indemnify a stock exchange which has stamped an instrument of transfer where another instrument of transfer relating to the same securities bears a stamp that purports to be that of the broker.

(CB cl. 194)

461. CB cl. 194 is based on VIC MSA s. 8 but with the following modifications:

- (a) Minor drafting changes have been made to take account of the new requirement that an instrument of transfer be stamped with an ink stamp. (see CB s-cl. 189 (5) and (6)).

- (b) The liability referred to in s-para 460(c) above is now joint and several.

Cl. 195 : Registration of prescribed instruments

462. A company or prescribed corporation will be entitled to assume, in the absence of contrary knowledge:

- (a) that a stamp on an instrument of transfer is what it purports to be. ie that of a transferee's or transferor's broker or that of a prescribed stock exchange (see CB cl. 191); and
- (b) that where a transfer is executed by an authorized trustee corporation, the corporation was authorized to do so and that the transfer was not by way of sale, gift or exchange of the securities (see CB cl. 192)

(CB cl. 195)

463. CB cl. 195 is based on VIC MSA s. 9 except that minor drafting changes have been made to CB s-cl. 195(1) to take account of the new requirement that the instrument of transfer be stamped with an ink stamp.

Cl. 196 : Operation of Division

464. There are provisions to ensure that the provisions relating to the transfer of marketable securities in Division 8 of Part IV will:

- (a) apply notwithstanding any provision to the contrary in the CB or in any other law or in a company's memorandum, articles, trust deed or other instrument (CB s-cl. 196(1) and (4));

- (b) not affect the terms and conditions on which marketable securities or rights thereto are sold (CB s-cl. 196(2));
- (c) not affect a company's rights to refuse to register a person as the holder of shares or to allot shares to him except that such an objection will not be valid if it relates only to the form of the instrument of transfer. (CB s-cl. 196(3));
- (d) not prevent the use of forms of transfer that are prescribed by laws other than the CB (CB s-cl. 196(5));
- (e) apply to transfers of marketable securities by or to a trustee or legal representative (CB s-cl. 196(6));

465. CB cl. 196 - based on VIC MSA s. 10.

Cl. 197 : Occupation need not appear in register, instrument, &c.

466. The omission from any document relating to marketable securities of the occupation of the person who is, or is entitled to be, registered as the holder of any marketable securities will not be treated as a breach of any law, memorandum, articles, trust deed or any other instrument (CB s-cl. 197(1) - based on VIC MSA s.11).

467. It will not be necessary in an instrument of transfer of marketable securities to state the occupation of the transferee or transferor or to have their signatures witnessed (CB s-cl. 197(2) - based on VIC MSA s.12).

Cl. 198 : Offences

468. It will be an offence for a broker to stamp an instrument of transfer unless the instrument relates to a sale or purchase made in the ordinary course of business of the broker for a consideration of not less than the unencumbered market value of the marketable securities. This provision also applies to a prescribed stock exchange, an authorized trustee corporation or any person (CB cl. 198 - based on VIC MSA s.13).

DIVISION 9 : REGISTRATION OF CHARGES

INTRODUCTION

469. Division 9 of Part IV of the CB (cls. 199 to 215) will require the registration of certain charges over the property of bodies corporate and will determine the priorities to be accorded to these registrable charges as against each other.

470. There are two major differences between this Division and the corresponding provisions in Division 7 of Part IV of the ICAC CAs (ss. 100 to 110).

471. Firstly, a system of priorities will be substituted for the current ICAC provisions making registrable charges invalid if not registered within 30 days after creation. The basic rationale for a priority system was outlined in paras 47 and 48 of the Seventh Interim Report of the Eggleston Committee:-

"47. As stated above, we have come to the conclusion that the best solution for the problems created by the form of the present legislation is to substitute a system of priorities for the present system of partial invalidity. The present system, although stated in terms of validity, is itself really a system of priorities, since the invalidity is stated to operate only as against the liquidator and any creditor of the company. The consequence of failure to register, therefore, is not to destroy the security absolutely but to destroy the preferential rights of the holder of the charge as against creditors and liquidators, but not (as pointed out by Professor Gower) as against persons who purchase the property from the company. The effect of non-registration therefore is to alter the priorities attaching to a charge. But it is apparent that the method of alteration of priorities set out in section 100 is unsatisfactory for several reasons.

48. In the first place, as we have already pointed out, the protection of a person registering a charge is imperfect in that such a person may register the charge at a time when the register is clear, only to find that an earlier charge which was not registered at the time of search or at the time of registration is registered within thirty days of its creation, and so takes priority over the second charge. In the second place, charges which have not been perfected by registration ought to be postponed, not only to the claims of creditors, but also to the claims of persons who, having searched and found no relevant charges on the register, have purchased the property subject to the charge from the company. Thirdly, under the present system, if the charge is not registered in time it becomes void as a security to the extent stated in section 100, and the situation can only be cured by an application to the Court under section 106. If a suitable system of priorities were laid down, there would be no need to impose a time limit on registration except insofar as failure to register might involve penalties for non-compliance with the Act. Late registration might result in the postponement of the charge as against interests created after the charge was registered. It would follow that sub-section (10) of section 100, and section 106, could be omitted from the Act. The power to extend the time for filing (section 108) would only affect the question of penalties, and could be made to apply generally, and not merely in the case of out-of-State documents."

472. Secondly, in relation to companies incorporated in participating Australian States and Territories and companies formed overseas which carry on business in Australia, a charge will only have to be registered in the "home" jurisdiction of the body corporate concerned (the "home" jurisdiction for an overseas company being the State or Territory in which it registers as a foreign company). The basic rationale for this change lies in the nature of the co-operative companies and securities scheme (see, particularly, paras 40 to 42 of this ex memo) and in the particular matters canvassed in para 20 of the Seventh Interim Report of the Eggleston Committee:-

"20. From the point of view of convenience, there is much to be said for the State of incorporation as the sole place of registration. In the normal course of events, a search for charges will be made in that State, wherever else it might be made. If such a scheme were adopted, a person wishing to search would know that he must search in that State and need not search anywhere else. He would have no concern with the location of the property the subject of the charge, and all problems as to changing location of movable chattels such as aircraft and motor vehicles would disappear. If failure to register in a second State in which property were situated were to involve invalidity, there would always be problems arising out of the failure of the company to inform the creditor that it had moved the property to another State. Moreover, under the existing provisions, if the property is moved to another State without the company commencing business or establishing a place of business in that State, the charge is not invalidated by the Companies Act, though it may require registration under the Instruments Act. But if the company has set up a place of business, or commenced to carry on business, the charge may be invalid unless registered."

473. The brief history of the preparation of the provisions in Division 9 of Part IV of the CB is as follows:-

(a) In July 1972 the Eggleston Committee presented its seventh interim report entitled 'registration of charges'. Three of the more significant changes proposed in that report to the existing ICAC provisions were as follows:-

(i) A system of priorities should be substituted for the provisions making registrable charges invalid if not registered within 30 days after creation (Seventh Report para. 45).

- (ii) A charge should only have to be registered in the jurisdiction of incorporation in Australia of the body corporate concerned (Seventh Report paras 20 and 21).

- (iii) A charge on shares in a subsidiary company or on certain shares in other corporations should be subject to the registration requirements (Seventh Report para. 42).

- (b) The recommendations contained in the Seventh Report were picked up, with modifications, in the NCB provisions relating to charges (NCB cls. 214 to 277).

- (c) The registration of charges provisions contained in the exposure draft were based on the NCB provisions modified to take into account:
 - (i) recommendations contained in Sir Richard Eggleston's Supplementary Report that had not already been covered (Sir Richard Eggleston's Supplementary Report was furnished at the request of the ICAC Ministerial Council and dealt with the question of what, if any, exemptions should be granted from the registration of charges requirements in relation to securities given by dealers in the money market);

- (ii) comments received from outside commercial lawyers on the NCB; and
 - (iii) the fundamental differences between a single NCB and the proposed co-operative companies legislation.
- (d) Additional changes were made in the August CB in the light of public comments, and further modifications have been made to in the present CB to take account of public comments on the August CB. Principal changes have been to:
- (i) the classes of charges requiring registration (see CB cl. 202); and
 - (ii) the reach of the priorities provisions (see CB cl. 206 and Schedule 5 which sets out the order of priorities of charges).

Cl. 199 : Interpretation

474. The terms "document of title", registrable charge" and "Register" (see CB cls. 200 and 205) have been defined for the purposes of this Division and Schedule 5. The definitions of "present liability" and "prospective liability" are relevant to CB cl. 206 and cl. 3 of schedule 5.

475. The term "document of title" is used in CB paras 200(1)(g), and (2)(c), s-cl. 200(5). The definition of "document of title" is based on the corresponding definition in NCB cl. 214, except that reference has been made in CB para. 199(1) (f) to a "warrant or order for the delivery of goods" (see definition of "bill of sale" in s. 32 VIC Instruments Act 1958).

476. Charges over property held by a company as trustee will be required to be registered (CB s-cl. 199(2)) except charges on property held by a trustee company as a legal personal representative or as a trustee under a will (CB s-cl. 200(9)).

477. A charge existing when property is acquired will be treated as if it were not registrable until the charge is registered. The rationale is that the new chargee cannot control what happens to the property of the company. Similarly, charges over property of a corporation which are not required to be registered when created but are subsequently required to be registered when the corporation transfers its incorporation or registers as a foreign company in the Territory (see CB s-cl. 85(4) and s-cl. 512(2)) will be treated as if it were not registrable until the charge is registered. When any of these charges are registered they have the priority accorded to a registered charge as from the time of registration. However, if they have an earlier priority at general law this priority remains, so that the new chargee is not prejudiced (CB s-cl. 199(3) and (4), based generally on cl. 8 of the Priorities Schedule to the Eggleston Committee's redraft - See also CB s-cl. 203(10) and (11)).

478. The time when a document will be deemed to be lodged is defined in CB s-cl. 199(2).

479. The provisions of the CB relating to the registration of charges (Division 9 and Schedule 5) will apply to charges on all property of locally incorporated companies (CB s-cl. 199(7)) but only to property within Australia of registered foreign companies formed overseas (CB s-cl. 199(9)), and only to property within the A.C.T. of registered foreign companies formed in a non-participating Australian jurisdiction (CB s-cl. 199(8)).

Cl. 200 : Charges required to be registered

480. The types of charges that are required to be registered under Division 9 are set out in CB cl. 200.

481. This provision:-

- (a) is based on NCB cl. 216 which was based generally on s-sec. 100(3) of the ICAC CAs, modified in the light of recommendations made in the Eggleston Committee Report;
- (b) incorporates a number of further modifications based on recommendations contained in the Supplementary Report (referred to in para 484(a) of this ex memo) and public comments on the two exposure drafts of the CB.

482. The main differences between CB s-cl. 200(1) and s-sec 100(3) of the ICAC CAs are set out below.

- (a) Charges created in equity: It will be clear that the provisions relating to the registration of charges apply to charges created in equity as well as at law (see introductory words to CB s-cl. 200(1)). A charge on property held by a trustee company as a legal personal representative or as a trustee under a will will not require registration (see CB s-cl. 200(9)).
- (b) Charges to secure debentures: Para 100(3)(a) of the ICAC CAs ('a charge (other than a charge solely on land) to secure any issue of debentures') will be omitted. This omission is recommended in para. 43 of the Eggleston Committee Report:

"The other paragraphs of the section deal with charges over specific kinds of property, rather than charges defined in terms of the kind of debt for which security is given, and in our opinion no harm will be done, and a source of uncertainty will be removed, if paragraph (a) is omitted altogether."

- (c) Paras 100(3)(b) and 3(e) of the ICAC CAs require the registration of charges on uncalled share capital and unpaid calls respectively. In the light of the distinction drawn in Re South Australian Barytes (1977) 3 A.C.L.R. 52 between uncalled share capital and uncalled share premiums, reference is now made in the CB to uncalled share premiums (see CB paras 200(1)(b) and (c)).

(d) Charge on personal chattels: Para 100(3)(c) of the ICAC CAs requires the registration of certain charges which, if created by an individual, would be invalid or of limited effect if not registered under State or Territory bills of sale legislation. As recommended by the Eggleston Committee Report, this paragraph has been replaced by a provision in CB para. 200(1)(d) that will require the registration of charges on personal chattels (defined in CB s-cl. 200(3) - and see CB s-cl. 200(2) for additional exclusions). This provision specifies the kind of charges that should be registered (rather than identifying them by reference to State or Territory legislation). CB para 200(1)(d) and s-cl. 200(3) are based on para. 100(3)(c) and s-cl. 100(11) of the Eggleston Committee's redraft. (The exclusions contained in paras 100(3)(c)(i) and (ii) in the Eggleston Committee's redraft above are covered in CB s-cl. 200(2)). A charge on 'personal chattels' will have to be registered whether or not it was "created" by an instrument in writing.

(e) Charges on ships: Charges on ships registered in an official register kept under a law relating to title to ships will now be now excluded from the charges requiring registration (CB para. 200(1)(d)). This omission was recommended by the Eggleston Committee in para. 38 of the Seventh Interim Report:

'.....A problem also arises in respect of shipping, for which a system of registration and priorities already exists. There are some difficulties in relation to the registration of shipping, but once a ship is registered the priorities of mortgages are determined by entry on the register. We do not see how a separate and different system of priorities could operate in respect of registered ships, and we recommend that the reference to ships appearing in section 100(3) be modified by excluding ships entered on an official register.'

Questions as to whether or not ship fittings such as tackle etc. are comprehended in the exemption will depend on the laws relating to title to ships.

- (f) Charge on service marks: It will be made clear that the provisions relating to registration of trade marks extend also to service marks and other registered designs (CB para. 200(1)(e)). See also CB s-cl. 204(5) which will ensure that the CB does not override Commonwealth legislation relating to trade marks etc which have their own provisions as to title validity and priority for charges.
- (g) A charge on a book debt The registration requirements will apply to charges on book debts (including future book debts and particular book debts) owed to a company. The requirement for the registration of a charge on a book debt has no counterpart in the ICAC CAs - it is bas _____ Eggleston Committee (see _____ on Committee's Rep _____ equently

be a marketable security and vice versa, and charges on marketable securities are required to be registered (see CB para 200(1)(g)), the provision has been drafted to ensure that the exemptions applicable to one category of charge are also applicable to the other. Accordingly, a charge on a book debt which is also a marketable security, will not be required to be registered if the charge is created by the deposit of a document of title to the marketable security (see CB para 200(1)(g) and s-cl. 200(4)).

- (h) A charge on a marketable security: CB para 200(1)(g) will require the registration of certain charges on marketable securities. The term 'marketable securities' is defined in CB s-cl. 5(1). The extension to 'marketable securities' will cover 2 specific extensions recommended by the Eggleston Committee:

- (i) a charge over shares in a subsidiary This was recommended by both the Jenkins Committee (para 301) and the Seventh Interim Report of the (para 39) Eggleston Committee to overcome the anomaly that 'if the company carried on business through branches, it could not charge the assets of the branches without registration, but if it carries on business through subsidiary companies, it can charge the shares in the subsidiaries without registering the charge'.

(ii) a charge over shares in another corporation, not being a charge in favour of a stockbroker or a charge by delivery of documents This extension was recommended by the Eggleston Committee (para. 39 of Seventh Interim Report). Sub-para 200(1)(g)(i) differs from the corresponding provision in the NCB (s-para. 216(1)(j)(i)) which made reference to the deposit "in the ordinary course of business" of a document of title to the marketable security. This gives partial effect to a recommendation contained in para 7 of the Eggleston Supplementary Report on the use of the expression "in the ordinary course of business".

(i) A charge on a negotiable instrument other than a marketable security: Charges created over negotiable instruments will be required to be registered (CB para. 200(1)(j)) unless the charge is created by way of deposit etc. (CB para. 200(2)(c)).

483. Certain dealings will be specifically exempted from the registration requirements (CB s-cl. 200(2)). The following points are noted:

(a) CB para 200(2)(a) will exclude a charge or a lien over property arising by operation of law. This provision may only be a statement of the existing law but stating it explicitly will serve to warn that such liens and charges are not covered.

- (b) CB para 200(2)(b) will exempt pledges from the registration requirements, consistent with Bills of Sale legislation, as the pledgee would have actual or constructive possession of the property.
- (c) CB para 200(2)(d) deals with transfers in the ordinary course of business - cf. s.32 of the VIC Instruments Act: "'Bill of sale' does not include transfers of goods in the ordinary course of business of any trade or calling"
- (d) CB para 200(2)(e) covers dealings outside Australia-cf. s.32 of VIC Instruments Act: "'Bill of Sale' does not include bills of sale of goods in foreign parts or at sea"

484. Attention is also directed to the following provisions of CB cl. 200:

- (a) The definition of book debt in CB s-cl. 200(4) will exclude marketable securities and negotiable instruments to avoid overlap with CB paras 200(1)(f) and (j) (see ex memo at para 480(g)). The definition of book debt will exclude charges on debts owing in respect of mortgages of land to avoid dual registration of sub-mortgages of land which would generally be registered in land title registers. A mortgage of the reversion of a lease will also be excluded. There is a new provision which is designed to cover the cases

considered in the Eggleston Supplementary Report (see pp 8-10) where documents evidencing or representing a thing in action (documents of title) are in the hands of a third party when the transaction is consummated or where the documents have not yet been issued, but the lender is nevertheless entitled to be protected (CB s-cl. 200(5)).

- (b) The registration of charges provisions will apply to an instrument of charge that charges both property falling within CB s-cl. 200(1) and other property of the company (CB s-cl. 200(6) - based on NCB s-cl. 216(5)).
- (c) The provisions will not apply to charges on land (CB s-cl. 200(7)) - see also CB s-cl. 204(2) which ensures that the provisions of Schedule 5 do not apply so as to effect the priority of a charge on land or other unregistrable property if a charge exists which applies to that property as well as to registrable property.
- (d) CB s-cl. 200(1) will not apply to a charge on fixtures given by a charge on the land to which they are affixed (CB s-cl. 200(8) - based on NCB s-cl. 216(6)). There is no equivalent provision in the ICAC CAs but cf. s-sec. 109A(1) of the NSW Conveyancing Act 1919.

(e) Charges by a trustee corporation will be dealt with in CB s-cl. 200(9) (based on NCB s-cl. 216(7)).

(f) A charge on property of a company will not be invalid by reason only of the failure to lodge with the NCSC or to give to the company or some other person a notice or other document that is required to be lodged or given under this Division (CB s-cl. 200(10) - based on NCB s-cl. 216(8)). However, the general penalty (\$500) will apply (CB s-cl. 208(2) and (3)).

Cl. 201 : Lodgment of notice of charge and copy of instrument

485. A company will have to lodge a notice of a charge with the NCSC within 45 days after the creation of the charge together with a copy of the instrument (if any) creating or evidencing the charge, or where a series of debentures has been issued and the charge is evidenced only by the resolution or resolutions and the debentures, a copy of the resolution or each of the resolutions and a copy of the first debenture issued in the series (CB cl. 201 based on NCB cl. 217 although the approach in the NCB of requiring only a notice of charge to be lodged will not be followed - also the 28 day period in the NCB will be extended to 45 days).

486. As a consequence of the decision to require a copy of any instrument creating or evidencing a charge to be lodged,

it has been necessary to include new provisions (CB para 201(1)(b) and s-cl. 201(2)) to cover cases where a company by resolution creates a series of debentures each containing its own charge clause and not supported by a separate trust deed - see para. 61 of the Eggleston Committee Report and cf. s-cl. 100(5) and (6) of the Eggleston Committee's re-draft which read as follows:

"(5) When a resolution is passed by a company authorising the issue of a series of debentures conferring on the holders thereof a charge to the benefit of which the debenture holders of that series are entitled equally, and there is no instrument creating or evidencing the charge other than that resolution or those debentures, it shall be sufficient if there are lodged with the Registrar for registration within thirty days after the execution of the first debenture of the series, a statement containing the following particulars -

- (a) the total amount (if any) secured by the whole series;
- (b) the date of the resolution authorising the issue of the series;
- (c) a general description of the property charged; and
- (d) the names of the trustee (if any) for the debenture holders -

together with a copy of the resolution authorising the issue of the series and a copy of the first of such debentures, and an affidavit verifying its execution and verifying the copies to be true copies; and save as aforesaid it shall not be necessary to register any debenture forming part of that series.

(6) For the purposes of sub-section (5) of this section where more than one resolution is passed authorising the issue of debentures in the series a copy of each subsequent resolution after the first shall be lodged within thirty days after the passing thereof."

487. Provision has been made for foreign companies which transfer their incorporation to the Territory or register as a foreign company in the Territory to lodge with the NCSC notice and a copy of charges in respect of property of the foreign company which was charged prior to it becoming registered as a local company under Division 4 of Part III or as a foreign company under Division 5 of Part XIII (CB s-cl. 201(3) - (5), Cf. sub-cl. 102(2) of the Eggleston Committee's redraft.)

Cl. 202 : Acquisition of property subject to charge

488. A company that acquires property subject to an existing charge will be required to lodge a notice of that charge with the NCSC and, if the charge was created or evidenced as mentioned in para. 201(1)(b) or (c), the instruments or copies of such instruments etc. required to be lodged under those provisions (CB cl. 202).

489. This provision is based on NCB cl. 218 - cf. also para. 102(1)(a) of the ICAC CAs and s-cl. 102(1) of the Eggleston Committee's redraft.

490. The 45 day period will also be adopted in this provision.

Cl. 203 : Registration of documents relating to charges

491. The NCSC will have to keep a register to be known as the Register of Company Charges and enter in the register certain

particulars in relation to charges (CB cl. 205). Persons wishing to lodge documents promptly to gain the benefits of the priority system will not be prejudiced by the existence of provisions in various Stamp Duties Acts preventing the Commission from accepting documents on which stamp duty is payable before the stamp duty has been paid (CB s-cl. 203(4) and (5) and cf. Eggleston Report para. 49). The provisions are similar to those relating to defective notices (CB s-cl. 203(6) - (9)).

492. The procedures involved where a purported notice of charge is defective will be as follows:

- (a) Where a notice is lodged that is defective, provided the notice contains the name of the company concerned and the particulars referred to in CB s-para. 201(1)(a) (iv) or (v), the NCSC will be required to enter the charge in the register and include the word 'provisional' alongside the entry (CB para. 203(6)(a)). The NCSC will then have to direct the person who lodged the document to ensure that on or before a specified date the requirements in relation to the notice will be complied with (CB para. 203(6)(b)).
- (b) Where a company complies with a direction by the NCSC (under CB s-cl. 203(6)) on or before the date specified

in the notice, the NCSC will have to delete the word 'provisional' from the entry in the Register and enter any required particulars that had not previously been entered (CB para. 203(7)(a)). However, if a company fails to comply with a direction before the date specified the NCSC will be obliged to delete all the particulars that were entered in relation to the charge (CB para. 203(7)(b)). Where a company complies with a direction after the date specified in the notice, the NCSC will have to then make an entry in the Register in relation to the charge of the time and date on which the direction was complied with together with the other required particulars (CB para. 203(3)(c)).

- (c) If the word 'provisional' is entered in the Register specifying a time and date in relation to a charge, the charge will not be deemed to have been registered, (CB s-cl. 203(3)), but if the company complies with the direction within the required time and the word 'provisional' is deleted and the entry specifying that time and date remains, the charge will be deemed to be registered and to have been registered from and including the time originally specified in the register. If the direction is only complied with after the required time, the charge will be deemed to be registered from the time of compliance. (CB s-cl. 203(9)).

493. If there is more than 1 charge on the property of a corporation of the type which does not become registrable at the time when the charge is created but only when the corporation subsequently becomes subject to the provisions of this Act, then the Commission is required to insert details of those charges in its register in such a manner that as against other registrable charges they are all accorded the same priority by Schedule 5 (CB s-cl. 203(10) - (13)). If a corporation fails to comply with its obligation to lodge particulars of all relevant charges at the same time, and instead lodges details of some pre-existing charges at a later time, the corporation will be liable to penalties but the charges will not be disadvantaged: these pre-existing charges will still be given the same priority time for the purposes of Schedule 5. However, as between themselves, these charges will retain their priorities under the general law. There are 3 categories of pre-existing charges to which these provisions apply:

- (a) charges over property of a foreign company which only become registrable under the Act when the foreign company transfers its place of incorporation to the Territory (CB s-cl. 203(10) and (11), and see also CB s-cl. 201(3));
- (b) charges over property of a foreign company which only become registrable when the foreign company commences carrying on business in the Territory and is thereby required to register as a foreign company in the Territory (CB s-cl. 203(10) and (11) and see also CB s-cl. 201(4)); and

- (c) charges over property of an individual or unregistered foreign company which only become registrable under the Act when the property is acquired by a local member or a registered foreign company (CB s-cl. 203(12) and (13), and see also CB cl. 202).

Cl. 204 : Priorities of charges

494. This clause provides that the priorities of registrable charges in relation to each other are as set out in Schedule 5 (CB cl. 204).

495. This provision is based on NCB cl. 221 with 3 exceptions:

- (a) Unlike the NCB and the Eggleston Committee proposals, the Priorities Schedule will not purport to determine the priorities between registrable charges and other unregistrable interests - this matter is left to the general law.
- (b) The provision for chargees to be able to consent to a waiver or variation of the priority to which their registrable charges would otherwise be entitled, is contained in CB s-cl. 204(2) rather than in the priorities schedule as in the N.C.B. - cf cl. 1 of the Priorities Schedule to the Eggleston Committee's redraft.

- (c) A chargee of a floating charge will be deemed to have consented to a subsequently registered fixed charge created before the floating charge crystallises taking priority unless the company, under the terms of the floating charge, had limited its power to create subsequent fixed charges and this fact had been notified to the NCSC by the holder of the floating charge (cf. N.C.B. where a comparable provision was included in the priorities schedule).

Cl. 205 : Certain charges void against liquidator or official manager

496. If liquidation or official management occurs then a registrable charge will be void as a security on the property of the company as against the liquidator or official manager unless notice is lodged with the NCSC within the specified time (see CB s-cl. 205(1) and (2) or at least six months before the commencement of the winding-up or official management. However, the charge will not be void as a security if the 45 day or other period has not elapsed when the winding up or official management commences CB s-cl. 205(1) of ICAC CAs s. 100(1)).

497. Subject to any extensions of time which may have been granted (CB s-cl. 205(3)), the periods of time within which the notice in respect of the charge must have been lodged will be:-

(a) 45 days from creation of the charge, in the case of a charge created by a company or registered foreign company (CB para 205(2)(a));

(b) 45 days after the chargee becomes aware that:

(i) the foreign company which has given the charge has transferred its incorporation to the Territory or registered as a foreign company in the Territory (CB para 205(2)(a)) or

(ii) that the relevant property has been acquired by a company or registered foreign company (CB para 205(2)(c)) - this period will operate rather than the time within which the corporation is required to ensure that details of the charge are lodged with the Commission, on the basis that it would be inequitable for the charge to become void as a security without the chargee being aware that it had become registrable, and

(c) 45 days after the variation occurs, in the terms of a registrable charge on property of a company which has the effect of increasing the amount of the debt increasing the liabilities or restricting the creation of subsequent charges on the property (CB para 205(2)(d)).

498. The provision is broadly based on para 2(e) of the Priorities Schedule to the Eggleston Committee's redraft. The Eggleston Committee explained the reasons for this provision in para 53 of its report which was in the following terms:

"53. So far as liquidators are concerned, we think that an unregistered charge should not confer any priority in a liquidation. This accords with the present position. But in the case of a registered charge, we think there should be a provision that the person entitled to a registered charge shall not be entitled to the benefit of the charge unless it is registered within thirty days of its creation, or at least six months prior to the liquidation. Otherwise a person might avoid disclosure of the existence of the charge until just before the company was about to go into liquidation, and then by a last-minute registration obtain the benefit of the charge."

499. A somewhat comparable provision has been inserted in Division 9 of Part 4 (CB s-cl. 205(1)) rather than in Schedule 5 on the basis that this is more appropriate for resolution as a question of validity rather than as a question of priority and postponement of charges. The effect of this provision is a question of an unregistered charge will rank alongside non-preferential unsecured creditors, whereas the effect of the Eggleston Priorities Schedule (see para 5(e)) would have been to rank the holder of an unregistered charge behind all unsecured creditors. (See also CB cls. 446, 451 and 452 as to the priorities and validity of charges in a liquidation).

500. Interested parties will be able to apply to the Supreme Court for an extension of time within which to lodge notices of charges and the Court will grant the extension if the failure to lodge the notice within the required time is accidental, or if it does not prejudice the position of creditors or

shareholders or if the granting of an extension on any other grounds would be just and equitable (CB s-cl. 205(3)). The provision is based on ICAC CAs s. 106 which also dealt with rectification of omissions or mis-statement in the register of charges. This matter is now covered in CB cl. 212.

501. As this Division retains some aspects of a partial invalidity system it has been considered appropriate to ensure that companies creating charges do not avoid the consequences of failure to register charges within the required time by creating new charges as security for the same debt just prior to expiry of the time limits, thereby achieving a contrived extension of time (CB s-cl. 205(4) - based on ICAC CAs sub-s. 100(10)).

502. The rights of a purchaser for value from a chargee or a receiver appointed by him of company property will be protected where the purchaser acts in good faith and without notice of the commencement of official management or winding up (CB s-cl. 205(5) - based on proposals mentioned in Eggleston Committee Report para 45).

Cl. 206 : Assignment and variation of charges

503. Where registrable charges are assigned, the new chargee will have to notify the NCSC and the company within 45 days (CB s-cl. 206(1)).

504. Where certain variations of registered charges are effected particulars will have to be lodged with the NCSC accompanied by the instrument effecting the variation or a certified copy thereof (CB s-cl. 206(2) - based generally on NCB cl. 222). See the definition of "priority time" in CB Schedule 5 cl. 7 as to the priority to be accorded to such variations.

505. Where a charge secures a debt of an unspecified amount or a debt of a specified amount and further advances, a payment or advance made by the chargee to the company in accordance with the terms of the charge will not be required to be notified to the Commission (CB s-cl. 206(3) - not in N.C.B.). This does not mean, however, in the case of a charge which provides for the possibility of further advances being made but the lender is not obliged to make those advances, that the priority accorded to the charge will necessarily extend to those further advances - see CB Schedule 5, cl. 3 and definitions of "priority time" (CB Schedule 5, cl. 7), "present liability" and "prospective liability" (CB s-cl. 199(1)). Furthermore, if the charge is varied by including additional items within the property charged then this would be treated as the creation of a new charge requiring fresh particulars to be lodged under CB cl. 201.

Cl. 207 : Satisfaction of, and release of property from, charges

506. The satisfaction of, and release of property from, charges is dealt with in cl. 207.

507. This provision is based on NCB cl. 223 which in turn is based generally on s.105 of the ICAC CAs which was examined in paras 65 and 66 of the Eggleston Committee's Report and accepted without change.

Cl. 208 : Lodgment of notices, offences, etc.

508. Particulars of a charge will be able to be lodged by the company creating it or by any other person (CB cl. 208).

509. The provision is based on NCB cl. 225 which, in turn, was based on s. 101 of the ICAC CAs and cl. 101 of the Eggleston Committee's redraft.

Cl. 209 : Company to keep documents relating to charges and register of charges

510. A company will be required to keep a copy of documents relating to registrable charges over its property and a register in which particulars of all charges (whether registrable or not) are entered (CB cl. 209).

511. This provision is based on NCB cl. 226 which, in turn, was based on s. 107 of the ICAC CAs except that:

- (a) copies of the instruments created will not be required to be available for public inspection;

(b) persons will be able to request that the company provide them with a copy of its register or a part thereof;

(c) a penalty provision has now been included.

512. For provision as to the location at which the register is to be kept see CB cl. 547.

Cl. 210 : Certificates

513. A certificate issued by the NCSC setting out particulars of a registered charge which are entered in the register of company charges will be prima facie evidence of the matters stated in the certificate (CB s-cl. 211(1) and (2) - based on N.C.B. cl. 227).

514. A certificate issued by the NCSC merely stating that particulars of the charge have been entered in the register will be conclusive evidence that the registration requirements have been complied with (based on ICAC CA's sub-s 103(2) except that with the change to a priority system, it has been made clear that such a certificate is not conclusive evidence that a notice has been lodged within 45 days of the creation of the charge).

Cl. 211 : Registration under Instruments Ordinance 1933

515. Where a company, a recognized company or a recognized foreign company transfers, assigns or gives security over a

personal chattel or book debt within the meaning of the A.C.T. Instruments Ordinance 1933, and those charges are subject to the registration requirements of the CB or of the companies legislation of another jurisdiction covered by the scheme, it will not be required to register under the provisions of the Ordinance that transfer, assignment or giving of security unless it is made or given jointly with one or more persons who is or are not a company, a recognized company, or a recognized foreign company (CB s-cl. 212(1) based on s-cl. 100(9) of the Eggleston Committee's redraft).

516. Failure to register in accordance with these exempting provisions (in CB s-cl. 211(1)) will not affect the validity or limit the effect of the transfer, assignment or giving of security nor result in any loss of priority which would otherwise be accorded if the charge were registered under the Instruments Ordinance (CB s-cl. 211(2)).

517. The laws of each other jurisdiction will contain similar provisions in relation to their bills of sale legislation.

Cl. 212 : Power of Court to rectify Register &c.

518. The Supreme Court will have the power to rectify omissions or mis-statements in the Register of Charges if it is satisfied of certain matters (CB cl. 212 - based on ICAC CAs s. 106; see also CB s-cl. 205(3) in relation to the power of the Supreme Court, if satisfied of those same matters, to extend

the time for lodging notice of charges. The matter was also covered in ICAC CAs s. 106)).

Cl. 213 : Charges on property of recognized companies or recognized foreign companies

519. The priorities system of each participating jurisdiction will be given effect throughout all participating jurisdictions (CB cl. 213). The provision gives the force of law in one jurisdiction to the law of another participating jurisdiction such that a company incorporated in one State carries its law with it no matter where the property is situated or where the charge is executed. Similarly, an overseas company registered as a foreign company in a participating jurisdiction carries with it the law of that jurisdiction no matter where the charge over property within Australia is executed.

Cl. 214 : Provisions applying when incorporation transferred

519A. There will be provision for the entry in the NCSC register of charges (which are not already registered under this Division) on property of recognized and foreign companies which transfer their place of incorporation (CB cl. 214).

Charges created before commencement of Act

519B. Charges that were created by a company prior to the commencement of the CB and property subject to a charge that was acquired by a company before the commencement of the CB are dealt with in cl. 17 of the C(TP)B.

CL. 215 : Power to exempt from compliance with certain requirements of Division

519C. The NCSC will be able to exempt a person from certain of the requirements in CB cls 201, 202 and 206 subject to such conditions as it thinks fit (CB cl. 215).

CB : PART V : MANAGEMENT AND ADMINISTRATION

520. Part V of the CB (cls. 216 to 265) deals with the management and administration of companies:

- Division 1 - Office and Name
- Division 2 - Directors and other Officers
- Division 3 - Meetings and Proceedings
- Division 4 - Register of Members
- Division 5 - Annual Return

DIVISION 1 : OFFICE AND NAME

Cl. 216 : Registered office of company

521. Division 1 of Part V of the CB (cls. 216 to 218) deals with the registered office and name of the company.

522. A company will be required to have a registered office which must be open and accessible to the public for certain hours each day (CB cl. 216 - based on ICAC CAs s.111). See also cl. 528 dealing with the service of documents on a company.

Cl. 217 : Notice of address of registered office and office hours

523. A company will be required to notify the NCSC of the address of its office and of the hours of public access to this office (CB cl. 217 - based on ICAC CAs s.112).

Cl. 218 : Publication of name

524. The name of the company will have to appear legibly on any seal of the company, on its business documents and outside each of its offices (CB cl. 218).

525. This provision is based on ICAC CAs s. 113. Para. 218(1)(b) will however, now also apply to an "order for goods or services" and it is made clear that the company must comply with the provision "whether or not the company is carrying on a business under a business name".

DIVISION 2 : DIRECTORS AND OTHER OFFICERS

526. Division 2 of Part V of the CB (cls. 219 to 238) deals with the duties and functions etc. of the directors and other officers of a company. 'director' and 'officer' are defined in CB s-cl. 5(1).

Cl. 219 : Directors

527. A public company will be required to have a minimum of 3 directors and a proprietary company a minimum of 2 directors (CB cl. 219).

528. This provision is based on ICAC CAS s. 114 except that there will now be a requirement that all directors of a public or proprietary company must be natural persons (CB sub-cl. 219(2)). This change was made in NCB s-cl. 74(2) and is a similar provision to s-cl. 40(1) of the 1973 United Kingdom Companies Bill; para. 218(1)(a) of the South African Companies Act and para. 182(1)(c) of the Ghana Companies Code. The Jenkins Committee (para 84) and the Macarthur Committee (para 35) also thought it important that natural rather than artificial persons should be responsible for the management of a company.

Cl. 220 : Restrictions on appointment or advertisement of director

529. A person will not be able to be named as a director in the memorandum or articles, or in a prospectus, unless he

has consented in writing to act as a director. Such a person will have to lodge certain undertakings and other documents with the Commission (CB cl. 220 - based on ICAC CAs s.115). (The reference to "a statement in lieu of prospectus" in s-secs. 115(1) and (3) of ICAC CAs has been omitted following the omission of ss 50 to 52 of the ICAC CAs in the CB).

Cl. 221 : Qualification of director

530. A director will have to, if required by the articles of the company, obtain his specified share qualification within 2 months of his appointment (CB cl. 221 - based on ICAC CAs s-secs. 116(1) and (2)).

Cl. 222 : Vacation of office

531. The office of a director will be vacated if:

- (a) he has not obtained his share qualification with the period referred to in s-cl. 221(1);
- (b) he ceases to hold his share qualification;
- (c) he becomes an insolvent under administration;
- (d) he is convicted of an offence referred to in s-cl. 227(2).

(CB s-cl. 222(1)).

532. CB paras 222(1)(a) and (b) are based on ICAC CAs s-secs. 116(3) and (4). Note that the definition of "insolvent under administration" will replace the definition of "undischarged bankrupt" in the ICAC CAs and that the former expression is wider than the latter in that it includes a person who has executed a deed of arrangement or whose creditors have accepted a composition (see CB s-cl. 5(1)).

533. There will be provisions for the re-appointment of such persons who vacate the office of director (CB s-cl. 222(2) - (4)).

Cl. 223 : Appointment of directors to be voted on individually

534. When directors are appointed by a public company at a general meeting, their appointment will have to be voted upon individually unless the meeting unanimously agrees otherwise (CB cl. 223 - based on ICAC CAs s.118).

Cl. 224 : Validity of acts of directors and secretaries

535. The acts of a director or secretary will be valid notwithstanding any defect that may afterwards be discovered in their appointment or qualification (CB cl. 224).

536. This provision is based on ICAC CAs s. 119 but has been expanded to cover the case of a person whose office as director is vacated pursuant to CB s-cl. 222(1).

Cl. 225 : Removal of directors

537. A public company will be able to remove a director by resolution before the expiration of his period of office provided that certain conditions, involving special notice of the resolution and the right of the director concerned to have his views made known to members, are met (CB cl. 225 - based on ICAC CAs s.120).

Cl. 226 : Age of directors

538. No person of or over the age of 72 years will be able to be appointed or act as a director of a public company or a subsidiary of a public company (CB s-cl. 226(1)) unless certain conditions are fulfilled (CB s-cl. 226(6) and (7)).

539. This provision is based on ICAC CAs s. 121. CB s-cl. 226(12) is a new provision which provides that a person is incapable of being appointed as a director unless he has attained the age of 18 years.

Cl. 227 : Certain persons not to manage corporations

540. A person who is an insolvent under administration will not be able to act as a director or promoter of, or take part in the management of, a corporation without the leave of the Supreme Court (CB s-cl. 227(1)) - based on ICAC CAs s-sec. 117(1)). (Note that the definition of "insolvent under administration" will replace the definition of "undischarged

bankrupt" in the ICAC CAs and that the former expression is wider than the latter in that it includes a person who has executed a deed or arrangement or whose creditors have accepted a composition (see CB s-cl. 5(1)).

541. A person who has been convicted of an offence in relation to the promotion, formation or management of a corporation or of any offence involving fraud or dishonesty or of any offence under certain sections of the CB, SIA, CASA, or corresponding provisions in any other State or Territory, will not be able to act as a director or promoter of, or take part in the management of, a corporation for 5 years from the date of conviction or of the date of release from prison, except with the leave of the Court (CB s-cl. 227(2) - based on ICAC CAs s-sec. 122(1)).

542. A certificate from a prescribed authority stating that a person was released from prison on a certain date will be prima facie evidence that a person was released on that date (CB s-cl. 227(3)). This is a new provision intended to overcome evidentiary problems that have been encountered in establishing such dates.

543. When granting leave under this provision, the Supreme Court will be able to impose such conditions or limitations as it thinks fit (CB s-cl. 227(4)). This is a new provision; it would appear that, under ss 117 and 122 of the ICAC CAs, the Supreme Court is not able to grant leave subject to restrictions.

544. A person intending to apply for leave will have to give the NCSC 21 days notice of his intention (CB s-cl. 227(5) - based on ICAC CAs s-secs. 117(2) and 122(2) but extended from 10 to 21 days). The right of the registering authority to appear and oppose the application as contained in ss 117 and 122 of the ICAC CAs has been omitted, as cl. 540 gives the NCSC the general right to intervene in any proceeding involving a matter arising under the CB.

545. The Supreme Court will be able at any time, on the application of the NCSC, to revoke leave granted under this provision (CB s-cl. 227(6)).

Cl. 228 : Disclosure of interests in contracts, property, offices, &c.

546. A director will have to declare any interest that he may have in a contract with the company and any conflicts that may arise between his duties or interests as a director and his other duties or interests (CB cl. 228).

547. This provision is based on ICAC CAs s. 123 except in that it will now provide that the declaration required by CB s-cl. 228(5) need only be made at the first meeting of directors after the director involved becomes aware of the relevant factors (CB s-cl. 228(5)). This change was made after receiving numerous public submissions to the effect that such a provision should be included.

Cl. 229 : Duty and liability of officers

548. The provision dealing with the duties and liabilities of officers is based on s. 124 of the ICAC CAs but amends that provision in certain important respects. These amendments are explained below (CB cl. 229).

549. An officer of a corporation will have to act honestly in the exercise of his powers and the discharge of the duties of his office (s-cl. 229(1)). This provision is based on s-sec. 124(1) of the ICAC CAs but differs from it in the following respects:

- (a) It applies to "officers" as well as directors. Note that the definition of "officer" for s-cl. 229 purposes is different from that set out in s-cl. 5(1) in that it includes all receivers, whether or not managers, and all liquidators but it does not include employees (CB s-cl. 229(5)).
- (b) A more severe penalty (\$20,000 or imprisonment for 5 years or both) will be imposed on officers who act with an intent to deceive or defraud than on officers who, although they have committed a s-cl. 229(1) offence, have not acted with such an intent. For these last mentioned officers the penalty imposed is \$5,000. (CB s-cl. 229(1)).

550. An officer will have to exercise a reasonable degree of care and diligence in the exercise of his powers and the discharge of his duties (CB s-cl. 229(2) -based on ICAC CAs s-sec. 124(1) but extended to apply to "an officer" and the requirement of a reasonable degree of care is included in addition to the present requirement of "reasonable diligence"). The penalty for non-compliance with this sub-clause has been increased to \$5,000.

551. An existing or former officer or employee of a corporation will not be able to make improper use of information acquired by virtue of his position (CB s-cl. 229(3)). This provision is based on ICAC CAs s-sec. 124(2) except in that it will also apply to former officers or employees in line with the insider trading provisions in the Securities Industry Act.

552. The effect of CB s-cl. 229(3) has been widened to include a prohibition on an officer or employee making improper use of his position as such, i.e. it is not restricted to information acquired by virtue of that position (CB s-cl. 229(4)).

553. The Supreme Court, in addition to imposing a criminal penalty, will now be able to order that a person convicted of an offence under this provision pay compensation to the corporation (CB s-cl. 229(6)). This provision is based on ICAC s-sec. 124(3) except in that it allows the order for compensation to be made at the same time that the conviction is imposed - separate proceedings do not have to be taken.

554. A corporation will, however, be able to take civil proceedings against a person who has contravened this section for an amount equal to the profit made by that person or the loss suffered by the corporation. This right will apply irrespective of whether the person involved has been convicted of an offence (CB s-cl. 229(7) - based on ICAC CAs s-sec. 124(3)).

Cl. 230 : Loans to directors

555. A company will not be able to directly or indirectly, give a loan to, or give a guarantee or provide security for a loan to:

- (a) a director of the company, a spouse of such a director, or a relative of such a director or spouse;
- (b) a director of a related corporation, a spouse of such a director, or a relative of such a director or spouse;
- (c) a trustee of a trust under which a person referred to in paras (a) or (b) above has a beneficial interest, being a loan to a trustee in his capacity as such;
- (d) a corporation, where a person referred to in (a) or (b) has, or 2 or more such persons together have, a direct or indirect beneficial interest in shares in the corporation the nominal value of which is not less

than 10% of the nominal value of the issued share capital of the corporation. Note that a person or persons will not be taken to have such a beneficial interest by reason only that the company has a relevant interest or interests in shares in the corporation and the person or persons has or have a relevant interest or relevant interests in shares in the company.

(CB s-cl. 230(1)).

556. This provision (CB s-cl. 230(1)) is based on ICAC CAs s-sec. 125(1), but differs from it as follows:

- (a) The prohibition on loans to relatives of spouses of directors is new and is designed to prevent avoidance of CB cl. 230 by making loans to such persons. (CB sub-para 230(1)(a)(i)).
- (b) The prohibition on loans to a trust in which directors, spouses of directors or their relatives have a beneficial interest is new. (CB sub-para 230(1)(a)(iii)).
- (c) The 10% beneficial interest test in para. (d) above replaces a substantial shareholding test in the ICAC CAs s-sec. 125(1). (CB sub-para 230(1)(a)(iv)). This change was made in an attempt to clarify the provisions of the equivalent ICAC provision which has, in the past, caused difficulties of interpretation and application.

557. The prohibition in s-cl. 230(1) will not apply

- to exempt proprietary companies (CB para. 230(3)(a)

- to loans or guarantees made in the circumstances set out in CB paras. 230(3)(b) to (f).

558. These exemptions are based on the exemptions contained in ICAC CAs s-sec. 125(1A) with the following major differences:-

(a) The exception in ICAC CAs para. 125(1A)(b) in relation to directors that are holding companies has been omitted in line with the new provision that all directors of a company must be natural persons (see CB s-cl. 219(2)).

(b) A loan, guarantee or security given to a related corporation if authorized by a resolution of the directors will be a new exception (CB para. 230(3)(b)). A definition of "related corporation" is set out in CB s-cl 7(5). A similar provision appears in s-cl. 46(3) of the 1973 United Kingdom Companies Bill.

(c) The exception for loans to full-time employees for home acquisition in ICAC CAs para. 124(1A)(d) will be extended to full-time employees of any related

corporation and will only apply to loans made for the purchase of a principal place of residence. The latter change was made to prevent abuse of this exception by giving loans to employees to purchase more than one home. (CB para 230(3)(d)).

(d) The exceptions dependent on shareholder approval (ICAC CAs paras. 125(1A)(c), (d) and (e) - see ICAC CAs s-sec. 125(2)) have been amended so that:

- where the company is a subsidiary of a listed corporation/s, necessary approval will have to be obtained at general meetings of the company and the listed corporation/s;
- where the company is not a subsidiary of a listed corporation but is a subsidiary whose ultimate holding company is incorporated in Australia or an external Territory, necessary approval will have to be obtained at general meetings of the company and the ultimate holding company;
- where the two cases above do not apply, the necessary approval will have to be obtained at a general meeting of the company

(CB paras. 230(3)(e), (4)(a) and (b)).

- (e) The exception in ICAC CAS para. 125(1A)(f) in favour of money lenders will be subject to the further limitation that the loan must be on normal commercial terms (CB para. 230(3)(f)).

559. There will also be provisions (CB s-cl. 230(5) to (10)) dealing with the offences that arise under this provision, the defences available, the civil liability arising from a contravention, and the relationship to other laws.

560. These provisions are based only in part on ICAC CAS s-secs. 125(3) to (8). Major differences between the two sets of provisions are as follows:

- (a) CB s-cl. 230(5) will make it clear that where a breach of CB cl. 230 occurs the company itself will not be guilty of an offence but the director and any officers who are in default will be guilty of an offence and also jointly and severally liable to make good any loss suffered by the company as a result of the contravention. The equivalent provisions in the ICAC CAS (s-secs 125(3) and (4) only applied to the directors involved in the contravention. The introduction of civil liability for officers in the CB has been made as a result of public submissions received recommending its inclusion and is also consistent with the increased obligations imposed on officers in other parts of the CB.

- (b) the penalty for a contravention of CB cl. 230 will depend on whether there is any fraudulent intent involved (CB paras. 230(5)(c) and (d)). This is a new provision which is in line with the penalty for a breach of CB s-cl. 229(1).

- (c) there will be a new defence to a prosecution under CB cl. 230 to the effect that if the defendant proves that he had no knowledge of the making of the loan etc he will be relieved of liability (CB s-cl. 230(6)).

- (d) There will be a new provision that if a company gives a certificate to the effect that it is not prohibited by CB cl. 230 from making the loan etc than any guarantee or security given in contravention of CB cl. 230 may be enforced. (CB para. 230(8)(b)). This is an extension of the existing ICAC CAS provisions (s-sec 125(6) and (7) - see also CB para 230(8)(c)) which only applies to certificates given by exempt proprietary companies.

Cl. 231 : Register of director's shareholdings, &c.

561. A company will have to keep a register of directors' shareholdings, debentures and other interests in the company or related corporations (CB cl. 231) (For the location of the register see CB cl. 547).

562. This provision is based on ICAC CAS s. 126 with the following exceptions:

- (a) There is no provision in CB cl. 231 equivalent to ICA s-sec. 126(4) which defines for the purposes of s-secs. 126(2) and (3), a wholly owned subsidiary. The CB definition appears in s-cl. 7(7).
- (b) CB cl. 231 does not contain a provision allowing the Commission to inspect the register kept pursuant to cl. 231 - cf ICAC s-sec. 126(10). See however CB cl. 11 which provides that a person authorized by the NCSC may inspect without charge any book required to be kept by the CB.
- (c) There is no specific penalty provided for a breach of cl. 231.

Cl. 232 : General duty to make disclosure

563. A director will have to give notice to the company of such matters relating to himself as may be necessary for the purposes of CB cls 231 and 238 and of the CASA.

564. This provision also deals with the periods within which such information must be provided and with other related matters (CB cl. 232).

565. This provision is based on ICAC CAs s. 127 except that CB para. 232(1)(b), unlike ICAC CAs para. 127(1)(b) requires notice of a change in the particulars referred to in CB para. 232(1)(a) to be given to the company, irrespective of whether that provision has itself been complied with.

566. There is a new provision in CB s-cl. 232(2) specifying the period within which notice under CB para 232(1)(c) is required to be given; and a further new provision exempting from compliance with CB cl. 232 a director who had given the requisite notice under a corresponding previous law of the Territory (CB s-cl. 232(3)).

ICAC CAs s. 128 : Prohibition of tax-free payments to directors

567. ICAC CAs s. 128 has been omitted from the CB as it no longer appears to serve any purpose.

Cl. 233 : Payments for loss of or retirement from office

568. Payments to directors as compensation for loss of office or in connection with the transfer of the whole or any part of the undertaking or property of a company will be prohibited unless particulars have been disclosed to the members of the company and the proposal has been approved by the company in general meeting. Approval will not be required in relation to an "exempt benefit" (CB s-cl. 233(2) and (7) - based on s-sec. 129(5) of the ICAC CAs).

569. This provision is based on ICAC CAs s. 129 but differs from it as follows:

- (a) CB cl. 233 has been extended from the equivalent provision in ICAC CAs s-sec. 129(1) to also apply to valuable considerations and benefits received in contravention of cl. 233.
- (b) CB s-cl. 233(5) has been reworded to ensure that, in the event of a conflict with any other rule of law, the statutory provisions in CB cl. 233 prevail - cf ICAC CAs s-sec. 129(6).
- (c) The prohibition on payment for loss of office will be extended to cover payment for loss of their offices by the following persons:
 - directors and principal executive officers of the relevant company and its related corporations (CB sub-paras. 233(6)(a)(i) and (ii));
 - any person who holds any management office in the company or a related corporation and who also holds or has, within a 12 month period immediately preceding the loss of that office, held an office mentioned in CB sub-paras. 233(6)(a)(i) and (ii).

(CB para. 233(6)(a) - cf ICAC CAs s-sec. 129(1) which only applies to directors. Para 50(1)(b) of the 1973 United Kingdom Companies Bill contains a similar provision).

- (d) The prohibition on payment to a person for loss of office or in connection with the transfer of any of the company's property will be extended to cover persons who were formerly office holders, to spouses of office holders and of former office holders, to relatives of office holders and their spouses and to relatives of former office holders and their spouses (CB para. 233(6)(b)). Changes of this nature were recommended in paras 92 and 93 of the Jenkins Committee Report and subsequently included in cl. 50 of the 1973 United Kingdom Companies Bill. The inclusion of the reference to spouses and relatives was not discussed by the Jenkins Committee but NCB cl. 88 is similar to the CB provision in that it also covers payments to "dependants" - defined in NCB cl. 4.
- (e) The payment to the holder of the prescribed office referred to in CB sub-para. 233(6)(a)(iii) is now only classified as an exempt benefit, if its value does not exceed 7 times the average of the total annual emoluments of the person involved in the period of 3 years immediately preceding the loss of or retirement

from the prescribed office (CB para. 233(7)(e)). This change to an averaging formula was made to take account of inflation. The expression "emoluments" is defined in CB s-cl. 233(7).

- (f) Payments made for leave of absence to which a person is entitled by virtue of an industrial instrument are now classified as exempt benefits (CB para. 233(7)(g)).
- (g) A new provision will be included to make it clear that the approval of a payment by a corporation does not relieve the officer involved of any duty to the company under CB cl. 229 or otherwise (CB s-cl.233(8)).

Cl. 234 : Provisions as to assignment of office

570. A director of a public company will not be able to assign his office without the approval of a special resolution of the company although he will be able to, if authorised by the articles, appoint alternate or substitute directors (CB cl. 234 - based on ICAC CAs s. 130). The reference to "executive officer" ("manager" in the ICAC CAs) has been deleted.

Cl. 235 : Powers to require disclosure of directors' emoluments

571. If served with a notice by 10% of members or by holders of 5% in nominal value of the issued share capital, a company will be required:-

- (a) forthwith to prepare a statement and cause it to be audited, setting out details of emoluments paid to directors of the company and of each subsidiary (CB para 235(1)(c));.
- (b) to send a copy of the statement to all persons entitled to receive notice of general meetings of the company as soon as it has been audited (CB para 235(1)(d); and
- (c) to lay a copy of the statement before the next general meeting held after the statement is audited. (CB para 235(1)(e)).

572. CB cl. 235 is based on s. 131 of the ICAC CAs except that:

- (a) 5% nominal value referred to in CB para. 235(1)(b) is 10% in the ICAC CAs provision.
- (b) The penalty for failure to comply with the CB is the general penalty.

Cl. 236 : Secretary

573. A company will have to have at least one secretary. A secretary will be appointed by the directors and must be a natural person. At least one secretary will have to reside ordinarily in the ACT (CB cl. 236 - based on ICAC CAs s. 132).

Cl. 237 : Provisions indemnifying officers or auditors

574. Any provision, whether in the articles or in a contract, exempting an officer or auditor from, or indemnifying him against, liability for negligence, default, breach of duty or breach of trust, will be void (CB s-cl. 237(1) - based on ICAC CAs. 133). This will not apply to payment of legal costs incurred in successfully defending civil or criminal proceedings, nor to any insurance contract where the company or a related corporation does not pay the premiums (CB s-cl. 237(2) and (3)).

Cl. 238 : Register of directors, principal executive officers and secretaries

575. A company will have to keep a register of its directors, principal executive officers and secretaries. (For the location of registers see cl. 547). A company will have to furnish the NCSC with the particulars contained in the register and notify the NCSC of any change (CB cl. 238 - based on ICAC CAs s.134.)

576. Note cl. 19 of the C(TP)B which deals with the issue of a certificate under sub-cl. 238(10) of the CB where it appears from a return lodged by a company under a provision of a previous law of the Territory that a person was a manager of the company.

DIVISION 3 : MEETINGS AND PROCEEDINGS

577. Division 3 of Part IV of the CB (cls 239 to 254) deals with meetings and proceedings.

Cl. 239 : Statutory meeting and statutory report

578. Where a public company that is a limited company with a share capital or a no-liability company issues a prospectus for the first time, the company will be required to hold a general meeting of members of the company between 1 and 3 months after the date on which the company allots shares pursuant to the prospectus. Such a meeting will be called the "statutory meeting" (CB s-cl. 239(1)).

579. At least 7 days before the meeting the directors will have to send a report containing certain particulars (set out in s-cl. 239(3)) to every member of the company (CB s-cl. 239(2)) and to the NCSC (CB s-cl. 239(5)). This report is the "statutory report" and will have to be reported on by auditors if there are any (CB s-cl. 239(4)).

580. There are also provisions setting out members' rights to be told of other members' shareholdings at the statutory meeting, to discuss certain matters at the meeting, to adjourn the meeting and to appoint committee/s of enquiry (CB s -cls. 239(6)-(9)).

581. CB cl. 239 is based on ICAC CAs s. 135 except that the general penalty provisions will apply.

Cl. 240 : Annual general meeting

582. A company will have to hold an annual general meeting at least once in each calendar year and within 5 months (or 6 months in the case of an exempt proprietary company) after the end of each financial year (CB s-cl. 240(1)). This provision differs from ICAC CAs s.136 as a result of changes which have been made to Part VI relating to the preparation of accounts.

583. The annual general meeting will no longer be required to be held within 15 months of the last such meeting, although a somewhat similar constraint is imposed by the requirement to hold an annual general meeting within 5 or 6 months, as the case may be, after the end of the financial year. (CB s-cl. 240(2)).

584. In the ICAC CAs there is a requirement that accounts of all companies are to be made out in respect of a period ending not less than 6 months before the annual general meeting (ICAC CAs s. 162). This will be replaced by a requirement to prepare accounts in respect of each financial year which is a period not exceeding 18 months determined by the directors (CB cl. 5 - see definition of "financial year").

585. The requirement to hold an annual general meeting will be expressed by reference to the new definition of financial year.

586. A company may hold its first annual general meeting at any time within 18 months of incorporation, but will not be required to hold the meeting more than 5 months (6 months in the case of an exempt proprietary company) after the end of the first financial year (CB s-cl. 240(2) - based on ICAC CAS sub-s. 136(1)).

587. There is a new provision that a general meeting of a company will be deemed to be its annual general meeting if resolutions have been passed at that meeting dealing with all matters that are required to be dealt with at the annual general meeting. This provision was included in order to resolve doubts as to when an annual general meeting is actually "held" (CB s-cl. 240(3)). This question was raised in the High Court decision in Guss v. Veenhuizen (1976-77) 2 A.C.L.R. 338.

588. Exempt proprietary companies will be deemed to comply with CB cl. 240 if they adopt the procedures in cl. 250 which exempt them from holding an annual general meeting (CB s-cl. 240(4)).

589. The NCSC will be able to extend the time for holding an annual general meeting (CB s-cl. 240(5), (6) and (7)). These provisions are similar to those in ICAC CAS s-sec. 136(2C) although changes have been made which reflect the differently expressed obligations in CB s-cl. 240(1).

Cl. 241 : Convening of general meeting on requisition

590. A general meeting will have to be convened by the directors of a company on the requisition of not less than 200 members, or of members holding 5% of the paid-up capital or entitled to 5% of the voting rights (CB cl 241).

591. This provision is based on ICAC CAs s. 137 except for the threshold proportion which has been changed from 10% to 5%, and the omission of the word "extraordinary" in the name of the meeting.

Cl. 242 : Convening of meetings

592. Two or more members holding at least 5% of the issued share capital, or not less than 5% in number of members of a company not having share capital, will be able to call a meeting as long as the articles do not provide otherwise (CB cl. 242).

593. This provision is based on ICAC CAs s. 138 except that:-

- (a) Under the ICAC CAs members had to hold 10% of the issued share capital, or to be 10% in number, before they could call such a meeting.

- (b) The provision in ICAC CA s-sec. 138(5) that accidental omission to give notice does not invalidate proceedings at the meeting now appears in CB s-cl. 539(3) which will apply to one meeting held for the purposes of the CB.

Cl. 243 : Articles as to right to demand a poll

594. Provisions in the articles which would exclude or restrict the right to demand a poll at a general meeting on any matter other than the election of the chairman of the meeting or the adjournment of the meeting or requiring a proxy to be lodged more than 48 hours before a meeting will be void (CB cl 243 - based on ICAC CAs s. 139). See also Table A r.55 and Table B r.39 on requiring proxies to be lodged 48 hours in advance.

Cl. 244 : Quorum, chairman, voting &c., at meetings

595. There will be provisions setting out general procedural matters for the conduct of meetings so far as the articles do not otherwise provide (CB cl. 244 - based on ICAC CAs s.140).

Cl. 245 : Proxies

596. Subject to certain restrictions, a member of a company entitled to attend and vote at a meeting will be entitled to appoint proxies, whether or not members, to attend meetings and vote instead of the member (CB cl. 245 - based on ICAC CAs s. 141).

Cl 246 : Power of Court to order meeting

597. The Supreme Court will be able, either of its own motion or on the application of a director or member, to order a meeting where for any reason it is impracticable to call a meeting in the manner prescribed by the articles or legislation (CB cl 246 - based on ICAC CAs s. 142).

Cl. 247 : Circulation of members' resolutions, &c.

598. A company will be obliged to circulate resolutions intended to be moved at an annual general meeting of the company together with a short statement as to the effect of those resolutions upon the request of a specified proportion of its members (CB cl. 247).

599. This provision is based on ICAC CAs s.143 except that the specific penalty has been omitted so that the general penalty provided for by CB cl. 570 will be applicable.

Cl. 248 : Special resolutions

600. A special resolution will be a resolution passed by at least 75% of the members or shareholders entitled to vote at a meeting if no less than 21 days notice is given specifying the intention to propose the resolution. The 21 day notice

period will not apply if members holding at least 95% of the issued share capital or not less than 95% in number of members of a company not having a share capital agree that it is not necessary (CB cl. 248).

601. This clause is based on ICAC CAs s. 144 with the following differences:

(a) CB cl. 248 is expressed to apply to special resolutions of share holders in a class of shares or of members in a class of members whereas ICAC CAs s. 144 only provides for special resolutions of all the members of a company (CB s-cl. 248(1)).

(b) CB s-cl. 248(1) will require the 21 days notice of a special resolution to be in written form.

Cl. 249 : Resolution requiring special notice

602. Where the legislation requires special notice of a resolution, notice of intention to move the resolution will be required to be given to the company 28 days before the meeting at which it is to be moved (CB cl 249 - based on ICAC CAs s. 145 but redrafted to make it more comprehensible).

Cl. 250 : Resolutions of exempt proprietary companies

603. If all the members of an exempt proprietary company sign a document stating that they are in favour of a resolution set out in that document, then the resolution will be deemed

to have been passed at a general meeting of that company held on the day and the time, at which the document was last signed by a member (CB s-cl. 250(1)). There will be some qualifications on the operation of this deeming provision (CB s-cl. 250(2)-(5)).

604. There is a similar provision to CB s-cl. 250(1) in s-sec. 23(2) of the Ontario Business Corporations Act and a recommendation for such a provision was made in para. 46 of the Jenkins Committee Report. There is, however, no equivalent in the ICAC CAs.

Cl. 251 : Lodgement with the Commission, &c., of copies of certain resolutions and agreements

605. Copies of certain resolutions will have to be lodged with the NCSC by the company. Where articles have not been registered, members may obtain copies of every resolution, document or agreement to which this section applies (CB cl. 251 - based on ICAC CAs s.146).

CL. 252 : Resolutions at adjourned meetings

606. A resolution passed at an adjourned meeting will be treated as having been passed on the date on which it was passed and not on any earlier date (CB cl 252 - based on ICAC CAs s. 147).

Cl. 253 : Minutes of proceedings

607. Minutes of general meetings and of meetings of directors will have to be entered in minute books within one month of the meeting. Such minutes will have to be signed by the chairman of the relevant meeting or by the chairman of the next succeeding meeting (CB cl. 253).

608. This provision is based on ICAC CAs s.148 except that:

- (a) CB s-cl. 253(2) has been amended to make it clear that signed minutes are only prima facie evidence of the proceedings to which they relate; and
- (b) Certain amendments have been made as a consequence of the new provisions (see CB s-cl. 250 : ex memo paras 603 + 604) relating to the circumstances in which a document signed by all members of an exempt proprietary company will be deemed to be a resolution of that company.

Cl. 254 : Inspection of minute books

609. A company will be required to keep minute books at its registered office or its principal place of business in the ACT or at such other place in Australia as is approved by the NCSC. The minute books of general meetings will have to be open for inspection by any member without charge and a member will be able to obtain a copy of them on payment of a fee (CB cl. 254).

610. This provision is based on ICAC CAs s. 149 but has been amended to allow books to be kept elsewhere in Australia with the approval of the NCSC.

611. This amendment is one of a series of amendments to the existing ICAC CAs to enable various minute books and registers to be kept at the registered office of the company, at its principal place of business in its home jurisdiction or at such other place in the ACT or Australia as has been approved by the NCSC. The other provisions that contain these amendments are as follows:-

- cl. 131 : register of options
- cl. 143 : register of substantial shareholders
(cf. ICAC CAs s. 69K)
- cl. 147 : register of debenture holders (cf. ICAC CAs s. 70)
- cl. 209 : register of documents relating to charg
- cl. 231 : register of directors' shareholdings
etc (cf. ICAC s. 126)
- cl. 238 : register of directors, principal
executive officers and secretaries (cf. ICAC s.
134)
- cl. 254 : minute books (cf. ICAC s. 149)

612. Cl. 172 relating to the register of holders of prescribed interests contains an amendment to ICAC s-sec. 84(1) so that the register can be kept at the registered office of the management company, at its principal place of business in the ACT or at such other place in the ACT as has been approved by the NCSC. The Division relating to prescribed interests is structured around the issue of prescribed interests in the jurisdiction and not around the home jurisdiction of the management company. Accordingly it is not possible, with the present structure of that Division, to bring cl. 172 completely into line with the amendments listed in para 608.

613. These amendments will also complement the provisions relating to 'one place of registration' which ensure that, subject to the availability of its name, a company can carry on business anywhere in Australia and still only have to lodge documents in one jurisdiction. The requirement for the consent of the NCSC if the register or other records are to be kept away from its registered office or principal place of business will ensure that the changes are not abused.

DIVISION 4 : REGISTER OF MEMBERS

614. Division 4 of Part V of the CB (cls. 255 to 262) deal with the register of members. This Division is based generally on ICAC CAs ss. 150 to 157 except that s. 152 of the ICAC CAs has been omitted : it now appears in more general form in cl. 547 dealing with the location of registers.

Cl. 255 : Non-application of the Division to mutual life assurance companies

615. Apart from the right given to members to inspect the register of members (CB s-cl. 257(5)), the provisions (of Division 4) relating to the register of members will not apply to a mutual life assurance company which complies with the requirements of s. 140 of the Life Insurance Act to keep a postal voters roll (CB cl. 255 - based on ICAC CAs s. 150).

Cl. 256 : Register and index of members

616. A company will have to keep a register and index of its members (CB cl. 256 - based on ICAC CAs s. 151). The location of registers is dealt with in CB cl. 547).

Cl. 257 : Inspection and closing of register

617. A company will be able to close the whole or part of its register of members for a limited period each year. The

register and index will have to be open for inspection by any member and by any other person on the payment of a fee. Copies of certain parts of the register will also have to be made available on payment of a fee (CB cl. 257).

618. This provision is based on ICAC CAs s. 153 except that, unlike ICAC CAs s-sec. 153(1), CB s-cl. 257(1) will not require notice of an intention to close the register to be given at least 14 days before the closure.

Cl. 258 : Consequences of default by agent

619. An agent of the company who causes the company to breach the requirements of the CB in regard to the register of members will be liable to the same penalties as if he were an officer of the company (CB cl. 258 - based on ICAC CAs s. 154).

Cl. 259 : Power of Court to rectify register

620. If there is an error in the register of members, the Supreme Court will be able, on the application of an aggrieved person, any member or the company, to order the rectification of the register of members (CB cl. 259).

621. This provision is based on ICAC CAs s. 155 but has been expanded to cover additional forms of error that might appear in the register (cf. Patents Act s. 32).

Cl. 260 : Trustee, &c., may be registered as owner of shares

622. A trustee, executor or administrator of the estate of a deceased or bankrupt person or of a person who is incapable, through physical or mental infirmity, of managing his affairs, will be able to be registered in that capacity as the holder of any legal or equitable interest in a company's shares held by that person. The trustees', etc. rights and liabilities will be the same as those of the person on whose behalf he holds the shares. (CB cl. 260).

623. A person who holds shares in a proprietary company as trustee will be required to notify the secretary of the company of that fact (CB s-cl. 260(9)).

624. CB cl. 260 is based on ICAC CAs s. 156 except that it has been extended to take account of the position of trustees of the estates of incapable and bankrupt persons.

Cl. 261 : Power of company to obtain information as to beneficial ownership of its shares

625. A company will be able by writing to require information from persons holding voting shares in the company, or a relevant interest in those shares, as to any beneficial ownership of the company's shares. Where a company receives

such information, it will be obliged to enter particulars of the relevant interest and of the person who holds it in a separate part of the register of its members. This separate part of the register will be open to inspection by the NCSC and to members of the company (CB cl. 261).

626. This provision is new and is based on s. 27 UK Companies Act 1976.

Cl. 262 : Branch registers

627. A company having a share capital will be able to keep a branch share register in any place outside the ACT provided certain conditions are fulfilled (CB cl. 262 - based on ICAC CAs s. 157).

628. A shareholder who is resident in a participating jurisdiction will be able to insist on the establishment of a branch share register in his jurisdiction (CB s-cl. 262(2)).

629. CB s-cl. 262(2) achieves the same result as ICAC CAs s. 343I except that:

- ICAC s. 343I imposes the obligation on recognized companies (ICAC CAs s-sec. 343I(1))
- CB s-cl. 262(2) only applies if the company is carrying on business in the relevant participating jurisdiction - s. 343I does not have this restriction.

630. The ICAC CAs also contain a number of additional provisions (s-secs. 343 to 343Q) applying various provisions relating to registers retained by companies to the branch register of a recognized company. These have been replaced in the CB by one sub-clause which provides that a branch register kept by a company will be deemed to be part of the company's register of members (CB s-cl. 262(3)). CB cl. 521 contains similar provisions in respect of registered foreign companies.

DIVISION 5 : ANNUAL RETURN

631. Division 5 of Part IV of the CB (cls 263 to 265) deals with the annual return.

Cl. 263 : Annual return

632. A company will be required to lodge with the NCSC an annual return in the prescribed form and containing certain particulars. Such a return will have to be lodged within one month after the annual general meeting of the company, or if the annual general meeting is not held within the period laid down by cl. 240, within one month of the last day of that period (CB cl. 263).

633. This provision is based on ICAC CAs ss 158 and 159 but with the following modifications:

- (a) The particulars to be set out in the annual return of a company having a share capital will no longer be set out in a schedule but will be determined by regulations (CB s-cl. 263(1)).
- (b) ICAC CAs ss 158 and 159 have been amalgamated; however, provision will be made in the regulations for less detail to be required of a company not having a share capital.

- (c) Drafting changes have been made to clarify the obligation to lodge an annual return in circumstances where the annual general meeting is not held within the statutory period. (CB s-cl. 263(1)).

634. Specific provision has been retained in respect of the annual return of a company keeping a branch register outside Australia (para 263(1)(b) - based on ICAC CAs sub-s. 158(4)).

635. Note cl. 21 of the C(TP)B which deals with obligations imposed on a company under ss 158 or 159 of the ACT CO.

Cl. 264 : Auditor's statement

636. A company that is not obliged to lodge accounts with the NCSC will be required to attach an auditor's statement to its annual return (CB cl 264 - based on ICAC CAs s. 159A).

Cl. 265 : Exemption of certain companies

637. A public company that has more than 500 members, keeps its principal share register within 25 kilometres of the office of the Corporate Affairs Commission for the ACT, and provides reasonable access to its share register will not be required to include a list of members in its annual return if the secretary includes in the return a certificate that the company is one to which this provision applies (based on ICAC CAs s.160, except that "25" kilometres replaces "5" kilometres) (CB cl. 265).

638. The NCSC will be able by order published in the Gazette, to require a company described above to comply with all or any of the provisions of this Division (CB s-cl. 265(2)) Note s-cl. 13(15) of the C(TP)B which deals with a notice published by the Minister under s-sec 160(2) of the ACT CO and in force immediately before the commencement of the CB).

CB : PART VI : ACCOUNTS AND AUDIT

639. Part VI of the CB (cls 266 to 288) contains the following provisions dealing with the accounts and audit of companies:

- Division 1 - Preliminary
- Division 2 - Accounts
- Division 3 - Audit
- Division 4 - Special Provisions Relating to Banking and Life Insurance Corporations.

640. These provisions are based on Part VI of the ICAC CAs which are, in turn, based on the recommendations contained in the First Interim Report of the Eggleston Committee. The present provisions in relation to these matters come into force on the following dates:-

- ACT 29 June 1973
- NSW 31 December 1971
- QLD 31 December 1971
- SA 30 June 1973
- TAS Continues to use old provisions (commenced 1 January 1963)
- VIC 31 December 1971
- WA 15 April 1974

DIVISION 1 : PRELIMINARY

Cl. 266 : Interpretation

641. There will be special definition and interpretation provisions for the purposes of Part VI (CB cl. 266).

642. This provision is based on ICAC CAs s. 161, except that:

- (a) the definition of "accounting records" has been altered and re-located in CB s-cl. 5(1).
- (b) the definition of "accounts" has been altered to clarify that it includes the directors' statement on the accounts under CB s-cl. 269(9) and (10)).
- (c) there is a new definition of "holding company" for the purposes of Part VI.

643. There is also a new definition of "financial year" in CB s-cl. 5(1) which is of particular relevance to Part VI.

DIVISION 2 : ACCOUNTS

644. Division 2 of Part VI of the CB cls. 267 to 276) deals with the accounts and reports to be prepared by companies and their officers.

Cl. 267 : Accounts to be kept

645. Each company will have to keep and preserve certain accounting records (CB cl. 267).

646. This provision is based on ICAC CAS s.161A with the following modifications:

- (a) Companies acting as trustees will be required to keep accounting records that correctly record and explain the transactions of the company as trustee (CB para. 267(1)(a)).
- (b) Companies will be permitted to keep accounting records outside their jurisdiction of registration, although the NCSC will be able to require a company to produce those records at a place within the jurisdiction not later than 14 days after the requirement is made (CB s-cl. 267(4)).
- (c) Where the accounting records are to be kept outside Australia, the company will be required to keep in Australia such statements and records as will enable

true and fair accounts and any documents required by this Act to be attached to the accounts to be prepared (CB s-cl. 267(5)).

- (d) A requirement equivalent to ICAC CAS s-sec 161A(6) has been retained, but it will apply only in those situations where the accounting records are to be kept outside Australia and the statements and records referred to in CB s-cl. 267(5) will not be kept at the registered office of the company (CB s-cl. 267(6)).

647. Where existing ICAC CAS, through the application of other State laws, permit the retention of accounting records for periods other than the period referred to in CB s-cl. 267(2), these variations will be included in State Companies Codes by the State adopting laws (cf. VIC CA s-sec. 161A(2)).

Cl. 268 : Financial years of grouped companies

648. Directors of holding companies will be required to ensure that the financial year of each subsidiary coincides with the financial year of the holding company. If there is good reason for the financial years not to coincide, an application is able to be made to the NCSC. There will be rights of appeal to the Supreme Court against the NCSC decision. (CB cl. 268).

649. This provision is based on ICAC CAS s. 161B s-sec. 161B(1) of the ICAC CAS has been split into 2 sub-sections (CB s-cl. 268(1) and (2)).

Cl. 269 : Profit and loss account, balance sheet and group accounts

650. Significant changes have been made to the provisions in the ICAC CAs relating to the preparation and laying of accounts to take account of the decision Jensen v. Viney (1979) VR 597. In that judgement, the Full Court of the Supreme Court of Victoria held that the obligation imposed on directors under ICAC CAs s. 162 to cause accounts to be made out and laid before the company arises only if an annual general meeting is held (CB cl. 269).

651. Note cl. 20 of the C(TP)B which deals with the preparation of accounts in relation to a "prescribed financial year" that ended before the commencement of the CB.

S-cl. 269(1) : Profit and loss account, balance sheet and group accounts

652. Company directors will be required to cause a profit and loss account to be made out for the last financial year of the company. The "financial year" is defined in CB cl. 5 and is a period of 12 months or such other period not exceeding 18 months as the directors resolve (commencing from incorporation, the end of the last period in respect of which a profit and loss account was made out under the previous law, or the end of the last financial year, depending on the circumstances).

653. That part of the ICAC CAs s-sec 162(1) which referred to laying the profit and loss account before an annual general meeting is now set out in a separate clause (CB cl. 275). ICAC CAs s-sec. 162(1) required the profit and loss account to be made out for a period ending not earlier than six months before the date of the annual general meeting. This temporal nexus is now achieved in CB cl. 240 which will require the annual general meeting to be held within 5 months (or 6 months in the case of an exempt proprietary company) of the end of the financial year.

654. With the exception of the shortening of the 6 month period to 5 months in the case of companies other than exempt proprietary companies, those companies which regularly prepare accounts covering a period of approximately 12 months and lay those accounts before their annual general meeting will not be required to alter their procedures in any way.

655. ICAC CAs s-sec. 162(2), which provides that the NCSC may allow a company's profit and loss account to be made out to a date earlier than 6 months before the annual general meeting before which it is to be laid, has been deleted from the CB although a provision achieving a comparable result has been inserted in CB s-cl. 240(5).

S-cl. 269(2) : Balance sheet:

656. Directors will be required to cause a balance sheet to be made out as at the end of the last financial year of the company (CB s-cl. 269(2)).

657. This requirement differs from ICAC CAS s-sec 162(3) which requires the balance sheet to be made out as at the end of the period of the profit and loss account. The result will be the same, although the obligations have been expressed differently in the light of Jensen v. Viney [1979] VR 597.

S-cl. 269(3) and (6) : Group accounts:

658. The directors of holding companies (except those which are also subsidiary companies) will be required by CB s-cl. 269(3) to cause group accounts to be made out dealing with:

- (a) the profit or loss of the company and its subsidiaries as at the end of their respective last financial years; and
- (b) the state of affairs of the company and its subsidiaries for their respective last financial years.

659. However, where a company is at the end of its financial year a wholly owned subsidiary of a corporation incorporated in the ACT or a participating State or participating Territory, it will not be required to prepare any group accounts that would otherwise have been required by CB s-cl. 269(3) (CB s-cl. 269(6)).

660. CB s-cl. 269(3) and (4) are based on ICAC CAS s-secs 162(4) and (5) respectively, although changes have been made consistently with the revised obligations in CB s-cl. 269(1) and (2).

Sub-cls 269(4) and (5):

661. Directors of companies (other than exempt proprietary companies in certain circumstances - see CB cls 278 and 279) will be required to have the accounts audited and to attach the auditor's report to the accounts (CB s-cl. 269(4) and (5)).

662. This requirement is based on ICAC CAs s-sec 162(8) but with the following modifications:

- (a) The obligations to have the accounts audited and to attach the auditor's report to the accounts have been expressed in separate sub-clauses (CB s-cl. 269(4) and (5) respectively).
- (b) Both obligations have been imposed on directors, rather than being expressed passively.
- (c) In order to enable directors to comply with the obligations to attach the auditor's report to the accounts, a separate obligation has been imposed on auditors to furnish their reports to the directors in sufficient time for the accounts to be distributed to shareholders before the annual general meeting (see CB s-cl. 285(2)).

S-cl. 269(7) : Value of assets

663. Before the accounts are made out, directors will be required to take certain steps in respect of the writing off of bad debts and the valuation of the company's assets (CB s-cl. 269(7) - based on ICAC CAs s-sec. 162(7)).

S-cl. 269(8) : Compliance with prescribed requirements

664. Directors will be required to ensure that the accounts comply with the relevant prescribed requirements, but if that will not result in a true and fair view being given of the matters required, additional information and explanations will be required (CB s-cl. 269(8) - based on ICAC CAs s-sec 162(9)).

S-cl. 269(9) and (10) : Directors' statements

665. Directors will be required to attach to the accounts, before the auditor reports on them, a statement as to whether they consider that:

- (a) The profit and loss account is drawn up so as to give a true and fair view of the profit or loss of the company for the financial year (CB para 269(9)(a) - based on ICAC CAs para 162(10)(a)).

- (b) The balance sheet is drawn up as to give a true and fair view of the state of affairs of the company at the end of the financial year (CB para 269(9)(b) - based on ICAC CAS para 162(10)(b).
- (c) There are reasonable grounds to believe that the company will be able to pay its debts as and when they fall due. (CB para. 269(9)(c) - new provision). The wording of CB para 269(9)(c) has been revised in an attempt to overcome criticisms of this paragraph contained in public submissions on the August CB.

666. A similar statement about the profit and loss account and the balance sheet will be required of directors of a holding company (CB s-cl. 269(10) - based on ICAC CAS s-sec. 162(11)).

667. ICAC CAS s-sec. 162(12), which imposes an obligation on principal accounting officers of companies to state whether to the best of their knowledge and belief the accounts give a true and fair view of the matters required to be dealt with, has been deleted.

Cl. 270 : Directors' reports

668. Directors will be required to prepare a report with respect to the profit or loss of the company in the last financial year and the state of the company's affairs as at the end of that financial year. A similar report is to be prepared by directors of a holding company. (CB cl. 270.)

669. CB clause 270 differs from ICAC CAs s. 162A in a number respects:

- (a) Directors will not be obliged to attach the report to the balance sheet (to take account of the decision in Jensen v. Viney (1979) VR 597 that the obligation imposed on directors under ICAC CAs s. 162 to prepare a report arises only when there comes into existence a balance sheet made out under ICAC CAs s. 162).
- (b) Directors of exempt proprietary companies will be required to state the same matters in their reports as directors of other companies (ICAC CAs s-sec 162A(4) has been deleted).
- (c) The fixed salary received by a director as a full-time employee of a related corporation has been added to the items which will not have to be disclosed as being a benefit a director of the company has received or become entitled to receive by reason of a contract made by the company or a related corporation with the director (CB s-cl. 270(7)).
- (d) Particulars of the extent to which each corporation in the group contributed to the consolidated profit or loss will now be required by the regulations which are expected to be based on ICAC CAs para 162A(2)(c).

(e) The requirement to disclose the name of the company's ultimate holding company and its place of incorporation will now be prescribed and is expected to be based on ICAC CAS s.sec 162A(5).

(f) Where at any time during the financial year the company was a holding company, the directors will have to state the names of any subsidiaries acquired or disposed of (CB para 270 (1)(d)).

Cl. 271 : Rounding off of amounts in accounts and reports

670. The regulations will be able to make provision permitting every company, or every company included in a class of companies, to round-off amounts in accounts and reports to the nearest one-thousand dollars (CB cl. 271).

671. Although this is a new provision, it effectively replaces the class orders made under ICAC CAS s.sec 162C(2) (cf CB s-cl. 273(5)).

Cl. 272 : Group accounts not to be issued, &c., until receipt of subsidiaries accounts, &c.

672. Directors of holding companies will be required to endeavour to ensure that they have all the necessary material in respect of the subsidiary companies before they cause the group accounts to be made out or prepare the directors' report (CB cl. 272 -based on ICAC CAS s. 162B).

Cl. 273 : Relief from requirements as to accounts and reports

673. Directors will be able to apply to the NCSC for an order relieving them from compliance with requirements relating to the accounts or the auditing of the accounts. The NCSC will also be able to make an order in respect of a specified class of companies relieving the directors of a company in that class from compliance with these requirements (CB cl. 273).

674. This provision is based on ICAC CAs s. 162C, although it differs in that:

- (a) relief can be granted from the need to comply with audit requirements (CB s-cls. 273(1) and (5)).
- (b) relief can be granted to a non-profit Company which is required by or under any law of the Commonwealth, of a State or of a territory to prepare annually a statement of its income and expenditure or a statement of its financial position or both (CB para 273(7)(b)).

Cl. 274 : Members of company entitled to balance-sheet, &c.

675. Companies will be required to send copies of all accounts and associated statements and reports to all persons entitled to receive notice of general meetings, not less than 14 days before each annual general meeting (CB cl 274 - based on ICAC CAs s. 164).

Cl. 275 : Accounts and reports to be laid before annual general meeting

676. Companies will be required to lay before each annual general meeting copies of the accounts, directors' reports, directors' statement on the accounts and the auditor's report. (CB cl. 275).

677. This is a new provision only in the sense that the obligations to lay all these documents before an annual general meeting have been placed together in one clause. By contrast, in the ICAC CAs the obligation to lay documents before an annual general meeting was expressed by reference to several provisions (ICAC CAs s-secs 162(1), (3), (4), (8), (10) and (11); 162A(1) and (2)).

Cl. 276 : Failure to comply with this Division

678. There will be penalties for failure to comply with the provisions relating to preparation and laying of accounts. (CB cl. 276).

679. These provisions are based on ICAC CAs s. 163 but with the addition of a provision whereby the NCSC will be able to request the directors to produce the accounts or reports required by CB cls. 269 and 270; proof of failure to produce the accounts or report will be able to be used in any proceeding for a failure to comply with CB cls. 269 and 270 (CB s-cl. 276(3)).

DIVISION 3 : AUDIT

Introduction

680. Division 3 of Part VI of the CB cls. 277 to 287) deals with audit.

681. References throughout this Division to the NCSC reflect the fact that functions previously exercised by separate Companies Auditors Boards in each jurisdiction covered by the co-operative scheme will now be exercised by the NCSC. (Attention is also drawn to the fact that there will be a Companies Auditors and Liquidators Disciplinary Board.)

Cl. 277 : Qualifications of auditors

682. The qualifications of persons appointed as company auditors are set out in CB cl. 277.

683. These qualifications are based on those in ICAC CAs. s. 165 but with the following modifications:

- (a) The amount of permitted indebtedness has been increased from \$1000 to \$5000 (CB para. 277(1)(e)).
- (b) A person will be disqualified from acting as auditor of a company if any corporation in which that auditor has a substantial shareholding is indebted to the company in an amount exceeding \$5000 (CB para. 277(1)(e)).

- (c) A firm will be disqualified from acting as auditor of a company if a member of the firm or if a corporation in which any member of the firm is a substantial shareholder owes the company a sum exceeding \$5000 (CB para. 277(2)(f)).

- (d) The prohibitions on the level of indebtedness to a corporation do not include indebtedness to a banking or life insurance corporation where the indebtedness arose as a result of a loan made by the corporation in the ordinary course of its ordinary business for the purchase price of premises to be used by the person as his principal place of residence (CB s-cl. 277(3)).

- (e) It is no longer necessary for all members of a firm to be registered company auditors (CB para. 277(2)(d), CB s-cl. 277(7) and (8)).

- (f) An attempt has been made to clarify the meaning of ICAC CAs s-sec 165(7) (CB s-cl. 277(8)).

Cl. 278 : Unlimited exempt proprietary company need not appoint auditor in certain circumstances

684. This provision deals with the circumstances in which unlimited exempt proprietary companies need not appoint an auditor (CB cl. 278 - based on ICAC CAs s. 165A).

Cl. 279 : Exempt proprietary company need not appoint auditor
in certain circumstances

685. The circumstances in which exempt proprietary companies need not appoint an auditor are set out in CB cl. 279.

686. This clause is based on ICAC CAs s. 165B but differs from it in two respects:

- (a) It sets out the procedure for the appointment of an auditor when members have previously agreed not to appoint an auditor (CB s-cl. 279(7)).
- (b) It provides that where a company becomes an exempt proprietary company the members may agree to terminate the appointment of the auditor (CB s-cl. 279(9)).

Cl. 280 : Appointment of auditors

687. There will be procedures to be adopted for filling the office of auditor following the incorporation of the company and after a vacancy occurs in that office. Different tenures of office will apply in respect of such appointments (CB cl. 280.)

688. These provisions are based on ICAC CAs s. 166, the principal difference being the relocation of the requirement for a company to give written notice to the Companies Auditors Board (ICAC CAs s-sec. 166(11)) in CB cl. 282 (with a reference to the NCSC rather than the Board.)

689. When a company becomes a subsidiary of another corporation the office of auditor will be vacated at the annual general meeting of the company next held after it becomes such a subsidiary (CB s-cl. 280(14) - cf. ICAC CAs s-sec. 166(15)) This provision reflects the views expressed in Pacific Acceptance Corporation Limited v. Forsyth (1970) 92 WN(NSW)29, that the same auditor should normally audit all corporations in a group of companies.

Cl. 281 : Nomination of auditors

690. There will be a procedure to be followed for the nomination of a person or firm for appointment to the office of auditor of a company (CB cl. 281).

691. These procedures are based on ICAC CAs s. 166A, although modified to make it clear that a purported appointment of an auditor in contravention of the section is ineffective (CB s-cl. 281(2)).

Cl. 282 : Removal and resignation of auditors

692. An auditor of a company will be able to be removed from office by resolution of the company at a general meeting of which special notice has been given or he may, subject to having received the consent of the NCSC, resign (CB cl. 282).

693. This clause is based on ICAC CAs s. 166B, but has been modified by the inclusion of a requirement to forthwith notify the NCSC of the removal from office of an auditor (CB s-cl. 282(5) - cf ICAC CAs s.sec. 166(11)).

Cl. 283 : Effect of winding up on office of auditor

694. An auditor will cease to hold office upon:

- (a) the passing of a special resolution for the voluntary winding up of a company (even if the court order for winding up is subsequently made), or
- (b) the making of a court order for the winding up of the company.

(CB cl. 283).

695. This is a new provision designed to remove any doubt as to the effect of winding up on the office of auditor.

Cl. 284 : Fees and expenses of auditors

696. The reasonable fees and expenses of an auditor of a company will be payable by the company (CB cl. 284 - based on ICAC CAs s. 166C).

Cl. 285 : Powers and duties of auditors as to reports on accounts

697. It will be the duty of an auditor to report on the accounts or group accounts required to be laid before the company at the annual general meeting and on the company's accounting records and other records relating to those accounts. To facilitate the performance of this duty, provision is also made for the auditor to have a right of access to the accounting and other records of the company and (in the case of a holding company) any subsidiaries (CB cl. 285).

698. This clause is based on ICAC CAs s. 167, which has been modified in the following ways:-

- (a) The auditor will be required to furnish his report to the directors of the company in sufficient time to enable the company to comply with CB s-cl. 274(1). (CB s-cl. 285(2)).

- (b) The penalty for obstructing an auditor in the performance of his duties has been substantially increased to bring it into line with the penalty for obstructing persons exercising statutory powers of inspection (see CB cl. 14) and re-located in a new clause (see CB cl. 286 - cf. ICAC CAs s-sec 167(10)).

Cl. 286 : Obstruction of auditor

699. Officers or auditors of corporations who obstruct an auditor in the course of his duty will be guilty of an offence (CB cl. 286).

700. This provision is based on ICAC CAs sub-s. 167(10) but with increased penalty).

Cl. 287 : Special provisions relating to borrowing and guarantor corporations

701. An auditor of a borrowing corporation will be required to furnish his report to the trustee for debenture holders as well as to the members of the corporation. He will also be required to report any matters that he considers prejudicial to the interests of debenture holders to the corporation of which he is auditor (whether a borrowing or guarantor corporation) and to the trustee (CB cl 287 - based on ICAC CAs s. 167A).

DIVISION 4 : SPECIAL PROVISIONS RELATING TO BANKING AND LIFE
INSURANCE CORPORATIONS

Cl. 288 : Banking and life insurance corporations

702. Banking and life insurance corporations will be exempted from certain requirements of Part IV (CB cl. 288).

703. This provision is based on ICAC CAs s. 167C.

CB : PART VII : SPECIAL INVESTIGATIONS

704. Part VII of the CB (cls. 289 to 313) deals with special investigations by a duly appointed inspector. While it is based generally on Part VIA of the ICAC CAs, those provisions have been substantially re-drafted to incorporate the system of control and allocation of powers set up in Part VI of, and the First Schedule to, the Formal Agreement.

705. Part VI of the Formal Agreement is as follows:

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 States 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 (i), 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 be no longer 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 Part II 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

(a) where the investigation was ordered by -

(i) the Ministerial Council;

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

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

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

by the National Commission;

(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.

706. See also cls. 22 and 23 of the C(TP)B which contain provisions relating to a special investigation being conducted under Part VIA of the ACT CO and to an investigation under s. 170 of the ACT CO.

Cl. 289 : Interpretation and application

707. There are various special interpretation and application provisions for the purposes of Part VII (cf. ICAC CAs s. 168 and SIA s. 15);

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

- "prescribed direction" refers to a direction 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 and where it is to be met out of NCSC funds. This is particularly important in view of para. 17(g) of the Formal Agreement.

(b) CB s-cl 289 (2) and (3) are the same as ICAC CAs s-secs 168(2) and (3) except for a drafting change to CB s-cl. 289(2) and deletion of "whether by the same instrument or by different instruments" from CB s-cl. 289(3).

- (c) 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 (CB s-cl. 289(4) and (5)).
- (d) 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 (CB s-cl. 289(6)). References to the "Minister" in the CB are to the responsible Commonwealth Minister. In the State legislation applying the CB in the States, those references will be translated to mean the responsible State Minister except in relation to investigations ordered in the national interest (see CB s-cl. 291(2)).
- (e) S-cl 289(7) replaces ICAC CAs s-sec 178(12).
- (f) A few changes have been made to the definition provisions:
- "affairs" has been moved and is now dealt with in CB cl. 6.
 - "company" has been changed to:
 - . a company as defined in s-cl. 5(1); and

a foreign company that -

(i) has been or is registered under Part
XIII Division 5;

(ii) has carried on or is carrying on
business in the Territory;

- "corporation" is a new definition : it includes a corporation that is in liquidation or has been dissolved
- "interest" is no longer referred to in the definition section
- "officer" now includes a person who is or was a provisional liquidator of the corporation.

Cl. 290 : Application for carrying out of investigation

708. An application for the carrying out of a special investigation will be able to be made to the Minister or the Ministerial Council by a certain number of members or by members holding a certain percentage of the issued or paid up shares or debentures (CB s-cl. 290(1) and (2)). The application must contain information that will enable the Minister or the Ministerial Council to determine whether an investigation is in the public interest (CB s-cl. 290(3)).

709. If that is the case, the Minister or the Ministerial Council shall by written instrument, direct the NCSC to arrange the investigation (CB s-cl 290(4) - based on ICAC CAs s. 169 and cl. 16 of the Formal Agreement).

710. CB cl. 290 is based on cl. 16 of the Formal Agreement and ICAC CAs s. 169 except that:-

(a) The 10% threshold formerly in ICAC CAs s-sec. 169(2) are reduced to 5% (CB s-cl. 290(2)).

(b) A reference to the public interest test is included (CB s-cl. 290(4)).

Cl. 291 : Investigations

711. Where the Commonwealth Minister considers that an investigation is in the public interest of the ACT or the national interest, the Minister may direct the NCSC to arrange the investigation (CB s-cl. 291(1) and (2)). The Ministerial Council will be able to direct the NCSC to arrange an investigation in any case (CB s-cl. 291(3)).

712. The NCSC will be able to request the Minister or the Ministerial Council in writing to exercise the power to direct the NCSC to arrange an investigation (CB s-cl. 291(4) and (5)). The Ministerial Council will be empowered to approve retrospectively certain directions (CB s-cl. 291(6)).

713. CB s-cl. 291(1) is based on ICAC CAs s-s. 170(1) except that a single "public interest" test will replace the separate criteria set out in s-s. 170(1). The rest of CB cl. 291 gives effect to cl. 16-18 of the Formal Agreement (see particularly Formal Agreement cl. 17(f) and (g) and cl. 18).

Cl. 292 : Conduct of investigations

714. An instrument of direction:

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

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

716. These provisions when read with the definitions of "direction" and "prescribed direction in CB s-cl. 289(1) give effect to cl. 17(d) and (8) are based on ICAC CAs s. 171 and of the Formal Agreement (CB cl. 292 - cf. ICAC CAs s. 171).

Cl. 293 : Investigation of affairs of related corporation

717. The NCSC or an inspector appointed to carry out an investigation will be able, with the written consent of the relevant authority (Minister or Ministerial Council) to investigate the affairs of a related corporation (CB cl. 293 an extension of ICAC CAs s. 172).

Cl. 294 : Powers of Commission and inspectors appointed under corresponding law

718. The NCSC and inspectors appointed to carry out investigations under a corresponding law of a jurisdiction covered by the co-operative scheme may exercise in the ACT the same powers as if they had been appointed in the ACT. This is based on ICAC CAs s-s. 170(2) and (3) but will operate automatically without the need for further appointments (CB cl. 294).

Cl. 295 : Powers of inspectors

719. An inspector will be able, by notice, to require an officer of the corporation being investigated:

- (a) to produce books relating to the corporation's affairs that are in the officer's custody or control;
- (b) to give the inspector all reasonable assistance; and
- (c) to appear and answer questions on oath or affirmation.
(CB s-cl. 295(1)).

720. An inspector will be empowered also to require any person to produce books in his custody or control, provided the inspector has reasonable grounds to believe the books may be relevant to his investigation (CB s-cl. 295 (3A)). This is a new provision to ensure access to books e.g., bank records, which will help explain transactions of the company, where the books of the company do not adequately explain them.

721. A notice requiring an officer to produce books and appear for an examination on oath or affirmation must set out the provisions of s-cl. 296(6) (attendance of qualified legal practitioner) and (7) (Use of incriminating answers in evidence) (CB s-cl. 295(2)).

722. Any person normally entitled to inspect the books must be given reasonable access to them while they are held by the inspector (CB s-cl. 295(6)).

723. CB cl. 295 is based on ICAC CAs s. 173 except for CB s-cl. 295(2), (3) and (4) which are new provisions.

Cl. 296 : Examination of officers

724. An officer of a company will be guilty of an offence:-

- (a) if without reasonable excuse, he refuses or fails to comply with a requirement of an inspector under CB cl. 295;
- (b) if he provides information or makes a statement that is false or misleading in a material particular; or
- (c) if he refuses or fails to be sworn take an oath or make an affirmation,

(CB s-cl. 296(2) - (5)).

725. Officers will be entitled to have a legally qualified practitioner present during their examination. The legal representative will be able to address the inspector and cross examine the officer (CB s-cl. 296(6), provided that in doing so he does not obstruct the examination (CB s-cl. 296(12) and (13)).

726. An officer must answer every question put to him during an examination. However, where he claims the answer may incriminate him, the answer is not admissible in evidence against him in proceedings other than under CB s-cl. 296(2), (3) or (4) or in respect of the falsity of the answer (CB s-cl. 296(7) - see also CB cl. 299).

Cl. 297 : Officer failing to comply with requirement of this Part

727. An inspector may certify to the Supreme Court that an officer has failed, without reasonable excuse, to comply with a requirement. The Supreme Court will be able to order the officer to comply with the requirement, and/or punish the officer as if in contempt of court (CB cl. 297).

728. This provision is based on ICAC CAs s. 175 except that it is made clear that the Supreme Court may take action notwithstanding that the officer has been convicted of an offence under CB cl. 295 (CB s-cl. 297(3)).

Cl. 298 : Record of examination

729. A record of an examination will be able to be made where such a record is reduced to writing, the inspector may require the officer to read and sign it. If this is done or the record is authenticated in any other prescribed manner, the record is prima facie evidence of the questions asked and answers given at the examination. An officer is entitled to a copy of

the record of his examination. Copies of a record of examination or any related book may be given to a qualified legal practitioner who is conducting or contemplating criminal or civil proceedings in respect of any matters investigated by the inspector. The NCSC will be able to give copies of a record of examination and any related books to any other person subject to such conditions as it imposes.

730. CB cl. 298 is based generally on ICAC CAs s. 176.

The major differences are:-

- (a) There are a number of drafting changes
- (b) The power to give a copy of the record to a legal practitioner or any other person will extend to copies of related books (CB s-cl. 298(6)(8))
- (c) Controls will apply to third parties who come into possession of a record of examination or related books (CB s-cl. 298(7) and (9))
- (d) CB s-cl. 298(8) is based on ICAC CAs s-sec. 178(5).

Cls 299 to 303 : Admissibility, credibility and weight of evidence

731. There are new provisions designed to allow evidence given in an examination to be admissible in any court proceedings against the person examined or other persons. Similar provisions are contained in SIA ss. 23 to 27.

Cl. 299 : Admissibility of record of examination in evidence
in proceedings against person examined

732. The record of examination is generally admissible as evidence against the person examined in any civil or criminal proceedings (CB cl. 299 - same as SIA s. 23).

733. There are four exceptions relating to:

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

734. To gain the advantage of exception (a), a person must claim before answering that the answer may incriminate him. To gain the advantage of exceptions (b), (c) and (d), the person must object to admission of the answer in evidence. (CB s-cl. 299(2)).

Cl. 300 : Admissibility in other proceedings of questions and answers at an examination

735. Questions and answers at an examination will be admissible in any proceedings against other persons. However, such evidence will not be admissible if the party seeking to admit the evidence fails to call the person examined as a witness when asked to do so by the opposing party , or it is unreasonable, impractical or impossible to call the person as a witness (CB cl. 300 - same as SIA s. 24).

Cl. 301 : Weight of evidence

736. The weight of any evidence admitted under cl. 300 in any proceedings will be judged in the light of any inferences that can be drawn as to its accuracy or otherwise. Circumstances which may give rise to such inferences include:

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

(CB cl. 301 - same as SIA s. 25)

Cl. 302 : Credibility of person who answered questions

737. Where evidence given by an officer during an examination is admitted against another person and the officer is not called as a witness, evidence relevant to the credibility of the officer will be admissible. However, there will be a limitation on the admissibility of such evidence if it could be refuted by cross-examination. (CB cl. 302 - same as SIA s. 26).

Cl. 303 : Determination of objection to admissibility of question and answer

738. A party may give another party to a proceeding at least 14 days' notice of intention to tender as evidence all or part of the record of an examination. The other party will have a further 14 days (unless extended) in which to object, giving reasons, to the admission of such evidence. The court may determine the question of admissibility before or during actual proceedings. If a party raises no objection under these provisions, he may not object to the admission of the record at the hearing. Existing law that would allow evidence to be admitted will be preserved. (CB cl. 303 - same as SIA s. 27).

Cl. 304 : Delegation by inspector

739. An inspector may delegate to another person any of his powers or functions except the power to delegate. However, only an inspector that is a State or Territory authority can delegate the power to:

(i) administer an oath or affirmation; or

(ii) examine on oath or affirmation.

(CB cl. 304 based on ICAC CAs s.177).

Cl. 305 : Reports of investigations

740. An inspector other than the NCSC will be able to, and if required by the NCSC or relevant authority as the case may be, must make interim reports to the NCSC or relevant authority and, on completion or termination of the investigation, a final report on his opinion of the facts obtained during the investigation. A similar provision applies where the NCSC is appointed as inspector (CB cl. 305).

741. This clause is based on ICAC CAs s. 178 with appropriate amendments to cater for appointments by the Ministerial Council.

Cl. 306 : Provisions relating to reports

742. The NCSC's basic obligations in relation to the distribution of reports on the investigation of a corporation will be as follows:-

(a) A copy of a final report and a copy of the whole or part of an interim report:-

(i) may be sent to the corporation being investigated;
and

(ii) if requested by the applicant for the
investigation, must then be sent to that
applicant;

(CB s-cl 306(1)).

(b) A copy of a report must be given to each person to
whom, in the opinion of the NCSC, the report ought
to be given. (CB s-cl 306(2)).

(c) It will not however, be bound to give out a copy of
all or part of a report if it considers that there
is good reason not to divulge its contents; (CB s-cl
306(3)).

(d) It must not provide a copy of a report if it is of
the opinion that such action might unduly prejudice
legal proceedings that have been or might be
instituted. (CB s-cl 306(4)).

(e) A court will be able to order that a defendant receive
a copy of a report (CB s-cl 306(5)).

743. All or any part of a report will be able to be
printed and published at the discretion of the Ministerial
Council or the Commonwealth Minister where the expenses of the
investigation are borne by the NCSC or the Commonwealth
respectively (CB s-cl. 306(6)). If the Ministerial Council or

the Commonwealth Minister, as the case may be, receives a certificate of the Attorney-General of the Commonwealth, Northern Territory, or of a State stating that publication of the report would prejudice the administration of justice in a Territory, the Northern Territory, or in the State, the report shall not be published unless that Attorney-General submits a further certificate stating that publication of the report would no longer be prejudicial (CB s-cl 306(7)). In the code as it is applied in each jurisdiction other the ACT:-

(a) The references in these provisions (CB s-cls (6) and (7)) to the Commonwealth Minister will become references to the responsible Minister in that jurisdiction; and

(b) the reference (in s-cl 306(6)) to the Commonwealth will become a reference to that jurisdiction.

744. There are new provisions that allow the report to be admissible as evidence of certain matters in civil proceedings. (CB s-cls 306(12) and (13)).

745. There are also other provisions regarding prosecution proceedings which are substantially the same as the corresponding provisions in the ICAC CAs s. 178.

Cl. 307 : Commission's powers in respect of books

746. An inspector will be able to give the NCSC any books he has taken possession of (see s-cl. 295(6)). The NCSC will be able

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

(CB s-cl 307(1)).

747. The NCSC must permit inspection by a person who would otherwise be entitled to inspect the books (CB s-cl 307(2) - based on ICAC CAS sub-s. 178(1A)).

Cl. 308 : Privileged communications

748. A qualified legal practitioner will be entitled to refuse to comply with a requirement by an inspector (under cl. 295) to reveal privileged communications unless the person to whom, or by or on behalf of whom the communication was made,

agrees to compliance by the legal practitioner with the requirement. If he refuses to comply he is bound (if he has the information) to provide the name and address of the person involved in the privileged communication. (CB cl 308 - new provision based on ICAC CAS s.367). See also L.J. Priestley SULLS sem pp 176-177.

Cl. 309 : Expenses of investigation

749. Subject to certain exceptions (see cl. 18 of the Formal Agreement and s-cls 309(3) to (8)), the expenses of and incidental to an investigation will be paid by the NCSC (CB cl 309 - based on ICAC CAS s.179).

Cl. 310 : Concealing, &c., of books of corporation

750. It will be an offence:

- to conceal, destroy or alter a book that is the subject of investigation; or
- to send the book out of the ACT or out of Australia.

(CB cl 310 - based on ICAC CAS s. 179A).

751. "Books" is widely defined in sub-cl. 5(1).

Cl. 311 : Power of Commission to make certain orders

752. Where it appears that facts relevant to an investigation cannot be ascertained because a prescribed person has failed to comply with an inspector's requirements, the NCSC will be able to make an order that is published in the Commonwealth Gazette:

- restraining a specified person from acquiring or disposing of any interest in specified securities of the corporation;
- restraining the exercise of any voting or other rights attached to specified securities of the corporation;
- directing the registered holder of securities to give written notice of the order to any person whom he knows is entitled to exercise a voting right that is attached to those securities;
- directing a corporation not to make a payment in respect of those securities (except in a winding up);
- directing a corporation not to register a transfer;

- directing a corporation not to issue shares to an existing shareholder.

(CB s-cl 311(1)).

753. The NCSC will be able to vary or revoke such an order (see C & S (1 & MP) A s. 22). An aggrieved person will be able to apply to the Supreme Court to vary or revoke the order s-cl 311(3)). Failure to comply with an order will constitutes an offence (CB s-cl 311(4)).

754. This clause is based on ICAC CAs s. 179B except that in lieu of revocation of an order by the NCSC being notified in the Gazette, the NCSC must serve a copy on any person affected by the order in addition to the corporation (see CB s-cl 311(2)).

Cl. 312 : Application for winding up

755. Upon receipt of a report by an inspector, the NCSC will be able to apply to the Supreme Court for the winding up of the corporation if it is a body which could be wound up within the jurisdiction (i.e. a local company or a body to which Div. 6 of Part XII applies). A copy of the winding up petition must be served on the corporation. (CB cl 312 - based on ICAC CAs s. 180).

Cl. 313 : Certain powers not to be delegated

756. The NCSC will not be able to delegate its power to appoint an inspector to carry out an investigation, to determine the terms and conditions of such an appointment or to terminate such an appointment.

CB : PART VIII : ARRANGEMENTS AND RECONSTRUCTIONS

757. Part VIII of the CB (cls. 314 to 319) establishes a procedure that enables a company to enter into a "compromise" with its creditors (or class of creditors) or members (or class of members). The essence of the procedure is that the Supreme Court will be able on the application of the company, a creditor, a member or the liquidator (if the company is being wound up), order a meeting of the creditors or members. If the compromise or arrangement is approved at the meeting by a majority in number representing 75% in value of the creditors or members present and voting in person or by proxy, and sanctioned by the Court, the compromise or arrangement will become binding on the creditors or members and on the company.

758. The CB, like the ICAC CAs, does not define either "compromise" or "arrangement", though CB s-cl. 315(22) (based on ICAC CAs s-sec. 181(10)) provides that "arrangement", includes the reorganisation of the share capital of a company by the consolidation and/or division of shares. The provisions of this Part are, however, sufficiently broad to enable a company, subject to the necessary majority and Supreme Court approval, to:

- (a) enter into a compromise with its creditors as an alternative to liquidation;
- (b) vary the share structure of the company, including variations to the rights of members, to an extent that

could not be achieved through an alteration to the memorandum or articles;

(c) be reconstructed through the transfer of its assets to a new company in consideration of the issue of the new company's shares to the first company's members;
or

(d) amalgamate with one or more companies through the transfer of their assets to one of them or to a new company formed for the purpose.

759. This Part is based on ICAC CAs Part VII, but there are a number of amendments including two significant amendments dealing with:

(a) the duties of persons administering compromises or arrangements (see CB s-cl. 315(8) to (11)); and

(b) the recognition of court orders in other jurisdictions (see CB s-cl. 315(19)).

Cl. 314 : Crown to be bound

760. All government authorities which are creditors of companies in respect of which a scheme of arrangement is approved are bound by the scheme in the same manner as other creditors.

(CB cl 314).

761. This is a new provision which has been adopted to overcome the problems exposed by Walker v Commissioner for Payroll Tax (1973) 3A.T.R. 673, where the NSW Supreme Court held that the Crown in right of a State is not bound by a scheme of arrangement and can therefore defeat the interests of preferred creditors. The Crown Debts (Priority) Bill will ensure (in s. 3 of that Bill) that the Commonwealth is bound by the provision in the law of the other jurisdictions covered by the co-operative scheme which corresponds to CB cl. 314. There are similar binding provisions elsewhere (see ex memo para 787).

Cl. 315 : Power to compromise with creditors and members

762. If a compromise or arrangement is proposed between a company and its creditors or members, the Supreme Court will be able on application by the company, or any creditor, member or liquidator of the company, to order a meeting of creditors or members (CB s-cl. 315(1)). The NCSC must be notified of any hearing resulting from such an application (CB s-cl. 315(2)).

763. The Court will not be able to make an order under CB s-cl. 315(1) that a meeting be held in a State or another Territory unless some or all of the members or creditors reside in that State or Territory (CB s-cl. 315(3)).

764. A compromise or arrangement will be binding on the creditors or members of a company only if:

(a) it is approved by a majority in number present and voting such majority representing 75% in value of all creditors or members present and voting in person or by proxy; and

(b) it is approved by the Supreme Court

(CB s-cl. 315(4) - based on ICAC CAs sub-s. 181(2)).

765. If the Supreme Court orders 2 or more meetings of creditors or of a class of creditors or 2 or more meetings of members or a class of members the meetings will be deemed to be one single meeting with the votes cast at each meeting aggregated accordingly (CB s-cl. 315(5)).

766. The Court may grant its approval to a compromise or arrangement subject to such alterations or conditions as it thinks just (CB s-cl. 315(6) - based on ICAC CAs s-sec. 181(3)).

767. A person will not be able without the leave of the Supreme Court, to administer or to be appointed to administer a compromise or arrangement if that person is :-

(a) a mortgagee of any property of the company;

- (b) an auditor or an officer of the company;
- (c) an officer of any corporation that is a mortgagee or property of the company; or
- (d) not a registered liquidator.

(CB s-cl 315(7)). This is a new provision - CB s-cl 315(8) defines officer for the purposes of CB s-cl. 315(7)). Similar restrictions are imposed in relation to:

- receivers (see CB s-cl 323(1) and (2)) and ex memo paras 792 to 794);
- official managers (see CB para 338(1)(b));
- liquidators (see CB s-cl 417(2) and ex memo paras 964 to 967).

768. A person appointed to administer a compromise or arrangement will have to observe the requirements that are imposed on receivers and liquidators in relation to:-

- . the power of the Court to fix remuneration of receivers
- . The duty of a receiver to notify the NCSC that he has ceased to act
- . the lodging of accounts of receivers
- . the enforcement of the duty to make returns

. the supervision of liquidators.

(CB s-cl. 315(9) to (11) - new provisions). See also cl. 24 of the C(TP)B which deals with the application of CB cl. 330 of the CB to a person or persons appointed to administer a compromise or arrangement before the commencement of the CB).

769. CB s-cl. 315(12), (13) and (14) set out procedural requirements in relation to orders made under CB para. 315(4)(b) (based on ICAC CAS s-secs. 181(4), (5) and (6) respectively).

770. The directors of a company must report on a compromise or arrangement that has been proposed, if the members of the company so direct (CB para. 315 (15)(a) based on ICAC CAS 187(7)(a)). This report must be available at the registered office of the company for inspection by the shareholders and creditors of the company at least 7 days before the date of any meeting ordered by the Court to be convened as provided in CB s-cl. 315(1). (CB para s-cl. 315 (15)(b) - based on ICAC CAS sub-s. 181(7)(b)).

771. The Court has power to restrain further proceedings in any action or other civil proceedings against the company (CB s-cl. 315(18) - based on ICAC CAS s-sec. 181(9)).

772. When an order corresponding to an order under CB s-cl. 315(1) is made by the Supreme Court of a participating jurisdiction and a copy is filed with the Registrar of the ACT Supreme Court, the order will take effect and will be able to be enforced as if it has been made by the ACT Supreme Court (CB sub-cl. 315(19) - new provision). A compromise or arrangement binding on creditors of a registered company or a registered foreign company by virtue of a provision corresponding to CB s-cl. 315(4) in a particular jurisdiction will be binding on creditors of that company whose debts are recoverable in a ACT court (CB s-cl. 315(20) new provision).

773. The purpose of these two provisions (in CB s-cl. 315(19) and (20)) is to overcome deficiencies in the present law that result from the fact that a company incorporated in one Australian jurisdiction but carrying on business in other jurisdictions:

- (a) may be subject to different court orders in different jurisdictions in relation to meetings of creditors or members; and
- (b) could have a compromise or arrangement approved by members or creditors sanctioned by different courts subject to varying conditions.

774. These difficulties will not arise under the new provisions because, with the narrower definition of "company" in CB s-cl. 315(22), only the Supreme Court of the jurisdiction in which the company is incorporated or registered will be able to order meetings under CB s-cl. 315(1) and approve compromises or arrangements under CB s-cl. 315(6). The existence of CB s-cl. 315(19) and (20) will permit court orders made under CB s-cl. 315(1) and (4) in any one jurisdiction to be recognised in all participating jurisdictions.

775. There is a new provision designed to prevent use of the scheme of arrangement provisions to effect takeovers CB (CB s-cl. 315(21)). The definition of "company" in CB s-cl. 315(22) has been narrowed to mean a company incorporated under this or corresponding previous legislation and, unlike the definition in CB s-cl. 5(1), includes a foreign company registered in the Territory.

Cl. 316 : Information as to compromise with creditors or members

776. Where a meeting is convened under CB cl. 315, the company will be required to supply certain information to creditors or members in relation to the compromise or arrangement (CB cl 316).

777. This clause is based on ICAC CAs s. 182 except that:

- (a) The information must now include all information within the knowledge of the directors that is material to the making of a decision to approve the scheme (CB s-para. 316(1)(a)(ii)).
- (b) The new expression "the explanatory statement" is used throughout the clause instead of "statement".
- (c) The explanatory statement need not be sent to creditors whose debts are less than \$200 as long as they are given an opportunity to obtain a copy on request (CB s-cl. 316(2)).

778. In a scheme of arrangement which merely involves a corporate reconstruction and does not involve creditors, the explanatory statement must be registered with the NCSC before it is sent out (CB s-cl. 316(6)). In schemes of arrangement involving insolvency (where time may be more critical), the explanatory statement does not have to be registered by the NCSC before it is sent out but the NCSC must be given an opportunity to examine it before the Court approves the arrangement (CB s-cl. 316(7)).

Cl. 317 : Provisions for facilitating reconstruction and amalgamation of companies

779. Where there is an application to the Supreme Court for the approval of a compromise or arrangement, and the compromise or arrangement is connected with a scheme for the

reconstruction or amalgamation of corporations, the Court will be able to give certain orders, including orders for the transfer of property and liabilities, the allotting of shares or the appropriation of other interests, the dissolution (without winding up) of the transferor corporation (i.e. the corporation whose property has been transferred), and for provision to be made for any person who dissents from the compromise or arrangement (CB cl. 317).

780. The Supreme Court will not be able to approve a compromise or arrangement under this clause unless it is satisfied that the compromise or arrangement has not been proposed for the purpose of enabling any person to avoid the operation of any of the provisions of the CASA.

781. This provision is based on ICAC CAs s. 183. It differs, however, in :

- (a) the extended definitions of "liabilities" and "property" in s-cl. 317(6), which are based on NCB cl. 268;
- (b) the omission of ICAC CAs s-sec 183(4) (dealing with the vesting of property under Court order) which now appears in a more general form as CB cl. 531;

- (c) the change of subject matter from "companies" to "corporations" to enable a court to consider a scheme involving a transfer from a corporation incorporated in another State to a company within its jurisdiction.
- (d) the conferral of power on the court to order allotments of units in a trust (CB s-cl. 317(1)).

782. When an order in relation to a company corresponding to an order under CB s-cl. 317(1) is made by the Supreme Court of a participating jurisdiction and a copy is filed with the Registrar of the ACT Supreme Court, the order will take effect and will be able to be enforced as if it had been made by the ACT Supreme Court (CB s-cl 317(4) - new provision).

Cl. 318 : Acquisition of shares of shareholders dissenting from scheme or contract approved by a majority

783. Where a scheme or contract (other than a takeover scheme) involving a transfer of shares to a person (the transferee) has been approved by holders of 90% in nominal value of the shares involved, the transferee will be able, within 2 months, to give notice to a dissenting shareholder that he desires to acquire the shares of that shareholder, and is bound and entitled to acquire those shares unless the Supreme Court otherwise orders (CB cl. 318 - based on ICAC CAs s. 185).

Cl. 319 : Notification of appointment of scheme manager and power of Court to require report.

784. Where an application is made to the Supreme Court in relation to a proposed compromise or arrangement, the Court will be able to require a report on the terms of the scheme, the conduct of the officers of the company and other matters to be prepared. The person appointed as administrator must also notify the NCSC of his appointment (CB cl. 319 - new provision which is based on NCB cl. 276).

CB : PART IX : CONDUCT OF AFFAIRS OF COMPANY IN OPPRESSIVE OR UNJUST MANNER

785. Part IX of the CB (cl. 320) is a new Part dealing with the remedy for oppression etc (in ICAC CAs s. 186).

Cl. 320 : Remedy in cases of oppression or injustice

786. A member of a company who believes that the affairs of the company are being conducted in an oppressive manner or the NCSC (following receipt of an inspector's report) will be able to apply to the Supreme Court for an order under this section. On receiving such an application, the Court will be able to make an order that the company be wound up, or may make any other order it thinks fit. (CB cl. 320).

787. The provision is based on ICAC CAs, s.186 except that:

- (a) it now includes an additional ground of application to the Court, namely, that the directors of the company have acted in their own interests and not in the interests of the members as a whole, or in any other manner that is unfair or unjust to one or more of the members (including himself) other than the directors.

(b) Para 320(1)(b) now permits an application to the Court for an order under the clause to be made by the NCSC where the NCSC has made a report under the special investigation provisions (see CB Part VII) to the relevant authority.

CB : PART X : RECEIVERS AND MANAGERS

788. Part X of the CB (cls. 321 to 332) contains provisions relating to receivers and to receivers and managers. Some receivers and managers are included in the general definition of "officer" (see s-cl. 5(1)). The definitional problems relating to "receiver" and "manager" were discussed in paras 419 and 420 of the Macarthur Committee Report which finally recommended that both the terms "receiver" and "manager" should be retained in the corresponding New Zealand legislation.

Cl. 321 : Interpretation

789. There is a new interpretation provision which states that, unless the contrary intention appears, a reference to a receiver includes a reference to a receiver and manager (CB cl. 321).

Cl. 322 : Crown to be bound

790. The Crown in right of the Commonwealth, a State or a Territory will be bound by Part X of the CB (CB cl. 322 - based on ICAC CAs s-sec. 196(4) which only applied to the Crown in the jurisdiction).

791. Similar binding provisions apply in relation to:

- arrangements and reconstructions (see CB cl 314 and ex memo paras 760 and 761).

- official management (see CB s-cl 334); and
- liquidations (see CB cl 358);

Cl. 323 : Disqualification for appointment as receiver

792. Certain persons will be prohibited from being appointed as receiver of the property of a company (CB cl. 323 - based on ICAC CAs s. 187).

793. An officer of a related corporation will be deemed to be an officer of the company for the purposes of the prohibitions in CB s-cl. 323(1) and a person who has been at any time within the immediately preceding period of 12 months an officer or promoter of the company or of a related corporation will also be deemed to be an officer of the company. The NCSC will have a discretion which it may exercise to direct that these persons are not deemed to be officers of the company. (CB s-cl 323(2)).

794. Similar restrictions are imposed in relation to

- a person who administers a scheme or compromise (see CB s-cl 315(7) and (8); ex memo para 767);
- official managers (see CB para 338(1)(b)); and
- liquidators (see CB s-cl 417(2));

Cl. 324 : Liability of receiver

795. The liabilities of a receiver or manager are set out in cl. 324.

796. This provision is based on ICAC CAs s. 188 except that there is a new provision enabling a receiver to apply to the Supreme Court for relief where he has incurred civil liability that he would not have incurred if he had been properly appointed (CB s-cl. 324(3)) - based on NCB s-cl. 230(3)).

Cl. 325 : Power of Court to fix remuneration of receivers

797. The Supreme Court will be able to make orders in relation to the remuneration of receivers (CB cl. 325).

798. This provision is based on ICAC CAs s. 189 except that:

- (a) It has been made clear that it applies whether the receiver has been appointed in respect of the whole or part of the property of the company
- (b) Application for such an order (or for its variation) may be made by the NCSC.

Cl. 326 : Notification of appointment of receiver

799. The NCSC will have to be notified of the appointment of a receiver of the whole or part of the property of a company (CB cl. 326).

800. This provision is based on ICAC CAS s. 191 except that

(a) it has been made clear that the obligation to notify applies even if the receiver is appointed in respect of only part of the property of the company.

Consequential amendments have also been made to the provisions based on ICAC CAS ss. 192, 193 and 195 (see CB cls 327, 328 and 330).

(b) The clause has also been expressed to extend to the appointment of a receiver of the property or part of the property of a registered foreign company.

Cl. 327 : Statement that receiver appointed

801. Every document on or in which the company name appears will have to contain a statement immediately following the name of the company that a receiver, or a receiver and manager as the case may be, has been appointed (CB cl. 327).

802. This provision is based on ICAC CAS s. 192 except that:

(a) The requirement now also applies where a receiver has been appointed in relation to part of the company's property (CB s-cl. 327(1) - see also CB s-cl. 326(1)).

(b) The provision has been re-drafted to bring it into line with the other similar requirements (see CB s-cl. 218(1) (name of company), 356(1) and 424(1)).

Cl. 328 : Provisions as to information where receiver appointed

803. Where a receiver of all or part of the company's property is appointed, he must provide certain information to the company, the NCSC and any trustee for debenture holders (CB cl 328).

804. This provision is based on ICAC CAs s. 193 except that:

(a) Where a receiver extends the period for submission of a statement of affairs, the receiver must notify the applicant (CB s-cl. 328(2)) and lodge with the NCSC a copy of the notice given by him to the applicant (CB Para 328(3)(a)).

(b) Where the Supreme Court extends the period for submission of a statement of affairs, the applicant must lodge with the NCSC a copy of the order of the Court. (CB para 328(3)(b)).

This will bring about consistency in the provisions relating to the preparation of and lodgement of, statements of affairs in both liquidations and receiverships.

Cl. 329 : Special provisions as to statement submitted to receiver

805. The matters that are to be included in the statement of affairs of a company required under CB cl. 328 are set out in CB cl. 329.

806. This provision is based on ICAC CAs s. 194 except that persons who have been required to submit a statement of affairs to the receiver will now have a right of appeal to the Supreme Court against the receiver's decision as to the payment of costs which they incurred in preparing the statement under a general appeal provision (CB cl. 538).

Cl. 330 : Lodging of accounts of receivers

807. A receiver will be required to lodge accounts with the NCSC every 6 months (CB cl. 330).

808. This provision is based on ICAC CAs s. 195 except that:

- (a) the accounts lodged with the NCSC must be verified by a statement in writing (CB s-cl. 330(1)).
- (b) The first period in respect of which accounts must be prepared may be a period of less than 6 months if the receiver so determines (CB s-cl. 330(1)).
- (c) The provision relating to auditing of the accounts has been changed so as to enable the NCSC to make an order declaring that the receiver is liable for the costs of the audit (CB s-cl. 330(5)).

Cl. 331 : Payments of certain debts out of property subject to floating charge in priority to claims under charge

809. Where a receiver has been appointed under a floating charge, certain other debts will have to be paid out of the property covered by the floating charge in priority to claims under the charge (CB cl 331).

810. This provision is based on ICAC CAs s. 196 except that:

- (a) The provision will now apply where, at the time of the receiver's appointment, the company has neither commenced to be wound up voluntarily nor been ordered to be wound up by the court. This replaces the less precise wording of ICAC CAs s-sec. 196(1) viz that the provision applies "if the company is not at the time in the course of being wound up".
- (b) Priority is now also accorded to the reasonable fees and expenses incurred by an auditor after he has been refused permission to resign (CB para 331(2)(b)).
- (c) The definition of floating charge for the purposes of CB cl. 331 has been relocated in CB cl. 5 and the provision by which the Crown is bound (ICAC CAs s-sec. 196(4)) has been incorporated in the wider CB cl. 322.

- (d) For the purposes of Subdivision C of Division 4 of Part XII the relevant date is the date of the appointment of the receiver or of possession being taken or control being assumed, as the case may be CB s-cl. 331(7).

Cl. 332 : Enforcement of duty of receiver to make returns

811. The Supreme Court will be able to make orders directing a receiver to make good certain defaults (CB cl. 332-based on ICAC CAs s. 197).

CB : PART XI : OFFICIAL MANAGEMENT

812. Part XI of the CB (cls. 333 to 357) deals with the placing of a company under official management. It is based on ICAC CAs ss 198 to 215.

Cl. 333 : Interpretation

813. There are definitional and interpretation provisions for the purposes of the Part (CB cl. 333).

814. This clause is based on ICAC CAs s. 198 although the requirements in relation to special resolutions have been simplified.

Cl. 334 : Crown to be bound

815. The Crown in right of the Commonwealth, a State or a Territory will be bound by this Part (CB cl. 334 - new provision).

816. There are similar binding provisions elsewhere in relation to:-

- arrangements and compromises (see CB cl 314 and ex memo paras 760 and 761);

- receiverships (see CB cl 322 and ex memo paras 790 and 791); and
- liquidations (see CB cl 358 and ex memo paras 864 and 865).

Cl. 335 : Power of company to call meeting of creditors to appoint official manager

817. Where it is resolved by the majority of directors at a meeting specially convened for the purpose that a company is unable to pay its debts as they become due and payable, the company will be able to (or, if requested in writing by a judgment creditor for not less than \$1,000, must) call a meeting of its creditors for the purpose of placing the company under official management. The procedures for the convening of the meeting and the information concerning the company's affairs that has to be made available are also dealt with. (CB cl. 335).

818. This provision is based on ICAC CAs s. 199 except that:

- (a) The time periods stipulated for sending notices to creditors have been shortened (CB s-cl. 335(3), (4) and (9)).
- (b) Advertisements of meetings of creditors must be lodged in each jurisdiction covered by the co-operative scheme in which the company has carried on business during the preceding 2 years (CB s-cl. 335(9)).

(c) If the chairman of the meeting of creditors determines that the time and place of the meeting are not convenient to the majority in value of creditors the meeting will not lapse (as in ICAC CAs s-sec. 199(14)) but can be adjourned under CB cl. 337.

(d) There are new penalty provisions (CB s-cl. 335(16) to (18)).

Cl. 336 : Statement of affairs of company to be submitted to meeting of creditors of company

819. A statement as to the affairs of the company, certified by the directors, will have to be available for creditors on request and also submitted to the meeting of creditors (CB cl. 336).

820. This provision is based on ICAC CAs s. 200 except that an additional provision has been included requiring the director so appointed to submit to a meeting of creditors the statement of affairs of the company prepared in accordance with s-cl. 335(4) (CB s-para 336(2)(a))

Cl. 337 : Power to adjourn meeting

821. A meeting convened under cl. 335 may by resolution be adjourned from time to time (CB cl. 337).

822. This provision is based on ICAC CAs s. 201 except that the maximum permissible adjournment has been reduced from 30 days to 21 days after the date for which the meeting was originally convened.

Cl. 338 : Power of creditors to place company under official management

823. The power of the creditors to place the company under official management is dealt with in cl. 338.

824. This provision is based on ICAC CAs s. 202 except that:

- (a) It is no longer a pre-requisite that creditors resolve that, in their opinion, the company is unable to pay its debts as and when they become due and payable.
- (b) The permissible duration of official management has been extended to 3 years.
- (c) The person appointed as official manager will have to furnish to the company a certificate stating that he is not an insolvent under administration (CB s-para 338(1)(b)(iii)). The reference in ICAC CAs s-para. 202(1)(b)(iii) to a person who has made any arrangement or composition with his creditors generally and has not been released from his indebtedness to them has been omitted.

- (d) The requirement in ICAC CAS para. 202(2)(c) that a company, within 7 days of the passing of the creditors resolution, cause notice that the company has been placed under official management to be published in a newspaper circulating throughout the jurisdiction has been replaced by a requirement that such information be published in the Commonwealth Gazette within 21 days after the passing of the special resolution (para 338(2)(b)).
- (e) The penalty provision has been amended to provide that only officers in default and not the company itself are liable to prosecution for failure to lodge the required notices (s-cl. 338(3)).

Cl. 339 : Appointment of committee of management

825. The creditors will be able to resolve that a committee of management be appointed (CB cl. 339 - based on ICAC CAS s. 202A).

Cl. 340 : Notice of appointment and address of official manager

826. The official manager will be required to notify the NCSC of:

- (a) his appointment and address (within 14 days of the appointment);

(b) any change in his address; and

(c) his resignation or removal from office

(CB cl. 340 - based on ICAC CAs s. 202B).

Cl. 341 : Effect of resolution

827. The effect of the special resolution placing a company under official management is dealt with in CB cl. 341.

828. This provision is based on ICAC CAs s. 203 except that CB s-cl 341(2) (based on ICAC CAs s-sec 203(2)) refers to the official manager being chairman of any meeting of the company, of its creditors or of the company and its creditors that is held or resumed while he holds office as official manager.

Cl. 342 : Six-monthly meetings of creditors and members

829. The official manager will be obliged to summon six-monthly meetings of members and creditors to consider the statement he is required to prepare in relation to the affairs of the company (CB cl. 342).

830. This provision is based on ICAC CAs s. 203A except that:

- (a) It is now made clear that the official manager must cause the statement and report to be laid before the creditors and members at the meeting (CB s-cl. 342(1)).

- (b) Notice of the meetings is no longer required to be advertised in a newspaper in the jurisdiction.

Cl. 343 : Stay of proceedings

831. Where a company is under official management, no civil action will be able to be commenced or proceeded with against the company without the leave of the Supreme Court (CB cl. 343).

832. This provision is based on ICAC CAs s. 203B except that:

- (a) It has been made clear that it only applies to civil proceedings (CB s-cl. 343(1)).

- (b) CB s-cl. 343(2) has been amended to take account of the one place of registration concept by prohibiting civil proceedings being taken in the jurisdiction against recognized companies that have been placed under official management in their jurisdiction of incorporation.

Cl. 344 : Power to extend period of official management

833. The creditors will be able, by special resolution, to extend the period of official management for a further period not exceeding 12 months (CB cl. 344).

834. This provision is based on ICAC CAs s. 203C except that the meeting convened to extend the period of official management is no longer required to be advertised in the press and may be convened up to 7 months prior to the due expiry of the period of official management in order that this matter may be considered at a regular 6 monthly meeting. See also CB s-cl. 344(2).

Cl. 345 : Extension of period of official management

834A. Where the period of official management has been extended in accordance with CB cl. 344 the extension will continue to apply until the official management is further extended or is terminated.

Cl. 346 : Appointment of official manager not to affect appointment and duties of auditor

835. The appointment of the official manager does not affect the appointment, rights and duties of the auditor of the company (CB cl. 346 - based on ICAC CAs s. 205).

Cl. 347 : Duties of official manager

836. The duties of an official manager are set out in CB cl. 347.

837. This provision is based on ICAC CAs s. 206 except that:-

- (a) The official manager is required to convene a meeting of the creditors on a date that is convenient to the majority in value of the creditors as well as for a time and place that is convenient. (CB s-cl. 347(3)).
- (b) The period of notice for the convening of such a meeting has been extended from 7 to 14 days.
- (c) The requirement for a notice of the meeting of the creditors to be advertised in a daily newspaper has been removed.

Cl. 348 : Undue preferences in the case of official management

838. Undue preferences will be void as against an official manager where the company has been placed under official management (CB cl. 348).

839. This provision is based on ICAC CAs s. 207 except that a creditor of the company who has issued execution against the property of the company or has instituted proceedings to attach

a debt due to the company or to enforce a charge against the company will be required to pay any amount received as a result of the execution or proceedings to the official manager (CB s-cl. 348(2) and (3)).

Cl. 349 : Application and disposal of property during official management

840. Certain restrictions will be imposed on the official manager in relation to the sale and disposition of company property during the official management (CB cl. 349).

841. This provision is based on ICAC CAs s. 208 except that:

- (a) The maximum amounts that can be dealt with by the official manager have been increased (s-cl. 349(2) and (3) - cf. NCB s-cl. 293(2) and (3)).
- (b) The official manager will be able with the leave of the Supreme Court, to charge the assets of the company as well as sell or otherwise dispose of them, whether in the ordinary course of business or not (CB s-cl. 349(4) - cf. NCB s-cl. 293(4)).
- (c) The official manager, with the consent of the creditors given by a special resolution at a meeting of creditors will be able to sell or otherwise dispose of, or mortgage or charge any property of the company. (CB para 349(4)(b)).

Cl. 350 : Official manager may apply to Court for directions

842. The official manager will be able to apply to the Supreme Court for directions (CB cl. 350).

843. This provision is based on ICAC CAs s. 208A except that certain acts done in accordance with a direction by the Supreme Court will be deemed to have been properly done for the purposes of the CB (CB s-cl. 350(2) - based on s-sec. 208A(2) of the ACT and NT COs).

Cl. 351 : Certain provisions applicable to official management

844. Certain provisions which apply in the winding up of a company will apply to the company under official management as if it were a company being wound up (CB cl. 351).

845. This provision is based on ICAC CAs s. 209 except that:

(a) The provision enabling the Supreme Court to exercise control over a liquidator (CB cl. 420) will also enable it to exercise control over an official manager (CB s-cl. 351(4)).

(b) A number of the provisions made to apply by reference (ICAC CAs ss 248, 249 and 306) have been re-cast and re-located, necessitating cross-referencing changes in CB cl. 351. Changes to ICAC CAs have been reflected in CB s-cl. 351(4) as follows:

- . ICAC CAs para 218(1)(g) is set out in full in CB s-cl. 351(2);
- . ICAC CAs ss 248 and 249 are incorporated into CB cl. 541 which applies of its own force to official management; and
- . ICAC CAs ss 374C and 374D apply of their own force to official management. (CB cls. 553, 556 and 557.)

Cl. 352 : Power of Court to terminate official management and give directions

846. In certain circumstances the Supreme Court will be able to terminate an official management and give such directions as it thinks fit for the resumption of the management and control of the company by its officers (CB cl. 352).

847. This provision is based on ICAC CAs s. 210 except that:

- (a) The NCSC will also be able to make an application for termination of an official management (CB s-cl. 352(1)).
- (b) Applicants other than the NCSC must notify the NCSC (CB s-cl. 352(2)).
- (c) The Supreme Court will also be able to grant leave for an application to be made for the winding up of the company (CB s-cl. 352(3) - cf. NCB s-cl. 295(2)).

Cl. 353 : Resolution to place company under official management effective, subject to appeal

848. Creditors and members of the company will be able to apply to the Supreme Court to cancel or vary the resolution placing the company under official management (CB cl. 353).

849. This provision is based on ICAC CAs s.211 except that ICAC CAs s-sec. 211(3) is replaced by CB s-cl. 353(3) to (5)).

Cl. 354 : Lodgment of office copy of court order

850. Where the Supreme Court makes an order terminating an official management (see CB cl. 352) or varying or cancelling a resolution to place a company under official management (see CB cl. 353), the persons on whose application the order is made will be required to lodge with the NCSC notice of the making of the order within 7 days after the order is made and also lodge an office copy of the order within 7 days of the passing and entering of the order (CB cl. 354).

851. This provision is based on ICAC CAs s. 211A except that:

- (a) It has been adjusted to reflect the fact that the NCSC may be an applicant under cl. 352; and
- (b) The requirement to advertise the termination of official management has been deleted.

Cl. 355 : Termination of appointment and release of official manager

852. This provision is based on an amalgamation of clause 345 and clause 355 (CB cl. 355). This amalgamation has been brought about to avoid some inconsistencies and problems of overlap between the two provisions.

(a) The appointment of a person as official manager of a company will terminate where:

- the person tenders his resignation in writing to the committee of management or a meeting of creditors of the company
- a special resolution that the appointment of the person be terminated is passed at a meeting of creditors of the company of which special notice has been given
- the Court makes an order that the appointment be terminated.

(CB s-cl. 355(1)).

(b) The grounds for the termination of the appointment of an official manager are set out. (CB s-cl 355(2)).
CBs-cl. 355(1) to 355(6) incl. are based on ICAC CA s s.204 except that:

- (a) there is a new provision dealing with the question of whether a person is qualified for appointment as official manager after a vacancy (CB s-cl. 355(4) - based on ACT CO s-sec 203(5));
- (b) a person who is appointed official manager under sub-cl. 355(3) is responsible for the management of the company and must perform the duties, functions, etc. of the directors of the company (CB s-cl. 355(5) - based on ACT CO s-sec. 204(6) and to the same extent as ICAC CAs s-sec. 204(4)); and
- (c) where the appointment of an official manager is terminated, his powers, functions, and duties vest in and can be performed by the deputy official manager or, if there is no deputy official manager, by the committee of management or, if there is no deputy official manager and no committee of management, by a person appointed by the Court (CB s-cl. 355(6) - based on ACT CO s-sec. 204(6)).

853. S-cl. 355(7) and 355(8) are new provisions:

- (a) A person who convenes a meeting of creditors of a company for the purpose of considering a resolution that the appointment of a person as official manager

be terminated will have to give to that person 14 days written notice of the meeting and the purpose of the meeting. (CB s-cl. 355(7)).

(b) A person who is official manager when he receives a notice given under CB s-cl 355(7) will have to:

- (i) prepare a report of his conduct of the official management
- (ii) present the report to the meeting and give such explanations as are reasonably requested by any creditor.
- (iii) within 7 days of the holding of the meeting lodge with the NCSC a notice of the holding of the meeting setting out the date of the meeting, the result of the resolution and a copy of his report.

854. CB s-cl. 355(9) - (15) are based on ICAC CAs s.212 except that:

- (a) The calling of the meeting of creditors will not be required to be advertised.
- (b) The creditors who are entitled to receive notice of a meeting convened pursuant to CB para 355(a)(b) are specified in that provision.
- (c) Provision is made for the situation where a meeting has been convened but a quorum has not been formed (CB

s-cl. 355(13)).

(d) The expenses incurred by a person who was an official manager in connection with the preparation of a report under CB s-cl. 355(8) will form part of the costs of the official management.

(e) It is stated that these provisions apply to a person who ceases to be an official manager by reason that his appointment is terminated by the Court under CB s-cl. 338(4) (CB cl. 355(9)).

Cl. 356 : Notification that corporation is under official management

855. Company documents will have to indicate that the company is under official management (CB cl. 356).

856. This provision is based on ICAC CAs s. 213 except that:-

(a) The provision has been redrafted to bring it into line with other similar requirements (see CB s-cl. 218(1), 327(1) and 424(1)).

(b) The list of documents etc. in which notification must be made has been extended.

Cl. 357 : Functions of committee of management and appointment of deputy official manager

857. The powers and functions of the committee of management including its powers to appoint a deputy official manager are set out in CB cl. 357.

858. This provision is based on ICAC CAS s. 214 except that:

- (a) The person appointed as deputy official manager must furnish to the company a certificate stating that he is not an insolvent under administration. (CB s-para 357(2)(a)iii). The reference in ICAC CAS s-para. 214(2)(a)(iii) to "a person who has made any arrangement or composition with his creditors generally and has not been released from his indebtedness" has been deleted.
- (b) The provisions of ICAC CAS s-sec. 214(2) are now in s-cl. 357(2) and (3).

Accidental omission to give notice

859. The provision formerly in ICAC CAS s. 215 relating to accidental omission to give notice of a meeting etc. has now been incorporated elsewhere: see CB s-cl. 539(3).

CB : PART XII : WINDING UP

860. Part XII of the CB (cls. 358 to 474) contains the following provisions dealing with the winding up of companies:

DIVISION 1 - Preliminary

DIVISION 2 - Winding Up by the Court

Subdivision A - General

Subdivision B - Liquidators

Subdivision C - General Powers of Court

DIVISION 3 - Voluntary Winding Up

Subdivision A - Introductory

Subdivision B - Provisions applicable only to Members' Voluntary Winding up

Subdivision C - Provisions applicable only to Creditors' Voluntary Winding Up

Subdivision D - Provisions applicable to every Voluntary Winding Up

DIVISION 4 - Provision applicable to every Mode of Winding Up

Subdivision A - General

Subdivision B - Committees of Inspection

Subdivision C - Proof and Ranking of Claims

Subdivision D - Effect on other
Transactions

Subdivision E - Offences

Subdivision F - Dissolution

DIVISION 5 - Reciprocity with Participating States
and Participating Territories

DIVISION 6 - Winding Up of Bodies other than
Companies

DIVISION 7 - Miscellaneous

861. These provisions are based on ICAC CAs Part X.

DIVISION 1 : PRELIMINARY

Introductory Note

862. Division 1 of Part XII deals with various preliminary matters.

863. This Division should be read in conjunction with cl. 25 of the C(TP)B which deals with a winding up that was commenced before the commencement of the CB.

Cl. 358 : Crown to be bound

864. This Part will bind the Crown in right of the Commonwealth, in right of a State or in right of a Territory (CB cl 358).

865. This provision is based on, although broader than, ICAC CAs s. 217. Similar binding provisions are contained elsewhere (see ex memo para 790).

Cl. 359 : Modes of winding up

866. A winding up may be either by the Supreme Court or voluntary (CB cl 359 - based on ICAC CAs s. 216).

Cl. 360 : Liability as contributories of present and past members

867. Subject to certain qualifications, every present and

past member will be liable to contribute to the assets of the company on its being wound up (CB cl. 360 - based on ICAC CAS s. 218).

868. The definition of "contributory" in CB s-cl. 5(1) has been amended to include a member of a no liability company. The change merely enables members of a no liability company to petition for its winding up under CB para 361(1)(c). It will not render members of no liability companies liable to contribute to the assets of the company on its being wound up as CB cl. 360 is not applicable to no liability companies - see CB cl. 475.

Cl. 361 : Nature of liability of contributory

869. The liability of the contributory will be the same as the liability for any debt due under a deed, according to the law of the jurisdiction. The debt will be due from the contributory when his liability commenced, but will be payable when calls are made for enforcing the liability (CB cl. 361 - based on ICAC CAS s. 219).

Cl. 362 : Contributories in case of death or bankruptcy of member

870. If a contributory dies, his personal representatives will be liable in the course of administration to contribute to the property of the company in discharge of his liability (CB s-cl. 362(1) - based on ICAC CAS s-sec. 220(1)).

871. If a contributory becomes bankrupt or assigns his estate for the benefit of his creditors, his trustee will represent him for all purposes of winding up and is a contributory. Also, the estimated value of the contributory's liability to future calls as well as the value of calls already made may be proved against his estate (CB s-cl. 362(2) - based on ICAC CAs s-sec. 220(2)); but see new definition of "insolvent under administration" in CB s-cl. 5(1)).

DIVISION 2 : WINDING UP BY THE COURT

872. Division 2 of Part XII of the CB (cls. 363 to 390) contains the special provisions of the CB relating to a winding up by the Supreme Court. This division is split into three sub-divisions:-

SUBDIVISION A - General

Cl. 363 : Application for winding up

873. A company will be able to be wound up under an order of the Supreme Court on the application of one or more of the following:-

- (a) the company;
- (b) a creditor;
- (c) a contributory;
- (d) the liquidator;
- (e) the NCSC where

(i) a report of an investigation has been made by an inspector (see CB cl. 312); or

- (ii) where an application has been made to terminate an official management and leave has been granted (see CB cl. 352);
- (f) the official manager of a company appointed under Part XI;
- (g) an applicant (other than the NCSC) for the termination of an official management who has been granted leave by the Supreme Court (see CB s-cl. 352(3));
- (h) the Insurance Commissioner appointed under the Insurance Act 1973 (see also ex memo paras 874(d) and 876 below).

(CB cl 363).

874. This provision is based on ICAC CAs s. 221 except that:

- (a) The term 'application' is used rather than the term 'petition'.
- (b) The ICAC provision which enabled the Minister to make an application for winding up after a special investigation (ICAC CAs para. 221(1)(e)) has been replaced by a provision enabling the NCSC to make such an application.

- (c) Where an application has been made to terminate an official arrangement, the applicant or the NCSC, if granted leave by the Supreme Court (see CB s-cl. 352(3)), will be able to present a petition (CB paras 363(1)(a) and (g)).
- (d) In respect of general insurance companies, the Commonwealth Insurance Commissioner will also be able to be an applicant (CB para 363(1)(h)). This is in addition to, and not in substitution for, the rights of the company creditors, contributories etc to make application. The provision has been included because delays have occurred in the past between a company getting into financial difficulties and the institution of liquidation proceedings and such delays have been to the detriment of creditors and policy owners. The Insurance Commissioner will only be able to make an application, however, if the Commonwealth Treasurer has appointed an inspector to investigate the company and it is insolvent according to the solvency provisions of the Insurance Act (CB s-cl. 363(2)).
- (e) Some of the restrictions under the ICAC provision upon making a winding up application have been deleted (ICAC CAs paras 221(2)(a), (b) and (d)). The only remaining restriction is that if the application is made by a contingent or prospective creditor, security for costs must be given and a prima facie case must be made out (CB s-cl. 363(3) - based on ICAC CAs para 221(2)(c)).

Cl. 364 : Circumstances in which company may be wound up by Court

875. The Supreme Court will be able to order the winding up a company if:

- (a) the company has so resolved by special resolution;
- (b) the company does not lodge the statutory report or hold the statutory meeting (see CB cl. 239);
- (c) the company does not commence business within a year of its incorporation or suspends its business for a whole year;
- (d) the number of members is reduced below 2 in the case of a proprietary company or below 5 in the case of any other company (except where all the shares in the company are held by a holding company that is a company within the meaning of the CB or the corresponding law of another jurisdiction covered by the co-operative scheme);
- (e) the company cannot pay its debts;
- (f) directors have acted in their own interests in the affairs of the company, rather than in the members' interests;

(g) the NCSC or an inspector has reported that it is of the opinion that:

(i) the company cannot pay its debts and should be wound up; or

(ii) it is in the interests of the public, the shareholders or the creditors that the company be wound up; or

(h) the Court is of the opinion that it is just and equitable that the company be wound up.

(CB s-cl. 364(1) - based on ICAC CAs s-sec. 222(1)).

876. The Supreme Court will be able to order the winding up of a general insurance company, on the application of the Insurance Commissioner, only if the Court considers it to be in the interests of the public, the shareholders or the creditors (CB para. 364(1)(h) - modelled on ICAC CAs sub-para 222(1)(g)(ii)).

Cl. 365 : Commencement of winding up by the Court

877. Where a company passes a resolution for voluntary winding up before the filing of an application, the winding up will be deemed to have commenced at the time of the passing of the resolution (CB s-cl. 365(1) - based on ICAC CAs s-sec. 223(1)).

878. In any other case, the winding up will be deemed to have commenced at the time of the filing of the application for the winding up (CB s-cl 365(2) - based on ICAC CAs s-sec. 223(1)).

Cl. 366 : As to payment of preliminary costs, &c.

879. The persons, other than the company itself or the liquidator of the company, who apply for a winding up order will have to prosecute all proceedings in the winding up until a liquidator is appointed (CB s-cl. 366(1) - based on ICAC CAs s-sec. 224(1)).

880. The liquidator will have to reimburse the applicant for the taxed costs incurred by the applicant in any such proceedings unless the Court orders otherwise (CB s-cl. 366(2) - based on ICAC CAs s-sec 224(2)).

881. If the company's assets are not sufficient, and a fraud has been committed in relation to the formation, promotion or operation of the company, the taxed costs not reimbursed under CB s-cl. 366(2) will be able to be reimbursed by the NCSC up to the amount of \$1,000 (CB s-cl. 366(3)). This provision in relation to reimbursement is based on ICAC CAs s-sec. 224(3) except that:-

- (a) The references to the responsible Minister in s-sec. 224(3) have been replaced by references to the NCSC in CB s-cl. 366(3).

(b) The amount reimbursable has been increased from \$300 to \$1,000.

(c) The reimbursement is no longer expressed as "provided by Parliament".

882. Where the winding up application is made pursuant to an application by the company or the liquidator of the company, the costs incurred will be paid out of the property of the company, subject to any order of the Supreme Court (CB s-cl. 366(4) - based on ICAC CAs s-sec 224(4)).

Cl. 367 : Powers of Court on hearing application

883. The Supreme Court will have extensive powers to deal with a winding up application including powers to dismiss the application, adjourn the hearing or make any order that it thinks fit (CB cl. 367 - based on ICAC CAs ss. 225 and 226).

884. This provision is based on ICAC CAs:-

- s. 225: powers of Supreme Court on hearing petition (see CB s-cl. 367(1) to (5)); and
- s. 226 power of Supreme Court to stay or restrain proceedings against a company (see CB s-cl. 367(6)).

885. The major modifications are as follows:-

- (a) The initiating process for a winding up order is now referred to as an 'application' rather than as a 'petition'.
- (b) The provision in CB s-cl. 367(4) will now apply 'notwithstanding any rule of law to the contrary'.

Cl. 368 : Avoidance of dispositions of property, attachments, &c.

886. Any disposition of the property of the company, and transfer of shares or change in the status of the members and any attachment or execution against property of the company made after the commencement of the winding up will be void (CB s-cl. 368(1) and (3)). The Supreme Court will have power to validate certain dispositions of property and to permit the company to carry on business on such terms as the Court thinks fit (CB s-cl.368(2)).

887. This provision is based on ICAC CAs:-

- s. 227: avoidance of certain dispositions of property (see CB s-cl. 368(1) and (2));
- s. 228; avoidance of certain attachments (see CB s-cl. 368(3)).

888. The major modifications to the ICAC CAs are:-

- (a) The initiating process is now referred to as an 'application' instead of as a 'petition'.
- (b) A disposition made by a liquidator under the CB or by order of the Supreme Court will be exempted from the provision avoiding dispositions (see CB s-cl. 368(3)).

Cl. 369 : Application to be lis pendens

889. Any application for winding up a company will be a lis pendens (pending legal action) within the meaning of any law relating to the effect of a lis pendens upon purchasers or mortgagees (CB cl. 369). The general principle as to lis pendens is that a party to litigation affecting property cannot sell it so as to prejudice his opponent (CB cl. 369 - based on ICAC CAs s.229).

Cl. 370 : Certain notices to be lodged with Commission

890. An applicant (other than the NCSC) for the winding up of a company will be required to lodge with the NCSC:

- (a) by 10.30 a.m. on the next business day after the filing of the application - notice of the application;

(b) within 2 business days of the making of an order for winding up - notice of the making of the order, the date of the order and the name and address of the liquidator; or

(c) within 2 business days of any withdrawal or dismissal of the application - notice of the withdrawal or dismissal.

(CB s-cl. 370(1)).

891. Within 7 days of the passing and entering of a winding up order the applicant also will be required to lodge office copies of the order with the NCSC (where the applicant is not the NCSC) the company and the liquidator (CB s-cl. 370(2)).

892. Failure to comply with these requirements will be an offence (CB s-cl. 370(3)).

893. Where the NCSC is the applicant it will be required to enter into its records the various particulars which an applicant other than the NCSC has to lodge with it (CB s-cl. 370(4)).

894. The provisions relating to lodgment of notice of the winding up order and lodgment of an office copy of the order are based on ICAC CAs s-secs. 230(1) and (2). The major modifications to ICAC CAs s. 230 are as follows:-

- (a) The time limit for lodging the notice of the winding up order has been reduced from 7 to 2 days (CB para 370(1)(b) - of ICAC CAs s-sec. 230(1)) to ensure that this important information is publicly available more quickly for the benefit of person's searching the company's public file.
- (b) The requirement to notify the making, withdrawal or dismissal of the application (see CB paras. 370(1)(a) and (c)) are new. They are designed to overcome some problems which have arisen under ICAC CAs ss 223 and 227.
- (c) The initiating process is now referred to as an 'application' instead of as a 'petition'.
- (d) The matters dealt with in ICAC CAs s-secs 230(3) and (4) are now covered by a separation clause (see CB cl. 371).

Cl. 371 : Effect of winding up order

895. A winding up order will bind all creditors and contributories. Where a winding up order has been made or a provisional liquidator has been appointed, no action or other civil proceedings will be able to start or continue against the company except by leave of the Supreme Court and according to any terms imposed by the Court (CB cl. 371 - based on ICAC CAs sub-ss 230(3) and (4)).

SUBDIVISION B - Liquidators

Introductory Note

896. ICAC CAs s. 231 has been omitted from the CB, and provisions dealing with the registration of liquidators as official liquidators have been included in cl. 21.

Cl. 372 : Power of Court to appoint official liquidator

897. On an order being made for the winding up of a company, the Supreme Court will be able to appoint an official liquidator to be the liquidator of the company (CB s-cl. 372(1)). After the filing of an application and before the making of a winding up order, the Supreme Court will also be able to appoint a provisional liquidator: he will have such functions, powers and duties as are conferred by the CB, by the Supreme Court Rules or as are specified by the Court. (CB s-cl. 372(2)).

898. These provisions are based on ICAC CAs s. 231A.

Cl. 373 : General provisions as to liquidators

899. There are provisions dealing with: the resignation, removal and remuneration of a liquidator; vacancies in the office of liquidator; and the validity of acts of a liquidator whose appointment or qualifications are subsequently discovered to be defective (CB cl. 373).

900. These provisions are based on ICAC CAs s. 232 except that:-

- (a) The liquidator's remuneration will now be able to be reviewed by the Supreme Court on the application of the NCSC and certain creditors (as well as on the application of the members as is the case at present - see ICAC CAs s-sec 232(4) and CB s-cl. 373(5)).
- (b) The reference to 'salary' has been omitted from CB , s-cl. 373(2) dealing with the provisional liquidator.
- (c) ICAC CAs s-sec 232(3) has been split into CB s-cl. 373(3) & (4) so that the provision relating to the convening of creditors' meetings is in a separate sub-clause.

Cl. 374 : Custody and vesting of company's property

901. Where a winding up order has been made or a provisional liquidator has been appointed, the liquidator or provisional liquidator will have custody of all property and things in action. If there is no liquidator, the Supreme Court will have custody. (CB s-cl. 374(1) - based on ICAC CAs s-sec. 233(1)).

902. On application by the liquidator, the Supreme Court will be able to order that the company's property vest in the liquidator (CB s-cl. 374(2) - based on ICAC CAs s-sec 233(2). A copy of such an order must be lodged with the NCSC (CB s-cl. 374(3) - based on ICAC CAs s-sec. 233(3)).

903. Such court order will not take effect, however, until the requirements of other laws of the jurisdiction relating to vesting of title to land have been complied with (see CB cl. 531 which is based on NCB cl. 554 and replaces ICAC CAs s-secs. 233(4) and other similar provisions).

Cl. 375 : Statement of company's affairs to be submitted to liquidator

904. A statement of the affairs of the company, as at the date of the winding up order, or as at any earlier date specified by the liquidator, will be required to be submitted by the persons who were the directors and secretary or secretaries at the relevant time. The liquidator will be able to require such a statement from former or present officers of the company, from persons involved with the formation of the company if the formation was within a year of the winding up or from officers or employees capable of giving information (CB cl. 375).

905. The provision is based on ICAC CAs s. 234 except that:-

- (a) There will now be an automatic obligation on all persons who were directors or secretaries of the company at the relevant time and providing for an earlier date to be specified by the liquidator.

- (b) A liquidator will be able to require a statement from a person who was a provisional liquidator (CB para 375(2)(e)) and for a person who is a provisional liquidator to require that he receive the same statements as a liquidator is entitled to receive (CB s-cl. 375(11)).

Cl. 376 : Preliminary report by liquidator

906. A liquidator of a company being wound up by the Supreme Court, after receiving a statement of the company's affairs, will be required to lodge a preliminary report with the NCSC as to:

- (a) the amount of capital, issued, subscribed and paid up;
- (b) the estimated amount of assets and liabilities of the company;
- (c) if the company has failed - the causes of the failure;
- (d) whether further inquiry into the promotion, formation or insolvency of the company or the conduct of the company or the conduct of the business is desirable.

(CB cl. 376)

907. This provision is based on ICAC CAs s. 235 except that

- (a) A time limit of 2 months or such further time as the NCSC allows has replaced the requirement that a liquidator lodge the report as soon as practicable.
- (b) The additional report previously required under s-sec. 235(2) of the ICAC CAs corresponds broadly with the report now required under CB para. 418(1)(b) and CB s-cl. 418(2) (see CB cl. 418 - based principally on ICAC CAs s. 306 - which requires additional reports to be lodged by liquidators of all companies, whether being wound up by the court or voluntarily).

Cl. 377 : Powers of liquidator

908. The powers that a liquidator can exercise with the authority of the Supreme Court, the committee of inspection or a resolution of the creditors are set out (CB cl. 377).

909. This provision is based on ICAC CAs s. 236 except that:

- (a) The capacity of the creditors to authorize these powers is new.
- (b) Para. 377(2)(g) has been amended to avoid an inference being drawn that liquidators are incapable of raising unsecured loans.

(c) The exception to ICAC CAs s-sec. 377(1) has been included in CB s-cl. 377(3).

(d) The amount of a debt which can be compromised has been increased to \$20,000 (CB [ara 377(2)(j)).

Cl. 378 : Settlement of list of contributories and application of property

910. As soon as practicable after a winding up order, the liquidator will be required to settle a list of contributories; will be able, where necessary, to rectify the register of members; and will be required to cause the property of the company to be collected and applied to discharge its liabilities (CB cl. 378).

911. This is based on ICAC CAs s. 244 except that that provision confers the power on the Court and the power is then delegated to the liquidator under rules of court. The list of contributories must be settled by the liquidator in accordance with the regulations (see CB para 576(1)(a)). It is intended that the regulations will be modelled on existing N.S.W. Supreme Court rules. There will be an appeal against the liquidator's decisions (see CB cl. 538). (see also CB cl 389 dealing with the delegation to the liquidator of certain powers of the Supreme Court and ex memo paras 926 and 927).

Cl. 379 : Exercise and control of liquidator's powers

912. In administering and distributing the property, the liquidator will be required to have regard to any directions given by resolution of the creditors or contributories at a general meeting or by the committee of inspection (CB cl. 379 - based on ICAC CAs s. 237).

Cl. 380 : Payment by liquidator into bank

913. A liquidator will be required to pay the money received by him into such bank and account as are specified by the Supreme Court or prescribed by its Rules (CB cl. 380). Non-compliance will render the liquidator liable to removal and re-payment of the money at interest.

914. This provision is based on ICAC CAs s. 238 except that the amount which can be retained by the liquidator has been increased to \$500 (CB s-cl. 380(2)).

Cl. 381 : Release of liquidators and dissolution of company

915. When the liquidator has realized all the assets of the company and has distributed a final dividend (if any) to the creditors and made a final return (if any) to the contributories, or when the liquidator has resigned or been removed from office, he will be able to apply to the Supreme Court for an order releasing him or for an order releasing him and dissolving the company (CB cl. 381 - based on ICAC CAs s. 239).

Cl. 382 : As to orders for release or dissolution

916. The CB contains provisions dealing with the effect of an order for release or dissolution and with the powers of the Court in relation to the release of the liquidator (CB cl. 382).

917. This provision is based on ICAC CAs s. 240 but makes the liquidator liable to make good any loss caused by his default, negligence, breach of trust or breach of duty (CB s-cl. 382(2)).

SUBDIVISION C - General Powers of Court

Cl. 383 : Power to stay or terminate winding up

918. At any time during the winding up of a company, the Supreme Court will be able, on the application of a liquidator, a creditor or a contributory, to make an order staying the winding up either indefinitely or for a limited time, or terminating the winding up (CB s-cl. 383(1)). Where the Court has made an order terminating the winding up, the Court may give directions for the resumption of the management and control of the company by its officers (CB s-cl. 383(3)).

919. In so far as it relates to staying orders CB cl. 383 is based on ICAC CAs s. 243. The power to terminate the winding up is a new provision based on NCB cl. 333. The power to give directions for the resumption of management upon termination of the winding up is also a new provision comparable to CB s-cl. 352(3) dealing with the resumption of management and control of the company upon termination of official management.

Cl. 384 : Delivery of property to liquidator

920. The Supreme Court will have power to require persons connected with the company to deliver to the liquidator any property to which the company is prima facie entitled. The Court

will be able to direct contributories to pay to the company any moneys due (CB cl. 384 - based on ICAC CAs s. 245).

Cl. 385 : Appointment of special manager

921. The liquidator will be able to apply to the Supreme Court for the appointment of a special manager whose remuneration and powers are to be fixed by the Court (CB cl. 385 - based on ICAC CAs s. 246).

Cl. 386 : Claims of creditors and distribution of property

922. The Supreme Court will have power to fix a date on or before which creditors must prove their debts or claims. The Court must adjust the rights of contributories amongst themselves. When the property is insufficient to meet liabilities, the Court may give such priority to the costs, charges and expenses incurred in the winding up as it thinks just (CB cl. 386 - based on ICAC CAs s. 247).

Cl. 387 : Inspection of books by creditors and contributories

923. The Supreme Court will have power to make any order for the inspection of the books and papers of the company that it thinks just (CB cl. 387 - based on ICAC CAs s. 248).

924. Additional powers of the Court to examine persons connected with the company are contained in CB cls. 541 and 542 (incorporating provisions based on ICAC CAs ss 249 and 250).

Cl. 388 : Power to arrest absconding contributory

925. The Supreme Court will have on being shown that a contributory is about to abscond or conceal property, power to arrest the contributory and seize his books, papers and movable personal property (CB cl. 388 - based on ICAC CAs s. 251).

Cl. 389 : Delegation to liquidator of certain powers of Court

926. Powers and duties conferred on the Supreme Court in respect of certain matters, including the holding and conducting of meetings of creditors and contributories, the making of calls, the fixing of the time for the proof of debts and claims etc., will be able to be exercised by the liquidator as an officer of the Court subject to the control of the Court (CB cl. 389).

927. This provision is based on ICAC CAs s. 252 except that:- Reference to the powers of the Court to settle lists of contributories and rectify the register of members has been deleted as these powers are now vested directly in the liquidator (- see CB cl. 378 and ex memo paras 910 and 911).

Cl. 390 : Powers of Court cumulative

928. Any powers conferred on the Supreme Court by the CB will be in addition to any existing powers of instituting proceedings against any contributory or debtor of the company (CB cl. 390 - based on ICAC CAs s. 253).

DIVISION 3 : VOLUNTARY WINDING UP

929. Division 3 of Part XII of the CB (cls. 391 to 414) contains special provisions relating to a voluntary winding up.

SUBDIVISION A - Introductory

Cl. 391 : Limitation on right to wind up voluntarily

930. Where an application has been filed with the Supreme Court for the winding up of a company on the ground that it is unable to pay its debts, the company will not be entitled to resolve that it be wound up voluntarily without the leave of the Court (CB cl 391 - based on ICAC CAs s. 276).

Cl. 392 : Circumstances in which company may be wound up voluntarily

931. Subject to cl. 391, a company will be able to be wound up voluntarily if the company so resolves by special resolution. A company will be required to lodge a copy of the resolution with the NCSC within 7 days of the passing of the resolution. Within 21 days of the passing of such a resolution, the company will be required to publish notice of the resolution in the Commonwealth Gazette (CB cl. 392 - based on ICAC CAs s.254).

Cl. 393 : Commencement of winding up

932. A voluntary winding up will commence at the time of

the passing of the resolution for voluntary winding up (CB cl. 393 - based on ICAC CAs s. 255).

Cl. 394. : Effect of voluntary winding up

933. From the commencement of the winding up, the company will be required to cease to carry on its business except so far as, in the opinion of the liquidator, is required for the winding up of that business. However the corporate state and powers of the company will continue until it is dissolved. Any transfer of shares or alteration in the status of the members made after the commencement of the winding up will be void unless sanctioned by the liquidator (CB cl. 394 - based on ICAC CAs s. 256).

Cl. 395 : Declaration of solvency

934. Where it is proposed to wind up a company voluntarily, the directors of the company will be able to make a written declaration that they are of the opinion that the company will be able to pay its debts in full within 12 months after the commencement of the winding up. A statement of affairs will be required to be attached to such a declaration. Such a declaration will have no effect unless certain conditions are fulfilled (CB cl. 395).

935. If a declaration of solvency is made, the winding up will be a members' voluntary winding up (see definition of

members' voluntary winding up in s-cl. 5(1)). If such a declaration is not made, the winding up will be a creditors' voluntary winding up.

936. This provision is based on ICAC CAs s. 257 except the

- (a) Provision has been made in paras 395(3)(b) and (c) for the NCSC to extend the period of time for the making of the declaration,
- (b) The penalty for a director making a declaration although not having reasonable grounds for doing so has been increased in accordance with the new scale of penalties (CB s-cl. 395(4)).
- (c) Furthermore, the penalty will be applicable even if the declaration has no effect for the purposes of the Act by virtue of, for example, the fact that it was not made at a meeting of directors or otherwise did not comply with CB s-cl. 395(3).

SUBDIVISION B - Provisions applicable only to Members' Voluntary
Winding Up

Cl. 396 : Liquidators

937. The company in general meeting will have to appoint a liquidator to wind up the company's affairs and distribute the company's property. Once a liquidator is appointed, all powers of the directors cease unless the liquidator approves the continuance of any of those powers (CB cl. 396 - based on ICAC CAs s. 258).

Cl. 397 : Duty of liquidator to call creditors' meeting in case
of insolvency

938. Where a declaration of solvency has been made under CB cl. 395 and the liquidator is of the opinion that the company will not be able to pay its debts in full within the period stated in the declaration, he will be required to call a meeting of creditors. At such a meeting, the liquidator will be required to submit a statement of the assets and liabilities of the company. The creditors at such a meeting will be able to appoint another liquidator. The liquidator, or new appointee, will be required to lodge a notice of the holding of the meeting within 7 days thereafter (CB cl. 397).

939. This provision is based on ICAC CAs s. 259 except the s-cla. 397(2) and (3) are new and require the liquidator to provide each creditor whose debt exceeds \$200 with a list of the names, addresses and the amounts of claims of all creditors as shown in the company records. Copies of this information is to be obtainable on request by creditors whose debts do not exceed \$200.

SUBDIVISION C - Provisions applicable only to Creditors'

Voluntary Winding Up

Cl. 398 : Meeting of creditors

940. A company will be required to call a meeting of creditors at a time and place convenient to the majority of creditors on the day on which (or the day after) there is to be a meeting proposing a resolution for voluntary winding up (CB s-cl. 398(1)).

941. The company will be required to give the creditors at least 7 days' notice of the meeting and to send with that notice:

- (a) a summary of the affairs of the company; and
- (b) a list of the names, addresses and estimated amounts of claims of all creditors as shown in the records of the company.

(CB s-cl. 398(2))

942. This provision is based on ICAC CAs s. 260 but with the following modifications:

- (a) The list of creditors is to include their addresses.
- (b) A summary of the affairs of the company is to be sent out with the notice.

- (c) The provisions in respect of lapsing and adjournment of meetings (ICAC CAs s-secs. 260(8) and (9)) have been re-cast in CB cl. 399.)
- (d) The requirement to advertise the meeting of creditors has been modified.
- (e) A copy of the notice of meeting and accompanying documents must be lodged with the NCSC not less than 7 days before the meeting.
- (f) Unless the Supreme Court otherwise orders, the statement of affairs need not be sent to creditors owed less than \$200, but opportunity must be afforded to them to obtain a copy on request.
- (g) A committee of inspection may be appointed at the meeting of creditors convened pursuant to CB cl. 398 - this will enable the committee to be appointed at the first meeting of creditors and not only at a subsequent meeting after a liquidator has been appointed (see CB cl. 432 and ICAC CAs s. 241 which provide that a committee of inspection can be appointed at a meeting which a liquidator has been requested to convene).

Cl. 399 : Power to adjourn meeting

943. A meeting of creditors will be able to be adjourned for up to 21 days. If a meeting is adjourned and the resolution for winding up is passed at an adjourned meeting, any resolution passed at the meeting of creditors will have effect as if it had been passed immediately after the passing of the resolution (CB cl. 399 - based on ICAC CAs s-secs. 260(8) and (9) although reference to a meeting lapsing has been deleted).

Cl. 400 : Liquidators

944. The company will be required and creditors will be permitted, at their respective meetings, to nominate a person to be liquidator. If the creditors and the company nominate different persons, the person nominated by the creditors shall be liquidator. On the appointment of a liquidator, the powers of the directors cease, except as far as approved by the committee of inspection, or the creditors if there is no committee of inspection (CB cl. 400 - based on ICAC CAs s. 261).

Cl. 401 : Execution and civil proceedings

945. After the commencement of the creditors' voluntary winding up, any attempt by a creditor to enforce a remedy by proceeding against the property of the company will be void and civil proceedings will only be able to be commenced against the company with the leave of the court (CB cl. 401 - based on ICAC CAs s. 263).

Cl. 402 : Execution and civil proceedings against recognized companies

946. Similar prohibitions to those in CB cl. 401 will apply to stay proceedings against the company in other participating jurisdictions (CB cl. 402). This is a new provision.

SUBDIVISION D - Provisions applicable to every Voluntary Winding Up

Cl. 403 : Distribution of property of company

947. The property of a company will, on its winding up, be applied equally in satisfaction of its liabilities and, subject to that application, will be distributed among the members according to their rights and interests in the property (CB cl. 403 - based on ICAC CAs s. 264).

Cl. 404 : Appointment of liquidator

948. If for any reason there is no liquidator acting, the Supreme Court will be able to appoint a liquidator (CB cl. 404 - based on ICAC CAs s. 265).

Cl. 405 : Removal of liquidator

949. The Supreme Court will be able, on cause shown, to remove a liquidator and appoint another liquidator (CB cl. 405 - based on ICAC CAs s. 266).

Cl. 406 : Review of liquidator's remuneration

950. Any member or creditor or the liquidator will be able to apply to the Supreme Court to review the remuneration of the liquidator. The decision of the Court will be final (CB cl. 406 -based on ICAC CAs s. 267).

Cl. 407 : Act of liquidator valid, &c.

951. The acts of a liquidator will be valid notwithstanding any defects in his appointment or qualification (CB cl. 407 - based on ICAC CAs s. 268).

Cl. 408 : Powers and duties of liquidator

952. The liquidator will be able to exercise certain powers given to the liquidator in a winding up by the Supreme Court, and certain powers of the Court (CB cl. 408 - based on ICAC CAs s. 269).

Cl. 409 : Power of liquidator to accept shares, &c., as consideration for sale of property of company

953. The liquidator will be able to with the sanction of a special resolution of the company, to accept shares, debentures, policies or other like instruments as consideration for the sale of property of the company (CB cl. 409 - based on ICAC CAs s. 270).

Cl. 410 : Annual meeting of creditors

954. If the winding up continues for more than one year, the liquidator must convene a general meeting of the company, or in the case of a creditors' voluntary winding up, a general meeting of the company and a meeting of the creditors, within 3 months after the end of the first year from the commencement

of the winding up and thereafter yearly. He must lay before the meeting an account of his acts and dealings and of the conduct of the winding up in the preceding year (CB cl. 410 - based on ICAC CAs s. 271).

Cl. 411 : Final meeting and dissolution

955. Once the affairs of a company are fully wound up, the liquidator will be required to make an account showing how the winding up has been conducted and how the company's property has been disposed of. He will be required to convene a general meeting of the company, or in the case of a creditors' voluntary winding up, a meeting of the company and the creditors, and lay the account before that meeting (CB cl. 411).

956. This provision is based on ICAC CAs s. 272 except that the requirement to advertise the meeting in the press has been deleted.

Cl. 412 : Arrangement, when binding on creditors

957. An arrangement entered into between a company about to be or in the course of being wound up and its creditors is binding on the company if sanctioned by a special resolution, and on the creditors if acceded to by a majority in number present and voting, where such majority represents 75% of the total amount of the debts of the creditors present and voting either in person or by proxy (CB cl. 412).

958. This provision is based on ICAC CAs s. 273 except that the power of the Supreme Court has now been extended to enable reversal of a scheme or arrangement.

Cl. 413 : Application to Court to have questions determined or powers exercised

959. The liquidator or any contributory or creditor will be able to apply to the Court to determine any question arising in the winding up of the company, or to exercise all or any of the powers that the Court might exercise if the company were being wound up by the Court (CB cl. 413 - based on ICAC CAs s. 274).

Cl. 414 : Costs

960. All proper costs incidental to the winding up, including the liquidator's remuneration, will be payable out of the property of the company in priority to all other claims (CB cl. 414 - based on ICAC CAs s. 275).

DIVISION 4 : PROVISIONS APPLICABLE TO EVERY MODE OF WINDING UP

961 Division 4 of Part XII of the CB (cls 415 to 464) contains a series of provisions that apply both to court windings up and to voluntary windings up.

SUBDIVISION A - General

Cl. 415 : Interpretation

962. Provisions relating to supervision of liquidators and similar matters will apply equally to provisional liquidators. This is a new provision in recognition of the fact that a provisional liquidator may exercise similar powers to those exercised by a liquidator even though the company is not in the course of being wound up (CB cl. 415).

Cl. 416 : Books to be kept by liquidator

963. The liquidator will be required to keep proper books in which he must record certain matters. Any contributory or creditor may inspect them, unless the Court orders otherwise (CB cl. 416 - based on ICAC CAs s. 277)

Cl. 417 : Disqualification of liquidators

964. A person will not be able to be a liquidator of a company unless he is either a registered liquidator or registered as a liquidator of that company and unless he meets certain other requirements (CB cl. 417).

965. This provision is based on ICAC CAs s. 277A apart from the following amendments:

- (a) S-sec. 277A(1) has been amended to make it clear that a liquidator of a specified company is not disqualified from being the liquidator of the company.
- (b) The extent to which a liquidator can be indebted to the company or to a related corporation without being disqualified has been raised to \$5000.
- (c) The indebtedness disqualification now extends to a person who is a substantial shareholder of a corporation which is indebted to the company or to a related corporation for more than \$5000 (other than indebtedness arising as a result of a loan made by a banking or life insurance corporation in the ordinary course of its ordinary business for the purchase of premises for that person's principal place of residence).
- (d) A person, whether a registered liquidator or not, will be prohibited from acting as a liquidator if he is a creditor of the company or of a related corporation for more than \$5000.
- (e) A person will be prohibited from acting as a liquidator if he is an officer of any corporation that is a mortgagor of property of the company.

- (f) Officers of related corporations and some former officers of the company will be prohibited from being appointed as a liquidator.
- (g) An auditor of the company, or a partner or employee of the auditor, will be prohibited from being the liquidator (except in respect of a members' voluntary winding up of a proprietary company that is an exempt proprietary company or is a subsidiary of a public company).
- (h) The period of notice to be given to creditors of the meeting at which they can determine that the prohibitions on officers etc. acting as liquidator in a creditors' voluntary winding up should not apply, has been extended to 14 days.

966. Similar restrictions are imposed in relation to:

- persons who administer compromises or arrangements (See CB s-cls 315 (7) and (8) and ex memo para 767)
- receivers (see CB s-cls 323(1) and (2) and ex memo paras 792 to 794); and
- official managers (see CB para 338(1)(b)).

967. Note cl. 26 of the C(TP)B which is a transitional provision pertaining to a person appointed as an official liquidator or registered as a liquidator of a company prior to the commencement of the CB.

Cl. 418 : Reports by liquidator

968. If it appears to the liquidator in the course of winding up a company that:

- (a) an officer of the company may have been guilty of an offence in relation to the company;
- (b) a person who took part in the formation, promotion, administration or winding up of the company -
 - (i) may have misappropriated any money or property of the company; or
 - (ii) may have been guilty of any negligence, default, breach of duty, or breach of trust in relation to the company;
- (c) the company is unable to pay its unsecured creditors more than 50 cents in the dollar,

the liquidator will be required to inform the NCSC and state whether he intends to apply for an examination or order under cls. 541 or 542 respectively and to give the NCSC any information it requires. The Supreme Court will also be able to direct the liquidator to make such a report (CB cl. 418).

969. Cl. 418 is a re-casting of some of the s-secs. of ICAC CAs ss 235 and 306 and NCB cl. 372. Those sub-sections imposing obligations on liquidators to prepare reports are now to be found in cl. 418 while prosecution of offences which come to light in a liquidator's report is covered in cls. 457 and 542.

970. The old and new provisions generally correspond as follows:

<u>ICAC CAs</u>	<u>CB</u>
s-sec. 235 (1)	cl. 376
235 (2)	para. 418 (1)(b) and sub-cl. 418(2)
306 (1)	-
306 (2)	paras 418 (1)(a),(d) and (e)
306 (3)	paras 418 (1)(c),(d) and (e)
306 (4)	s-cl. 457 (1) and cl. 541
306 (5)	s-cl. 418 (3)
306 (6)	-
306 (6A)	s-cl. 457 (2)
306 (7)	s-cl. 457 (5)
306 (8)	-
306 (8A)	-
306 (9)	s-cl. 457 (6)
306 (10)	s-cl. 457 (7).

Cl. 419 : Liquidators to enjoy qualified privilege in certain circumstances

971. In the absence of malice on his part, a liquidator will not be liable to any action for defamation in regard to any statement he makes in the course of his duties as liquidator (CB cl. 419 - based on ICAC CAs s. 167B which applies to auditors).

Cl. 420 : Supervision of liquidators

972. If it appears to the Supreme Court or to the NCSC that a liquidator has not faithfully performed his duties, or if a complaint is made to the Court or NCSC in regard to the liquidator's performance of his duties, the Court or the NCSC will be able to enquire into the matter and the Court may take such action as it thinks fit (CB cl. 420).

973. This clause is based on ICAC CAs s. 278 but some of the supervisory powers of the Supreme Court are now extended to the NCSC. In the process of inquiring into the matter the NCSC will be able to exercise all its powers of inspection under Division 1 of Part II. The powers of the NCSC and the Court under cls. 541 and 542 will also be exercisable. The NCSC may report to the Court any matter that in its opinion is a misfeasance, neglect or omission on the part of a liquidator and the Court may order the liquidator to make good any loss that the company has sustained as a result.

Cl. 421 : Notice of appointment and address of liquidator

974. A liquidator will be required to lodge notice of his appointment and his address with the NCSC. He will also be required to lodge notice of his resignation, removal from office or change of address (CB cl. 421 - based on ICAC CAs s. 280).

Cl. 422 : Liquidator's accounts

975. A liquidator will be required to lodge with the NCSC every 6 months an account of his receipts and payments and a statement of the position in the winding up. The NCSC will be able to cause these accounts to be audited (CB cl. 422).

976. This provision is based on ICAC CAs s. 281 except that:

- (a) A liquidator is no longer required to lodge accounts on obtaining an order of release. He is, however still required to lodge them within one month after ceasing to act as a liquidator.
- (b) The NCSC will also be able to require the statement to be audited and a report prepared.
- (c) Qualified privilege will be accorded to the auditor in respect of the report (see CB cl. 30).
- (d) A copy of the report will be provided to the liquidator and will be made available for public search at the NCSC.

Cl. 423 : Liquidator to make good defaults

977. If a liquidator has not lodged any document that he is required by law to lodge, and fails to make good the default within 14 days after service on him of a notice requiring him to do so, the Supreme Court will be able to make an order directing the liquidator to make good the default (CB cl. 423 - based on ICAC CAs s. 282).

Cl. 424 : Notification that a corporation is in liquidation

978. When a corporation is being wound up, the words "in liquidation" will be required to be set out after the name of the company on every document issued or signed by or on behalf of the company (CB cl. 424 - based on ICAC CAs s. 283).

Cl. 425 : Books of company

979. Where a company is being wound up, all books of the company and of the liquidator relevant to the company will be, as between the contributories of the company, prima facie evidence of the truth of all matters recorded within them. When a company has been wound up the liquidator will be required to retain the books for at least 5 years (CB cl. 425).

980. This provision is based on ICAC CAs s 284 except that the CB recognises that the Commonwealth Income Tax Assessment Act 1936 requires records to be retained for 7 years.

Cl. 426 : Investment of surplus funds on general account

981. Whenever the cash balance standing to the credit of a company is in excess of the amount that is required for the time being to answer demands in respect of the property of the company, the liquidator will be able to invest any part of the sum in authorised trustee investments or with authorised dealers in the short term money market in addition to being able to deposit it at interest with any bank. Any interest received is part of the property of the company (CB cl. 426 - cf. ICAC CAs s. 285 which is more restrictive).

Cl. 427 : Unclaimed property to be paid to Minister

982. Where a dividend remains unclaimed for more than 6 months from the date it became payable or an amount remains unclaimed or undistributed after the final distribution, the liquidator will be required to pay these moneys to the Minister for purposes of payment into a Companies Liquidation Account and, ultimately, into consolidated revenue. Provision is made for repayment to persons entitled to these moneys (CB cl. 427).

983. This clause and cl. 428 are based on ICAC CAs s. 286. The Application of Laws Bills in each State will make some minor adaptations relating to the person to whom the unclaimed moneys are to be paid, the name of the liquidation account etc.

Cl. 428 : Companies Liquidation Account

984. There is a machinery provision relating to action take after receipt by the government authorities of unclaimed moneys in the hands of a liquidator (CB cl. 428).

985. This provision is based generally on ICAC CAs s-sec. 286(3), adjusted in line with Commonwealth accounting requirements. The Application of Laws Bills in each State will adapt these provisions to their particular accounting requirements.

Cl. 429 : Expenses of winding up where property insufficient

986. Unless expressly directed to do so by the NCSC or the Supreme Court, a liquidator will not be liable to incur any expense in relation to the winding up unless there is sufficient available property (CB cl. 429).

987. This provision is based on ICAC CAs s. 287 except that:

(a) the power to direct a liquidator to incur a particular expense can now be exercised by the Supreme Court as well as by the NCSC.

(b) It has also been made clear that this provision does not enable liquidators to avoid making certain reports and lodging accounts etc.

Cl. 430 : Resolutions passed at adjourned meetings of creditors and contributories

988. Where a resolution is passed at an adjourned meeting of any creditors or contributories of a company, the resolution will be treated as if it were passed on the date on which it was in fact passed and not on any earlier date (CB cl. 430 - based on ICAC CAs s. 288).

Cl. 431 : Meetings to ascertain wishes of creditors or contributories

989. The Supreme Court will be able to have regard to the wishes of the creditors and contributories as to all matter relating to the winding up. If it thinks it necessary, the Court may order meetings of creditors and contributories to ascertain those wishes (CB cl. 431 - based on ICAC CAs s. 289).

SUBDIVISION B - Committees of Inspection

990. The provisions relating to committees of inspection (CB cls 432 to 436) are based on cls 353 to 358 of the NCB. They in turn, are based generally on ICAC CAs ss 241 and 242 and the Bankruptcy Act 1966 s.72. The provisions relating to appointment of a committee of inspection previously differed as between a voluntary winding up (see ICAC CAs s. 262) and a Court winding up (see ICAC CAs s. 241 and s. 242).

Cl. 432 : Convening of meetings by liquidator for appointment of committee of inspection

991. If requested by a creditor or member, the liquidator will have to convene separate meetings of the creditors and members to determine whether they require the appointment of a committee of inspection to act with the liquidator (CB cl 432).

Cl. 433 : Proceedings of committee of inspection

992. Provision is made for the convening of meetings of a committee of inspection and then taking of decisions. (CB cl 433 - based on NCB cl 354 which, in turn, was based generally on ICAC CAs s. secs 242(2) and (3)).

Cl. 434 : Vacancies on committee of inspection

993. There are provisions for filling vacancies on committees of inspection (CB cl 434 - based on NCB cl. 355 which, in turn, was based generally on ICAC CAs sub-ss 242(4) to (9)).

Cl. 435 : Member of committee not to accept extra benefit

994. A member of a committee of inspection shall not, except as provided by the CB or with the leave of the Court make an arrangement to derive a pecuniary benefit from the winding up or become the purchaser of any property of the company (CB cl 435 - based on NCB cl. 357 which, in turn, is in part based on s. 72 Bankruptcy Act 1966).

Cl. 436 : Powers of Court where no committee of inspection

995. Where there is no committee of inspection the liquidator will be able to seek comparable directions or permission from the Supreme Court (CB cl. 436 - based on NCB cl. 358 which, in turn is based on ICAC CAs sub-s. 241(3)).

SUBDIVISION C - Proof and Ranking of Claims

Cl. 437 : Interpretation

996. This provision which operates subject to CB cl. 581, is based on ICAC CAs s-sec. 292(11) and defines and interprets the expression "relevant date" for the purposes of subdivision C. It differs from the ICAC provision in that the definition of "floating charge" is now in s-cl. 5(1).

Cl. 438 : Proofs of debts

997. In every winding up, all debts payable on a contingency and all claims against the company will be admissible to proof against the company. In the winding up of insolvent companies the provisions of the Bankruptcy Act will apply in relation to the rights of secured and unsecured creditors, debts provable, and the valuation of annuities and future and contingent liabilities (CB cl. 438 - based on ICAC CAs s. 291).

Cl. 439 : Computation of Debts

997A. With the exception of amounts required to be paid under CB s-cl. 442(1), the amount of a debt of a company will, for the purposes of a winding up, be computed as at the "relevant date" (defined in CB cl. 437)(CB cl. 439).

Cl. 440 : Debts proved to rank equally except as otherwise provided

998. Except as otherwise provided, all debts proved in a winding up will rank equally. If the property of the company is insufficient to meet them in full, debts must be paid proportionately (CB cl. 439).

999. This is a new provision based on NCB cl. 413 and supplements provisions relating to priority payments (see CB cls 441 to 450) and provisions for distribution of assets to members after payment of liabilities (see CB cl. 403).

Cl. 441 : Priority payments

1000. The order of priority of payment of debts in the winding up of a company is set out, in CB cl. 441. Definitions of "industrial instrument" and "injury compensation" which are relevant to this clause are set out in s-cl. 5(1).

1001. This order of priority is based on ICAC CAs s-sec. 292(1) except that:-

- (a) Priority is now accorded to the costs incurred by a provisional liquidator.
- (b) Priority is no longer accorded under para. (h) to any debts owing to the Commonwealth.

- (c) The order of priorities is stated on its face to be subject to the overriding priorities conferred by sections 221P and 221YU of the Income Tax Assessment Act 1936 in respect of the instalment deductions and withholding tax on dividends and interest remitted overseas (see also Crown Debts (Priority) Bill 1981 cl. 4).

Cl. 442 : Orders under cl. 309 or under s. 33 of Securities Industry Act

1002. Where an order is made under cl. 309 or under SIA s. against a company being wound up, the amount the company is liable to pay under the order will be admissible to proof against the company (CB cl 442).

1003. This provision is based on ICAC CAs s-sec. 292(1A) and (1AB) except that the notice to be served under CB para. 442(2)(a) is to be served on the NCSC, rather than on the Minister.

Cl. 443 : Debts due to employees

1004. Where a contract of employment with a company being wound up was in existence immediately before the relevant date, the employee under the contract will be entitled to payment under cl. 441 as if his services with the company had been terminated by the company on the relevant date (CB cl. 443 - based on ICAC CAs s-secs. 292(1B), (1C), (1D) and (1E)).

Cl. 444 : Debts of a class to rank equally

1005. Debts of a class will rank equally between themselves and will be paid in full, unless the property of the company is insufficient to meet them, in which case they will be paid proportionately (CB cl. 444 - based on ICAC CAs sub-s. 292(2)).

Cl. 445 : Advances in respect of wages and leave of absence

1006. A person who advances money in respect of wages or leave of absence payments etc. will have a specified right of priority in relation to the money so advanced and paid (CB cl. 445 - based on ICAC CAs s-sec. 292(3)).

Cl. 446 : Priority of employees' claims over floating charges

1007. Employees' claims for wages and leave entitlements, and claims of persons who have advanced money for those purposes, will take priority over claims under floating charges (CB cl. 446 - based on ICAC CAs s-sec. 292(4)).

Cl. 447 : Insurance against liabilities to third parties

1008. The amounts received by the company or liquidator under a pre-liquidation contract of insurance against liability to third parties will be paid to the third party in respect of whom the liability was incurred, in priority to other debts referred to in cl. 441 (CB cl. 447 - based on ICAC CAs s-secs. 292(5) to (7)).

Cl. 448 : Provisions relating to injury compensation

1009. Notwithstanding anything in CB cl. 441, para. 441(f) will not apply:

(a) where the company is being wound up for the purpose of reconstruction or amalgamation and the right to injury compensation has been preserved (based on ICAC CAs s-sec. 292(8)); or

(b) the company has entered into a contract with an insurer in respect of any liability for injury compensation.

(CB s-sec 448(1) - based on ICAC CAs para 292(8)(a)).

1010. This clause also clarifies the method of calculating certain worker's compensation payments (based on ICAC CAs s-sec. 292(9)).

Cl. 449 : Priority where security given for payment of taxes

1011. Where a company has given security for the payment of any amount to which para. 441(h) relates, that paragraph will apply only to the balance of any amount due after deducting the amount realised from the security (CB cl. 449 - based on ICAC CAs para. 292(8)(b)).

Cl. 450 : Power of Court to make orders in favour of certain creditors

1012. Where in a winding up:

- (a) property has been recovered under an indemnity for costs of litigation given by creditors; or
- (b) expenses in relation to which a creditor has indemnified a liquidator have been recovered,

the Supreme Court will be able to make such order as it deems just with respect to the distribution of that property and those expenses (CB cl. 450 - based on ICAC CAS s-sec. 292(10)).

SUBDIVISION D - Effect on other Transactions

Cl. 451 : Undue preferences

1013. A settlement, conveyance or transfer of property, a charge on property, a payment made or an obligation incurred by a company which would be void against the trustee in bankruptcy if it had been made by a natural person who had become bankrupt, will be void against a liquidator which is being wound up. This provision also deals with the date in relation to a winding up that corresponds with the date of the presentation of the petition in bankruptcy proceedings (CB cl. 451).

1014. This clause is based on ICAC CAs s. 293, except that, for the purposes of this clause, the date that corresponds with the date on which a person becomes a bankrupt will be the date on which the winding up of the company commences or is deemed to have commenced (CB s-cl 451(3) - based on ACT CO and NT CO s-sec. 293(2A)).

Cl. 452 : Effect of floating charge

1015. Certain floating charges created by the company within 6 months of the commencement of the winding up will be invalid (CB cl. 452).

1016. This provision is based on ICAC CAs s. 294 except that:

- (a) The exception relating to "cash" paid in consideration for the charge has been broadened to encompass other "monies"
- (b) The permissible interest on such "moneys" has been increased from 5% to 8% or such other amount as is set by regulation.

Cl. 453 : Liquidator's right to recover in respect of certain transactions

1017. Where, within a period of 4 years prior to the commencement of the winding up, the company has, for cash consideration, either acquired from or sold to certain persons closely associated with the formation or management of the company, any property, business or undertaking, the liquidator will be able to recover from those persons the difference between the cash consideration and the value of the property at the time of its acquisition or sale (CB cl. 453).

1018. This part of the clause is based on ICAC CAs s. 295 except that the relevant period has been extended to 4 years and the list of persons has been extended in line with changes to CB cl. 230. CB s-cl. 453(5) and (6) are new and enable recovery by a liquidator of moneys from an officer of a company in circumstances where a disposition of property by a company within 6 months before the winding up confers a preference on a creditor and discharges the officer from a guarantee or other liability.

Cl. 454 : Disclaimer of onerous property

1019. A liquidator will be able to disclaim onerous property (CB cl. 454).

1020. This clause is based generally on NCB cl. 365, which in turn was based on s. 133 of the Bankruptcy Act 1966. CB cl. 454, however, retains the limitations on the powers of the liquidator which existed in ICAC CAs sub-s. 296(1) but which had been removed in NCB cl. 365.

Cl. 455 : Executions, attachments, &c., before winding up

1021. Where a creditor has issued execution or instituted proceedings against the property of a company within 6 months before the commencement of the winding up of a company, the creditor will be obliged to pay the liquidator the amount he received as a result of such proceedings. Where the creditor has paid the liquidator under such circumstances, he will be able to prove his debt in the winding up as an unsecured creditor. (CB cl. 455)

1022. This provision is based on NCB cl. 429, which in turn was based on s.118 of the Bankruptcy Act 1966 . (In 1980, after the NCB had been prepared, ss. 118 and 119 of the Bankruptcy Act were amended).

Cl. 456 : Duties of sheriff after receiving notice of application

1023. Where a sheriff (defined in s-cl. 5(1) - cf. ICAC CAs s. 297) receives notice in writing of:

- (a) an application to the Court for the winding up of a company; or
- (b) the convening of a meeting of a company to consider a resolution that the company be wound up voluntarily,

the sheriff must not sell property of the company pursuant to any process of execution by a creditor, or pay to such creditor the proceeds of a sale of property which has taken place under such a process (CB cl. 456).

1024. This provision is based on NCB cl. 430, which in turn was based on s. 119 of the Bankruptcy Act 1966 - 1975.

SUBDIVISION E - Offences

Cl. 457 : Prosecution of delinquent officers and members

1025. Where a report is made under cl. 418, the NCSC will be able to investigate the matter and to apply for a Supreme Court order conferring all powers of investigation in respect of a Court winding up on the NCSC, or another person designated by the NCSC. The NCSC will also be able to require an officer of the company to give all reasonable assistance in connection with any prosecution that the NCSC decides to institute (CB cl. 457).

1026. This clause is based on ICAC CAs s-secs. 306(4) and (6A) to (10) inclusive. (Provisions based on ICAC CAs s-secs. 306(2), (3) and (5) are now to be found in cl. 418). There is also an additional CB s-cl. 457(4) which is in line with CB cl. 14(6)).

SUBDIVISION F - Dissolution

Cl. 458 : Power of Court to declare dissolution of company void

1027. Where a company has been dissolved following a winding-up, the Supreme Court will be able at any time, on an application by the liquidator or other interested person, to make an order declaring the dissolution to be void. The Court will be able to give directions and make such provisions as seem just for placing the company and all other persons in the same position, as far as possible, as if the company had not been dissolved (CB cl. 458 - based on ICAC CAs s. 307).

Cl. 459 : Power of Commission to deregister defunct company

1028. Where the NCSC has reasonable cause to believe that a company is not carrying on business it will be able, after sending certain notices to the company, by notice published in the Gazette, to cancel the registration of the company. The NCSC will also be able to cancel the registration of a company in a similar manner if the company is being wound up and:

- (a) no liquidator is acting;
- (b) the affairs of the company are fully wound up and the liquidator is 6 months in default in lodging a return;
or
- (c) the affairs of the company are fully wound up under Division 2 and there is insufficient property to pay

the costs of obtaining a Court order dissolving the company.

(CB cl. 459).

1029. This provision is based on ICAC CAs s. 308 except that

(a) Where a company has been deregistered as the result of an administrative error, the NCSC will now be able to restore the company to the register without approaching the Supreme Court (CB s-cl. 459(5)).

(b) Notice of such restoration must be published in the Commonwealth Gazette (CB s-cl. 459(7)).

Cl. 460 : Commission to act as representative of defunct company in certain events

1030 In certain circumstances, the NCSC will be able to act as the representative of a defunct company (CB cl. 460 - based on ICAC CAs s. 309).

Cl. 461 : Outstanding property of defunct company to vest in Commission

1031. After a company has been dissolved, any outstanding property to which the company was entitled will vest in the NCSC (CB cl. 461).

1031A. This provision is based on ICAC CAS s. 310 except that:-

- (a) There is no equivalent to ICAC CAS s-sec. 310(1A) which is a savings provision only for the purposes of the ICAC Securities Industry (Amendment) Act, 1971.
- (b) There is a new provision requiring directors of a dissolved company to retain the books of that company for a period of 3 years after dissolution. (CB cl. 461(3)).

Cl. 462 : Outstanding interests in property, how disposed of

1032. Once the NCSC has an estate or interest in property vested in it (under cl. 461), it will be able to get in, sell or otherwise dispose of, or deal with any part or all of that estate or interest (CB cl. 462 - based on ICAC CAS s. 311).

1033. This provision only deals with property vesting in the NCSC under cl. 461. Property which vested in the A.C.T. Registrar of Companies under s. 310 of the ACT CO immediately before the commencement of the CB is dealt with in cl. 10 of the C(TP)B.

Cl. 463 : Liability of Commission and Commonwealth as to property vested in Commission

1034. Property vested in the NCSC under this Subdivision will be liable to all charges etc. imposed on that property by

reason of any law as to rates, taxes etc. to which the property would have been liable had it continued in the ownership of the company (CB cl. 463 - based on ICAC CAs s. 312).

Cl. 464 : Accounts

1035. The NCSC will be required to keep accounts relating to property vested in it under this Subdivision (CB cl. 469 - based on ICAC CAs s. 313 except that s-sec. 313(2) has been omitted).

1036. Provision for State Auditors-General to have all necessary powers in respect of such accounts maintained by State authorities as delegates of the NCSC (cf ICAC CAs sub-s. 313(2)) will be contained in the State application legislation.

DIVISION 5 : RECIPROCITY WITH PARTICIPATING STATES AND PARTICIPATING TERRITORIES

1037. The whole of Division 5 contains new provisions designed to ensure that if a company incorporated in a participating jurisdiction or an overseas company registered as a foreign company in a participating jurisdiction goes into liquidation in its Australian home jurisdiction, then the person who is appointed as liquidator in that home jurisdiction will have the powers and functions of a liquidator in each participating jurisdiction. There will only be one winding up throughout the participating jurisdictions conducted by one liquidator.

Cl. 465 : Recognition and enforcement in the Territory of order made in a participating State or participating Territory in relation to a recognized company or recognized foreign company

1038. If a copy of an order made by the Supreme Court of a participating State or Territory under a corresponding law in connection with the winding up of a recognized company or a recognized foreign company is filed by the liquidator with the Registrar of the A.C.T. Supreme Court the order will have effect and will be enforced in the ACT as if it were an order of the ACT Supreme Court made under the CB (CB cl. 465).

Cl. 466 : Exercise by the Court of powers or functions in relation to a recognized company or recognized foreign company

1039. The A.C.T. Supreme Court will be able to exercise

powers or perform functions under the CB in relation to a recognized company or recognized foreign company that is being wound up if:-

- (a) the proper officer of the Supreme court of the 'home jurisdiction makes a request to the Registrar of the A.C.T. Supreme Court for that latter Court to exercise or perform a power or function under Part XII of the CB; or
- (b) a liquidator of a recognized company or recognized foreign company makes an application to the ACT Supreme Court for the Court to exercise or perform a power or function under Part XII of the CB.

(CB cl. 466).

1040. The Companies (Application of Laws) Bill in each other jurisdiction covered by the co-operative scheme will amend this provision as it applies in that other jurisdiction so that that jurisdiction's Supreme Court will be able to act in aid of all windings up in the ACT and other scheme jurisdictions.

Cl. 467 : Power of Registrar to request Supreme Court of a participating State or participating Territory to exercise or perform powers or functions

1041. The Registrar of the ACT Supreme Court will be able to request to the proper officer of the Supreme Court of a participating State or Territory for that last-mentioned Court to exercise or perform a power or function under a corresponding law of that State or Territory in relation to the winding up of a company or a registered foreign company under Part XII of the CB. Where such a request is given effect to any act done by that Court pursuant to the request will have effect as if it were done by the Supreme Court in this jurisdiction. (CB cl 467).

Cl. 468 : Powers and functions in the Territory of liquidators of recognized companies or recognized foreign companies

1042. The liquidator of a recognized company or recognized foreign company that is being wound up under the law of a participating State or Territory will be able to exercise any power or perform any function under Part XII that may be exercised or performed by a liquidator of a company incorporated under this Bill (CB cl 468).

DIVISION 6 : WINDING UP OF BODIES OTHER THAN COMPANIES

Introductory Note

1043. Division 6 of Part XII of the CB (cls 469 to 472) deal with the winding up of bodies other than companies.

1043A. This Division has 2 separate functions:

(a) In respect of foreign companies that are, or are required to be, registered as foreign companies under the CB, the Division provides for the provisions of the CB relating to the winding up of companies to be equally applicable to the winding up of these other bodies but only in respect of property in the jurisdiction. Provision is made in Part XI (CB cl. 352) for the appointment of a liquidator in the jurisdiction and for such person to pay any amounts realized in the jurisdiction to the liquidator appointed in the "home" jurisdiction of the foreign company.

(b) The second function of this Division is to provide for the winding up of other bodies formed in the jurisdiction to the extent that other laws do not exist for the winding up of such bodies.

1044. The provisions in this Division are based generally on the provisions relating to the winding up of 'unregistered companies' in ICAC CAs ss 314 to 318. These ICAC provisions

can be traced back to the U.K. Joint Stock Companies (Winding-up) Act 1849 (see (1980) 43 M.L.R. 637 - 638).

Cl. 469 : Application

1045. This Division will apply to:

- (a) a foreign company that is, or is required to be, registered as a foreign company under the Bill; and
- (b) a partnership, association or other body, whether corporate or unincorporate, that consists of more than 5 members.

(CB cl. 469).

1045A. This provision is based on ICAC CAs s. 314 except that it no longer includes recognized companies as these are now covered in Part XII Division 5.

Cl. 470 : Winding up of bodies to which this Division applies

1046. A body to which Division 6 applies will be able to be wound up under Part XII subject to certain adaptations (CB cl. 470).

1047. This provision is based on ICAC CAs s. 315 except that:

- (a) There is an additional provision (see CB para. 470(1) (c)(iv)) which provides that, in the case of a foreign

company, where either an inspector appointed under Part VII or the NCSC is of the opinion that -

(i) the company cannot pay its debts and should be wound up; or

(ii) it is in the interests of the public, of the shareholders or of the creditors that the company should be wound up, a circumstance exists under which the company may be wound up.

(b) The circumstances in which an unregistered company will be regarded as carrying on business in the Territory is defined (see s-cl 470(4)). This change of wording is merely consequential upon a re-drafting in cl. 500 of ICAC CAs s. 344.

Cl. 471 : Contributories in winding up of a body to which this Division applies

1048. Every person who is liable to pay (i) any debt or liability of a body being wound up, (ii) a sum for the adjustment of members rights or (iii) the costs and expenses of the winding up, will be a contributory. Every contributory will be liable to pay all sums due from him in respect of such a liability (Cl. cl 471 - based on ICAC CAs s. 316).

Cl. 472 : Power of Court to stay or restrain proceedings

1049. The provisions of the CB relating to staying and restraining actions and other civil proceedings against a company being wound up will extend to actions and other civil proceedings against the contributory of a company where the application to stay or restrain is by a creditor (CB cl 472 - based on ICAC CAS s. 317).

DIVISION 7 : MISCELLANEOUS

1050. Division 7 of Part XII of the CB (cls 473 and 474) contains some miscellaneous provisions dealing with the property of defunct bodies.

Cl. 473 : Outstanding property of defunct body formed within Australia

1051. Where any Australian body other than a company incorporated in the jurisdiction (i.e. the ACT) has been dissolved and there remains in the jurisdiction any outstanding property belonging to the company which has not been disposed of the property vests in such person as is entitled to the property according to the law of the place of incorporation or origin of the body (CB cl 473).

1052. This clause is based on ICAC CAs s.318 except that:-

- (a) It has been taken out of Division 6 to ensure that it also applies to recognized companies and it is now limited to bodies, whether corporate or unincorporate, which are incorporated or formed in Australia or an external Territory.
- (b) Separate provision is now made in cl. 474 for the vesting in the NCSC of outstanding assets of defunct overseas bodies.

Cl. 474 : Outstanding property of defunct body formed outside
Australia

1053. Outstanding property of such bodies formed outside Australia will vest in the NCSC (cf. CB cl. 473) and will be able to be disposed of in similar manner to the property, wherever situated, or a company incorporated in the jurisdiction (see cls 461 to 464)(CB cl 474 - new provision).

CB : PART XIII : VARIOUS TYPES OF COMPANIES

1054. Part XIII (cls 475 to 527) contains the following provisions dealing with various types of companies:

DIVISION 1 - No liability Companies

DIVISION 2 - Investment Companies

DIVISION 3 - Companies Carrying on Business Outside
the Territory

DIVISION 4 - Recognized Companies and Recognized
Foreign Companies

DIVISION 5 - Foreign Companies other than Recognized
Foreign Companies.

DIVISION 1 : NO LIABILITY COMPANIES

1055. Division 1 of Part XIII of the CB (cls 475 to 489) contains special provisions dealing with no liability companies.

Cl. 475 : Application of Act to no liability companies

1056. The provisions of the CB relating to public companies, other than those relating to the liability of members, will apply to no liability companies (CB cl 475 - based on ICAC CAs s. 319)

1057. A no liability company will not be able to be formed as a proprietary company (see CB s-cl. 34(1)). Only mining companies will be able to be formed as no liability companies (see CB para 33(2)(e)).

Cl. 476 : Shareholder not liable to calls or contributions

1058. Shareholders will not be required to pay calls in respect of shares they hold in a no liability company or to contribute to its liabilities. If, however, calls are unpaid, then the shareholder will not be entitled to any dividend due on the shares, in respect of which the calls are due. These are the essential features of no liability companies. (CB cl. 476 - based on ICAC CAs s. 320).

Cl. 477 : Dividends payable on shares held irrespective of amount paid up on shares

1059 Subject to the articles, a dividend will be payable to a no liability company shareholder in proportion to the number of shares held, irrespective of the amount paid up or credited as paid up (CB cl 477 - based on ICAC CA s. 321).

Cl. 478 : Calls, when due

1060. There will be procedures to enable no liability company shareholders to become aware of a call having been made and to have sufficient time to meet the call (CB cl 478). The obligations on the company are less inflexible and expensive than those imposed by the corresponding ICAC provision (ICAC CA s. 322) which requires companies to:

- (a) make calls payable on the second Wednesday in a month and
- (b) publish details of the call in a daily newspaper circulating generally throughout the State. The advertising requirement has been deleted in line with the policy throughout the CB of reducing unnecessary costs for companies where notice is required to be sent to each affected person individually.

Cl. 479 : Forfeiture of shares

1061. Any share in a no liability company upon which a call remains unpaid 14 days after the day payment is due, will be forfeited and will be offered for sale by public auction (CB cl 479 - based on ICAC CAs s. 323).

Cl. 480 : Provisions as to sale of forfeited shares

1062. If forfeited shares which are advertised for sale at public auction are not sold, they will have to be offered to share holders for a limited period (unless the shareholders resolve otherwise) and, if still unsold, must be held by the directors in trust for the company. They must then be disposed of in such manner as the company determines (CB cl 480 - based on ICAC CAs s. 324).

Cl. 481 : As to shares held by or in trust for company

1063. A call will not have any effect on a forfeited share that is held by or in trust for the company but if it is re-issued or sold by the company it may be credited as paid up to an amount which the company determines (CB cl 481 - based on ICAC CAs s. 325).

Cl. 482 : Sale of shares on non-payment of calls valid although specific numbers not advertised

1064. A sale of forfeited shares will be valid although the specific numbers of the shares are not advertised (CB cl 482 - based on ICAC CAs s. 326).

Cl. 483 : Postponement of sale

1065. An intended sale of forfeited shares will be able to be postponed for a limited period (CB cl 483 - based on ICAC CAs s. 327).

Cl. 484 : Redemption of forfeited shares

1066. Subject to certain conditions, a person will be able to redeem a forfeited share prior to the intended sale of such share (CB cl 484 - based on ICAC CAs s. 328).

Cl. 485 : Office to be open the day before sale

1067. The company's office will have to be open on the day immediately preceding the day of the intended sale of a forfeit share (CB cl 485 - based on ICAC CAs s. 329).

Cl. 486 : Distribution of surplus where cessation of business upon winding up

1068. Any surplus in a winding up will be distributed among the parties entitled to it in proportion to the shares held by them irrespective of the paid up value of the shares although the holder of shares on which a call is due will not be so entitled (CB cl 486 - based on ICAC CAs s. 330).

Cl. 487 : Distribution of surplus where cessation of business
within 12 months

1069. If a no liability company ceases to carry on business within 12 months of its incorporation, shares issued for cash will rank on a winding up in priority to shares issued to vendors or promoters for consideration other than cash (CB cl 487 - based on ICAC CAs s. 331).

Cl. 488 : As to rights attaching to preference shares issued
to promoters

1070. The holders of any shares issued to vendors or promoters will not be entitled to any preference on the winding up of the company (CB cl 488 - based on ICAC CAs s. 332).

Cl. 489 : Restrictions on tribute arrangements

1071. A no liability company will be required to do its own working of any mines rather than contract the work out, unless authorised by a special resolution of the company to contract out or, if the contract or lease arrangement is for a period of less than 3 months, a similar arrangement has been made in the preceding 2 years (CB cl. 489 - based on ICAC CAs s. 333).

DIVISION 2 : INVESTMENT COMPANIES

1072. Division 2 of Part XIII of the CB (cls 490 to 499) contains special provisions dealing with investment companies.

Cl. 490 : Interpretation

1073. There are special definition and interpretation provisions for the purposes of this Division 2. (CB cl. 490).

1074. CB cl. 490 is based on ICAC CAs s. 334, with the following changes:

(a) Foreign companies which do not carry on business in the Territory or have any connection with it will be excluded from the ambit of the Division. Only a company incorporated in the jurisdiction and a foreign company registered in the jurisdiction will be able to be declared by the NCSC to be an investment company (CB s-cl. 490(3)).

(b) The NCSC will be able to specify, when declaring a corporation to be an investment company, that only some provisions of the Division apply to that corporation (CB s-cl. 490(4) - (6)).

1075. Note s-cl. 13(16) of the C(TP)B which deals with a declaration made by the Minister under s-sec 334(2) of the ACT CO and in force immediately before the commencement of the CB.

Cl. 491 : Restriction on borrowing by investment companies

1076. An investment company will be prohibited from borrowing amounts equivalent to more than 50% of its net tangible assets. Borrowing otherwise than by the issue of debenture stock will be limited to 25% of the net tangible assets. (CB cl 491 - based on ICAC CAs s. 335).

Cl. 492 : Restriction on investments of investment companies

1077. An investment company will be prohibited from:-

- (a) investing amounts equivalent to more than 10% of its net tangible assets in another corporation; and
- (b) holding more than 5% of the ordinary share capital of another corporation

(CB cl. 492 - based on ICAC CAs s. 336).

Cl. 493 : Restriction on underwriting by investment companies

1078. An investment company will be prohibited from underwriting issues of authorised securities (authorised trustee investments) to an amount exceeding the equivalent of 40% of its net tangible assets. The amount will be restricted to the equivalent of 20% of its net tangible assets in the case of underwriting other securities (CB cl 493 - based on ICAC CAs s. 337).

Cl. 494 : Special requirements as to articles and prospectus

1079. An investment company will be prohibited from issuing a prospectus without specifying:-

(a) the type of security in which its objects enable it to invest; and

(b) whether the objects enable it to invest within or outside Australia or both

(CB cl 494 - based on ICAC CAs s. 338).

1080. In addition, within 3 months of the company being declared an investment company, its articles will have to specify the matters mentioned in paras (a) and (b) above if the company wishes to invest, borrow, underwrite or sub-underwrite (CB s-cl. 494(1) - based on ICAC CAs s-sec 338(1)).

Cl. 495 : Investment company not to hold shares in other investment companies

1081. Investment companies will be prohibited from holding any shares or debentures in any other investment company or a corporation engaged primarily in the business of investment that has been declared by an order of the NCSC for the purpose of these provisions (CB cl. 495 - based on ICAC CAs s. 339)

1082. Note s-cl. 13(17) of the C(TP)B which deals with a declaration made by the Minister under para. 339(b) of the ACT CO and in force immediately before the commencement of the CB.

Cl. 496 : Investment company not to speculate in commodities

1083. An investment company will be prohibited from buying, selling or dealing directly in any raw materials or manufactured goods for the purposes of profit (CB cl 496 - based on ICAC CAs s. 340).

Cl. 497 : Balance - sheets and accounts

1084. Investment companies will be required to state in their accounts in greater detail than other companies their purchases and sales of securities, investments, underwriting income and brokerage and to indicate the manner in which their investments have been valued (CB cl 497 - based on ICAC CAs s. 341). It is understood that the practice of most such companies is to use either cost with selective upward revaluations or current market values.

Cl. 498 : Investment fluctuation reserve

1085. Investment companies will be required to credit profits from the sale of securities to a reserve account which is available for the payment of income tax but not for the payment of dividends (CB cl 498 - based on ICAC CAs s. 342).

CL. 499 : Penalties

1086 There will be a specific general penalty for all breaches of the provisions of the Division (CB cl 499 - based on ICAC CAs s. 343). Comparative tables of penalties in the CB are contained in Appendix 'A' to this ex memo.

DIVISION 3 : COMPANIES CARRYING ON BUSINESS OUTSIDE THE
TERRITORY

Introductory

1087. Division 3 of Part XIII of the CB (cls 500 to 504) is a new Division which, in conjunction with Divisions 4 and 5 of Part XIII, is designed to give effect to the concept of one place of registration.

1088. This concept involves the following features:

- (a) A company incorporated in a participating State or Territory will only need to lodge documents in its jurisdiction of incorporation in order to carry on business throughout all participating jurisdictions.
- (b) An overseas corporation that wishes to carry on business in Australia will only need to lodge document in one jurisdiction in order to carry on business throughout all participating jurisdictions.
- (c) An Australian body that is not a company in its jurisdiction of formation and a company formed in a non-participating Australian jurisdiction will still be required to register as "foreign companies" in each other Australian jurisdiction in which they wish to carry on business.

1089. Division 3 gives effect to the first 2 principles listed above by providing that those corporations which receive the benefits of the co-operative scheme need only provide the delegate of the NCSC in their "home" jurisdiction with details of their principal places of business in other participating jurisdictions in order to be entitled to carry on business in those other jurisdictions.

1090. Note cl. 29 of the C(TP)B which deals with a company that immediately before the commencement of the CB had established a place of business or carried on business in a participating State or another participating Territory.

Cl. 500 : Interpretation

1091. This Division will apply to companies incorporated in the jurisdiction and to foreign companies incorporated or formed outside Australia that are registered in the jurisdiction as a foreign company (CB s-cl 500(1)).

1092. A number of factors are set out in the interpretation provision which, by themselves, are not to be regarded as indicating that a company is "carrying on business" within a participating jurisdiction (CB s-cl 500(3)). These indicia are similar to those used in ICAC CAS s-sec 344(3) in context of when a foreign company will not be regarded as 'carrying on business' within the ICAC jurisdiction concerned.

CL. 501 : Notification of principal office in participating State or Territory

1093. A local company or a overseas foreign company registered locally which has established a place of business or commenced to carry on business in another participating State or Territory must notify the corporate affairs office in its "home" jurisdiction of the situation of its principal office(s) in any other participating jurisdiction(s) (CB s-cl 501(1)). Notification of the hours during which such offices are open to the public is optional (CB s-cl 501(2)). (While cl. 501 and other provisions throughout the CB refer only to lodgement of notice with the NCSC this is to be interpreted as a reference to the corporate affairs office of the "home" jurisdiction - see C & S (I & MP) A s. 14).

1094. Where such a company has lodged a notice with the NCSC in relation to its principal office in a participating jurisdiction the NCSC will be required (on request) to issue a certificate stating that the company has a principal office in that jurisdiction and specifying the address of that office (CB s-cl 501(3)). Such a certificate will be prima facie evidence in all courts of the particulars stated in it (CB s-cl 501(4)). This certificate will correspond to that which was previously issued under ICAC CAs s-sec 346(9) in respect of foreign companies in the jurisdiction in which they were registered as foreign companies (A certificate issued in a participating jurisdiction will also be prima facie evidence in all courts of the particulars stated in it (see CB s-cl. 507(2))).

Cl. 502 : Notice to be given of change or alteration in principal office in participating State or Territory

1095. Notice in the prescribed form of any change in the situation of the principal office of a company to which this Division applies in a participating jurisdiction will be required to be lodged with the NCSC not later than 7 days after the day on which the change occurs. A similar requirement will apply in respect of notification of altered office hours if the original hours of operation had been notified to the NCSC. (CB cl 502 - these provisions are similar to the requirements in relation to registered office in CB cl 217).

Cl. 503 : Notice to be lodged of cessation of business in participating State or Territory

1096. If a company to which this Division applies ceases to have a place of business or to carry on business in a participating jurisdiction it will be required to notify the NCSC within 7 days after so ceasing (CB cl 503).

Cl. 504 : Offences

1097. Officers as well as the company itself will be liable for breaches of a provision of this Division (CB cl 504)

DIVISION 4 : RECOGNIZED COMPANIES AND RECOGNIZED FOREIGN COMPANIES

Introductory Note

1098. Division 4 of Part XIII of the CB(cls 505 to 509) is based on Division 2A Part XI of the ICAC CAs (which related only to recognized companies) but is considerably shorter, reflecting the advantages which recognized companies and recognized foreign companies receive under the one place of registration concept. For example, there are no longer any provisions in this Division requiring corporations to lodge documents with the NCSC in jurisdictions in which they are recognized companies.

1099. The provisions relating to branch registers that were in the corresponding Division of the ICAC CAs have been removed. The ICAC CAs required recognized companies to maintain branch share registers in the jurisdictions in which they were recognized companies if requested to do so by residents of those jurisdictions. The same result is now achieved in relation to recognized companies by imposing (through the law of the home jurisdiction) an obligation on each local companies to maintain branch share registers in participating jurisdictions where requested to do so by residents of those jurisdictions (see CB cl. 262 - see also CB cl. 521 dealing with the branch registers of registered foreign companies).

1100. Note cl. 28 of the C(TP)B which deals with a recognized company that immediately before the commencement of the CB was registered under the ACT CO as a foreign company.

Cl. 505 : Interpretation

1101. A number of factors are set out in the interpretation provision which, by themselves, are not to be regarded as indicating that a recognized company or a recognized foreign company is "carrying on business" within the ACT (CB cl 505). Similar indicia are relevant to the question whether a local company is 'carrying on business' in another participating jurisdiction (see CB cl 500).

Cl. 506 : Power to hold land

1102. A recognized company or a recognized foreign company will have power to hold land in the ACT (CB cl 505 - based on ICAC CAs s.343B). A similar power is conferred on foreign companies registered under Division 5 (see CB cl 511).

Cl. 507 : Recognized company or recognized foreign company to have a principal office

1103. A recognized company or a recognized foreign company that has established a place of business or commenced to carry on business within the jurisdiction will be required to have a principal office in the ACT which is open for certain specified hours on business days and attended to by an authorized company representative (CB cl. 507 - based on ICAC CAs s-sec. 343C(1)).

1104. This provision complements the provision corresponding to cl. 501 in the laws of other participating jurisdictions requiring notification in the home jurisdiction of the principal office in a participating jurisdiction.

Cl. 508 : Name of recognized company or recognized foreign company to be reserved or registered

1105. A recognized company or a recognized foreign company will not be able to establish a place of business or carry on business within the ACT unless its name has been reserved or registered (CB cl. 508 - based on ICAC CAS s. 343E).

(Application for reservation will need to have been made in the home jurisdiction under the equivalent of Division 2 of Part II of the CB).

Cl. 509 : Obligation of recognized company or recognized foreign company to exhibit name

1106. A recognized company or recognized foreign company, other than a banking corporation, will be required:-

- (a) to place on all relevant documents its name and place of incorporation and, in the case of a recognized foreign company, a statement to the effect that its liability is limited if that is the case (CB s-cl. 509(1)); and

(b) to exhibit conspicuously outside every place of business established by it in the ACT its name and place of incorporation; the fact that its liability is limited (if it is); and, in the case of a principal office, the words "Principal Office" (CB s-cl. 509(4)).

1107. These requirements are based on ICAC CAs s. 343F except that it has been widened to ensure that all recognized companies and recognized foreign companies carrying on business in the ACT are subject to the same disclosure requirements in the ACT as are imposed on local companies (see CB cl 218) and on locally registered foreign companies (see CB cl 517).

DIVISION 5 : FOREIGN COMPANIES OTHER THAN RECOGNIZED FOREIGN COMPANIES

1108. Division 5 of Part XIII of the CB (cls 510 to 527) deals with foreign companies other than recognized foreign companies and is based on ICAC CAs Division 3, Part XI. However it is structured slightly differently in view of the fact that not all registered foreign companies are accorded equal entitlement to the benefits of the co-operative scheme. The Division will not apply to recognized foreign companies (see ex memo para 1110, below).

Cl. 510 : Interpretation

1109. For the purposes of the Division there are definitions of "agent" and "foreign company" (which excludes recognized foreign companies) and an interpretation provision as to the factors which, in themselves, will not amount to "carrying on business" in the jurisdiction (CB cl 510). Similar indicia will be used in the provisions which apply where a local company, a recognized company or a recognized foreign company is 'carrying on business' outside its home jurisdiction (see CB s-cl 500(2) and (3) and CB 505).

1110. This clause is based on ICAC CAs s. 344 except for the inclusion in the CB of a definition of a foreign company as meaning a foreign company other than a recognized foreign company. The effect of this definition is that the Division will apply to:

- (a) companies formed outside Australia that are not registered as a foreign company in another participating jurisdiction (under Division 5, Part XIII of a corresponding law);
- (b) companies incorporated in non-participating Australian jurisdictions; and
- (c) bodies formed anywhere in Australia that are not companies in their place of formation.

1111. Although all 3 categories of foreign company are required to register as a foreign company under this Division (see CB cl. 512) only the first category is accorded the benefits of the co-operative scheme. A company formed outside Australia which registers as a foreign company under this Division will by virtue of Division 3 of Part XIII, be entitled to carry on business in other participating jurisdictions simply by notifying the NCSC in its jurisdiction of registration, of a principal place of business in other participating jurisdictions (see CB cl 507 which requires a recognized foreign company to maintain a principal office in the ACT if it is carrying on business there).

1112. Note that ICAC CAs s-sec 344(1) has been deleted and that cl. 30 of the C(TP)B deals with a corporation (other than a recognized company) that immediately before the commencement of the CB was registered as a foreign company under the ACT CO. The provision also deals with a corporation, formed outside

Australia, that is registered as a foreign company in the ACT and in one or more other participating jurisdictions - such a corporation will only be required to be registered as a foreign company in one participating jurisdiction after the commencement of the CB.

Cl. 511 : Power of foreign companies to hold land

1113. A foreign company registered under this Division have power to hold land in the ACT (CB cl 511 - based on IC CAs s. 345). A similar power is conferred on recognized companies and recognized foreign companies (see CB cl 506).

Cl. 512 : Unregistered foreign company not to establish place of business or carry on business in the Territory

1114. A foreign company (other than a recognized foreign company) will not be able to establish a place of business or commence to carry on business within the jurisdiction unless it is registered under this Division. The NCSC will be required to register a foreign company under the Division if the foreign company lodges certain documents with the NCSC (CB cl. 512)

1115. This clause is based on ICAC CAs s. 346 except that companies are required to register prior to commencing to carry on business in the jurisdiction rather than within one month thereafter.

Cl. 513 : Registered office of registered foreign company

1116. A registered foreign company will be required to have a registered office within the ACT to which all communications may be addressed, which is open to the public for certain hours on business days and at which a representative of the company is present at all times when the office is open to the public (CB cl 513 - based on ICAC CAs s-sec 346(4) and similar to cl. 507 in respect of recognized companies and recognized foreign companies).

Cl. 514 : Agents

1117. There are provisions relating to the appointment of agents in the Territory authorised to accept service of process on behalf of the company (CB cl 514 - based on ICAC CAs s-secs 346(2), (5) - (9)).

Cl. 515 : Notice to be filed where documents etc altered

1118. Registered foreign companies will be required to notify the NCSC within one month, of changes to such things as the company's constituent documents, the directors, its agents the company's name, the company's address in its place of incorporation and increases in authorized share capital (CB cl. 515).

1119. Notification of a change in the hours during which the registered office of a registered foreign company is open in the jurisdiction will be required to be lodged not later than 7 days after the change has occurred. This is in line with the same provisions relating to the registered office of a local company : (see CB cl. 217).

1120. The clause is based on ICAC CAs s. 347 except that the time for compliance in relation to notice of a change in the hours that the registered office must be open have been altered.

Cl. 516 : Balance-sheets and other documents

1121. A registered foreign company will be required at least once in every calendar year and at intervals of not more than 15 months, to lodge with the NCSC a copy of its balance-sheet and of its profit and loss account made up to the end of its last financial year in such form as the company is required to prepare by the law for the time being applicable to that company in the place of its incorporation or formation (CB cl. 516).

1122. This clause is based on ICAC CAs s.348 except that:

- (a) It relies on the new definition of financial year (see CB s-cl. 5(1)) associated with changes made to Part VI.

- (b) It requires registered foreign companies to lodge profit and loss accounts as well as balance sheets. (CB s-cl. 516(1) - see s. 402 N.Z. Companies Act). The periods of time are subject to the power of the NCSC to grant extensions of time for the lodgement of balance sheets and profit and loss accounts.
- (c) The provision has been amended to make it clear that the NCSC Commission will be able to require the balance sheet or the profit and loss account to be audited before it is lodged (CB s-cl 516(3)).
- (d) The NCSC, rather than the Governor or Minister, will be able to make a declaration having the effect of excluding certain companies from the requirements of the clause (CB para 516(7)(b) and (c)).

1123. Note s-cl. 13(18) of the C(TP)B which deals with a declaration made by the Minister under para. 348(5)(b) or (c) of the ACT CO and in force immediately before the commencement of the CB.

Cl. 517 : Obligation to exhibit name of foreign company etc.

1124. A foreign company, other than a banking corporation, will be required:

- (a) to place on all relevant documents its name and place of incorporation and a statement to the effect that its liability is limited if that is the case (CB s-517(1)); and
- (b) to exhibit conspicuously outside every place of business established by it in the ACT its name place of its incorporation; the fact that its liability is limited (if it is); and, in the case of a principal office, the words "Principal Office" (CB s-cl. 517

1125. These requirements are based on ICAC s. 350. They are similar to those imposed on local companies, recognized companies and recognized foreign companies see CB cls. 218 a 509.

Cl. 518 : Cessation of business etc

1126. If a registered foreign company (ie one registered in the A.C.T.) ceases to have a place of business or to carry on business in the ACT or any other participating jurisdiction it will be required to notify the NCSC within 7 days of so ceasing (s-cl. 518(1) - based on ICAC CAs s-sec 352(1) but amended in the light of the one place of registration arrangements).

1127. If the NCSC receives notice from an agent of a registered foreign company that the company has been dissolved, the NCSC must remove the name of the company from the register (CB s-cl. 518(2) - based on part of ICAC CAs s-sec 352(5)).

1128. Where the NCSC has reasonable cause to believe that a registered foreign company no longer has a place of business or carries on business in the jurisdiction (and in the case of a registered foreign company formed outside Australia, no longer has a place of business in any other participating jurisdiction) the NCSC will be able to initiate a procedure which can lead to a company's name being struck off the register (CB s-cl. 518(3), (4), (5) and (6)). This procedure is to the same effect as that set out in ICAC CAs s-sec 352(6) but the CB expresses in greater detail the steps required to be taken by the NCSC being steps analagous to those to be taken to strike a locally incorporated company off the register (see CB cl. 459).

1129. Provision is also made for restoring the company's name to the register if struck off by administrative error or if a person is aggrieved by the striking off (CB-cl. 518(7), (8) and (9) respectively, in line with CB s-cl. 459(5), (6) and (7)).

1130. If a registered foreign company formed or incorporated within Australia is placed under official management, or the period of official management is terminated, it will be required to notify the NCSC within 1 month thereof (CB s-cl. 518(12) - based on ICAC CAs sub-s. 352(2A)).

1131. If a registered foreign company goes into liquidation or is dissolved in its place of incorporation or formation:-

- (a) the company's agent will be required to notify the NCSC of the commencement of the liquidation and of the dissolution and the appointment of a liquidator if applicable; and
- (b) the liquidator in the place of incorporation or formation will be able to apply to the ACT Supreme Court for the appointment of a liquidator to realize the property of the company in the jurisdiction

(CB s-cls 518(11), (12) and (13)).

1132. These three sub-clauses are based on ICAC CAs s-secs 352(2), (3) and (4) except that two changes have been made to give effect to the concept that a liquidator once appointed, has control over all the company's affairs, irrespective of where the company carries on business. These two changes are as follows:-

- (a) There is no longer provision that until a liquidator for this jurisdiction has been appointed by the Supreme Court, the liquidator appointed in the jurisdiction of incorporation or formation has the powers and functions of a locally appointed liquidator.

- (b) In the case of a registered foreign company formed or incorporated outside Australia, the liquidator appointed by the Court may realize the assets in other participating jurisdictions as well as in the jurisdiction in which the company is registered as a foreign company.

Cl. 519 : Name of foreign company to be struck off register

1133. Where a registered foreign company that is formed outside Australia or the external Territories is registered as a foreign company in a participating State or Territory, the NCSC will be required to strike the name of the company off their register (CB s-cl. 519(1)).

1134. Where a registered foreign company formed outside Australia or the external Territories is registered as a company under the provisions of a law that correspond to Division 4 of Part III of the CB, the NCSC will be required to strike the name of the company off the register (CB s-cl. 519(2)).

Cl. 520 : Restriction on use of certain names

1135. Foreign companies will have to comply with the provisions relating to names set out in Division 2 of Part III of the CB (CB cl 520 - based on ICAC CAs cl. 353).

1136. Note s-cls 13(19) and (20) of the C(TP)B which deal with consents given by the Minister under s-secs 353(1) and (2) of the ACT Co before the commencement of the CB).

Cl. 521 : Branch register of shares in foreign company

1137. A branch register of the shares of members resident in the jurisdiction must be kept in the jurisdiction by any registered foreign company carrying on business in the ACT that has a share capital if a share holder resident in the jurisdiction requests the keeping of such a register (CB s-cl 521(1) and (3) - based on ICAC CAs s-secs 354(1) and (2)). In addition a registered foreign company will be required, if requested by a member who is resident in a participating jurisdiction, to keep a share register in that jurisdiction if it is carrying on business there and if less than 2 months has elapsed since a similar request was made (CB s-cl 521(2) and (4) - new provisions).

1138. There will also be provisions (based on ICAC CAs ss 354 and 358) relating to:

- (a) exclusions from the provisions of CB cl. 521 of companies that cannot seek funds from the public (C s-cl. 521(6));
- (b) the manner of keeping the branch register (CB s-cl 521(7) - (9));

(c) the opening of a branch register (CB s-cl. 521(10))
and;

(d) changes in its location (CB s-cl. 521 (11)).

Cl. 522 : Registration of shares in branch register

1139. Registered foreign companies, upon application by local shareholders, will be required to register in a branch register shares held by members that are registered in another register kept by the company (CB s-cl. 522(1) - this is a complementary provision to CB cl. 523).

1140. This clause is based on ICAC CAs s. 355, but it is supplemented by a new requirement that registered foreign companies formed outside Australia must, on application by shareholders resident in other participating jurisdictions, register in branch registers maintained in those participating jurisdictions, the shares that are held by members that are registered in any other register kept by the company (CB s-cl. 522(2)).

Cl. 523 : Removal of shares from branch register

1141. Registered foreign companies will be required, on application being made, to remove shares from a branch register and to register them in such other register as is specified in the application (CB cl. 523).

1142. This clause is based on ICAC CAs s.356 but has a wider operation since it now also extends to removal from, and registration on, registers maintained in participating jurisdictions (in respect of registered foreign companies incorporated outside Australia).

Cl. 524 : Index of members holding shares in branch register, and inspection and closing of branch registers

1143. The requirements imposed on locally incorporated companies as to the keeping of indexes of names of members and the requirements as to inspection and closing of registers of members will apply (with such adaptations as are necessary) to branch registers maintained by registered foreign companies. (CB cl. 524 - based on ICAC CAs s. 357).

Cl. 525 : Branch register to be prima facie evidence

1144. A branch register will be prima facie evidence of any matters required or authorized by the Act to be inserted therein (CB cl 525). This provision is based on ICAC CAs s. 359 except that the wording has been brought into line with the similar evidentiary provision in relation to the register of members of a local company (see CB s-cl. 256 (4)).

Cl. 526 : Certificate as to shareholding

1145. A certificate under the seal of a foreign company specifying any shares held by any share holder and registered in the branch register will be prima facie evidence of the title of the shareholder to the shares and of the fact that the shares are registered in the branch register (CB cl. 526 - based on ICAC CAs s. 360).

Cl. 527 : Penalties

1146. The foreign company and any officer or agent who is in default under this Division will be subject to the basic penalty of \$500 (CB cl. 527 - based on ICAC CAs s. 361; see also CB s-cl. 570 (6) which sets out the amount of the basic penalty).

CB : PART XIV : MISCELLANEOUS

1147. Part XIV of the CB (cls 528 to 581) contains three Divisions entitled:

Division 1 - General

Division 2 - Offences

Division 3 - Rules and Regulations.

DIVISION 1 : GENERAL

1148. Division 1 of Part XIV of the CB (cls 528 to 551) deals with various general matters.

Cl. 528 : Service of documents on company

1149. A document will be able to be served on :

- (a) a company by leaving it at, or posting it to, the registered office (CB s-cl 528(1) and (2)) or serving it personally on 2 Australian resident directors (CB s-cl 528(4));
- (b) a liquidator of a company by leaving it at, or posting it to, the last address of the liquidator lodged with the NCSC (CB s-cl. 528(5));
- (c) an official manager of a company by leaving it at, or posting it to, the last address of the official manager lodged with the NCSC (CB s-cl. 528(6)).

1150. These provisions as to service are based on ICAC CAs s. 362 except that:

- (a) The provisions relating to the situation of the registered office of a company have been expanded (CB s-cl.528(2) and (3) - cf. ICAC CAs s-sec 362(2)).

- (b) There is a new provision enabling a document to be served on a company by delivering a copy of the document personally to each of two directors of the company (CB s-cl. 528(4)).

- (c) There is a new provision for service on an official manager where one has been appointed (CB s-cl. 528(6)). There is no equivalent provision in relation to recognized companies, recognized foreign companies or registered foreign companies (see CB cls. 529 and 530).

- (d) There is a new provision that nothing in this clause affects the power of the Supreme Court or the operation of a provision of another law to authorize a document to be served in a manner not authorized by this clause. (CB s-cl. 528(7)). There is also an equivalent provision in relation to recognized companies, recognized foreign companies or registered foreign companies (see CB cls. 529 and 530).

1151. There is no specific provision in the CB in relation to service by telex (discussed by JG Starke 54 A.L.J. 423-4 : see also definition of 'document' in C & S (1 & MP) A para 13(c) and C & S (1 & MP) A s. 15 dealing with service by post).

Cl. 529 : Service of documents on recognized company or
recognized foreign company

1152. A document will be able to be served on a recognized company or a recognized foreign company or the liquidator of such a company in the same general manner as it will be able to be served on a local company or its liquidator (CB cl. 529).

1153. This provisions is based on ICAC CAs s. 343H except that:-

(a) It has been extended to apply to recognized foreign companies.

(b) It has been amended along the lines of CB cl. 528.

Cl. 530 : Service of documents on registered foreign company

1154. A document will be able to be served on a registered foreign company or its liquidator in the same general manner as it can be served on a local company or its liquidator (CB cl. 530).

1155. These provisions as to service are based on ICAC CAs s. 351 but have been amended along the lines of the provisions dealing with service on local companies (see CB cl. 528).

Cl. 531 : Vesting of property

1156. Where a court order under the CB vests property in a person, the property forthwith vests in the person except where the transfer or transmission of the property may be registered under a Commonwealth, State or Territory law, the property will not vest in that person at law (though it does in equity) until the requirements of the law relating to registration have been complied with (CB s-cl. 531(1) & (2)). This is the case also for any property vesting under the CB the transfer or transmission of which may be registered (CB s-cl. (1) & (2)).

1157. These provisions as to vesting are based on ICAC CA s-secs 183(4) and 233(4) but have been expressed in more general terms.

Cl. 532 : Parts of dollar to be disregarded in determining majority in value of creditors, &c.

1158. Parts of a dollar will be disregarded in determining a majority in value of creditors (CB cl 532 - new provision based on s. 304 Bankruptcy Act - same provision in NCB cl 583).

Cl. 533 : Security for costs

1159. Where a corporation is plaintiff in legal proceedings the Supreme Court will be able, if it appears that the corporation may be unable to pay costs if the defendant is

successful, to require security to be given for those costs (CB cl 533 - based on ICAC CAs s. 363).

Cl. 534 : Disposal of securities if whereabouts of holder unknown

1160. Where the whereabouts of a holder of securities have been unknown for a period of not less than 6 years, the company will be able, subject to compliance with certain procedures, to arrange for the transfer of those securities to the Minister responsible for administering the A.C.T. Unclaimed Moneys Ordinance 1950 (CB cl. 534)).

1161. This provision is based on ICAC CAs s. 364, except that:

- (a) The provision has been extended to cover securities, rather than only shares (see definition in s-cl. 5(1))
- (b) The time period has been reduced from 10 years to 6 years.

1162. In each jurisdiction covered by the co-operative scheme other than the A.C.T.:

- (a) the relevant Minister will be the Minister in that jurisdiction responsible for administering that jurisdiction's unclaimed moneys legislation:-

- NSW : Unclaimed Moneys Act 1917
- QLD : Public Curator Act 1915
- SA : Unclaimed Moneys Act 1891
- TAS : Unclaimed Moneys Act 1918
- VIC : Unclaimed Moneys Act 1962
- WA : Unclaimed Moneys Act 1912.

(b) the exemption from liability in CB s-cl. 534(6) will be conferred on the jurisdiction in question and its relevant Minister (instead of the Commonwealth and its Minister).

Cl. 535 : Power to grant relief

1163. Where there are proceedings actual or anticipated, for negligence, default, breach of duty or breach of trust against officers and certain other persons who have functions to perform in relation to a corporation, the court will be able to relieve that person of liability where it appears to the court that he acted honestly and ought fairly to be excused (CB cl 535).

1164. These powers to grant relief are based on those in ICAC CAs s. 365 except that the requirement that the person appear to have acted "reasonably" as well as honestly has been omitted - the NCB cl 561 also required reasonableness.

Cl. 536 : Power of Court to give directions with respect to meetings ordered by the Court

1165. The Supreme Court will be able to give directions with respect to the convening, holding or conduct of meetings which it orders and also any ancillary directions which it thinks are appropriate (CB cl. 536 - based on ICAC CAs s-sec 142(1)).

Cl. 537 : Appeals from decisions of NCSC

1166. There will be a general right of appeal to the Supreme Court from acts, omissions or decisions of the NCSC where there is no appeal or review procedure otherwise provided in the CB, except in relation to matters declared by the CB to be conclusive or final (see eg CB s-cl. 210(4)) or in respect of which an appeal procedure has already been provided for by the CB (see eg CB s-cl. 27(9)) (CB cl 537 - cf. ICAC CAs s-sec 12(6)).

Cl. 538 : Appeals from decisions of receivers, liquidators, &c.

1167. There will be a general right of appeal to the Supreme Court in respect of an act, omission or decision of persons administering a compromise or scheme of arrangement; a receiver; a receiver and manager; a liquidator; a provisional liquidator; an official manager, or a deputy of an official manager (CB cl 538).

1168. This provision is based on ICAC CAs s. 279 except that it has been extended to apply to persons administering a compromise or schemes of arrangement, receivers or receivers and managers and provisional liquidators as well as liquidators.

Cl. 539 : Irregularities

1169. There are provisions dealing with irregularities in proceedings (based on ss 215 and 366 of the ICAC CAs.) The main provisions of are as follows:

- (a) A proceeding under the CB is defined to include a liquidation proceeding (CB para 539(1)(a) - new provision).
- (b) A reference to a procedural irregularity will include a reference to a defect, irregularity or deficiency notice or time (CB para 539(1)(b) - new provision).
- (c) A proceeding under the CB will not be invalidated for any reason of any procedural irregularity, unless the court is of the opinion that some substantial injustice would be caused which cannot be remedied by the Supreme Court and by order declares the proceeding invalid (CB s 539(2) - based on ICAC CAs s-sec 366(1)).

(d) The accidental omission to give notice of a meeting will not invalidate the meeting or proceedings unless the Supreme Court declares the proceedings at the meeting to be void (CB s-cl. 539(3) - based on ICAC CAs s.215 except that the CB provision:-

(i) applies to the whole CB and not just to the official management provisions; and

(ii) applies also to meetings notice of which has to be given under the CB as well as to meetings held for the purposes of the CB.

(e) The Supreme Court, on application by any interested person, will be able to make any of the following orders:

(i) an order declaring any act to be valid notwithstanding a failure to comply with the CB or with the constituent documents of a corporation (CB para 539(4)(a) - based on ICAC CAs s-sec 366(2) and (3));

(ii) an order directing the rectification of any Register kept by the NCSC (CB para. 539(4)(b) - new provision);

- (iii) an order relieving a person from any liability in respect of such a failure (CB para 539(4)(c) - new provision);
 - (iv) an order extending or abridging the period for doing any act (CB para 539(4)(d) - based on ICAC CAS s-sec 366(4)).
- (f) In the case of an order declaring an act to be valid under CB para 539(4)(a), the Supreme Court will be required to be satisfied that:
- (i) the act is essentially procedural in nature;
 - (ii) those concerned in the failure or contravention acted honestly;
 - (iii) it is in the public interest that the order be made, before it can make an order.
- (CB para 539(6)(a) - new provision).
- (g) In the case of an order relieving a person from any civil liability, the Supreme Court will be required to be satisfied that the person acted honestly (CB para 539(6)(b) - new provision)

- (h) In all cases, before an order can be made, the Supreme Court will be required to be satisfied that no substantial injustice has been or is likely to be caused to any person (CB para 539(6)(c) - based on ICAC CAs para. 366(3)(b)).

Cl. 540 : Power of NCSC to intervene in proceedings

1170. The NCSC will be able to intervene in any legal proceeding (see Baxt 1980 A.B.L.R. 412-413) relating to a matter under the CB. When it does so, it will be deemed to be a party to the proceeding with all the attendant rights, duties and liabilities. The NCSC will be able to appear and be represented by a employee of the NCSC or by a person to whom it has delegated its functions and powers (CB cl. 540 - same provision in CASA s. 61 and in SIA s. 148).

1171. This power is a more general version of the power of a corporate affairs office to be represented in certain proceedings which previously arose under the ICAC CAs - see sub-ss 117(2) and 122(3).

Cl. 541 : Examination of persons concerned with corporations

1172. CB cl. 541 deals with the procedure for the examination of persons concerned in the affairs of corporations.

1173. The procedures involved in such examinations are:

(a) Where it appears to the NCSC or a prescribed person (i.e. an official manager or liquidator or other person authorised by the NCSC) that a person concerned in the affairs of a corporation is guilty of fraud, default, negligence, breach of duty or trust in relation to the corporation, or has information in relation to the affairs of a corporation, the NCSC will be able to apply to the Supreme Court for an order (CB s-cl. 541(2)); the Supreme Court will be able, if it thinks fit, to order that the person attend before the Court to be examined on oath as to the affairs of the company (CB s-cl. 541(3)); such an examination will be held in public except in special circumstances (CB s-cl. 541(4)); and the Supreme Court will be able to give directions as to the matter to be inquired into and the procedure to be followed (CB s-cl. 541(5)).

(b) A person who is ordered to attend must not:-

(i) fail to attend without reasonable excuse (CB s-cl. 541(6));

(ii) fail to take an oath or make an affirmation (CB s-cl. 541(7));

(iii) refuse to answer a question (CB s-cl. 541(8))

- (iv) fail to produce relevant books under his control if directed to produce them by the Court (CB s-cl. 541(9));
 - (v) make a statement that is false or misleading in a material particular (CB s-cl. 541(11)).
- (c) A person will not be excused from answering a question on the ground that the answer might tend to incriminate him, but where the person claims that this will be the case, the answer will not be admissible in evidence against him in criminal proceedings other than proceedings under CB cl. 541 or proceedings in respect of the falsity of the answer (CB s-cl. 541(12)).
- (d) The Court will be able to order the questions put and answers given at the examination to be put in writing and signed by the person (CB s-cl. 541(13)); such a signed transcript will be able to be used in evidence in any legal proceedings against the person (CB s-cl. 541(14)); an examination under this clause will be able to, if the Court so directs, be held in another court (CB s-cl. 541(15)); such a person will be able to employ a solicitor and counsel who may ask questions that the Court considers just (CB s-cl. 541(16)); the Court will be able to adjourn the examination from time to time (CB s-cl. 541(17)); and the Court has the right, if it thinks that the order for the examination

was unreasonably obtained to order that the costs be paid by the applicant or by any person who took part in the examination (CB s-cl. 541(18)).

1174. CB cl. 541 is based on the provisions of ICAC CAs ss. 249, 250 and 367A subject to the following modifications:

- (a) There is no equivalent to ICAC CAs s. 249 in the extent to which it allows the Court to summons on its own initiative (i.e. without any application being made to it) persons connected with a company for the purposes of examination.
- (b) The ICAC CAs provisions do not allow an official manager to seek a Court order that a person be examined (see CB s-cl. 541(1)).
- (c) The ICAC CAs do not, in the case of examinations initiated by the Court (s. 249) or requested by a liquidator (s. 250) give the Court any discretion to:
 - order that the examination be held in private (CB s-cl. 541(11));
 - make procedural orders for the conduct of the examination (CB s-cl. 541(5));
 - make any special orders as to costs (CB s-cl 541(18)).

1175. The following is a comparative table of the provisions in CB cl. 541 and ICAC CAs ss 292, 250 and 367A. It should be noted that the correspondence is sometimes only approximate:

<u>ICAC CAs</u>	<u>Companies Bill</u>
s-sec 249(1)	s-cl. 541(2) except that there is no provision in the CB allowing a Court to initiate an examination
s-sec 249(2)	s-cl. 541(3), (13), (14)
s-sec 249(3)	s-cl. 541(9), (10)
s-sec 249(4)	s-cl. 541(15)
s-sec 249(5)	s-cl. 541(16)
s-sec 249(6)	no exact equivalent in the CB but see penalties provided for in CB s-cl. 541(6)
s-sec 250(1)	s-cl. 541(1), (2), (3) but note that CB s-cl. 541(1) allows an official manager to apply for an order for an examination
s-sec 250(2)	
s-sec 250(3)	s-cl. 541(5)
s-sec 250(4)	s-cl. 541(3)
para. 250(5)(a)	
para. 250(5)(b)	s-cl. 541(16)
s-sec 250(6)	
para. 250(7)(a)	s-cl. 541(13)
para. 250(7)(b)	s-cl. 541(13)
para. 250(7)(c)	s-cl. 541(14)

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para. 250(7)(d)	
s-sec 250(8)	s-cl. 541(17)
s-sec 367A(1)	s-cl. 541(2)
para. 367A(2)(a)	s-cl. 541(4)
para. 367A(2)(b)	s-cl. 541(15)
s-sec 367A(3)	s-cl. 541(5)
para. 367A(5)(a)	s-cl. 541(3)
para. 367A(5)(b)	s-cl. 541(8)
para. 367A(5)(c)	s-cl. 541(12)
s-sec 367A(6)	s-cl. 541(16)
para. 367A(7)(a)	s-cl. 541(13)
para. 367A(7)(b)	s-cl. 541(13)
para. 367A(7)(c)	s-cl. 541(14)
para. 367A(7)(d)	
s-sec 367A(8)	s-cl. 541(17)
s-sec 367A(9)	s-cl. 541(18)

Cl. 542 : Orders against persons concerned with corporations

1176. On the application of a prescribed person and where the Supreme Court is satisfied that a person is guilty of fraud, negligence, default, breach of trust or breach of duty in relation to a corporation and the corporation has suffered loss or damage as a result, the Court will be able to make such orders as it thinks appropriate. Such an order may direct the person to pay money or transfer property or pay the amount of any loss

or damage to the corporation but will not be made unless the person has an opportunity to be heard and to give evidence (CB cl. 542).

1178. A prescribed person is defined in CB s-cl. 542(1) to mean an official manager, a liquidator or a person authorized by the NCSC.

1179. CB cl. 542 is based on ICAC CAs s. 367B subject to the following modifications:

(a) CB cl. 542 is framed in more general terms than the equivalent ICAC CAs provision.

(b) The CB provision ensures that the person the subject of the order has the opportunity to give evidence and call witnesses and to employ a solicitor (CB s-cl. 542(3)).

(c) There is a proviso in CB s-cl. 542(5) to the effect that nothing in CB cl. 542 prevents any person instituting any other proceeding in respect of the subject matter of the CB cl. 542 order.

Cl. 543 : Civil proceedings not to be stayed

1180. Civil proceedings arising under the CB will not be stayed by reason only that the proceedings disclose, or arise out of, the commission of an offence (CB cl 543).

Cl. 544 : Form and evidentiary value of books

1181. A book that is required by the CB to be kept or prepared, will be able to be kept:

- (a) by making entries in a bound or looseleaf book;
- (b) by recording or storing the matters concerned by means of a mechanical, electronic or other device; or
- (c) in any other manner approved by the NCSC.

(CB s-cl. 544(1))

1182. However, a book will not be able to be prepared by means of a mechanical, electronic or other device unless:

- (a) the matters recorded or stored will be capable of reproduced in written form; or
- (b) a reproduction of those matters in a written form approved by the NCSC is kept.

(CB s-cl. 544(2)).

1183. A corporation will be required to take all reasonable precautions, including any precautions set out in regulations to safeguard against falsification records required to be kept.

for the purpose of the CB. This will enable the making of regulations about standards of security etc in relation to computerized records and imposes a general duty to safeguard against falsification. Under the existing law (ICAC CAs s-sec. 369(2)) this duty only exists if the records are not kept in a bound book. (CB s-cl. 544(3)).

1184. Where a corporation records or stores any matter by means of a mechanical, electronic or other device, any duty imposed by the CB to make a book containing those matters available for inspection will be construed as a duty to make the matters available for inspection in written form, or to provide a reproduced copy of them (CB s-cl. 544(4)).

1185. The provisions (CB cl. 544) about the form and evidentiary value of records kept for CB purposes are based on NCB cl. 567, the 1973 U.K. Companies Bill cl. 81, and the Ontario Business Corporations Act s. 156. See also ICAC CAs s. 367.

Cl. 545 : Inspection of books

1186. A book that must be available for inspection according to the provisions of the CB, will be required to be available for inspection at the place where it is kept at a time when the registered office in the ACT of the corporation is open and accessible to the public. If it is kept at a place other than the registered office, that place will be required to be open

and accessible for inspection during the same hours that the registered office is required to be open (CB cl. 545. As to the place where books of a company must be kept see ex memo paras 609 to 611).

1187. CB cl. 545 is based on ICAC CAs s. 370 except that:

- (a) It provides for the situation where a register is kept by a company in a place which is not its registered office - see CB s-cl. 545(2).
- (b) It will now be an offence for any person, whether or not an officer of a corporation, to refuse to allow an authorized person access to a company's books (CB s-cl. 545(3)).

Cl. 546 : Location of books kept on computers etc.

1188. Where a corporation keeps required books in other than a written form (e.g. on a computer) it will be deemed to have complied with the requirements of the CB relating to the location of books if:-

- (a) the information is available in written form at the place where the books are required to be kept;
- (b) the NCSC is notified; and

(c) changes in location are notified within 14 days.

(CB cl. 546. As to the place where books of a company are required to be kept see ex memo paras 609 to 611).

1189. CB cl. 546 is based on NCB cl. 569 (see also 1973 United Kingdom Companies Bill cl. 82) subject to the following modifications:

- (a) NCB cl. 569 distinguishes between the requirements for a register of members or debenture holders of a corporation and those for a management register or index of the corporation.
- (b) The time limit for notification of a change in the location of register etc in the NCB is 28 days whereas it is 14 in the CB (CB para 546(3)(b)).
- (c) The NCB provision applies only to registers.

Cl. 547 : Location of registers

1190. A local company or a registered foreign company (see CB s-cl 547(7)) will be required to keep the following registers at its registered office or principal place of business in the ACT.

- register of options granted to persons to take up unissued shares in the company (see CB cl 131);
- register of substantial shareholders (see CB cl 147);
- register of debenture holders (see CB cl 147);
- register of charges (see CB cl 209);
- register of directors shareholdings (see CB cl. 238(1));
- register of directors, principal executive officer and secretaries (see CB cl. 238(1));
- register of members (see CB cl. 256); and
- branch register of shares in a registered foreign company (see CB cl. 521).

1191. These registers will be able to be kept in another place if:

- (a) the register is made up at another office of the company within the ACT;
- (b) the company arranges for the register to be made by some other person at an office within the ACT;
- (c) the NCSC approves that other place CB s-cl. 547

1192. Similar requirements apply in respect of branch share registers that are required by the CB to be maintained in another jurisdiction (CB s-cl. 547(2)).

1193. Where a register is kept at a place other than the registered office, or, in the case of branch share registers, at a place other than the company's principal place of business in the jurisdiction in which it is maintained, or if there is any change, in its location the NCSC must be notified (CB s-cl. 547(4) - see ex memo paras 609 to 611 for details of the place where certain minute books and registers are required to be kept).

1194. CB cl. 547 is based on ICAC CAs s. 152 except that the latter provision is restricted to the place where registers of members must be kept. The extension of the equivalent provision in the 1948 United Kingdom Companies Act along the lines of CB cl. 547 was recommended in the Jenkins Committee Report at para 470.

Cl. 548 : Translations of instruments

1195. Where a corporation is required to lodge any document with the NCSC and the document is not written in English, a certified translation of the document will be required to be lodged at the same time (CB s-cl. 548(1)). Where a corporation must make an instrument available to the public and the instrument is not in English, the corporation will be required to keep a certified translation at its registered office or Principal office in the ACT (CB s-cl. 548(2)).

1196. This provision is based on ICAC CAs s. 371, except that:

- (a) The reference to principal office in CB s-cl. 548(2) is new.
- (b) CB s-cl. 548(3) is new and gives a definition of "instrument" for the purposes of the section (a definition of certified translation appears in s-cl. 5(1)).

Cl. 549 : Certificate of incorporation conclusive evidence

1197. A certificate of incorporation (given under cl. 31, cl. 35 or cl. 72 of the CB or under a previous law of the ACT) will be conclusive evidence that all the requirements of the CB or previous law in respect of registration have been complied with, and that the company is duly incorporated (CB cl 549).

1198. This provision is based on ICAC CAs s. 372) which did not, however, specify the provisions under which the certificate was given. Consequently there may have been some doubts as to the extent of its coverage, especially in relation to certificates under a previous law.

Cl. 550 : Admissibility of books in evidence

1199. Any book kept by a corporation under the CB, a previous law of the ACT, a corresponding law of another State or Territory or a previous corresponding law will be admissible in evidence

in any proceeding and will be prima faice evidence of the matter stated or recorded in the book. A document purporting to be a book kept by a corporation will be deemed to be such a book unless the contrary is proved. (CB cl 550).

1200. This is a new provision based on s-sec 156(3) of the Ontario Business Corporations Act. It is an evidentiary provision that is intended to expedite legal proceedings where books are to be introduced in evidence. This provision obviates the need to call witnesses to prove that books are books of the corporation when this fact is not in question or to prove transactions recorded in books when these matters are not in dispute.

Cl. 551 : Court may compel compliance

1201. The CB requires certain books (including registers) to be open for inspection and for copies to be supplied on request (see e.g. CB cls 238, 257). If a person refuses to comply with these provisions, the Supreme Court will be able to order an immediate inspection of the book or to order a copy to be supplied (CB cl 551).

1202. CB cl. 551 is based on ICAC CAs s. 373 except that the latter provision only applies to registers, minute books or documents.

DIVISION 2 : OFFENCES

1205. Division 2 of Part XIV of the CB (cls 552 to 574 contains a series of provisions imposing offences and also dealing with some related matters.

Cl. 552 : Restriction on offering shares, debentures, &c., subscription or purchase

1206. A person will be prohibited from going from place to place offering for subscription or purchase to the public shares, debentures, units or documents conferring on the holder a claim against a corporation which is in existence or which is to be formed, unless the NCSC has exempted the corporation from the operation of this provision (CB cl. 552).

1207. Except in the circumstances set out in CB s-cl. 552(6) a person will also be prohibited from making an offer in writing to any member of the public of any shares etc. for purchase unless the offer is accompanied by:

- (a) a statement in writing containing the particulars required by CB s-cl. 552(6) or
- (b) in the case of shares of a corporation formed outside the A.C.T., a statement or a prospectus that complies with the CB.

1208. CB cl. 552 is based on ICAC CAs s. 374 except that CB s-cl. 552(3) will now not apply to an offer of shares where the provisions of Division 1 (prospectuses) or Division 5 (debentures) of Part IV of the CB have been complied with. This change was recommended by the Eggleston Committee (para 11 of his Sixth Interim Report).

1209. Note s-cl. 13(21) of the C(TP)B which deals with an exemption given by the Minister under para. 374(2)(b) of the ACT CO that is in force immediately before the commencement of the CB.

Cls 553 to 557 : offences by officers of certain companies

1210. Cl 554 to 558 of the CB are provisions dealing with offences committed by officers of certain companies. These provisions are based on part of the 'defaulting officer provisions' of the ICAC CAs. See also D.R. Magarey (SULS sem).

Cl. 553 : Interpretation

1211. There are special application and definition provisions for the purposes of these clauses (CB cl. 553).

1212. In particular, the provisions of CB cls 554 to 557 will apply to a company:-

- (a) that has been or is being wound up, including one where the winding up has been stayed or terminated (by a CB cl. 383 order);
- (b) that is or has been under official management;
- (c) whose affairs are or have been under investigation pursuant to Part VII of the CB or a corresponding previous law of the Territory;
- (d) in respect of the property of which a receiver, or a receiver and manager, has at any time been appointed;
- (e) that has ceased to carry on business or is unable to pay its debts; or
- (f) that has entered into a compromise or arrangement with its creditors.

(CB s-cls. 553(1) and (2)).

1213. These application provisions are the same as in ICAC CAs s. 374E except that CB cls. 554 to 557 will now also apply to:

- (a) a company in respect of which a winding up order has been stayed or terminated (CB para 553(1)(a));

- (b) a company in respect of whose property a receiver who is not a manager has been appointed (CB para 553(1)(e));
- (c) a company that has entered into a compromise or arrangement with its creditors (CB para 553(1)(g));
- (d) a company that has been under a "disability" in the past as well as a company that is undergoing a present "disability".

1214. The definitions of "appropriate officer" and "relevant day" in CB cl. 553 are directly related to the companies to which CB cls. 554 to 557 will apply (see CB s-cl. 553(3)).

Cl. 554 : Offences by officers of certain companies

1215. It will be an offence for a past or present officer of a company to which this provision applies:

- (a) not to disclose, as far as he is capable, to the appropriate officer (i.e. a liquidator, official manager, receiver the NCSC or a person administering a compromise or arrangement - see CB s-cl. 553(3)) all the property of the company or not to provide information concerning the disposal of the property of the company during the past 5 years (except property disposed of in the ordinary course of business);

- (b) not to hand over all the property or books in his custody or control to an appropriate officer;
- (c) to conceal or remove property of the company or to conceal a debt due to or by the company;
- (d) to fraudulently part with or alter any of the company's books;
- (e) to obtain on credit by fraud property that the company has not subsequently paid for;
- (f) to dispose of property, otherwise than in the ordinary course of business, that the company has obtained on credit and not paid for;
- (g) to make a material omission in a statement relating to the affairs of the company;
- (h) to fail to inform the appropriate officer of any knowledge or belief that a false debt has been proved by a person;
- (i) to prevent the production of any of the company's books;
- (j) to make entries in the books of the company showing fictitious transactions, losses or expenses; or

- (k) to make any false representation or to commit any other fraud to obtain the consent of the creditors of the company to an agreement in relation to the company's affairs or to the winding up.

(CB cl. 554 - based on ICAC CAs s. 374A).

Cl. 555 : liability where proper accounts not kept

1216. Where a company to which this provision applies (see CB cl. 553) and ex memo para 1212 or a company which within 2 years becomes such a company, fails to keep proper records (in contravention of CB cl. 267) directors and officers who are in default are guilty of an offence (CB cl. 555).

1217. This provision is based on ICAC CAs s. 374B except that:

- (a) There is now a specific reference in cl. 555 to a director of a company who fails to take all reasonable steps to secure compliance by the company with cl. 267 (which sets out the accounting records to be kept).
- (b) It will be a defence with regard to such non-compliance if reasonable grounds existed for the belief that a competent and reliable person was handling the discharge of this duty to comply with cl. 267.

Cl. 556 : offences relating to incurring of debts or fraudulent conduct

1218. If a company to which this provision applies (see CB cl. 553 and ex memo para 1212) incurs a debt and at the time the debt was incurred or immediately before that time, there were reasonable grounds to expect that the company would be unable to pay its debts, any person who was a director, or who part in the management, of the company at the time when the debt was incurred, will be guilty of an offence and those persons and the company will be jointly and severally liable for the payment of the debt (CB s-cl. 556(1)).

1219. This provision is based on ICAC CAS s-sec 347C(1), except that it has been restructured to place greater responsibility on persons who are directors or managers of a company at the time that unreasonable debts are incurred by the company and to provide that such persons, and the company, are liable to creditors for the repayment of any debts incurred in contravention of cl. 556. The question of what constitutes reasonable grounds has been discussed in Dunn v. Shapowloff (1978) 3A.C.L.R. 755 and in Hamilton v. Caratti .

1219A. A new provision has been inserted to make it clear that a criminal conviction need not be obtained before civil proceedings can be instituted pursuant to CB s-cl. 556(1). (CB s-cl. 556(3A)).

1220. It will be a defence to a charge under CB cl. 556 if the defendant proves that the debt was incurred without his express or implied authority or consent or that he did not have reasonable grounds to expect that the company would not be able to pay its debts (CB s-cl. 556(2)). This is a new provision and is designed to protect a person who either does not authorize the incurring of the relevant debt or who does not realize that the company will not be able to pay its debts.

1221. Where a person repays, in accordance with an obligation imposed by CB s-cl. 556(1) a debt incurred by a company, that repayment will not make the company liable to the person concerned in respect of the amount paid (CB s-cl. 556(4)). This is a new provision which will have the effect of ensuring that an officer who repays a debt will not be able subsequently to claim the amount paid from the company and to that extent will restrict the operation of CB cl. 558.

1222. If a company does any act with intent to defraud creditors or any other person, or for any other fraudulent purpose, and the company is or becomes a company as defined in CB cl. 553, any person who is knowingly concerned in the doing of the act with that intent will be guilty of an offence (CB s-cl. 556(5)). This offence is based on ICAC CAS s-sec 374C(2) except that it has been made clear that the provision applies to an act of the company both before and during the period it is a company to which these provisions apply.

Cl. 557 : Powers of Supreme Court

1223. Where a person has been convicted of an offence under s-cl. 556(1) or (5), the Supreme Court will be able to declare that person to be personally liable for certain debts, and may give directions and make orders to enforce such declarations (CB cl. 557).

1224. This provision is based on ICAC CAs s. 374D except that:

- (a) In the case of a conviction under CB s-cl. 556(1) an order by the Court must be made in favour of the person to whom the debt is payable (CB s-cl. 557(1)).
- (b) Where a company is or has been under official management and CB cl. 556 applies, a member of the company may make an application under CB cl. 557 (para. 557(3)(c)).
- (c) In CB s-cl. 557(8), an applicant other than an appropriate officer is also able to give evidence and call witnesses on the hearing of an application under CB s-cl. 557(1).

Cl. 558 : Certain rights not affected

1225. Nothing in CB s-cl. 556(1) or 557(1) will affect the rights of a person to indemnity, subrogation or contribution.

(CB cl. 558). This is a new provision which was included to ensure that where, for example, an officer was held to be liable for the repayment of a company's debts pursuant to CB s-cl 556(1) or 557(1), the common law rights referred to in (CB cl. 558) were preserved for his use against other officers of the company.

Cl. 559 : Inducement to be appointed liquidator or official manager

1226. It will be an offence for a person to offer or give a member or creditor of a company valuable consideration to secure his own appointment, or to secure or prevent the appointment of another person, as the company's liquidator, provisional liquidator, or official manager, or as receiver, or receiver and manager of the company's property or as manager of a compromise or scheme of arrangement (CB cl 599 - based on ICAC CAs s-sec 374F(1) - except that the latter provision is restricted to appointments as the company's liquidator or official manager).

Cl. 560 : Falsification of books

1227. Any officer, former officer, member or former member who conceals, destroys, mutilates, alters or falsifies any of the company's securities or books will be guilty of an offence (CB cl 560).

1228. This provision is based on ICAC CAs s-sec 374F(2) except that:

- (a) CB cl. 560 will also apply to former officers and members.
- (b) It will now be an offence where a company's books are kept on a computer etc, for a person:
 - (i) to record or store information he knows to be false;
 - (ii) to destroy, remove or falsify information; or
 - (iii) to fail to record or store information with intent to falsify an entry made or intended to be compiled.

(CB s-cl. 560(2) - new provision). These new offences endeavour to deal with some of the problems that can arise with computer-kept records: see, for example, J.W.K. Burnside: "The legal implications of computers" (1981) 55 A.L.J. 79 @ 87.

- (c) It will be a defence to the offences created by CB s-cl. 560(1) and (2) if the defendant proves he acted honestly and that, in all the circumstances, the offence should be excused (CB s-cl. 560(3)).
- (d) Officers will (for the purposes of CB cl. 560) include receivers who are not also managers (CB s-cl. 560(4)).

Cl. 561 : Frauds by officers

1229. A person will be guilty of an offence if while an officer of a company,

- (a) he fraudulently induces a person to give credit to the company or a related corporation;
- (b) with intent to defraud the company, he makes a gift or transfer of, or charge on the property of a company or related corporation, or is involved in a levy of execution against such property; or
- (c) with intent to defraud the company he conceals or removes any such property after or within 2 months before the due date of any unsatisfied judgement for payment of money against the company or related corporation.

(CB cl 561).

1230. This clause is based on ICAC CA s s. 374G except that:

- (a) CB paras 561(b) and (c) are now also expressed to apply to members as well as creditors.
- (b) The clause has been widened and refers to "company or related corporation" rather than merely a "company".

Cl. 562 : Court may disqualify person from acting as director, &c., in certain circumstances

1231. On an application by the NCSC, the Supreme Court will be able to make an order prohibiting a person from acting as director of, or being concerned in the management of, a company for a period of up to 5 years, provided that:

- (a) the person was given notice of the application;
- (b) the person was, up to 7 years before the application, a director of, or concerned in the management of, 2 or more companies that had been wound up etc (see Cl s-cl. 562(1) for companies to which CB cl. 562 applies); and
- (c) in the case of such a company, the manner in which the affairs of the company had been managed was wholly or partly responsible for that company being wound up etc.

(CB cl 562).

1232. This provision is based on ICAC CA s. 374H except in that CB cl. 562 will also apply to certain companies in respect of which a winding up order has been stayed or terminated (see CB para 562(1)(b)).

Cl. 563 : False and misleading statements

1233. It will be an offence for a corporation to advertise, circulate or publish a misleading statement of the amount of its capital, and for any officer of the corporation knowingly to authorize, direct, or consent to the advertising (CB s-cl. 563(1)).

1234. A person who in a document required by or for the purposes of the CB or lodged with or submitted to the NCSC, makes or authorizes the making of a statement that to his knowledge is false or misleading, without having taken all reasonable steps to ensure that the statement was not false or misleading, will be guilty of an offence (CB s-cl. 563(2) and (3)).

1235. This provision is based on ICAC CAs s. 375 except that:

- (a) CB s-cl. 563(2) and (3) - based on ICAC CAs s-sec 375(2) - deal with documents lodged or submitted for lodgement with the NCSC whereas ICAC CAs s-sec 375(2) applies to any document required for the purposes of the Act.
- (b) "Wilfully" in the ICAC CAs s-sec 375(2) has been omitted.
- (c) The negligent making of a false or misleading statement is now covered (CB s-cl. 563(3)).

- (d) CB s-cl. 563(4) (based on ICAC CAs s-sec 375(3)) has been redrafted to ensure that it will apply to the omission of something from a document as well as to the making of a statement.

Cl. 564 : False reports

1236. It will be an offence for an officer of a corporation to make or authorize the making of any false or misleading statement or report relating to the affairs of the corporation to:

- (a) a director, auditor, member, debenture holder or trustee for debenture holders of the corporation;
- (b) an auditor of the holding company in the case of a corporation that is a subsidiary;
- (c) a stock exchange or officer of a stock exchange,

(CB cl 564).

1237. This provision is based on ICAC CAs s. 375A except that:

- (a) CB s-cl 564(3) is new and defines the making of such a statement to include a reference to a false and misleading statement or report as to the state of the knowledge of the person making such a statement or report.

(b) CB s-cl 564(4) is also new and provides that where a statement is made to a person referred to in para. (1)(a), (b) or (c) in response to a question asked by that person, the question, and the statement or report, must be considered together in determining whether the statement or report was false or misleading.

Cl. 565 : Dividends to be paid out of profits

1238. Dividends must be paid out of profits or from the share premium account (see CB cl. 119) (CB cl 565).

1239. This provision is based on s. 376 of the ICAC CAs and replaces cls. 376, 376A and 376B of the exposure drafts. See also Macfarlan (SULS sem pp 124-135) and UK Companies Act 1980 ss. 39 to 45.

Cl. 566 : Restriction on use of words "Limited" and "No Liability"

1240. It will be an offence for a person to carry on business under a name using "Limited" or "No Liability" or any abbreviation of these words as part of the name, unless duly incorporated with limited liability or no liability, as the case may be (CB cl 566 - based on ICAC CAs s. 377).

Cl. 567 : Restriction on use of word "Proprietary"

1241. It will be an offence for a company to use the word "Proprietary" or any abbreviation of that word unless the company fulfils the requirements of the CB with regard to proprietary companies. The company and each officer of the company who is in default will each be guilty of an offence (CB cl 567).

1242. This provision is based on ICAC CAs s. 378. It is envisaged that the Victorian Companies (Application of Laws) Bill will provide that this provision in its application in Victoria will not apply to a company incorporated before 24 December 1896.

Cl. 568 : Reciprocity in relation to offences

1243. A person who does an act within the A.C.T. which would have been an offence outside the A.C.T. under a provision that corresponds with a provision of the CB, will be guilty of an offence against the relevant provision of the CB (CB cl 568 based on ICAC CAs s-sec 378A(1) - identical to SIA s. 148).

Cl. 569 : Offences committed partly in and partly out of the Territory

1244. Where any act, omission or thing done partly inside and partly outside the ACT would have constituted an offence against the CB if it had been done wholly within the ACT, t

the doing or omission of that act or thing will be deemed to be an offence against the CB (CB cl 569).

1245. This is a new provision based on SIA s. 149.

Cl. 570 : General penalty provisions

1246. A person who contravenes or fails to comply with a provision of the CB will be guilty of an offence by virtue of the general penalty provision unless that provision otherwise provides that he is guilty of an offence (CB cl 570 - based on ICAC CAs s. 379 of CASA s. 53 and SIAS. 141).

Cl. 571 : Continuing offences

1247. There will be a new provision imposing, in effect, a penalty of \$50 a day for failure to comply with a continuing obligation (CB cl. 571 - cf CASA s. 54 and SIA s. 142).

1248. This provision for continuing offences is designed to overcome a defect in s. 380 of the ICAC CAs which was exposed in the decision of Welsh v. Cornfoot (1973) VR 21. In Welsh v. Cornfoot the informant obtained orders nisi to review the decision of a magistrate that the two defendants, both directors of a company, had no case to answer in relation to alleged breaches ss 54, 112 and 134 of the VIC CA. Each of these provisions requires certain things to be done within one month

of a specified occurrence. These provisions also provide that "if default is made....every officer of the company who is in default shall be guilty of an offence against this Act." S-sec 380(3) of the ICAC CA defines an "officer in default". The information charged that the offence had been committed after the relevant one month periods. The court discharged the order nisi on the basis that the offences were complete when the one month periods expired and the offences were not continuous.

1249. The new provision will apply where:

- (a) under the CB an act must be done within a particular period;
- (b) failure to do that act is an offence; and
- (c) that act is not done within the period.

In those circumstances: -

- (d) the obligation to do that act will continue, even if the time period has elapsed;
- (e) where a person is convicted of an offence that, by virtue of (d), consists in the failure to do that act after that period has elapsed, that person will be guilty of a further and separate offence in respect of each day he continues to fail to do that act after the day of conviction; and

(f) the penalty applicable to each separate and further offence will be \$50.

(CB s-cl. 571(1)).

1250. The situation where the CB requires something to be done, but no time period is specified, is also covered (CB s-cl. 571(2)).

Cl. 572 : Officers and other persons in default

1251. An officer or other person will be deemed to be in default of the requirements of a provision of the CB if, by act or omission, they are directly or indirectly knowingly concerned in the contravention of those requirements (CB s-cl. 572(1) - cf CASA s.55).

1252. CB s-cl. 572(1) is based on s-sec 380(3) of the ICAC CAs but it has been extended to also cover past officers of a corporation, or any other person, as the case may be, and to apply to omissions as well as acts and to indirect contraventions as well as direct contraventions.

1253. For the purpose of CB s-cl. 572(1) a secretary of a company will, unless the contrary is proved, be deemed to be knowingly concerned in and party to any breach in regard to:

- (a) a provision of CB cl. 216 requiring the registered office of a company to be open for certain hours on business days;
- (b) any provision of CB cls. 238 (register of directors, principal executive officers and secretary) or 263 (annual return) requiring the lodgement of a document with the NCSC.

(CB s-cl 572(2))

1254. This deeming provision is new. Its effect is to place the obligation to comply with certain routine technical matters upon the secretary of a company (cf. s-sec 252(1) of the Income Tax Assessment Act 1936 in relation to the "public officer" of a company).

ICAC CAs s. 381

1255. There is no provision in the CB that corresponds with s. 381 of the ICAC CAs (proceedings how and when taken). This matter is dealt with in s. 36 of the C & S (I & MP)A.

1256. Note also cl. 27 of the C(TP)B which deals with the institution of a proceeding under the ACT CO that was subject to the consent of the Minister.

Cl. 573 : Power of Supreme Court to prohibit payment or transfer of moneys, securities or other property

1257. If an investigation, prosecution or proceeding is in progress, the Supreme Court will be able, on application by the NCSC to make orders:

- (a) prohibiting a person who is indebted to the relevant person from making a payment in total or partial discharge of the debt at the direction of the person to whom the debt is owed (for the purposes of this provision, a relevant person will be a person subject to an investigation under the CB or the subject of criminal or civil proceedings under the CB.);
- (b) prohibiting a person holding money, securities or property on behalf of the relevant person from paying any of the money, or parting with the securities or property to a person on whose behalf the money or the securities or other property, is or are held;

- (c) prohibiting the taking or sending out of the ACT or Australia of moneys of the relevant person or any person associated with the relevant person;
- (d) prohibiting the taking, sending or transfer of securities or other property of the relevant person out of the ACT or Australia;
- (e) an order appointing a receiver or trustee to the property or part of the property of the person where the relevant person is a natural person or where the relevant person is a body corporate a receiver or receiver and manager of the property or part of the property of the person;
- (f) prohibiting a natural person leaving Australia without the Court's consent and requiring delivery of his passport and other such documents.

(CB cl. 573).

1258. This is a new provision based on cl. 273 of the CSIB; see also s. 151 of the SIA.

Cl. 574 : Injunctions

1259. The Supreme Court will be able on the application of the NCSC or of any person interested in or affected by the conduct, to grant an injunction restraining a person from committing an offence or requiring a person to do something which is either considered desirable by the Court or which would prevent the occurrence of an offence. Alternatively or in addition the Court award damages to the affected person. The Court will also be able to grant an interim injunction and rescind or vary any injunction granted.

1260. This is a new provision and is based on SIA s. 149. See also R. Baxt (1980) A.B.L.R. 413 and R.P. Austin (SULS sem).

Cl. 575 : Power of Court to punish for contempt of Court.

1261. The power of the Supreme Court in relation to the punishment of contempt will not be affected by any provision of the CB (CB cl. 575).

1262. This is a new provision which replaces specific provisions to the same effect in the August CB (see, eg, s-cl. 562(6) and 571(5) of the August CB).

DIVISION 3 : RULES AND REGULATIONS

Cl. 576 : Rules

1263. The power to make rules of court conferred by s. 28 of the ACT Supreme Court Act will be extended in respect to certain matters (CB cl 576).

1264. This clause is based on VIC CA s. 383, except that the words "not inconsistent with this Act" are new and ensure that any Companies Rule that is inconsistent with a provision the CB or the regulations will be inoperative to the extent of the inconsistency. By virtue of CB s-cl. 5(1) "this Act" includes the regulations.

Cl. 577 : Regulations

1265. The Governor-General will be able to make regulations not inconsistent with the CB prescribing all matters required or permitted by the CB to be prescribed by the regulations (C cl 577).

1267. This clause is based on VIC CA s 384, except that:

- (a) VIC CA paras 384(1)(c) and (e) have been omitted.
- These paragraphs deal respectively with:

- the prescribing of fees not provided for in the Fees Schedule (para 384(1)(c)); and
- the making of regulations which are necessary for giving effect to the VIC CA or which are permitted to be prescribed under the Act otherwise than by rules.

- (b) The Governor-General will now be able to make regulations concerning the manner in which a liquidator may exercise his powers (CB para 577(1)(g)).
- (c) The maximum amount for any penalty for breach of regulations has been raised to \$500 (CB para 577(1)(j)).
- (d) The Governor-General's power to make regulations will only be able to be exercised in accordance with advice that is consistent with resolutions of the Ministerial Council (CB s-cl. 577(2)). This provision appears in s-sec 53(4) of the NCSC Act and in the other Commonwealth legislation that is part of the co-operative scheme and that contains a regulation making power.

DIVISION 4 : MISCELLANEOUS

Cl. 578 : Non-application of rule against perpetuities to certain schemes

1267A. The rule against perpetuities will not apply to the trust of any funds established for the benefit of any employee of a company (CB s-cl. 578(1)). The companies, funds and employees to which CB cl. 578 apply are specified in CB s-cl. 578(2).

1267B. This provision is based on s. 382 ACT CO which is similar in terms to s. 386 of the SA CA and s. 82 of the NSW CA.

Cl. 57a : Act not to apply to trade unions

1267C. The CB will not apply to trade unions and the registration of any trade union pursuant to its provisions will be void (CB cl. 579).

Cl. 580 : Operation of Life Insurance Act

1267D. Nothing in the CB will affect any of the provisions of the Commonwealth Life Insurance Act 1945.

Cl. 581 : Operation of Workmen's Compensation Supplementation Fund Ordinance

1267E. CB cls. 437 to 450 will apply subject to the provisions of s. 40 of the Workers Compensation Supplementation Fund Ordinance 1980.

COMPANIES BILL SCHEDULES

1268. The Companies Bill contains the following Schedules:

- Schedule 1 : Repealed Ordinances
- Schedule 2 : Powers
- Schedule 3 : Table A : Regulations for management of a company limited by shares
Table B : Regulations for management of a no liability company
- Schedule 4 : Forms of transfer of marketable securities
- Schedule 5 : Order of priority of registrable charges

1269. Schedules 4 and 5 are new. The other Schedules set out above are based on the corresponding Schedules to the ICAC CAs.

1270. The ICAC CAs Schedules that have been omitted, and the reasons for their omission, are as follows:

- Second Schedule : This Schedule, which deals with fees payable under the CAs, has been replaced by the Companies (Fees) Bill and the Companies (Fees) Regulations.

- Fifth Schedule : The contents of this Schedule, which deals with prospectuses, are to be prescribed by regulations (see CB para. 98(1)(e)), except in the case of certain matters which have now been incorporated in the CB - see the section of this ex memo dealing with cl. 98.

- Sixth Schedule : This Schedule, which deals with statements in lieu of prospectuses, has been omitted along with ss 50 to 52 of the ICAC CAs - see the introduction to the section of this ex memo dealing with Division 2 of Part IV.

- Seventh Schedule : The contents of this Schedule, which deals with statements to be issued in relation to the issue of prescribed interests, are to be prescribed by regulation - see CB s-cl. 170(4).

- Eighth Schedule : The contents of this Schedule, which deals with the contents and form of company annual returns, are to be prescribed by regulation - see (s-cl. 263(1).

- Ninth Schedule : The contents of this Schedule, which deals with the content of company accounts and group accounts, are to be prescribed by regulation - see CB s-cl. 269(8).

- Tenth Schedule : This Schedule, which deals with takeovers, has been replaced by Schedules to the C

SCHEDULE 1

Repealed Ordinances

1271. Schedule 1 sets out the ACT Ordinances that will be repealed when the CB comes into operation (see CB cl. 4).

SCHEDULE 2

Powers

1272. Schedule 3 sets out the general powers of a company. Unless expressly excluded by the memorandum or articles of the company, a company will have these powers in addition to the powers set out in CB cl. 67.

1273. This Schedule is virtually identical to the Third Schedule to the ICAC CAs.

SCHEDULE 3

Table A : Regulations for Management of a Company Limited by Shares

Table B : Regulations for Management of a No Liability Company

1274. A company will be able to adopt all or any of the regulations in Table A of Schedule 3; a no liability company will be able to adopt all or any of the regulations in Table B of Schedule 3 . These articles will apply automatically to such companies except insofar as the articles of the company exclude or modify the regulations (see CB cl. 75).

1275. Schedule 3 to the CB is based on the Fourth Schedule to ICAC CAs except that:

(a) There are new interpretation provisions:-

Table A : s-regs 1(2), (3);

Table B : s-regs 1(2), (3);

(b) Changes have been made to the provisions dealing with general meetings:-

Table A regs 40, 41;

Table B : regs 24, 25.

(c) Changes have been made to the provisions dealing with powers and duties of directors:-

Table A : reg. 66;

Table B : reg. 50.

- (d) Changes have been made to the provisions dealing with the signing of resolutions by directors:-

Table A: reg 77;

Table B: reg 61.

- (e) Changes have been made to the provision dealing with the inspection of records (previously titled 'Accounts').

Table A: reg 85;

Table B: reg 69.

SCHEDULE 4

Forms of Transfer of Marketable Securities

1276. Schedule 4 sets out forms for the transfer of marketable securities. All forms in this Schedule are based on the corresponding forms in the existing marketable securities legislation of the 6 States and the 2 mainland Territories.

1277. However, the wording of Forms 8 to 11 inclusive (which deal with transfers involving authorized trustee corporations) have been altered slightly to take account of amendments made to the provisions relating to transfers by authorized trustee corporations (see CB cl 192).

SCHEDULE 5 : ORDER OF PRIORITY OF REGISTRABLE CHARGES

Introductory Note

1278. The priorities as between registrable charges are out in Schedule 5.

1279. The policy issues involved as to which charges should take priority over other charges have been generally resolved along the lines of the Eggleston Committee's draft schedule priorities. However, unlike the Eggleston Committee's draft schedule, the CB does not purport to determine priorities as between registrable charges and other unregistrable interests in the property of a company.

Cl. 1 : priority given to a registered charge

1280. Registered charges will take precedence inter se according to the times of registration unless the later registered charge was created earlier and the holder of the prior registered charge is proved to have had notice of it when he took his charge (CB Schedule 5 paras 1(1)(a), 1(2)(a) and 1(1) - based on Eggleston Committee's draft schedule paras 2(a) and 3(c)). In certain circumstances, registered charges will also not take precedence inter se according to the times of registration where the earlier charge is a floating charge and the later registered charge is a fixed charge - see CB s-cl. 204(3).

1281. A registered charge takes precedence over an earlier created unregistered charge unless the holder of the registered charge is proved to have had notice of the earlier unregistered charge when he took his charge (CB Schedule 5 paras 1(1)(b) and 1(2)(b) - based on Eggleston Committee's draft schedule paras 2(a) and 3(c)).

1282. Priorities as between registered charges and other unregistrable interests in the property (such as interests acquired by a retail buyer and stockbrokers' liens over shares) will be left to be determined under general law (cf. Eggleston Committee's draft schedule paras 2(b) and 3(b)). In line with this policy, CB Schedule 5 does not contain any reference to competition between holders of registered charges and execution creditors although this omission would not have any effect on the general law: a registered charge will not take precedence over the claim of an execution creditor under a prior levied execution.

1283. CB Schedule 5 does not contain any reference to competition between registered charges and claims in liquidation. This issue is covered in CB cl. 205. If liquidation or official management occurs then a registrable charge will be void as a security on the property of the company as against the liquidator or official manager unless notice is lodged with the NCSC within the specified time (see CB s-cl. 205(1) and (2)) or at least six months before the commencement of the winding-up or official management. However, the charge

will not be void as a security if the 45 day or other period has not elapsed when the winding up or official management commences (CB s-cl. 205(1) of ICAC CA s. 100(1)) (see also ex memo paras 497 to 499; cf. Eggleston Committee's draft schedule paras 2(d) and 3(d)).

Cl. 2 : priority given to an unregistered charge

1284. An unregistered charge will take precedence over a subsequently created registered charge if the holder of the registered charge is proved to have had notice of the earlier unregistered charge when he took his charge (CB Schedule 5 para 2(a) - based on Eggleston Committee's draft schedule paras 4(b) and 5(b)).

1285. Unregistered (but registrable) charges will take precedence inter se according to the times of their creation, regardless of notice (CB Schedule 5 para 2(b) - based on Eggleston Committee's draft schedule para 4(a)).

1286. Priorities as between unregistered (but registrable) charges and other unregistrable interests will be left to be determined under general law (cf. Eggleston Committee's draft schedule paras 4(c), 5(a) and 5(c)). As to competition between unregistered charges and claims in a liquidation see CB cl. 2 and ex memo paras 496 to 499 and 1151.

C1 3 : Tacking

1287. If a registrable charge over company property secures any liability that is not fixed or capable of being ascertained at the time that the charge is registered, then whether or not any priority accorded by Schedule 5 to the charge over another charge will extend to that liability (another charge will extend to that liability) may depend on 1 or more of the following factors:

- (a) whether or not the liability is of an unspecified amount;
- (b) whether or not the chargee has actual knowledge of the other charge;
- (c) if the liability is only a liability up to a specified maximum amount, whether or not the NCSC has been notified of the nature of the liability and the amount so specified;
- (d) whether or not the liability becomes fixed or capable of being ascertained before the chargee first learns of the other charge; and
- (e) whether or not the charge can be required, in certain circumstances, to make further advances.

1288. If, for example, a company gives security for an overdraft which provides for the possibility of the lender making further advances of an unspecified amount and, whether before or after the charge is registered, the lender makes further advances, even though under no obligation to do so then the

lender will be entitled to repayment of those further advances in priority to the claims of, say, the holder of a subsequently registered charge only if the advances had been made prior to the first lender learning of the existence of the other charge. (CB Schedule 5 -s-cl. 3(2) and para 3(4)(c)).

1289. If, however, the terms of the charge providing for further advances actually require the chargee to make those subsequent advances, then the lender will be entitled to repayment of those further advances in priority to the claims of the holder of the subsequently registered charge even if the advances are made after the person making them knew of the existence of the subsequently registered charge. (CB Schedule 5 para 3(4)(d)).

1290. Similar principles will apply if the charge secures a liability which is not capable of being ascertained at the time that the charge is registered, although the maximum possible amount of the liability is fixed, but that that maximum amount is not notified to the NCSC (CB Schedule 5 para 3(4)(d)).

1291. If the nature of that liability and the maximum amount are notified to the Commission then the priority accorded by the Schedule to the charge over another charge, extends to the liability even if it becomes a fixed liability only after registration and even if, when it becomes a fixed liability, the chargee knows of the existence of the other charge (CB Schedule 5 s-cl. 3(3)).

1292. Whereas priorities as between registered charges will generally be affected by constructive notice on the part of chargees of the existence of prior created charges (see CB Schedule 5 cls. 1 and 4), actual knowledge is the factor which will determine whether or not the priority accorded to a charge by cl. 1 extends to a liability that is not fixed or capable of being ascertained at the time that the charge is registered. This is to avoid the need for example, for lenders making further advances under the terms of a registered charge to be constantly searching the register of charges (given that they would be fixed with constructive notice of details on the register).

Cl. 4 : notice and knowledge

1293. A reference in CB Schedule 5 to a person having "notice" of a charge will include a person having constructive notice. The meaning of "constructive notice" will be left to be determined under the general law. (cf. Eggleston Committee's draft schedule para 7 which was concerned not simply with the notice of other charges deemed to be obtained by holders of registrable charges but also notice on the part of person having other unregistrable interests in property of the company.)

Charges existing when property acquired

1294. A charge existing when property is acquired will be treated as if it were not registrable until the charge is registered but when the charge is registered it has priority

accorded as from the time of registration. This registration will not prejudice any rights of the charge prior to registration. Provisions to this effect, based on cl. 8 of the Priorities Schedule to the Eggleston Committee's redraft, are contained in CB s-cl. 199(3) and (4) rather than in Schedule 5. See ex memo para 477.

Waiver of priority

1295. Chargees will be able to consent to a waiver or variation of the priority to which their charges would otherwise be entitled. A provision to this effect, based generally on cl. 1 of the Priorities Schedule to the Eggleston committee's redraft is contained in CB s-cl. 204(2) rather than in Schedule 5.

1296. A chargee of a floating charge will be deemed to have consented to a subsequent registered fixed charge created before the floating charge crystallises taking priority unless the chargee of the floating charge takes certain action. A provision to this effect is contained in CB s-cl. 204(3). There was no counterpart in the Eggleston Committee recommendations.

Cls 5 and 6

1297. These are interpretation provisions relating to the categories of charges.

ACCOUNTS AND GROUP ACCOUNTS

Introductory Note

1298. The provisions in Schedule 6 to the August Bill, which related to accounts and group accounts, were based on the Ninth Schedule to the ICAC CAs. That Schedule is basically uniform in all jurisdictions except Tasmania, which has not introduced the accounts and audit amendments that other jurisdictions introduced around 1970 following the First Interim Report of the Eggleston Committee.

1299. It has now been decided that these provisions should be set out in Regulations to facilitate amendments to take account of changes in accounting standards etc.

1300. It is envisaged that the initial Regulations will be based on the ICAC CAs Ninth Schedule with the following amendments:-

- (a) particulars of income received, or due and receivable, as interest on debentures, deposits, loans or advances from "other persons" will also be required (based on ICAC CAS Ninth Schedule para 2(1)(b) as amended by this requirement.)
- (b) it will not be necessary to state whether any profit or loss on sale of assets (other than current assets, has been brought into account in determining the net

amount of the profit or loss of the company or of the company and its subsidiaries (cf. ICAC CAs Ninth Schedule paras 2(1)(c) and (f)).

- (c) particulars of the amount of debts on which interest or credit charges that is or are due has or have not been brought fully to account in the profit and loss account will be required (based on ICAC CAs Ninth Schedule 2(1)(j) as amended by this requirement).
- (d) it will not be necessary to disclose emoluments received by a non-resident director of the company from a holding company that is formed or incorporated outside Australia (cf. ICAC CAs Ninth Schedule para 2(1)(1)).
- (e) particulars of the nominal value of shares in the capital of the company in respect of which options are outstanding, the amount of premium (if any) payable in respect of those shares and particulars of the options will be required.
- (f) particulars of the amount of the discount at which preference shares are to be redeemed or are liable to be redeemed will now be required (based on ICAC CAS Ninth Schedule para 5(1)(b) as amended by this requirement).

- (g) the requirements on disclosure of stock on hand and work in progress in ICAC CAS Ninth Schedule paras. 5(4)(b) and (c) have been combined and expanded and will now require the disclosure, where appropriate, of raw materials, finished goods, work in progress and other stock.
- (h) particulars of options held over shares in the holding company, subsidiaries, other related corporations and other corporations will now be required.
- (i) the amounts of interest due from the holding company, subsidiaries, other related corporations and other person will be required to be disclosed if that interest has not been brought to account in the profit and loss account.
- j) particulars will be required in respect of:-
- (i) loans made by the company of its subsidiaries or both to the trustee of a trust under which a director of the company of a related company or the spouse or other relative of such a director has a beneficial interest; and
 - (ii) such loans guaranteed or secured by the company or its subsidiaries or both.

Based on ICAC CAs Ninth Schedule para 5(4)(i) as amended by this requirement).

- (k) particulars of the extent to which each corporation in the group contributed to the consolidated profit or loss will be required (cf. ICAC CAs para 162A(2)(c)).
- (l) estimates will now also be required in the balance sheets of borrowing and guarantor corporations of amounts payable by, and debts payable to, the company within 1 year after the end of the financial year (based on ICAC CAs Ninth Schedule cl. 8 as amended by this requirement).
- (m) the name of a company's ultimate holding company and its country of incorporation will be required (cf. ICAC CAs s-sec 162A(5)).
- (n) the requirement to provide comparative figures in balance sheets and profit and loss statements has been modified to make clear that comparative figures also have to be provided in respect of notes to those documents (based on ICAC CAs Ninth Schedule cl 11 as amended by this requirement).

- (o) the requirement that unearned income be deducted from the gross amount of debts owing to the company or the company and its subsidiaries has been modified to also require the deduction of unearned income from each class of debt referred to in para 1300(1) of this ex memo (based on ICAC CAs Ninth Schedule s.cl 12(2) as amended by this requirement).



APPENDIX A

OFFENCES UNDER THE CB

1303. The offences under the CB can be analysed into the following groups:-

- A - serious offences relating to management of the company;
- B - offences relating to the raising of funds;
- C - offences relating to maintenance of capital;
- D - offences related to inspection procedures and special investigations;
- E - offences relating to breach of requirements arising from corporate status of company and less serious offences relating to management of company;
- F - offences relating to auditors and liquidators;
- G - offences relating to failure to comply with directions of the Supreme Court or of the NCSC;
- H - offences relating to the keeping of registers; and
- I - offences relating to the lodgment of documents or the provision of information to the public.

PART A : Serious offences relating to management of company

1304. Group A - Offences which carry penalty of \$20,000 or 5 years imprisonment or both.

	<u>Clause</u>		<u>Subject of offence</u>
1981	August		
Bill	CB	ED	
229	229	124	DUTY AND LIABILITY OF OFFICERS (1) failing to act honestly in exercise of powers and discharge of duties where there is an intent to deceive or defraud the company, members or creditors or creditors of any other person (3) improper use of information acquired by virtue of position (4) improper use of position
230	230	125	LOANS TO DIRECTORS (5)(e) making a loan, giving a guarantee or providing security to a director or relative thereof with intent to deceive or defraud company members or creditors or creditors of any other person
276	276	164B	FAILURE TO COMPLY WITH THIS DIVISION (1)(b) acting in contravention of Part VI Div. 2 with intent to deceive or defraud members or creditors of the company or creditors of any other person

1305. Group B - Offences which carry penalty of \$10,000 or 1 years imprisonment or both.

	<u>Clause</u>		<u>Subject of offence</u>
1981	August		
Bill	CB	ED	
554	554	374A	OFFENCES BY OFFICERS OF CERTAIN COMPANIES (1) failure to disclose information or to deliver property and books and concealing property, books or information
556	556	374C	OFFENCES RELATING TO INCURRING OF DEBTS OR FRAUDULENT CONDUCT (5) company acting with intent to defraud creditors of the company or creditors of another person
560	560	374FA	FALSIFICATION OF BOOKS (1) destruction or concealment of documents (2) offences in relation to computer records
561	561	374G	FRAUDS BY OFFICERS (a) by false pretences, inducing a person to give credit to the company (b) with intent to defraud the company, making a gift or transfer of or charge on property of the company

(c) with intent to defraud the company,
concealing or removing any part of the
property of the company

563 563 375

FALSE AND MISLEADING STATEMENTS

(1) advertising, issuing or publishing any
statement of the amount of capital that is
misleading or in which the amount of nominal
or authorized capital is stated without the
words "nominal or authorized", or in which
the amount of capital or authorized or
subscribed capital is stated, but the amount
of any charge on uncalled capital is not
stated

(2) making of false or misleading statement
or omission of matter without which document
is misleading

564 564 375A

FALSE REPORTS

(1) furnishing reports relating to the
affairs of the corporation

1306. Group C - Offences which carry penalty of \$5000 or 1 years imprisonment or both.

	<u>Clause</u>		<u>Subject of offence</u>
1981	August		
Bill	CB	ED	
227	227	122	CERTAIN PERSONS NOT TO MANAGE CORPORATIONS (1) without court leave acting as director or promoter while an insolvent under administraton (2) without court leave acting a director or promoter within 5 years of conviction (4) failing to comply with limitations or conditions imposed by the Court when granti leave to manage a corporation.
230	230	125	LOANS TO DIRECTORS (8), (9) furnishing false certificate
499	449	343	PENALTIES failure by investment company to comply wit Part XIII Div. 2
554	554	374A	OFFENCES BY OFFICERS OF CERTAIN COMPANIES (5) receiving property knowing it to be pawned or pledged

- 555 555 374B LIABILITY WHERE PROPER ACCOUNTS NOT KEPT
(1) failing to comply with (CB cl. 267 during
the whole or any part of the relevant period
of 2 years
- 556 556 374C OFFENCES RELATING TO INCURRING OF DEBTS OR
FRAUDULENT CONDUCT
(1) offences relating to incurring of debts
when company unable to pay
- 562 562 374H COURT MAY DISQUALIFY PERSON FROM ACTING AS
DIRECTOR, &c., IN CERTAIN CIRCUMSTANCES
(3) (4) failing to comply with court order
disqualifying person from acting as director
- 563 563 375 FALSE AND MISLEADING STATEMENTS
(3) making a statement without having taken
reasonable steps to ensure statement true and
complete
- 564 564 375A FALSE REPORTS
(2) making or furnishing a statement or
report without having taken reasonable steps
to ensure statement true and complete

1307. Group D - Offences which carry penalty of \$5000

	<u>Clause</u>		<u>Subject of offence</u>
1981	August		
Bill	CB	ED	
229	229	124	DUTY AND LIABILITY OF OFFICERS
			(1) failing to act honestly in exercise of powers and discharge of duties where there is no intent to deceive or defraud the company members or creditors of the company or creditors of any other person
			(2) failing to exercise the skill of a reasonably prudent person
276	276	164B	FAILURE TO COMPLY WITH THIS DIVISION
			1(a) failure by director to comply with Division 2 of Part VI where there is no intent to deceive or defraud the company or creditors of any other person.

PART B : Offences relating to the raising of funds

1308. Group A - Offences which carry penalty of \$20,000 or 5 years' imprisonment or both.

	<u>Clause</u>		<u>Subject of offence</u>
1981	August		
Bill	CB	ED	
96	96	37	FORMS OF APPLICATION FOR SHARES OR DEBENTURES TO BE ATTACHED TO PROSPECTUS (3) failing to issue prospectus with form of application for shares or debentures
97	97	38	INVITATIONS OR OFFERS IN RELATION TO BORROWINGS BY A CORPORATION (10)(a) failing to comply with requirements that a prospectus be registered with the NCSC before any invitation or offer is made
103	103	42	REGISTRATION OF PROSEPECTUSES (3) issuing unregistered prospectus
108	108	47	CRIMINAL LIABILITY FOR UNTRUE STATEMENT OR NON-DISCLOSURE IN PROSPECTUS (1) issuing prospectus containing any untrue statement or non-disclosure

174 174 86 PENALTY FOR BREACH OF CERTAIN PROVISIONS OR
CONVENANTS
(1) failing to comply with certain section
or with a covenant in an approved deed

1309. Group B - Offences which carry penalty of \$5000 or 1
year's imprisonment or both.

	<u>Clause</u>		<u>Subject of offence</u>
1981	August		
Bill	CB	ED	
105	105	44	ALLOTMENT OR ISSUE OF SHARES OR DEBENTURES WHERE PROSPECTUS INDICATES APPLICATION FOR QUOTATION ON STOCK MARKET (8) issuing a prospectus containing untrue statement re permission for quotation on stock market

1310. Group C - Offences which carry penalty of \$2500 or 6
months' imprisonment or both.

	<u>Clause</u>		<u>Subject of offence</u>
1981	August		
Bill	CB	ED	
97	97	38	INVITATIONS OR OFFERS IN RELATION TO BORROWINGS BY A CORPORATION (10)(b) issuing invitation without having

registered prospectus or failing to issue
document acknowledging indebtedness

- 98 98 39 CONTENTS OF PROSPECTUSES
(7) issue of prospectus which does not
comply with requirements of the Act
- 99 99 40 CERTAIN NOTICES, &c., NOT TO BE PUBLISHED
(7) publishing notices offering for
subscription or purchase shares in or
debentures of a corporation or proposed
corporation
- 100 100 40A CERTAIN REPORTS REFERRING TO PROSPECTUSES NOT
TO BE PUBLISHED
(6) publishing reports which are reasonably
likely to induce persons to apply for shares
or debentures referred to in issued or
pending prospectuses
- 102 102 41 RETENTION OF OVER-SUBSCRIPTIONS IN DEBENTURES
ISSUES
over-subscription cannot be accepted or
retained unless the right to accept or retain
has been expressly reserved (fine only)
- 105 105 44 ALLOTMENT OR ISSUE OF SHARES OR DEBENTURES
WHERE PROSPECTUS INDICATES APPLICATION FOR
QUOTATION ON STOCK MARKET
(6) failing to keep money received pursuant

to prospectus in separate bank account
(7) failing to comply with undertaking
to stock exchange

106	106	45	EXPERT'S CONSENT TO ISSUE OF PROSPECTUS CONTAINING STATEMENT BY HIM (2) issuing prospectus with statement by expert where his consent not given
110	109	48	PROHIBITION OF ALLOTMENT UNLESS MINIMUM SUBSCRIPTION RECEIVED (6) failing to repay money received from applicants for shares (without interest) within 7 days of becoming liable to do so (12) allotting shares or debentures on the basis of a prospectus after the expiration 6 months from the issue of the prospectus
111	110	49	APPLICATION MONEYS TO BE HELD IN TRUST UPON ALLOTMENT (2) failing to keep application moneys in separate bank account upon trust for the applicant
152	152	74	QUALIFICATIONS OF TRUSTEE FOR DEBENTURE HOLDERS (9) failure to appoint trustee for debenture holders

154 154 74B CONTENTS OF TRUST DEED
(5)&(6) (5) failure to express in debenture or trust deed limitation on amount that borrowing corporation may borrow

552 552 374 RESTRICTION ON OFFERING SHARES, DEBENTURES, &c., FOR SUBSCRIPTION OR PURCHASE
(10) making an offer (in writing) of shares for purchase without prescribed statement or prospectus, or going from place to place offering shares for subscription or purchase

1311. Group D - Offences which carry penalty of \$1000 or 3 months imprisonment or both.

	<u>Clause</u>	<u>Subject of offence</u>
1981	August	
Bill	CB ED	
101	101 40B	EVIDENTIARY PROVISIONS, &c. (4) failing to deliver to the NCSC the certificate specifying directors' names or exempting a notice from application of s-cl. 99(4) or 100(4).

1312. Group E - Offences which carry penalty of \$500.

	<u>Clause</u>		<u>Subject of offence</u>
1981	August		
Bill	CB	ED	
110	109	48	PROHIBITION OF ALLOTMENT UNLESS MINIMUM SUBSCRIPTION RECEIVED (1) making allotment where minimum subscription not subscribed or where sum payable not received

PART C : Offences relating to maintenance of capital

1313. Group A - Offences which carry penalty of \$10,000 or 2 years imprisonment or both.

	<u>Clause</u>		<u>Subject of offence</u>
1981	August		
Bill	CB	ED	
123	123	64	SPECIAL RESOLUTION FOR REDUCTION OF SHARE CAPITAL (11) concealment of name of creditor entitled to object to a reduction in the share capital of the company or misrepresentation of nature or amount of the debt or claim of any creditor of the company
129	129	67	COMPANY FINANCING DEALINGS IN ITS SHARES, &c. (5) giving financial assistance in connection with acquisition of shares
565	565	376	DIVIDENDS PAYABLE FROM PROFITS ONLY (2) paying dividend out of an amount which is known not to be profits.

1314. Group B - Offences which carry penalty of \$1000 or months imprisonment or both.

	<u>Clause</u>		<u>Subject of offence</u>
1981	August		
Bill	CB	ED	
116	116	57A	RESTRICTION ON APPLICATION OF CAPITAL OF COMPANY (3) applying shares or capital money either directly or indirectly in making a payment to a person in consideration of his subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares in the company

PART D : Offences related to inspection procedures and special investigations

1315. Group A - Offences which carry penalty of \$20,000 or 5 years imprisonment or both.

	<u>Clause</u>		<u>Subject of offence</u>
1981	August		
Bill	CB	ED	
310	310	179A	CONCEALING, &c., OF BOOKS OF CORPORATION (1) concealing, destroying, mutilating or altering books of a corporation under investigation

1316. Group B - Offences which carry penalty of \$10,000 of 2 years imprisonment or both.

	<u>Clause</u>		<u>Subject of offence</u>
1981	August		
Bill	CB	ED	
14	14	74A	OFFENCES (1) refusing or failing to furnish information (2) furnishing information or making a statement that is false or misleading in a material particular

(3) (4) obstructing or hindering the NCSC or person executing a warrant

296 296 174 EXAMINATION OF OFFICERS
(2) failing to produce books or give assistance
(3) furnishing information that is false misleading in material particular
(4) making a statement that is false or misleading in a material particular

541 541 367A EXAMINATION OF PERSONS CONCERNED WITH CORPORATIONS
(6) failing to attend before the Court
(7) refusing to take an oath or make an affirmation
(8) refusing or failing to answer a question
(9) refusing or failing to produce books
(11) making a false or misleading statement

1317. Group C - Offences which carry penalty of \$2,500 or months imprisonment or both.

	<u>Clause</u>	<u>Subject of offence</u>
1981	August	
Bill	CB ED	
14	14 7AA	OFFENCES (5) occupier or person in charge of premises

failing to provide all reasonable facilities
and assistance to person executing a warrant

311 311 179B POWER OF COMMISSION TO MAKE CERTAIN ORDERS
(4) failing to comply with order of the
NCSC in relation to an investigation

1318. Group D - Offences which carry penalty of \$1000 or 3
months imprisonment of both.

	<u>Clause</u>		<u>Subject of offence</u>
1981	August		
Bill	CB	ED	
16	16	7B	PRIVILEGE (1) failing to furnish Commission with name of person to whom or by whom communication made
296	296	174	EXAMINATION OF OFFICERS (5) refusing to take an oath or make an affirmation
298	298	176	RECORD OF EXAMINATION (4) non-compliance by interviewee with conditions attached to receiving copy of record of examination

(7) improper use of record of examination
legal practitioner

(9) non-compliance by any other person with
conditions attached to receiving copy of
record of examination

308 308 178B PRIVILEGED COMMUNICATIONS
failing to furnish name and address of person
to whom or by whom communication made

PART E : Offences relating to breach of requirements arising from corporate status of company and less serious offences relating to management of company

1319. Group A - Offences which carry penalty of \$2500 or 6 months imprisonment or both.

	<u>Clause</u>		<u>Subject of offence</u>
1981	August		
Bill	CB	ED	
175	175	87	WINDING UP OF SCHEMES, &c. (1) failing to call meeting where management company is in liquidation or has ceased to carry on business (fine only) (4) failing to apply to the Court for an order confirming a resolution of the holders of prescribed interest (fine only)
198	199	99L	OFFENCES fixing stamp to instrument that does not relate to sale, executing and lodging instruments that are not sufficient instruments of transfer
233	233	129	PAYMENTS FOR LOSS OF OR RETIREMENT FROM OFFICE failure to disclose to members

particulars of compensation to
directors for loss of, or retirement
from, office

267	267	161A	ACCOUNTS TO BE KEPT
	(11)		(11) failure to keep accounts and to have them available for inspection
375	375	234	STATEMENT OF COMPANY'S AFFAIRS TO BE SUBMITTED TO LIQUIDATOR
	(9)		(10) failing to submit statement of company's affairs to liquidator

1320. Group B - Offences which carry penalty of \$1000 or 3 months imprisonment or both

	<u>Clause</u>		<u>Subject of offence</u>
1981	August		
Bill	CB	ED	
71	71	27	DEFAULT IN COMPLYING WITH REQUIREMENTS AS PROPRIETARY COMPANIES
			(7) arranging any subscription for shares or debentures of or any deposit of money w a proprietary company through a solicitor, broker, agent or any other person who invi the public to make use of his services in arranging investments or holds himself out the public as being in a position to arran investments

(8) failing to comply with any restriction, limitation or prohibition of a kind specified in s-cl. 34(1) that is included or deemed to be included in the memorandum or articles

144 144 69L OFFENCES AGAINST CERTAIN SECTIONS
failure by substantial share holder to give notice of his interests (cl. 137) of changes in his interests (cl. 138) and of ceasing to be substantial shareholder (cl. 139).

146 146 69N POWERS OF COURT WITH RESPECT TO DEFAULTING SUBSTANTIAL SHAREHOLDER
(10) contravention of or failure to comply with court order
(11) where offence under (11) committed by corporation, officer in default guilty of an offence

218 218 113 PUBLICATION OF NAME
(1) failure by company to have its name on seal, stationery, &c. (fine only)
(2) use or issue of stationery &c. on which company's name does not appear (fine only)
(4) failure by company to have its name and "Registered Office" (if applicable) on outside of every office (fine only)

- 222 222 117 VACATION OF OFFICE
(5) a person whose office is vacated
purporting to act as a director
- 230 230 125 LOANS TO DIRECTORS
(5)(d) making a loan, giving a guarantee or
providing security to a director or relative
thereof (no intent to deceive or defraud the
company)
- 232 232 127 GENERAL DUTY TO MAKE DISCLOSURE
failure to disclose particulars relating to
shares &c, and changes thereto, and to give
notice of birth date
- 240 240 136 ANNUAL GENERAL MEETING
(9) failing to hold annual general meeting
or to comply with conditions imposed by
Commission
- 253 253 148 MINUTES OF PROCEEDINGS
(4) failing to keep minutes of all
proceedings of general meetings and of
meetings of directors and of executive
officers

- 261 261 156A POWER OF COMPANY TO OBTAIN INFORMATION AS TO
BENEFICIAL OWNERSHIP OF ITS SHARES
(6) failing to comply with a notice from
company requiring particulars of persons with
relevant interests
- 274 274 164 MEMBERS OF COMPANY ENTITLED TO BALANCE-SHEET,
&c.
(1) failing to send accounts and statements
to persons entitled to receive notice of
general meetings (fine only)
(2) failing to comply with request to supply
past accounts and statements (fine only)
- 327 327 192 STATEMENT THAT RECEIVER APPOINTED
(2) failing to have statement on business
documents that a receiver, or a receiver
and manager, as the case may be, has been
appointed (fine only)
- 335 335 199 POWER OF COMPANY TO CALL MEETING OF CREDITORS
TO APPOINT OFFICIAL MANAGER
from (16), (17) & (18)
(1) failing to call meeting of
creditors to appoint official manager
(4) failing to prepare statement of
affairs
(5) failing to furnish certificate

(6) failing to give grounds for belief that statement does not give a true fair view of the company's affairs

(7) furnishing certificate without making reasonable inquiries

(10) failing to attach summary and certificates to notice, to notify that statement available for inspection or that request can be made for a copy, failing to comply with such a request

(15) failing to lodge copy of notice of meeting with certified copy of statement of affairs attached

336 336 200 STATEMENT OF AFFAIRS OF COMPANY TO BE SUBMITTED TO MEETING OF CREDITORS OF COMPANY
(3) failing to appoint director to attend meeting of creditors or to submit statement of company's affairs

356 356 213 NOTIFICATION THAT CORPORATION IS UNDER OFFICIAL MANAGEMENT
(1) failing to have "under official management" on all business documents

398 398 260 MEETING OF CREDITORS
from (4)
(1) failing to convene meeting of creditors

- (2) failing to give 7 days' notice of meeting, to send statement of affairs
- (4) failing to present full statement and lodge copy of statement with Commission and to appoint director to attend meeting
- (5) failure by director and secretary to attend and disclose affairs of the company

424 424 283 NOTIFICATION THAT A CORPORATION IS IN LIQUIDATION

- (2) failing to have "in liquidation" on business documents

508 508 343E NAME OF RECOGNIZED COMPANY OR RECOGNIZED FOREIGN COMPANY TO BE APPROVED

- (3) carrying on business with unapproved name or with name other than approved name

509 509 343F OBLIGATION OF RECOGNIZED COMPANY OR RECOGNIZED FOREIGN COMPANY TO EXHIBIT NAME

- (1) failing to have name on business documents and failing to disclose whether liability is limited (fine only)
- (2) improper use of stationary etc on which company's name does not appear (fine only)
- (4) failure to disclose place of incorporation and "Principal office" (fine only)

517 517 350 OBLIGATION TO EXHIBIT NAME OF FOREIGN
COMPANY, &c.
(1) failing to exhibit name and to have name
on business documents
(2) improper use of stationary etc on which
company's name does not appear (fine only)
(4) failure to disclose place of
incorporation and "Principal office" (fine
only)

566 566 377 RESTRICTION ON USE OF WORDS "LIMITED" AND
"NO LIABILITY"
using "Limited" or "No Liability" in name
where not incorporated with limited or no
liability

1321. Group C - Offences which carry penalty of \$500

	<u>Clause</u>	<u>Subject of offence</u>
1981	August	
Bill	CB ED	

33 33 14 FORMATION OF COMPANIES
(3) forming an association or partnership
consisting of more than 20 persons that has
for its object the acquisition of gain which
is not incorporated or formed pursuant to
another Act or letters patent

- 72 72 27A (4) failing to lodge, within 14 days, copy of any document altering the memorandum of a company
- 82 82 36 PROHIBITION OF CARRYING ON BUSINESS WITH FEWER THAN STATUTORY MINIMUM NUMBER OF MEMBERS
(1) proprietary company carrying on business for more than 6 months with less than 2 members and any other company carrying on business for more than 6 months with less than 5 members
- 88 88 36F ALTERATIONS TO CONSTITUENT DOCUMENTS OF FOREIGN CORPORATIONS
(1), (2) and (3) (8) failing to make necessary alterations to constituent documents, to use the same rate to convert amounts of money to Australian currency, and to apply to the Court for approval of the altered constituent documents when directed to do so by the Commission.
- 128 128 66 RIGHTS OF HOLDERS OF PREFERENCE SHARES TO BE SET OUT IN MEMORANDUM OR ARTICLES
(2) allotting preference shares or converting shares to preference share where the rights of holder of those shares are not set out in the articles or memorandum

180	180	92	CERTIFICATE TO BE EVIDENCE OF TITLE (4) issuing a certificate not under the common seal of the company and not containing required particulars
188	188	99	DUTIES OF COMPANY WITH RESPECT TO ISSUE OF CERTIFICATES (3) failing to have documents relating to allotment of shares or issue of debentures read within a specified time and failing to send them to the relevant person (4) failing to comply with court order directing company to make good any default
219	219	114	DIRECTORS (5) public company failing to have at least 3 directors, at least 2 being natural persons ordinarily residing in Australia, and proprietary company failing to have at least 2 directors, at least one being a natural person ordinarily residing in Australia
228	228	123	DISCLOSURE OF INTERESTS IN CONTRACTS, PROPERTY, OFFICE &c. failure by director to disclose interests in contracts, property, offices, &c.

- 235 235 131 POWERS TO REQUIRE DISCLOSURE OF DIRECTORS' EMOLUMENTS .
(2) failing to prepare audited statement showing total amount of directors' emoluments, to convene a general meeting, to send a copy of the statement to every person entitled to receive notice of general meetings and to lay the statement before the general meeting
- 236 236 132 SECRETARY
(8) failing to have at least one secretary being a natural person ordinarily resident in the Territory appointed by the directors; secretary failing to be present at registered office; secretary acting as director and secretary where Act requires thing to be done by director and secretary
- 239 239 135 STATUTORY MEETING AND STATUTORY REPORT
(10) failure to hold statutory meeting and to present statutory report
- 245 245 141 PROXIES
(5) in the case of a public company having a share capital, failing to include in notice convening a meeting a statement that a member entitled to attend and vote is entitled to appoint not more than 2 proxies, that where

more than one proxy is appointed, each proxy must be appointed to represent a specified proportion of the member's voting rights and that a proxy need not be a member, and, in the case of a public company not having a share capital, failing to include a statement that a member entitled to attend and vote is entitled to appoint a proxy and that the proxy must or need not be a member (as the case requires)

(6) sending notice re proxies to some members only

247	247	143	CIRCULATION OF MEMBERS' RESOLUTIONS, &c. (7) failing to circulate copy of resolution and statement relating thereto
315	315	181	POWER TO COMPROMISE WITH CREDITORS AND MEMBERS (13) (16) failing to annex copy of court order approving compromise or arrangement to every copy of memorandum or constituent documents (15) (17) failing to instruct accountants or solicitors or both to report on the proposal and to make the report available for inspection

- 316 316 182 INFORMATION AS TO COMPROMISE WITH CREDITORS
OR MEMBERS
failing to provide explanatory statement of
compromise
- 318 318 185 ACQUISITION OF SHARES OF SHAREHOLDERS
DISSENTING FORM SCHEME OR CONTRACT APPROVED
BY MAJORITY
(10) failing to keep sums received in
separate bank account in trust for the
persons entitled to shares
- 328 328 193 PROVISION AS TO INFORMATION WHERE RECEIVER
APPOINTED
(1) failing to serve on the company notice
of appointment as receiver; failing to make
out and submit to receiver a statement as to
affairs of the company; failing to lodge copy
of statement and any necessary comments on
statement, to send company copy of comments
(if any) or notice that there are not comments
and in particular circumstances to send
trustees copy of statement and comments
(3) failing to lodge copy of notice given by
receiver or copy of court order

- 329 329 194 SPECIAL PROVISIONS AS TO STATEMENT SUBMITTED
TO RECEIVER
- (1) failing to include specified information in statement required by cl. 328
 - (2) failing to have statement verified by statutory declaration
-
- 342 342 203A SIX MONTHLY MEETINGS OF CREDITORS AND MEMBERS
- (1) failing to prepare statement of assets and liabilities of the company and a report to convene a meeting of creditors and members to consider the statement and report and to cause the statement and report to be laid before the meeting
 - (4) failing to comply with meeting notice requirements
 - (5) failing to send notice to creditors and members that statement of assets and liabilities has been prepared
 - (5) failing to keep copies of statement and report and to have them available for inspection
 - (6) failing to lodge notice of holding of meeting together with a copy of each statement and report

347 347 206 DUTIES OF OFFICIAL MANAGER

- (1) failing to take into custody or under control property of company, to conduct business and management of company in manner most beneficial to interests of members and creditors, to comply with certain directions of creditors, to comply with requirements of Act relating to keeping of accounts and lodging of annual returns, to perform all other duties imposed on company or directors, under specified circumstances to convene a meeting of creditors or a meeting of members
- (3) failing to convene meeting of members to consider voluntary winding up where continuance of official management will not enable company to pay its debts
- (4) failing to convene meeting of creditors where meeting convened under sub-s. (3), to send notices to creditors and members on the same day
- (5) failing to lay before creditors full statement of company's affairs and list of creditors
- (11) failing to lodge notice of the holding of meetings and to lodge sub-s. (5) statement

410 410 271

ANNUAL MEETING OF CREDITORS

- (1) where winding up continues for more than one year, failing to convene general meeting of the company in case of members' voluntary winding up) or general meeting of company & meeting of creditors (in case of creditors' voluntary winding up) within 3 months of the end of the first year from commencement of winding up and the end of each succeeding year and failing to lay before meeting or meeting an account of acts and dealings
- (2) failing to send notices to creditors & members simultaneously

411 411 272

FINAL MEETING AND DISSOLUTION

- (1) failing to prepare account and convene meeting(s)
- (2) failing to comply with meeting notice requirements
- (3) failing to lodge return of the holding of the meeting(s) with copy of account attached
- (4) where applicable failing to lodge return with account attached stating that meeting duly convened and no quorum present
- (7) failing to lodge office copy of court order

- 479 479 323 FORFEITURE OF SHARES
(1) failing to offer shares for sale by public auction
(2) failing to advertise sale in prescribed manner
(6) failing to apply proceeds of sale in specified manner
- 512 512 346 UNREGISTERED FOREIGN COMPANY NOT TO ESTABLISH PLACE OF BUSINESS OR CARRY ON BUSINESS IN THE TERRITORY
(1) foreign company carrying on business where not registered
- 520 520 353 RESTRICTION ON USE OF CERTAIN NAMES
(5) using a name other than that under which it is registered
- 527 527 361 PENALTIES
the penalty for contravention of the Division is \$500 except where a penalty or punishment is expressly mentioned
- 567 567 378 RESTRICTION ON USE OF "PROPRIETARY"
using word "Proprietary" where requirements of proprietary companies not fulfilled.

PART F : Offences relating to auditors and liquidators

1322. Group A - Offences which carry penalty of \$10,000 or 2 years imprisonment or both

	<u>Clause</u>		<u>Subject of offence</u>
1981	August		
Bill	CB	ED	
286	286	167AA	OBSTRUCTION OF AUDITOR refusing or failing to allow auditor of corporation or of holding company to have access to records

1323. Group B - Offences which carry penalty of \$1000 or 3 months imprisonment or both

	<u>Clause</u>		<u>Subject of offence</u>
1981	August		
Bill	CB	ED	
417	417	277A	DISQUALIFICATION OF LIQUIDATORS person not registered as liquidator accepted appointment as liquidator or person accepted appointment as liquidator when not entitled to do so

559 559 374F INDUCEMENT TO BE APPOINTED LIQUIDATOR OR
OFFICIAL MANAGER
giving or agreeing to give valuable
consideration to secure own appointment or
prevent appointment of another

1324. Group C - Offences which carry penalty of \$500

	<u>Clause</u>		<u>Subject of offence</u>
1981	August		
Bill	CB	ED	
267	267	161A	ACCOUNTS TO BE KEPT (10) disclosing to a person other than a director information acquired in the course of an inspection
277	277	165	QUALIFICATIONS OF AUDITORS (1) a person consenting to be auditor when not a registered auditor or when otherwise disqualified (2) a firm consenting to be auditor when not qualified (11) where a firm consents to be appointed or acts as auditor of a company or prepares a report required by the Act to be prepared by a registered company auditor or by an auditor of a company each member for the firm is guilty of an offence

(16) wilfully disqualifying self or firm

- | | | | |
|-----|-----|------|---|
| 280 | 280 | 166 | APPOINTMENT OF AUDITORS |
| | | | (1) failing to appoint auditor within one month of incorporation |
| | | | (3) failing to appoint auditor at annual general meeting or to fill vacancies |
| | | | (5) failing to fill vacancy |
| | | | (7) appointing person or firm that has not consented to appointment |
| 281 | 281 | 166A | NOMINATION OF AUDITORS |
| | | | (1) appointing auditor where no notice or insufficient notice given |
| | | | (3) failing to send copy of notice to each person nominated, to each auditor of the company and to each person entitled to receive notice of general meetings |
| 282 | 282 | 166B | REMOVAL AND RESIGNATION OF AUDITORS |
| | | | (2) failing to advise auditor and Commission that resolution to remove auditor has been passed |
| | | | (4) failing to send copy of auditor's representations to persons requested |
| | | | (5) failing to lodge notice of removal of auditor with the Commission |

- 285 285 167 POWERS AND DUTIES OF AUDITORS AS TO REPORTS
ON ACCOUNTS
- (1) failing to report on accounts
 - (2) failing to furnish report in prescribed
time
 - (3) failing to set out particulars in report
 - (4) failing to state particulars of any
deficiency, failure or shortcoming
 - (5) failing to give auditor books or
information
 - (6) failing to give auditor books or
information relating to subsidiaries
 - (7) failing to attach auditors' report to
accounts and to have it open for inspection
 - (8) failing to give auditor notice of
meeting
 - (9) failing to inform Commission of default
 - (10) failing to report to Commission

- 287 287 167A SPECIAL PROVISIONS RELATING TO BORROWING AND
GUARANTOR CORPORATIONS
- (1) failing to send copy of report or
document to every trustee for the holders of
debentures of the borrowing corporation
 - (2) failing to send report to corporation
and to trustee

- 330 330 195 LODGING OF ACCOUNTS OF RECEIVERS
(1) failing to lodge account in prescri
form
(2) failing to lodge accounts at least
a year
- 342 342 203A SIX-MONTLY MEETING OF CREDITORS AND MEMBI
(10) auditor failing to supply official
manager with statement
- 375 375 234 STATEMENT OF COMPANY'S AFFAIRS TO BE
SUBMITTED TO LIQUIDATOR
(7) liquidator failing to file copy of
statement with Court and to lodge copy of
statement with Commission and failing to
copy of notice to Commission
- 380 380 238 PAYMENT BY LIQUIDATOR INTO BANK
(3) paying money into an account or bank
other than an account or bank prescribed o
specified under sub-s. (1)
- 416 416 277 BOOKS TO BE KEPT BY LIQUIDATOR
failing to keep proper books or to allow
creditor or contributory to inspect them

425 425 284 BOOKS OF COMPANY
(2) destroying books within 5 years of the
date of dissolution of the company

455 455 298 EXECUTIONS, ATTACHMENTS, &c., BEFORE WINDNG
UP
(1) failing to pay to liquidator an amount
equal to the amount (if any) received as a
result of the execution less the taxed costs
thereof

PART G: Offences relating to failure to comply with direction order

1325. Group A - Offences which carry penalty of \$5000 or 1 years imprisonment or both

	<u>Clause</u>		<u>Subject of offence</u>
1981	August		
Bill	CB	ED	
31	31	12	REGISTERS (13) failing to comply with court order t make good a default

1326. Group B - Offences which carry penalty of \$500

	<u>Clause</u>		<u>Subject of offence</u>
1981	August		
Bill	CB	ED	
65	65	23	CHANGE OF NAME (3) failing to comply with direction from NCSC to change name
265	265	160	EXEMPTION OF CERTAIN COMPANIES (3) failing to comply with order of the 1

PART H : Offences relating to the keeping of registers

1327. Group A - Offences which carry penalty of \$500

	<u>Clause</u>		<u>Subject of offence</u>
1981	August		
Bill	CB	ED	
131	131	67B	REGISTER OF OPTIONS (7) failing to keep a register of options granted to persons to take up unissued shares in the company
143	143	143	COMPANY TO KEEP REGISTER OF SUBSTANTIAL SHAREHOLDERS (4) failing to keep a register of substantial shareholders
147	147	70	REGISTER OF DEBENTURE HOLDERS AND COPIES OF TRUST DEED (10) failing to keep a register of holders of debentures
172	172	84	REGISTER OF HOLDERS OF PRESCRIBED INTERESTS (1) failing to keep a register of the holders of prescribed interests

210	210	110A	COMPANY TO KEEP DOCUMENTS RELATING TO CHARGES AND REGISTER OF CHARGES (5) failing to keep register of charges
231	231	126	REGISTER OF DIRECTORS' SHAREHOLDINGS, &c. (12) failing to keep a register of directors' shareholdings &c.
238	238	134	REGISTER OF DIRECTORS, EXECUTIVE OFFICERS SECRETARIES (8) failing to keep a register of directors executive officers and secretaries
256	256	151	REGISTER AND INDEX OF MEMBERS (7) failing to keep a register of members
261	261	156A	POWER OF COMPANY TO OBTAIN INFORMATION AS TO BENEFICIAL OWNERSHIP OF ITS SHARES (7) failing to enter in separate part of register the name of each person who has a relevant interest in shares
262	262	157	BRANCH REGISTERS (9) failing to keep branch register
521	521	354	BRANCH REGISTER OF SHARES IN FOREIGN COMPANIES (5) failing to keep a branch register for the purpose of registering shares of members resident in the ACT

- 544 544 369 FORM AND EVIDENTIARY VALUE OF BOOKS
(3) failing to take all reasonable precautions for guarding against damage to or falsification of any book required to be kept
- 546 546 370A LOCATION OF BOOKS KEPT ON COMPUTERS, &c
(2) failing to keep available for inspection at a place where books of a company are required to be kept, record of those matters which are not kept in written form.
- 547 547 370B LOCATION OF REGISTERS
(3) failing to keep books in specified places
(4) failing to notify NCSC of place where register kept or of change of place

PART I : Offences relating to the lodgment of documents or the provision of information to the public

1328. Group A - Offences which carry penalty of \$500

	<u>Clause</u>		<u>Subject of offence</u>
1981	August		
Bill	CB	ED	
71	71	27	DEFAULT IN COMPLYING WITH REQUIREMENTS AS TO PROPRIETARY COMPANIES (6) failing to lodge an office copy of an order determining that a company has ceased to be a proprietary company
72	72	27A	GENERAL PROVISIONS AS TO ALTERATION OF MEMORANDUM (2) failing to lodge a copy of a resolution an office copy of an order or a copy of a document which affects the memorandum and a printed copy of the memorandum as altered
74	74	29	ARTICLES OF ASSOCIATION failing to register articles complying with requirements of CB

- 79 79 34 COPIES OF MEMORANDUM AND ARTICLES
(5) failing to supply member with copy of memorandum and articles; to issue memorandum or articles as altered; to lodge copy of articles as altered; and to issue or lodge memorandum or articles with agreement attached
- 112 112 54 RETURN AS TO ALLOTMENTS
(7) failing to lodge a return of any allotment specifying certain matters and to lodge a copy of certain contracts
- 120 120 61 REDEEMABLE PREFERENCE SHARES
(8) failing to lodge notice specifying that shares redeemed
- 124 124 64A COMMISSION TO BE INFORMED OF SPECIAL RIGHTS CARRIED BY, OR DIVISION OR CONVERSION OF, SHARES
(3) failing to lodge statement containing particulars of rights attached to shares or to lodge a return in the prescribed form showing particulars of division or conversion
- 125 125 65 RIGHTS OF HOLDERS OF CLASSES OF SHARES
(7) failing to lodge office copy of court order

- 153 153 74A RETIREMENT OF TRUSTEES
(6) failing to lodge notice in the prescribed form of the appointment of a successor to a trustee
- 158 158 74F OBLIGATIONS OF BORROWING CORPORATION
(1) failing to lodge report with trustee a copy with Commission
(2), (3) failing to include certain particulars in report
(4) failing to furnish particulars of any charge
(5) failing to lodge profit and loss account and balance-sheet
- 159 159 74G OBLIGATION OF GUARANTOR CORPORATION TO FURNISH INFORMATION
(2) failure by guarantor corporation to furnish borrowing corporation with information
- 166 166 78 APPROVAL OF DEEDS
(3) failure to lodge deed or copy of deed verified by statutory declaration
- 172 172 84 REGISTER OF HOLDERS OF PRESCRIBED INTEREST
(3) failing to make copy of register available for inspection

- 185 185 97 NOTICE OF REFUSAL TO REGISTER TRANSFER
(3) failing to send transferee notice of refusal to register transfer
- 206 207 108 ASSIGNMENT AND VARIATION OF CHARGES
(1) new chargee failing to lodge a notice that he has become chargee and failing to give copy of notice to company
(2) failing to lodge a notice setting out particulars of any variation increasing the amount of the debt or extending the obligations secured by a charge and failing to lodge instrument effecting the variation or a copy thereof
- 207 208 109 SATISFACTION OF, AND RELEASE OF PROPERTY FROM, CHARGES
(1) failing to give company a memorandum acknowledging that the debt or other obligation has been satisfied in whole or in part or that the property or a part of it is no longer subject to the charge
- 208 209 110 PERSONS WHO MAY LODGE NOTICES
(2) where document lodged by person other than company concerned, failure by that person to give copy of documents to company
(3) failing to advise Commission of assignment of a charge

- 216 216 111 REGISTERED OFFICE OF COMPANY
(2) failing to have registered office and/or to have office open and accessible to the public during prescribed times
- 217 217 112 NOTICE OF ADDRESS OF REGISTERED OFFICE AND OFFICE HOURS
(1) failing to lodge notice in the prescribed form of the full address of the proposed registered office of the company including room number and building floor
(3) failing to lodge notice of change of address 7 days before change occurs
(4) where notice of hours lodged, failing to lodge notice of change of hours 7 days before change occurs
- 220 220 115 RESTRICTIONS ON APPOINTMENT OR ADVERTISEMENT OF DIRECTOR
(1) naming person as director where consent not lodged
(4) failing to lodge with the memorandum a list of the persons who have consented to be directors or lodging an incorrect list
- 244 244 140 QUORUM, CHAIRMAN, VOTING, &c., AT MEETINGS
(7) failing to lodge copy of minute relating to a notice, resolution or other documents as required by the CB.

- 251 251 146 REGISTRATION AND COPIES OF CERTAIN
RESOLUTIONS AND AGREEMENTS
(3) failing to lodge copy of resolution or
agreement or to supply copy to member
- 254 254 149 INSPECTION OF MINUTE BOOKS
failing to keep minute books at an approved
place, to have them available for inspection
or to provide copies
- 257 257 153 INSPECTION AND CLOSING OF REGISTER
(4) failing to have register and index of
members available for inspection or to
provide copies
- 263 263 158 ANNUAL RETURN
(3) failing to lodge annual return containing
list of members and accompanied by prescribed
documents

264	264	159A	AUDITOR'S STATEMENT (3) failure by company that is not required to lodge accounts to include in or attach its annual return a statement relating to accounts of the company signed by the auditor
317	317	183	PROVISIONS FOR FACILITATING RECONSTRUCTION AND AMALGAMATION OF COMPANIES (3) failing to lodge office copy of Court order
320	320	186	REMEDY IN CASES OF OPPRESSION OR INJUSTICE (6) failing to lodge office copy of Court order
326	326	191	NOTIFICATION OF APPOINTMENT OF RECEIVER (3) failing to lodge notice of appointment of receiver or notice of receiver's ceasing to act as such
338	338	202	POWER OF CREDITORS TO PLACE COMPANY UNDER OFFICIAL MANAGEMENT (3) failing to lodge notice of passing of resolution to place company under official management, to send notice thereof to creditors and members and to cause notice that the company has been placed under official management to be published in the <u>Gazette</u>

(6) failing to lodge copy of court order terminating appointment of official manager and appointing a registered company auditor as official manager

340 340 202B NOTICE OF APPOINTMENT AND ADDRESS OF OFFICIAL MANAGER

(3) failing to lodge notice of appointment as official manager, of address or change of address and of resignation or removal from office

344 344 203C POWER TO EXTEND PERIOD OF OFFICIAL MANAGEMENT
(4) failing to lodge copy of resolution

354 354 211A LODGMENT OF OFFICE COPY OF COURT ORDER
(2) failing to lodge notice of the making of court order and office copy of court order

355 355 212 TERMINATION OF APPOINTMENT AND RELEASE OF OFFICIAL MANAGER
(7) failing to give notice or sufficient notice to official manager
(8)(a) and (9)(a) failing to prepare report showing how official management conducted
(8)(b) and (11) failing to give explanations
(8)(c) and (12) failing to lodge notice of the holding of meeting together with a copy of the report

(9)(b) failing to convene meeting of creditors

(10) failing to give notice or sufficient notice to creditors

(13) and (14) (where applicable) failing to lodge notice that meeting not held on the day for which it was convened

(13) failing to lodge office copy of court order

357 357 214

FUNCTIONS OF COMMITTEE OF MANAGEMENT AND APPOINTMENT OF DEPUTY OFFICIAL MANAGER

(4) failing to lodge notice of appointment as deputy official manager, of address or change of address

(5) failing to lodge notice of ceasing to be deputy official manager

(6) failing to comply with direction from committee of management

370 370 230

CERTAIN NOTICES TO BE LODGED WITH COMMISSION

(3) failing to lodge notice of application for winding up, of making of order or of withdrawal or dismissal of application and failing to lodge office copy of order, serve office copy on executive officer and deliver office copy to liquidator together with statement that order has been served.

- 374 374 233 CUSTODY AND VESTING OF COMPANY'S PROPERTY
(3) failing to lodge office copy of court order
- 382 382 240 AS TO ORDERS FOR RELEASE OR DISSOLUTION
(5) failing to lodge office copy of court order
- 383 383 243 POWER TO STAY OR TERMINATE WINDING UP
(5) failing to lodge office copy of court order
- 392 392 254 CIRCUMSTANCES IN WHICH COMPANY MAY BE WOUND UP VOLUNTARILY
(3) failing to lodge copy of resolution for voluntary winding up and to cause notice of the resolution to be published in the Gazette
- 397 397 259 DUTY OF LIQUIDATOR TO CALL CREDITORS' MEETING IN CASE OF INSOLVENCY
(1) failing to convene meeting of creditors
(2) failing to send notice of meeting accompanied by statement showing names of all creditors and the amounts of their claims
(4) failing to submit statement of assets and liabilities
(7) failing to lodge notice in prescribed form

- 411 411 272 FINAL MEETING AND DISSOLUTION
- (1) failing to prepare account and to hold meeting
 - (2) failing to advertise meeting in Gazette
 - (3) failing to lodge a return of the holding of the meeting with a copy of the account attached
 - (4) (where applicable) failing to lodge a return with account attached stating that meeting duly convened but no quorum present
 - (7) failing to lodge office copy of order deferring date of dissolution
- 421 421 280 NOTICE OF APPOINTMENT AND ADDRESS OF LIQUIDATOR
- (1) failing to lodge notice of appointment as liquidator, of address or change of address
 - (2) failing to lodge notice of resignation or removal from office
- 422 422 281 LIQUIDATOR'S ACCOUNTS
- (1) failing to lodge in the prescribed form and verified by statutory declaration an account of receipts and payments and a statement of the position in the winding up

(2) failing to furnish auditor with required books and information

(3) failing to keep account and have it available for inspection

(4) failing to give notice that account made up and available for inspection

458 458 307 POWER OF COURT TO DECLARE DISSOLUTION OF COMPANY VOID

(2) failing to lodge office copy of order declaring dissolution to be void

503 503 343AD NOTICE TO BE LODGED OF CESSATION OF BUSINESS IN PARTICIPATING STATE OR TERRITORY

failing to lodge notice of cessation of business

513 513 346A REGISTERED OFFICE OF REGISTERED FOREIGN COMPANY

(1) failing to have registered office and/or to have office open and accessible to the public during prescribed times

515 515 347 NOTICE TO BE FILED WHERE DOCUMENTS, &c., ALTERED

(1) failing to lodge notice of change or alteration in situation of registered office

(2) failing to lodge notice of change or alteration in constituent documents, directors, agents etc.

(3) failing to lodge notice of change in hours

516 516 348 BALANCE-SHEETS AND OTHER DOCUMENTS

(4) failing to comply with requirements of NCSC notice

(5) (where applicable) failing to lodge with NCSC a profit and loss account

(7) failing to lodge return in prescribed form

518 518 352 CESSATION OF BUSINESS &c

(1) failing to lodge notice of ceasing to carry on business

(8) failing to lodge office copy of order that name of company be restored to register

(11) failing to lodge notices that company is being wound up or has been dissolved and of appointment of liquidator

(12) failing to lodge notice of commencement and/or termination of official management

(13) failing to advertise invitation to creditors to make claims, paying out any creditor of the exclusion of any other creditor and failing to recover and realise property

545 545 370

INSPECTION OF BOOKS

(1) failing to have books available for inspection

(2) where register kept at place other than registered office, failing to have that place open during the hours that the registered office is open

(3) failing to permit person entitled to inspect books to make copies or take extracts

APPENDIX B

ADVERTISING REQUIREMENTS IN THE COMPANIES BILL

1329. The following advertising requirements remain in the
CB.

	<u>Clause</u>		<u>Requirement</u>
1981 Bill	CB	ED	
66(1)	66(1)	24(1)	...the Commission may (after requiring, if it thinks fit, the proposal to be advertised in such manner as it directs either generally or in a particular case), by licence...
69(3)	69(3)	25(3)	...notice of the change of status shall be published by the company in such manner (if any) as the Commission directs.
72(8)	72(8)	27A(6)	Notice of the registration shall be published in such manner (if any) as the Court or the Commission directs.

129	129	67	...a notice - is published, in each
(10)(h)	(7)(h)	(5)(e)	State and Territory in which the
			company is carrying on business, in
			a daily newspaper circulating
			generally in that State or
			Territory;
182	182	94	The directors of a company
(3)(a)	(3)(a)	(3)(a)	may, ..., require the applicant -
			(a) to cause an advertisement to be
			inserted in a daily newspaper
			circulating in a place specified by
			the directors...
184(5)	184(5)	96(5)	Lists of share certificates...
			shall be advertised in the <u>Gazette</u>
			and in such newspapers and at such
			times as the company thinks fit.
335	335	199	...notice of a meeting of
9(b)	9(b)	(9)(b)	creditors...shall be given by - (b,
			publishing a copy of that notice in
			the Territory, and in each State or
			other Territory in which the
			company carries on business or has
			carried on business..., in a daily
			newspaper circulating generally in
			the Territory, or in that State or
			other Territory, as the case may
			be,

337(3)	337(3)	201(3)	...the company shall cause notice...of the resumption of the meeting to be published in a daily newspaper circulating generally in the Territory...
338 (2)(b)	338 (2)(b)	202 (2)(b)	The company shall - (b)...cause notice that the company has been placed under official management... to be published in the <u>Gazette</u> .
392 (2)(b)	392 (2)(b)	254 2(b)	A company shall - (b)...cause notice of the resolution to be published in the <u>Gazette</u> .
399(3)	399(3)	260A (3)	...the company shall cause notice...of the resumption of the meeting...to be published in a daily newspaper circulating generally in the Territory...
411(2)	411(2)	272(2)	The meeting shall be convened by an advertisement published in the <u>Gazette</u> ...
479(2)	479(2)	323(2)	The sale shall be advertised... in a daily newspaper circulating generally throughout the Territory.

483(2)	483(2)	327(2)	The date to which the sale is postponed shall, ..., be advertised in a daily newspaper circulating generally in the Territory.
518 (13)(a)	518 (13)(a)	352 (12)(a)	A liquidator of a registered foreign company who is appointed by the Court - (a) shall, before any distribution of the foreign company's property is made, by advertisement in a newspaper circulating generally in the Territory and, in the case of a foreign company formed outside Australia and the external Territories, in each participating State or participating Territory where the foreign company had been carrying on business..., invite all creditors to make their claims...
534(1)	534(1)	364(1)	...the company may cause an advertisement to be published in a daily newspaper circulating in the State, Territory or country shown in that register in relation to the address of the person concerned...

1330. Provisions requiring the NCSC to publish copies of notices etc in the Gazette are not included in the above list.

Appendix C

1331. The major changes between the exposure draft and the August CB were as follows:-

<u>Exposure Draft</u>	<u>Nature of Change</u>
Cl. 5(1)	The definition of "affairs" was deleted and replaced by cl. 6 of the August CB which contained a definition of "affairs" and applied it to specific provisions of the August CB. The definition of "affairs" in the exposure draft on the other hand applied generally throughout the draft. References to a trustee of a trading trust were also deleted from the new definition consequential upon the deletion of Part VIAA of the exposure draft.
Cl. 5(1)	The definition of "banker's books" no longer referred to "books of a banker", but was changed to "books of a banking corporation, including any documents used in the ordinary business of a banking corporation".

Provision of Exposure
Draft

Nature of Change

- Cl. 5(1) A banking corporation was excluded from the definition of a "borrowing corporation."
- Cl. 5(1) A cheque, order for the payment of money, bill of exchange and a promissor note were specifically excluded from the definition of "debenture."
- Cl. 5(1) The reference to the words "affairs of" was deleted from the definition of "executive officer".
- Cl. 5(1) The definition of "financial year" was amended to make it clear that the directors might resolve a period "whether longer or shorter than 12 months".
- Cl. 5(1) A new definition of "home exchange" was included - see cl. 141 of August CB.
- Cl. 5(1) A new definition of "listed corporation" was included - see e.g. sub-para. 129(6)(b)(ii).
- Cl. 5(1) A new definition of "minerals" was included - see para (a) of definition of "mining purposes".

Provision of Exposure
Draft

Nature of Change

- Cl. 5(1) The definition of "nominee corporation" was amended to bring it into line with the corresponding definition in the CASA.
- Cl. 5(1) The definition of "prescribed business" was deleted consequential upon the deletion of Part VIAA of the exposure draft.
- Cl. 5(1) A new definition of "principal executive officer" was included. That definition was similar to the definition of "manager" in the ICAC CAs but narrower than the definition of "executive officer" in the CB.
- Cl. 5(1) The definition of "trading trust" was deleted consequential upon the deletion of Part VIAA of the exposure draft.
- Cl. 5(1) The definition of a "voting share" was changed so that it only extended to an issued share in a body corporate.
- Para. 6A(4)(e) The 20 per cent interest in this provision was amended to "the prescribed percentage".

Provision of Exposure
Draft

Nature of Change

S-cl. 6AA(1)

(cl. 9 in the August CB)

The reference to an "executive officer" was omitted from s-cl. 9(1) of the CB

Cl. 6AB

Omitted

This provision, dealing with the binding of the Crown, was omitted from the August CB but see cls 314, 322, 334 and 358 of the August CB.

Cl. 7

(cl. 12 in the August CB)

New sub-cl. 12(1) was added to require the NCSC to satisfy a purpose test before it could order the production of books.

S-cl. 7(5)

(s-cl. 12(6) in the August CB)

Sub-para. (a)(ii) was amended to make it clear that the explanation sought was one within the ability of the person to provide.

Sub-para. (a)(iii) was amended to allow the NCSC to retain books only for the purposes of inspection or the making of copies.

Provision of Exposure
Draft

Nature of Change

S-cl. 7(6)

(s-cl. 12(7) in the August CB)

This was amended to make it clear that the relevant identification was one which was within the ability of the person to make.

S-cl. 7A(4)

(s-cl. 13(4) in the August CB)

Paras (a) and (b) were amended - similar to amendments to sub-paras 7(5)(a)(ii) and (iii) (now sub-paras 12(6)(a)(ii) and (iii)).

Cl. 7AA

(cl. 14 in the August CB)

New sub-cl. 14(3) was added to provide a defence of reasonable belief to a prosecution for giving false and misleading statements.

new provision

(cl. 15 in the August CB)

This evidentiary provision was included so that a copy of a book would be admissible as original evidence in any proceeding (under the August CB or general law). This inclusion was made to avoid the necessity of having to rely on secondary evidence rules in such proceedings.

Provision of Exposure
Draft

Nature of Change

Cl. 7B

(cl. 16 in the August CB)

S-cl. 7B(1) (s-cl. 16(1)) was amended to make it clear that the name and address to be furnished was one within the knowledge of the legal practitioner.

S-cl. 7B(2)

This was deleted from the August CB as unnecessary.

Cl. 8

(cl. 17 in the August CB) :

This clause was amended to provide that:-

- (i) only natural persons could be registered as liquidators (this change was not, however, intended to affect trustee companies which were already acting as corporate liquidators under present legislation).
- (ii) an applicant for registration as a liquidator need not be registered company auditors.

Provision of Exposure
Draft

Nature of Change

Cl. 9

(cl. 18 in the August CB)
Sub-cl. 9(9) (s-cl. 18(9) of August CB) was amended so that the NCSC could not be required at first instance to give the unsuccessful applicant the reasons for its decision - it could only be required to give notice of the decision within a specified period, and reasons on request.

Cl. 11

(cl. 20 in the August CB)
Qualifications for an applicant not already registered as a liquidator under present legislation (sub-para. 11(2)(a)(i) (sub-para 20(2)(a)(i)) in the August CB)) were amended as a result of the decision not to require liquidators to also be registered company auditors (see cl. 8 (now cl. 17)). The qualifications required in the August CB were similar to those for an auditor under para. 9(2)(a) (now para 18(2)(a) in the August CB).

S-cl. 11(11)

(s-cl. 20(11) in the August CB)
This was amended similar to s-cl. 9(9) (s-cl. 18(9) in the August CB).

Provision of Exposure
Draft

Nature of Change

Cl. 11B

(cl. 22 in the August CB)

Amended so that the liquidator's security had to be lodged with the local Corporate Affairs Office and to allow the NCSC to specify the form and amount of the security. (Consistent with provisions as to stock brokers' securities in SIA).

Also amended to make it clear that the NCSC could determine a security for a particular liquidator.

Cl. 11H

The main provisions of this clause were incorporated into cl. 27 of the August CB cl. (formerly 11G) as follows:

- . s-cl. 11H(2) became s-cl. 27(9)
- . s-cl. 11H(4) became s-cl. 27(15)
- . s-cl. 11H(5) became s-cl. 27(8).

Cl. 11J

(cl. 28 in the August CB)

A new s-cl. 28(6) was added to provide that the reference to "document" in s-cl. 28(5) included a reproduction of that document.

Provision of Exposure
Draft

Nature of Change

new provision

(cl. 30 in the August CB)

This clause was included to make provision for auditors and other persons to enjoy qualified privilege in certain circumstances in similar terms to cl. 167B of the exposure draft which was omitted.

Cls. 22 to 22D

(cls. 38 to 66 in the August CB)

The names provisions were substantially redrafted to encompass the concepts of reservation and registration in a codified form for application to the various categories of company status e.g. recognized company, registered foreign company etc.

Cl. 31

(cl. 76 in the August CB)

Sub-cls (4) to (6) regarding alteration of the articles to effect a restriction of voting rights, were omitted.

Cls 35A and 35B

(cl. 81 in the August CB)

Cls 35A and 35B on preincorporation contracts were redrafted to overcome technical ambiguities and omissions and were combined into one clause.

Provision of Exposure
Draft

Nature of Change

Cl. 37A

(cl. 94 in the August CB)

A new s-cl. 94(2) was inserted. It provided that for the purposes of cl. 95 or 96, forms were deemed to be issued to the public irrespective of the method used to select the recipient and irrespective of the fact that the form could only be used by the person to whom it was issued. Forms issued to-

- (a) persons whose ordinary business is buying and selling shares, debentures or prescribed interests;
- (b) existing members or debenture holders of the corporation; and
- (c) existing members in connection with a proposal under cl.409

were excepted.

A new s-cl. 94(3) was inserted.

This provision previously appeared as the definition of "statement" in s-cl. 40(1) of the exposure draft.

Provision of Exposure
Draft

Nature of Change

Cl. 37AA

(cl. 95 in the August CB)

Para. 37AA(2)(b) was redrafted to refer to the invitation or offer to which the form relates, rather than the invitation or offer with which the form was issued.

S-cl. 37AA(3) was omitted because of the inclusion of the new s-cl. 94(2).

Cl. 37

(cl. 96 in the August CB)

S-cl. 37(1) was redrafted so that a form of application for shares or debentures had to be attached to a prospectus, and both the prospectus and the application had to be registered by the NCSC.

Para. 37(2)(b) was redrafted along the same lines as para. 37AA(2)(b).

S-cl. 37(3) was omitted because of the inclusion of the new s-cl. 94(2).

Provision of Exposure
Draft

Nature of Change

Cl. 38

(cl. 97 in the August CB)

Sub-sub-para. 38(4)(b)(ii)(H) was amended to exclude advances to related corporations which are guarantor corporations.

A new sub-sub-para. 97(5)(b)(ii)(I) was inserted requiring disclosure of advances made by guarantor corporation to related corporations of the borrow corporation.

Cl. 39

(cl. 98 in the August CB)

Para. 39(1)(e) was omitted. A new para. 98(1)(e) was included which provided that in specified cases, prospectuses would contain matters and reports to be prescribed by regulation. In all other cases, the matters and reports to be included in a prospectus would be specified by the NCSC. Para. 39(1)(1) was redrafted to require a prospectus to state whether or not an application for listing was proposed to be made.

Provision of Exposure
Draft

Nature of Change

Cl. 40

(cl. 99 in the August CB)

The definition of "statement" which appeared previously in s-cl. 40(1) of the exposure draft was covered by the new s-cl. 94(3).

Cl. 42

(cl. 103 in the August CB)

S-cl. 42(3) of the exposure draft was omitted. The effect of the omission was that a prospectus of a foreign company formed in an other State or Territory would have to comply with all of the requirements of the CB before it could be registered.

Cl. 44 (cl. 105 in the August CB)

The words "and wilfully" were deleted from sub-para. 44(6)(b)(iii). S-cl. 44(10) was omitted as para. 39(1)(1) made the provision unnecessary.

Cl. 46

(cl. 107 in the August CB)

The word "wilful" was deleted from s-cl. 46(1).

Provision of Exposure
Draft

Nature of Change

Cl. 47

(cl. 108 in the August CB)

The word "wilful" was deleted from s-cl. 47(1). A new para. 108(1)(c) was inserted providing a defence where it would be shown any non-disclosure was inadvertent.

Cl. 48

(cl. 109 in the August CB)

Para 48(6)(b) was omitted. The new para. 109(6)(b) made directors jointly and severally liable to repay money and interest if the company did not repay the money within 7 days of becoming liable. It also made every director guilty of an offence in those circumstances. S-cl. 48(7) was amended to extend the defence provided by that sub-clause to the offence provision.

Cl. 57A

(now cl.116 in the CB)

This was amended by omitting s-cl. 57A(3) which was redrafted to become s-cl. 59(1) (s-cl. 118(1) in the August CB).

Cl. 59

(cl. 118 in the August CB)

See above.

Provision of Exposure
Draft

Nature of Change

Cl. 60

(cl. 119 in the August CB)
S-cl. 60(1) was amended so that application of provisions of August CB relating to reduction of share capital did not include s-cl. 123(6).

Cl. 61

(cl. 120 in the August CB)
S-cl. 61(5) was amended so that the amount to be debited would not include a premium payable on redemption of shares. This was in accordance with the present legislation.

Cl. 62

(cl. 121 in the August CB)
S-cl. 62(4) and (5) were omitted.

Cl. 64

(cl. 123 in the August CB)
A drafting change was made to s-cl. 64(15) (s-cl. 123(15) in the August CB).

Cl. 64A

(cl. 124 in the August CB)
The word "shareholders" was used instead of "members" in s-cl. 64A(5) (now s-cl. 124(5)).

Cl. 65A

(cl. 126 in the August CB)
A similar provision to cl. 65 (cl. 125 in the August CB) was added to apply to companies having a share capital not divided into classes.

Provision of Exposure
Draft

Nature of Change

Cl. 65B

(cl. 127 in the August CB)

A similar provision to cls 65 and 65A (cls 125 and 126 in the August CB) was added to apply to companies not having a share capital but where members have special rights.

Cl. 67

(cl. 129 in the August CB)

Cl. 67 was extensively redrafted as a result of submissions from the public.

S-cl. 67(1)

(s-cl. 129(1) in the August CB)

Drafting changes.

S-cl. 67(3)

(s-cl. 129(3) in the August CB)

This was amended to include an offence deemed to have been committed by sub-s. 38(1) of the C & S (I & MP) A.

new provision

(s-cl. 129(4) in the August CB)

Added to extend the power of the Court to grant relief from liability under cl. 535 to relief from an order for compensation under s-cl. 129(3) (former s-cl. 67(3)).

Revision of Exposure
Draft

Nature of Change

new provision

(s-cl. 129(5) in the August CB)

Added to make it clear that certain transactions were not prohibited forms of "financial assistance".

-cl. 67(4)

(s-cl. 129(6) in the August CB)

Para. 67(4)(a) (para. 129(6)(a) in the August CB) was amended to include the giving of guarantees or securities. Also, two new sub-paras were included to provide additional restrictions on the circumstances in which the loan, guarantee or security could be given in the course of business. Paras 67(4)(b) and (c) were amalgamated and simplified (para. 129(6)(b) in the August CB) and amended to take account of the situation where a listed company in a group is not the ultimate holding company, or where the local holding company is a subsidiary of an overseas parent.

-cl. 67(5)

(s-cl. 129(7) in the August CB)

This was amended -

Provision of Exposure
Draft

Nature of Change

- (a) to provide that steps similar to those taken by a company in relation to the special resolution for financial assistance were also to be taken by the listed corporation of which the company is a subsidiary or by the ultimate Australian holding company (see also change to s-cl. 67(4) (s-cl 129(6) in the the August CB.
- (b) so that the requirement for a statement of the directors' opinion as to the financial assistance applied only to a proprietary company and it was expanded to require the inclusion of the name of the directors who voted against the resolution and the reasons why they voted against it. In the case of a public company this requirement is to be replaced by report of a registered company auditor.

Provision of Exposure
Draft

Nature of Change

The requirement that it be stated whether the financial assistance would be in the interests of the company was deleted in relation to both the statement and the report - Instead the relevant consideration became the likelihood of the financial assistance causing material prejudice to the interests of creditors or members.

new provision

(S-cl. 129(8) in the August CB)
Added to allow a company that has substantially complied with s-cl. 129(7) to give the financial assistance proposed.

S-cl. 67(6)

(now s-cl. 129(9) in the August CB)
This was consequentially amended by addition of new para. to cover the situation of the listed corporation and ultimate holding company.

S-cl. 67(7)

(s-cl. 129(10) in the August CB)
Consequential amendments and drafting changes were made.

S-cl. 67(9)

(s-cl. 129(12) in the August CB)
Drafting changes were made.

Provision of Exposure
Draft

Nature of Change

new provision

(s-cl. 129(14) in the August CB)
Added to protect acts done after the enactment of the CB pursuant to contracts entered into prior to enactment if the acts would have been valid under the previous legislation

Cl. 67A

(cl. 130 in the August CB)
Cl. 67A was substantially redrafted in the light of public submissions.

S-cl. 67A(1)

(s-cl. 130(1) in the August CB)
This was amended to make it clear that a company's acquisition of shares in itself was void but that the giving of financial assistance by the special resolution procedure by the company would be valid.

S-cl. 67A(2)

(s-cl. 130(2) in the August CB)
This was amended to cover a contract or transaction that was related to a contract or transaction which contravened cl. 129.

Provision of Exposure
Draft

Nature of Change

S-cl. 67A(3)

This was replaced by new s-cl. 130(3) in the August CB which gave the Court power to authorize certain persons to give notice of avoidance in the name of the company.

S-cl. 67A(4)

(s-cl. 130(4) in the August CB)
Drafting changes were made, and the provision was consequentially amended to cover related contracts or transactions (see changes to s-cl. 67A(2) - now s-cl. 130(2)).
The reference to orders being made against "any person who has been convicted of an offence under sub-sect. 67(2)" was replaced by a reference to orders being made against "the company or against any person who aided and abetted, counselled or procured, or was, by an act or omission, in any way, directly or indirectly, knowingly concerned in or party to the contravention".

Provision of Exposure
Draft

Nature of Change

new provisions

(s-cl. 130(6) to (12) in the August CB)
New provisions were added to provide for a certificate of compliance to be given by directors which would protect a person relying on it from a court order and which would also provide for the validity of the contract or transaction and protect it from avoidance.

Cl. 69A

(cl. 134 in the August CB)
S-cl. 69A(6) was omitted, and the definition of "business day" inserted in s-cl. 5(1).

Cl. 69C

(cl. 136 in the August CB)
"executive officer" was deleted from sub-paras 69C(3)(a)(i) and (ii). A similar deletion was made from sub-paras 6AA(1)(a)(i) and (ii) (sub-paras 9(1)(a)(i) and (ii) in the August CB).

Cl. 69E

(cl. 138 in the August CB)
The words "and of every associate of the person" were deleted from s-cl. 69E(3).

Provision in Exposure
Draft

Nature of Change

new provision

(cl. 141 in the August CB)

A new clause (cl. 141) was inserted requiring the person giving notice under cl. 137, 138 or 139 to a listed company to copy the notice to the home exchange of the company.

Cl. 70

(cl. 147 in the August CB)

S-cl. (2) was made to refer to Division 5 of Part XIII.

S-cl. (8) was made to refer to a company or foreign company.

S-cl. 70(9) and (10) were deleted.

S-cl. 147(9), (10) and (11) were added as new provisions.

new provision

(cl. 148 in the August CB)

This clause was added to deal with branch registers.

Cl. 74

(cl. 152 in the August CB)

In the new s-cl. 152(1) the words "or Public Curator" were deleted.

Provision in Exposure
Draft

Nature of Change

Cl. 74B

(cl. 154 in the August CB)

Cl. 154 was reworded and linked to the Companies (Acquisition of Shares) Act 1980. S-cl. (2) and (3) were added as new provisions.

Cl. 74B

A new s-cl. (6) was added.

Cl. 74F

(cl. 158 in the August CB)

S-cl. 158(4) amended to refer to a "relevant guarantor corporation". S-cl. (6), (7) and (8) were added as new provisions. S-cl. (10) was omitted and s-cl. 158(13), (14), (15), (16), (17), (21) and (23) were added as new provisions.

Cl. 93

(cl. 181 in the August CB)

This was amended to add "Certificate Seal", so as to extend the concept of a "Share Seal" to certificates for debentures, unsecured notes and interests.

Provision in Exposure
Draft

Nature of Change

new provision

(cl. 186 in the August CB)

A new cl. 186 was added to remedy possible injustices in small and "two family" companies where the company refuses to register a transfer by death, lunacy or bankruptcy. A right of appeal to the Court against such a refusal was included.

Cl. 99D

(cl. 192 in the August CB)

This was amended to cover transfers by authorized trustee corporations and other persons in addition to transfers by authorized trustee corporations only.

Cl. 102

(cl. 202 in the August CB)

Changes were made to clarify that:

- (a) charges over negotiable interests other than those created by way of deposit, etc. were required to be registered (paras 202(1)(k) and (2)(c)); and
- (b) the provisions relating to registration of trade marks extended to service marks and other registered designs.

Provision in Exposure
Draft

Nature of Change

Cl. 110E

(cl. 214 in the August CB)

Changes were made to the provision which was designed to give effect to the priorities system of each participating jurisdiction throughout all participating jurisdictions. It had been suggested that the provision in the exposure draft would not have achieved the desired effect.

Cl. 112

(cl. 217 in the August CB)

Amended to provide that notice of a change of address or a change in the hours of public access had to be lodged seven days after the day on which the change occurred (s-cl. 217(3) and (4) - had the effect of reverting to the position in ICAC CAs).

Cl. 119

(cl. 224 in the August CB)

The reference to an executive officer in sub-cl. 224(1) of the CB was deleted.

S-cl. 120(9)

(cl. 225 in the August CB)

S-cl. 120(9) was omitted from cl. 225 of the CB.

Provision in Exposure
Draft

Nature of Change

Cl. 121

A new provision was inserted which provided that a person would be incapable of being appointed as a director unless he had attained the age of 18 years (s-cl. 226(12)).

S-cl. 124(2)

(now cl. 229 in the August CB)
This was redrafted to bring it closer to the existing ICAC CAs provision (s-cl. 229(2) of the August CB). The penalty of imprisonment was also omitted.

Cl. 125

(cl. 230 in the August CB)
Cl. 230 of CB was extensively redrafted to accommodate points raised in public submissions.

Cl. 128

This was omitted from the August CB because the purpose of the provision was thought to be unclear.

Cl. 129

(cl. 233 in the August CB)
The main changes were:
(1) exemptions in s-sec. 129(5) ICAC CAs were included (s-cl. 233(7) of CB).

Provision in Exposure
Draft

Nature of Change

- (ii) s-cl. 129(4) to (7) were omitted because they were all covered in CASA;
- (iii) to provide that where payment (to which para. 233(1)(a) applied) had to be approved by the company in general meeting, exempt benefits had to be disclosed but not approved (this was in line with Jenkins Committee recommendation).

Cl. 134

(cl. 238 in the August CB)
Drafting changes were made to this clause, inserting in place of "executive officers", "principal executive officers".

S-cl. 148(1)

(cl. 253 in the August CB)
This clause was changed so that it no longer contained a reference to "executive officers".

S-cl. 148(4)

Deleted

Provision in Exposure
Draft

Nature of Change

Cl. 161

(cl. 266 in the August CB)

The definition of "accounts" was altered to clarify the inclusion of the directors' statement on the accounts under s-cls 269(9) and (10).

Cl. 161A

(cl. 267 in the August CB)

There were 3 changes to this provision:

- (a) All of the requirements relating to companies acting as trustees for trading trusts were omitted.
- (b) The requirement that a company retain the accounting records kept under this provision for a period of 7 years after the completion of the transactions to which they relate was reinserted in this provision.
- (c) A company keeping its accounting records outside Australia, was required to:

Provision in Exposure
Draft

Nature of C

(i) keep in Australia such statements and records as would enable true and fair accounts and any documents required by this Act to be attached to the accounts to be prepared: and

(ii) notify the Commission where those statements and records are kept if they are not kept at the registered office.

Cl. 162

(cl. 269 in the August CB)

A provision was added requiring directors to state in a statement prepared pursuant to s-cl. 269(9) whether they considered that the company is able to pay its debts as and when they fall due.

Cl. 162A

(cl. 270 in the August CB)

The fixed salary received by a director as a full-time employee of a related corporation was added to the items which do not have to be disclosed as

Provision in Exposure
Draft

Nature of Change

being a benefit a director of the company has received or become entitled to receive by reason of a contract made by the company or a related corporation with the director (s-cl. 270(8) in the August CB).

Cl. 162B

(cl. 272 in the August CB)

Amended to require directors of a holding company to take all reasonable steps to ensure that, before preparing their directors' report, they had available the directors' reports and accounts of each subsidiary.

Cl. 165

(cl. 277 in the August CB)

The following changes were made to this clause:

- (a) The amount of permitted indebtedness for auditors was increased from \$2000 to \$5000 (paras 277(1)(e) and (2)(f)).
- (b) The permitted level of indebtedness of an auditor was stated not to include indebtedness to a banking or life insurance corporation where

Provision in Exposure
Draft

Nature of Change

the indebtedness arose as a result of a loan made by the corporation in the ordinary course of its ordinary business for the purchase of a principal place of residence (s-cl. 277(3)).

- (c) To allow a firm to be appointed auditor of a company provided that at least one member of the firm was a registered company auditor ordinarily resident in a State or Territory (para. 277(2)(d)).
- (d) The appointment of a firm as auditor of a company was deemed to be an appointment of all persons who are members of the firm and who are registered company auditors (s-cl.277(7)).
- (e) Consequential changes were made to s-cl. 277(8) to take account of the fact that not all members of the firm have to be registered company auditors.

Provision in Exposure
Draft

Nature of Change

Cl. 165A

(cl. 278 in the August CB)

The reference to an exempt proprietary company that is a trustee of a trading trust was omitted.

Cl. 165B

(cl. 279 in the August CB)

This clause was modified in three ways:

(a) The procedure for the appointment of an auditor when members have previously agreed not to appoint an auditor was included.

(b) A further inclusion provided that where a company becomes an exempt proprietary company the members may agree to terminate the appointment of the auditor.

(c) The reference to an exempt proprietary company that is a trustee of a trading trust was omitted.

Cl. 167B

This clause was omitted from the CB, as a similar clause, cl. 30, which made provision for auditors and other persons to enjoy qualified privilege in certain circumstances, had already been included.

Provision in Exposure
Draft

Nature of Change

Part VIAA

This part, containing special provision relating to trustees of trading trusts, was omitted from the August CB.

Cl. 168

(cl. 289 in the August CB)
S-paras (1)(b)(iii) to (x) of the definition of "company" were removed.

Cl. 173

(cl. 295 in the August CB)
The words "in the prescribed form" in s-cl. 173(1) were replaced by the words "containing the prescribed matters".
A new sub-clause was inserted (s-cl. 295(2)) to provide that a notice given pursuant to para. (1)(c) set out the provisions of s-cl. 296(6) and (7).

Cl. 174

(cl. 296 in the August CB)
A new sub-clause was inserted (s-cl. 296(8)), providing that a claim in s-cl. (7) could be made in any form of words agreed between the officer and the inspector.

Cl. 176

(cl. 298 in the August CB)
S-cl. 176(1) and (2) were replaced by three new sub-clauses.

Provision in Exposure
Draft

Nature of Change

Cl. 176A

(cl. 299 in the August CB)

The word "or" was removed after
para. 176A(2)(a).

Sub-paras (b)(i) and (ii) were changed
to paras (b) and (c).

Cl. 176B

(cl. 300 in the August CB)

The word "or" was placed after sub-paras
176B(a)(ii) and (iii). Sub-paras
(a)(iv) and (v) were deleted.

Cl. 177

(cl. 304 in the August CB)

The words "a prescribed person" in
s-cl. 177(4) were replaced by the words
"an officer of a corporation".

Cl. 176E

(cl. 303 in the August CB)

In s-cl. 176E(6) the words ", without
the leave of the court or tribunal hearing
the proceedings" were inserted after
the words "a party is not entitled".

Cl. 178AA

(cl. 306 in the August CB)

The word "legal" in s-cl. 178AA(12)
and (13) was replaced by the word "civil".

Provision in Exposure
Draft

Nature of Change

Cl. 178B

(cl. 308 in the August CB)

At the end of the clause the words "requirement, he shall forthwith furnish it in writing the name and address of the person to whom or by or on behalf of whom the communication was made." were replaced by the words "requirement he shall, if he knows the name and address of the person to whom or by or on behalf of whom the communication was made, forthwith furnish that name and address in writing to the inspector."

Cl. 181

(cl. 315 in the August CB)

References in this clause and other clauses in Part VIII referring to schemes of arrangement requiring approval by a majority in number representing 75% in value of the creditors or members (as the case may be) were changed to 75% of those persons present and voting in person or by proxy at the relevant meeting.

Provision in Exposure
Draft

Nature of Change

S-cl. 181(2)

(s-cl. 315(2) in the August CB)

Persons intending to make an application to the court were no longer required to give 21 days notice to the Commission. Instead 14 days notice, or such lesser period as the Commission permits, was required to be given of the hearing of the application (s-cl. 315(2)).

S-cl. 181(7)

(s-cl. 315(5) in the August CB)

The implication that members or creditors belonging to more than one class of members or creditors respectively are not entitled to vote at meetings of each such class was removed.

S-cl. 181(9)

(s-cl. 315(7) in the August CB)

A change was made to clarify that an auditor of a company which is a mortgagee of the scheme company would not be precluded from being appointed to administer the scheme.

Provision in Exposure
Draft

Nature of Change

S-cl. 181(12)

(s-cl. 315(10) in the August CB)

The provision which imposed on scheme administrators some of the obligations and responsibilities of receivers was changed so that the scheme administrator would not incur personal liability in the same manner as a receiver. The provision relating to control of liquidators (cl. 420) was made to apply to scheme administrators. Changes were also made so as to prevent this provision operating retrospectively.

S-cl. 181(21)

(s-cl. 315(19) in the August CB)

The residency test in s-cl. 181(21) was replaced with a test as to where debts are recoverable. This change was made to achieve the stated intention of overcoming differences in court orders between jurisdictions as they affect parties to a particular scheme of arrangement.

Provision in Exposure
Draft

Nature of Change

S-cl. 181(22)

(s-cl. 315(20) in the August CB)

A new provision was inserted providing that the Court should not approve what amounts to a take-over in the guise of a scheme of arrangement.

A similar provision was inserted in s-cl. 317(4).

S-cl. 182(5)

(s-cl. 316(6) and (7) in the August CB)

General changes were made to this clause,

(1) an explanatory statement was now no longer required to be sent to creditors whose debts were less than \$200 as long as they were given an opportunity to obtain a copy on request (s-cl. 316(2)).

(2) In a scheme of arrangement which merely involved a corporate reconstruction and did not involve creditors, the explanatory statement had to

Provision in Exposure
Draft

Nature of Change

be registered by the Commiss. before it was sent out (rather than approved by the Court as in the exposure draft).

- (3) The CB was also changed so that in schemes of arrangement or compromises in which insolvency was an element, the explanatory statement would not have to be registered by the Commission before it was sent out. The Commission however, would have to be given opportunity to examine the statement before the Court approved the arrangement, however (s-c. 316(7)).

Cl. 185A

(cl. 319 in the August CB)

This clause was changed to require a person appointed as administrator of a scheme to notify the Commission of his appointment.

Cl. 186

(cl. 320 in the August CB)

An additional ground for applying to the Court was inserted in the provision relating to conduct of affairs of a company in an oppressive manner.

Provision in Exposure
Draft

Nature of Change

The new ground applied where directors of a company were acting in their own interests rather than in the interests of the members as a whole, or in any other manner that was unfair or unjust to members other than the directors.

Cl. 187

(cl. 323 in the August CB)

The prohibition on corporations acting as receivers (ICAC CAs s. 187) was restored and the prohibition on auditors of mortgagee corporations acting as receivers (exposure draft) was removed.

Cl. 192

(cl. 327 in the August CB)

The list of documents in which reference must be made to the fact that a receiver has been appointed was extended.

Cl. 192A

(cl. 538 in the August CB)

The provision enabling appeal against decisions of a receiver was relocated to cl. 538.

Provision in Exposure
Draft

Nature of Change

Cl. 195

(cl. 330 in the August CB)

Provision was made for the Commission to make an order declaring that a receiver was liable for the costs of an audit of his accounts.

Cl. 196

(cl. 331 in the August CB)

The overriding priority in respect of tax instalment deductions and withholding tax on dividends remitted overseas, conferred by ss 221P and 221YU of the Income Tax Assessment Act 1936, was recognized on the face of the CB.

Cl. 198

(cl. 333 in the August CB)

The definition of "special resolution" in the ICAC CAs was restored so as to require passage by a majority of creditors present and voting whose debts against the company amount in the aggregate to not less than 75% of the total amount of the debts of creditors present and voting, either in person or by proxy, at the meeting.

Provision in Exposure
Draft

Nature of Change

Cl. 202

(cl. 338 in the August CB)

The capacity to object to the appointment of an official manager was extended to secured creditors and a consequential adjustment was made to the value of debts owed to a creditor, entitling him to object (see also s-cl. 347(1) and 353(1)).

Cl. 203A

(cl. 342 in the August CB)

The requirement to advertise six monthly meetings of members and creditors was deleted.

Cl. 203B

(cl. 343 in the August CB)

The provision designed to ensure that, unless otherwise ordered by the court, an official management takes priority, for the purposes of trading, over the right of a secured creditor to appoint a receiver was deleted.

Cl. 203C

(cl. 344 in the August CB)

The permitted timing of a meeting to consider whether or not to extend the period of official management was altered to enable this matter to be

Provision in Exposure
Draft

Nature of Change

considered at a regular 6 monthly meetings and thus prevent an extra meeting being necessary.

Cl. 208

(cl. 349 in the August CB)

The amount of property that an official manager may sell otherwise than in the ordinary course of business was raised again to \$5000 (or \$20,000 if the committee of management consents). The capacity to sell an unlimited amount with the approval of the Court was changed so as only to require consent of the creditors given by special resolution.

Cl. 212

(cl. 355 in the August CB)

The creditors, of which the official manager must convene a meeting after his release, were defined as meaning all persons who were creditors at the commencement of the official management and all persons who were creditors on the day on which the person ceased to be the official manager.

Provision in Exposure
Draft

Nature of Change

Cl. 213

(cl. 356 in the August CB)

The list of documents etc. in which notification must be given that a corporation is under official management was extended.

Cl. 218A

This clause relating to transfers to avoid liabilities was deleted.

Cl. 226

(cl. 367 in the August CB)

The provision conferring power on the Court to stay or restrain proceedings against the company was amalgamated in cl. 367 along with the other powers of the Court on hearing a winding up application.

Provision in Exposure
Draft

Nature of Change

Cl. 228

(cl. 368 in the August CB)

The provision avoiding the enforcement of certain remedies by proceeding against property of a company after the commencement of winding up was amalgamated with cl. 368 relating to avoidance of certain dispositions etc.

Cl. 230

(cl. 370 in the August CB)

The provision requiring lodgment with the Commission of certain documents in relation to the winding up of a company was altered so as to require notice of the application for winding up to be lodged not later than 10.30 am on the next business day after the filing of the application.

Cl. 232

(cl. 373 in the August CB)

Provision was made for the review of the liquidator's remuneration by the Court on the application of the Commission and certain creditors (as well as certain members).

Provision in Exposure
Draft

Nature of Change

Cl. 235

(cl. 376 in the August CB)

The preliminary report by a liquidator as to the causes, if applicable, of the company's inability to pay its debts in full within 12 months from the commencement of winding up was replaced by a report as to the reasons for the company's failure.

Cl. 236

(cl. 377 in the August CB)

Amended so that, in addition to powers being conferred on a liquidator by the Court or by a committee of inspection, these powers could also be conferred by a special resolution of creditors. The amount of debts which a liquidator can compromise was increased to \$20,000.

Cl. 238

(cl. 380 in the August CB)

The amount of money received by a liquidator which can be retained for more than 10 days without being paid into a bank was increased to \$500.

Provision in Exposure
Draft

Nature of Change

Cls. 241, 242 and 262

(cls 432 to 436 in the August CB)

The provisions relating to appointment of a committee of inspection previously differed as between a voluntary winding up (cl. 262) and a winding up by the court (cls 241 and 242). These provisions were amalgamated and relocated in Division 4, and made applicable to every mode of winding up. The amalgamated provisions were based on NCB cls 352 to 358.

Cl. 244

(cl. 378 in the August CB)

The power of the Court to settle lists of contributories was conferred directly on the liquidator (rather than indirectly under the rules of court, as previously). A right of appeal against the liquidator's decisions was provided for in cl. 538.

Cl. 260

(cl. 398 in the August CB)

Amended so that notice of a meeting of creditors at which a proposal for voluntary winding up was to be put, had to be lodged with the Commission not less than 14 days before the meeting

Provision in Exposure
Draft

Nature of Change

and advertised in each State or Territory in which the company carried on business or had carried on business during the preceding 2 years. The statement of affairs which was required to be posted to creditors did not have to be sent to creditors who were owed less than \$200, but such creditors were to be afforded an opportunity to obtain a copy on request.

new provision

(cl. 402 in the August CB)
Similar prohibitions to those in ICAC CAs s.263 (and exposure draft cl. 263) concerning execution and civil proceedings against companies after the commencement of a creditors voluntary winding up were applied so as to stay proceedings against the company in other participating jurisdictions.

Cl. 276A

(cl. 415 in the August CB)
The provision relating to disqualification of liquidators was made applicable to provisional liquidators.

Provision in Exposure
Draft

Nature of Change

Cl. 277A

(cl. 417 in the August CB)

A number of changes were made to the provision relating to disqualification of liquidators.

Cl. 279

(cl. 538 in the August CB)

The right of a person aggrieved by any act or decision of a liquidator to appeal to the Court was re-located in a general provision.

Cl. 281

(cl. 422 in the August CB)

The provision enabling auditing of a liquidator's accounts was amended to enable the accompanying statement of the position in the winding up to be audited and a report prepared by the auditor. Also amended to require the Commission to provide the liquidator with a copy of the report and to make copies available for public search.

Cl. 283

(cl. 424 in the August CB)

As with other similar provisions, the list of documents in which notification must be made that a corporation is in liquidation was expanded.

Provision in Exposure
Draft

Nature of Change

new provision

(cl. 440 in the August CB)

Provision was made to implement the Eggleston Committee recommendation that, in a winding up, a charge that is capable of being registered under the Act but hasn't been registered would be void against the liquidator.

Cl. 292

(cl. 441 in the August CB)

Priority was accorded to the costs incurred by a provisional liquidator and priority was no longer accorded, under para. (h), to any debts owing to the Commonwealth.

Cl. 295

(cl. 453 in the August CB)

The liquidator's right to recover preferences was extended to enable recovery of moneys from an officer of a company in circumstances where a preferential payment to a creditor of the company discharged an officer from a guarantee or other liability.

Provision in Exposure
Draft

Nature of Change

Cl. 296

(cl. 454 in the August CB)

Time limits were imposed on the liquidator's power to disclaim onerous property (thus restoring the limitation in ICAC CAS s-sec. 296(1)).

Cl. 306

(cl. 457 in the August CB)

This provision was amended by the deletion of that part of s-cl. 457(1) which was covered in cl. 541, and by exempting from the requirement to give assistance to the Commission in its prosecution a duly qualified legal practitioner acting for a defendant or likely defendant (s-cl. 457(2)).

Cl. 318

(cl. 473 in the August CB)

This provision was restricted to bodies (other than companies incorporated in the jurisdiction) formed within Australia. A new cl. 474 was inserted to provide that outstanding property of similar bodies incorporated or formed overseas would vest in the Commission in a similar manner to ICAC CAS s. 310.

Provision in Exposure
Draft

Nature of Change

C. 347

(cl. 515 in the August CB)

Time limits for notification of changes in particulars were changed back to the 1 month period as in ICAC CAs except in relation to notification of change in address of registered office and hours of opening, where notification was required not later than 7 days after the change.

Cl. 362

(cl. 528 in the August CB)

Provision was made in a new s-cl. 528(5) for service of documents on an official manager.

Cl. 362B

Omitted

Cl. 362B on retention of books was omitted in reliance on the new s-cl. 267(2) dealing with the keeping of accounting records for seven years.

Cl. 362D

Omitted

Cl. 362D dealing with certain provisions in contracts etc. that are to be regarded as void was omitted because it was felt it would have caused unnecessary difficulties in relation to settled commercial practice.

Provision in Exposure
Draft

Nature of Change

new provision

(cl. 536 in the August CB)

This clause was concomitant to cl. 535, and enabled the Court to give directions with respect to meetings which it might order.

new provisions

(cls 537 and 538 in the August CB)

These two new clauses gave a general right of appeal from acts, omissions or decisions of the NCSC, receivers, liquidators etc. and they applied where no other appeal or review procedure was provided or the matter was not specified to be conclusive or final.

Cl. 366

(cl. 539 in the August CB)

A new para. 539(4)(b) was added to allow an order by the Court directing the rectification of any NCSC Register.

new provision

(cl. 543 in the August CB)

This new provision specified that civil proceedings under the CB were not to be stayed by reason only that the proceedings disclosed, or arose out of, the commission of an offence.

Provision in Exposure
Draft

Nature of Change

Cl. 374A

(cl. 554 in the August CB)

Amended so that the offence of non-disclosure in para. 554(1)(a) would only go to what the person was capable of disclosing.

Cl. 374B

(cl. 555 in the August CB)

It was provided that a defence to non-compliance with cl. 267 was available if reasonable grounds existed for the belief that a competent and reliable person was handling the discharge of the duty to comply with the accounts provisions in that clause.

Cl. 374C

(cl. 556 in the August CB)

It was provided that a defence to a charge under this clause was available if the debt was incurred without the defendant's express or implied authority or consent, rather than where he did not know and could not have found out by the exercise of reasonable diligence. This recognized situations where a defendant knew that a debt was being incurred but where it was not within his power to stop or influence its being incurred.

Provision in Exposure
Draft

Nature of Change

new provision

(cl. 558 in the August CB)

Included to expressly provide that the matters under s-cl. 556(1) or 557(1) did not affect any rights of a person to indemnity, subrogation or contribution.

Cl. 376

(cl.565 in the August CB)

Cl. 376 was substantially redrafted as cl. 565, and the dividends to be paid out of profits provisions were substantially based on s.376 of the ICAC CAs.

Cls. 376A and 376B

Omitted

Cls. 367A and 367B were omitted as they were no longer necessary.

Cl. 380A

(cl. 572 in the August CB)

Para. 380A(2)(b) was omitted in the redraft of cl. 572 thus not deeming the secretary of a corporation to be a party to the offence therein.

Sch. 7A

(Sch. 4 in the August CB)

Forms 8 to 11 were amended consequent upon changes to cl. 99D (cl. 192 in the August CB).

Provision in Exposure
Draft

Nature of Change

Sch. 7B

(Sch. 5 in the August CB)

Changes were made to this schedule including changes to:

- (a) take account of claims of an official manager in relation to property of the company (paras 1(1)(e) and 1(2)(e));
- (b) ensure that the references to liens were in line with those in Division 9 of Part IV;
- (c) include in the priorities schedule (cl. 3) the provision formerly in s-cl. 108(4) of the exposure draft relating to the priority accorded to the amount of an increase in the debt secured by a charge;
- (d) ensure that the references to unlimited securities (cl. 3) covered present and future advances, contingent liabilities, liabilities in respect of bills of exchange, letters of credit, third party indebtedness etc.;
- (e) recognize, in cl. 6, that priorities were divided differently between a number of charges by

Provision in Exposure
Draft

Nature of Change

reference to different monetary layers of the total amount secured by all charges.

(f) clarify the definition of a prior registered charge; and

(g) define a "holder in due course" for the purposes of cl. 1.

Sch. 9

(Sch. 6 in the August CB)

Paras 2(1)(c) and (f) were modified to remove the need to state whether any profit or loss on sale of assets (other than current assets) was brought into account in determining the net amount of the profit or loss of the company or of the company and its subsidiaries.

A new provision (para. 2(1)(m)) requiring disclosure of the total amount of wages and salaries paid by the company to its employees was inserted. Sub-para. 5(1)(j)(iii) was omitted as it only had application in respect of companies which were trustees of trading trusts.

Provision in Exposure
Draft

Nature of Change

Para. 5(4)(1), which concerns certain loans made, guaranteed or secured by the company, or by the company and its subsidiaries, was revised as a consequence of s-cl. 230(1) being redrafted.

Appendix D

1332. The major changes between the August CB (ie, the Bill that was introduced into the House of Representatives on 27 August 1980) and the present 1981 CB are as follows:-

August CB	Nature of Change
S-cl. 5(1)	The definition of "charge" (which is of relevance to Div. 9 of Pt IV and Sch. 5 of the CB) has been amended by deleting the words "including a charge created by assignment" because a charge unlike a mortgage does not involve a transfer of the title.
S-cl. 5(1)	A new definition of "chargee" has been inserted (which is of relevance to Div. 9 of Pt IV and Sch. 5 of the CB) to marry with the definition of "charge".
S-cl. 5(1)	The definition of "debenture" excludes notes with a face value of \$50,000 or more, and excludes prescribed documents.

August
CB

Nature of Change

- S-cl. 5(1) A new definition of "exempt proprietary company" has been inserted which extends the definition to proprietary companies no member of which is a public company.
- S-cl. 5(1) The definition of "foreign company" has been redrafted so as to separate the categories of bodies corporate deemed foreign companies under the CB.
- S-cl. 5(1) The definition of "listed corporation" has been amended to ensure that it only applies to companies the shares of which are currently listed for quotation on a stock exchange list.
- S-cl. 5(1) The definition of "promoter" has been amended to exclude a person performing functions attaching to a business relationship with a promoter.
- S-cl. 5(1) The definition term "undischarged bankrupt" has been changed to "insolvent under administration".

August
CB

Nature of Change

S-cl. 5(1)

The definition of "unit" has amended to include equitable interests.

S-cl. 5(3)

(now s-cl. 5(3) in the CB)
Former para 5(3)(b) is recast and split into new paras 5(3)(b) and (c) dealing separately with offers and invitations.

S-cl. 5(4)

(now s-cl. 5(4) in the CB)
"with respect to shares, debentures or prescribed interests" deleted from line 10 of sub-cl 5(4).

New provision

(Para 5(4)(d) in the CB)
This para provides that an offer made to the holders of prescribed interests pursuant to a deed approved under Division 6 of part IV of the CB will not be regarded as an offer to the public in certain circumstances.

New provision

(s-cl. 8(7) in the CB)
New CB s-cl. 8(7) inserted - corresponding to SIA s-sec 5(7) - to bring CB into line with SIA.

August
CB

Nature of Change

New provision

(s-cl. 8(12) in the CB)
Definition of "prescribed percentage" included in new CB s-cl. 8(11) along the lines of proposed amendment to SIA.

Para 9(2)(a)

(para 9(2)(a) in the CB)
Amended to include within the category of relations not necessarily deemed "associated", the situation where a person furnishes advice to another in the proper performance of a function attaching to a "business relationship"

New provision

(para 9(2)(c) in the CB)
This is a new provision included in CB so that a person giving a proxy to another person will not necessarily be taken to be associated with that person.

Para 12(1)(a)

(para 12(1)(a) in the CB)
Amended to make it clear the NCSC may not demand the production of books for the purpose of exercising the power to make recommendations to Ministerial Council for laws under NCSC Act s-sec 6(3).

August
CB

Nature of Change

Para 12(1)(b)

(para 12(1)(b) in the CB)

Amended to make it clear that NCSC's power to inspect books be exercised in relation to possible contraventions of the ACT CO or a law corresponding thereto.

Para 12(3)(a)

(para 12(3)(a) in the CB)

Amended to allow the notice to specify a time and a place at which the books may be produced.

New provision

(s-cl. 12(8) in the CB)

This is a new provision included in the CB to protect persons from liability who comply with a direction given by the NCSC to produce books whether or not the direction itself is validly given.

Cl. 13

(cl. 13 in the CB)

New s-cl. 13(1A) and 13(1B) added and s-cl. 13(2) replaced. For details of the changes, see paragraphs 82 and 83 of the explanatory memo.

August
CB

Nature of Change

New provision

(s-cl. 16(2) in the CB)

New s-cl. 16(2) added to deal with oral explanations by lawyers in relation to the company books where a privileged communication may be involved. In similar terms to CB s-cl. 16(1), except that the lawyer must comply with a request for the explanation to the extent that he can do so without divulging the privileged communication.

S-cl. 18(3)

(s-cl. 18(3) in the CB)

Amended to also provide that the Commission shall not register as an auditor persons who are prohibited from acting as a director etc. of a company by a provision equivalent to CB cl. 562 in a past or present State or Territory law.

Para 18(7)(a)

(para 18(7)(a) in the CB)

Consequential amendment to take account of creation of Companies Auditors and Liquidators Disciplinary Board (see notes on cl. 27).

August
CB

Nature of Change

S-cl. 18(9)

(s-cl. 18(9) in the CB)

Amended so that the NCSC is to give reasons for all decisions where it refuses to register an auditor, not only where the unsuccessful applicant requests it.

The notice has also been amended so that in addition to giving the decision and the reasons for it, it is to set out "the findings on material questions of fact, referring to the evidence or other material on which those findings were based". Changes in similar terms to CB s-cl. 18(9) have also been made to CB s-cl. 20(11) and 27(15).

Para 20(2)(c)

(para 20(2)(c) in the CB)

Requirement added that a prospective liquidator satisfy the NCSC that he is "capable of performing the duties of a liquidator" so as to bring this provision into line with CB para 18(2)(c).

August
CB

Nature of Change

S-cl. 20(4)

(s-cl. 20(4) in the CB)

Amended to also provide that the Commission shall not register as an auditor persons who are prohibited from acting as a director etc. of a company by a provision equivalent to CB cl. 562 in a past or present State or Territory law.

S-cl. 20(8)

(s-cl. 20(8) in the CB)

Consequential amendments to take account of creation of Companies Auditors and Liquidators Board (see notes on CB cl. 27).

S-cl. 20(11)

(s-cl. 20(11) in the CB)

Corresponding amendment to that in CB s-cl. 18(a) made in respect of NCSC decision to refuse to register a liquidator or a liquidator of a special corporation (see notes on CB s-cl. 18(9)).

S-cl. 25(4)

(s-cl. 25(4) in the CB)

Amended to provide expressly for notification of bankruptcy and schemes of arrangement with creditors under Part X of Bankruptcy Act, rather than relying on reference to CB s-cl. 227(1).

August
CB

Cl. 27

(now cl. 27 in the CB)

Redrafted so as to take account of decision to establish a separate tribunal, the Companies Auditors and Liquidators Disciplinary Board (the Board) to deal with the cancellation or suspension of registration of, or other disciplinary action against, auditors and liquidators (other than official liquidators and persons requesting the cancellation of their own registration who continue to be dealt with by the NCSC). Other changes to CB cl. 27 consist of:

- new provision to enable the Board to require the NCSC to pay costs where the NCSC where it makes an unsuccessful application (CB s-cl. 27(13))
- a new provision making it clear that the Board may deal with a matter whether or not criminal charges are to be laid (CB s-cl. 27(14))

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CB

Nature of Change

- amendment made to the provision requiring reasons to be given for a decision of the Board (formerly the NCSC) - CB s-cl. 27(15)), in similar terms to CB s-cl. 18(9))

- redrafted and additional provisions dealing with the time at which a decision of the Board is to come into effect (CB s-cl. 27(16), (17), (18) and (19))

- redrafted and additional provisions dealing with the recovery of penalties and costs imposed by the Board (CB s-cl. 27(5), (22), (23) and (24))

- new provision giving an aggrieved person or the NCSC rights to appeal to the Supreme Court from decision of the Board (CB s-cl. 27(26) and (27) to complement the general right of appeal against decisions of the NCSC in CB cl. 537).

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CB

Nature of Change

New provision

(CB para 30(1)(c))

Applies the provisions of CB s-cl. 30(1) to the giving of accounts and group accounts to the NCSC pursuant to CB s-cl. 285(9) and (10).

New provision

(CB para 30(2)(aa))

Inserted so as to make it clear that the qualified privilege available to third persons extends to statements made by the auditor under CB s-cl. 30(1).

New provision

(CB s-cl. 36(1A))

Added to cover acquisition by a subsidiary of "units of shares" in holding company (see notes on CB s-cl. 5(1) "unit").

S-cl. 73(1)

(s-cl. 73(1) in the CB)

Amended to allow a company to alter its memorandum with respect to "powers" as well as "objects".

S-cl. 73(2)

(s-cl. 73(2) in the CB)

Redrafted, and new provisions (CB

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CB

Nature of Change

s-cl. 73(3) and (4)) added to make it clear that the minimum requirement for alteration of a provision in the memorandum that could be lawfully contained in the articles is a special resolution, and that requirements additional to the passing of the special resolution may be imposed before the memorandum can be changed.

S-cl. 76(1)

(s-cl. 76(1) in the CB)
Redrafted, and new provisions (CB s-cl. 76(2) and (3)) added - corresponding to amendment made to CB cl. 73 (see notes on CB s-cl. 73(2)).

S-cl. 80(3)

(s-cl. 80(3) in the CB)
The words "interested in that contract or in the matter to which the document relates" have been omitted and substituted by "interested in that contract or other document or in the matter to which that contract or other document relates".

August CB	Nature of Change
Sub-para 81(1)(a)(ii)	(sub-para 81(1)(a)(ii) in the CB The words "under a name specific in the contract" have been delet
Para 81(1)(c)	(para 81(1)(c) in the CB) Redrafted so as to provide a flexible formula which will enabl the company to ratify a contract and which will protect the person (cf previous CB draft where "promoter" was used) who executes or purports to enter into the contract from liability, when and only when the company subsequentl formed is reasonably identified, in all the circumstances, with the company to which the pre- incorporation contract refers.
S-cl. 81(8)	Omitted
New provisions	(CB s-cl. 81(8) and (9)) New CB s-cl. 81(8) and (9) have been added. Whereas s-cl. 81(8) of the August Bill provided that a promoter could escape personal liability under s-cl. 81(4) and (7) if each other party to the contract consented in writing to

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CB

Nature of Change

the promoter being exempted, the new provisions provide that, where there are a number of parties to the contract, then any party who expressly consents to another being exempted from liability cannot recover damages from the other under CB s-cl 81(4) and (7). Consequential amendments have also been made to those provisions. The requirement that the person seeking exemption serve on the party to the contract a statement setting out the terms of CB cl 81 has been deleted.

S-cl. 81(12)

Omitted

Omitted because it appeared that the issue of constructive notice was not relevant to liability under CB s-cl. 81(4).

New provision

(s-cl. 81(12) in the CB)
Inserted to make it clear that notwithstanding any legal or equitable principles, a trustee will not have any right to indemnity from the company where CB cl. 81 applies.

August
CB

Nature of Change

New provision

(s-cl. 81(13) in the CB)

CB s-cl. 81(13) has been included so that a company may ratify a contract for the purposes of CB cl.81 in or similar manner to a contract being ratified under cl. 80.

Para. 83(5)(d)

(para 83(5)(d) in the CB)

Amended to refer to a compromise or arrangement with "another person or other persons" rather than with "its creditors or members".

Para. 85(4)(f)

(para 85(4)(f) in the CB)

Redrafted to take account of the charges made to the provisions on registration of charges (CB Div. 9 of Part IV)

Para. 94(1)(b)

Omitted

Included as s-cl. 107(4) and 108(2).

Para. 94(2)(b)

Reference to prescribed interests omitted (see para. 94(2)(c)).

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CB

Nature of Change

New provision

(para 94(2)(c) in the CB)
Excludes forms issued to holders of prescribed interests pursuant to deeds approved under Division 6 of Part IV that relate to those prescribed interests.

New provision

(para 94(2)(d) in the CB)
Equivalent of para 94(2)(c) in the August CB.

S-cl. 97(1)

(s-cl. 97(1) in the CB)
1st 4 lines of s-cl. 97(1) are recast in the light of the changes made to s-cl. 5(3).

S-sub-para 97(5)(b)
(11)(I)

(sub-para 97(5)(b)(11)(I) in the CB)
"(Other than the amount of advances to any other corporation that is also a guarantor corporation in relation to the borrowing corporation)" is added at the end of s-sub-para 97 (5)(b)(11)(I).

S-cl. 97(6)

(s-cl. 97(6) in the CB)
Recast in the light of changes made to s-cl. 5(3).

August
CB

Nature of Change

S-cl. 97(10)(a)

(para 97(10)(a) in the CB)

Now applies only in respect of breaches arising from failure to comply with CB para. 97(1)(a).

New provision

(para 104(1)(b) in the CB).

CB s-cl. 104(1) has been separated to include paras (a) and (b).

CB para 104(1)(b) provides that where a corporation issues or allots shares or debentures with a view to all or any of them being offered to the public, the law relating to the offering or intended offering of shares or debentures applies to any document by which the offer is made.

S-cl. 105(5)

(CB s-cl. 105(9))

Relocated as CB s-cl. 105(9).

New provision

CB cl. 109 is a new provision.

This provision empowers the NCSC to exempt a person from compliance with Division 1 Part IV or to declare that this Division applies as if modified.

August
CB

Nature of Change

Cl. 120

(cl. 120 in the CB)

Substantially redrafted along the lines of ICAC CAs s. 61 so as to take out the references to accounting records and to the making of entries in the accounting records, which were included to take account of former cls. 376 and 376 of the first exposure draft which have since been redrafted.

Two new provisions have been included in ICAC CAs s. 61 for the purposes of the CB. CB s-cl. 120(9) has been inserted to provide that redemption will be deemed even though, where payment has been by cheque, the cheque has not been presented. An offence provision (CB s-cl. 120(10) has also been included.

S-cl. 123(15)

(s-cl. 123(15) in the CB)

Amended so that the exemption from the provisions of CB cl. 123 also apply to a reduction of capital or cancellation of shares that is necessary because of a law corresponding to the CASA.

August
CB

Nature of Change

Para. 129(1)(b)

(para 129(1)(b) in the CB)
CB sub-para 129(1)(b)(ii) has been separated into a new CB para 129(1)(c). The resulting CB sub-para 129(1)(b)(ii) now covers a person purporting to acquire shares or units of shares in a holding company of the company.

New provision

(s-cl. 129(2) in the CB)
The words ", and whether by means of a loan, guarantee or the provision of a security or otherwise" have been omitted from CB para 129(1)(a) and placed in a separate provision (CB s-cl. 129(2)) which acts as an inclusory definition of "financial assistance". This new provision also adds the words ", the release of an obligation or the forgiving of a debt" after the word "security". The intention of the change is to widen the types of "financial assistance" which are to be covered.

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CB

Nature of Change

New Provisions

(s-cl. 129(3) and (4) in the CB)
CB s-cl. 129(3) and (4) have been inserted to deal with, respectively, the "relevant purpose" of the giving of the assistance, and, to deem certain circumstances to be "in connection with" an acquisition for which assistance has been given by a company.

S-cl. 129(8)

(s-cl. 129(8) in the CB)
This provision has been amended in the following ways

- certain exceptions have been taken out (i.e. former CB paras 129(5)(b), (e) and (f)) on the basis that they are sufficiently well covered by existing general law
- as a corollary of the above, new CB paras 129(8)(j) and (k) have been included to preserve the existing general law and to leave the way open for the common law to provide for further exceptions to those in CB s-cl. 129(8) as the situation arises

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CB

Nature of Change

- the remaining exceptions have been modified, where appropriate, to ensure that they are entered into bona fide and in the ordinary course of commercial dealing
- the requirement that the consent of NCSC be obtained by a borrowing corporation under CB para 129(8)(d) has been removed
- a new provision has been added (sub-para 129(8)(d)(ii)) to complement the provision of a security in relation to the repayment of the moneys (CB s-cl. 129(8)(d) formerly only dealt with the giving of a guarantee).

Sub-para 129(6)(b)(ii) (sub-para 129(9)(b)(ii) in the CB)

Redrafted to provide for the situation where the company is a subsidiary of more than one listed corporation.

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CB

Nature of Change

Sub-para 129(7)(c)(ii)

(sub-para 129(10)(c)(ii) in the
CB)

This provision which required a public company for the purposes of the special resolution procedure, to obtain a report of a registered company auditor on the financial position of the company has been deleted. There is now no difference between public and proprietary companies under para 129(10)(c) - both are required to send a copy of the directors' resolution to members.

New provision

(para 129(12)(e) in the CB)

New para 129(9)(e) has been added to give a right to the members, trustees and creditors of a subsidiary company to appeal to the court notwithstanding the passage of the special resolution. This places them on a similar footing to the members etc. of other companies in the group.

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CB

Nature of Change

New provision

(para 130(1)(c) in the CB)

Provides that the validity of a contract or transaction will not be affected by a contravention of CB para 129(1)(c) unless such a contract or transaction effects the loan that constitutes the contravention.

S-cl. 130(4)

(s-cl. 130(4) in the CB)

Redrafted to allow the Supreme Court to give redress where the contract or transaction is not yet void but is about to become void under cls. 129 or 130.

S-cl. 130(15)

(s-cl. 130(15) in the CB)

Amended to add at the end of the provision the words "but, where there would be any inconsistency between the rights and liabilities of a person under this section (or under an order of the Court made by this section) and the rights and liabilities of that person apart from this section, the provisions of the section or of the order made the Court prevail".

August
CB

Nature of Change

Para. 134(2)(a)

(para. 134(2)(a) in the CB)
Amended consequential to the changes made to the definition of "listed corporation" in CB cl. 5.

S-cl. 136(2)

(s-cl. 136(2) in the CB)
Voting shares, in which an associate has a relevant interest and in respect of which a certificate is obtained from the NCSC under new s-cl. 136(7), will be disregarded in determining a persons entitlement (s-cl. 136(2)).

New provision

(para 136(4)(c) in the CB)
A person will not be taken to be an associated by reason only of his appointment as an unpaid proxy at a meeting of the company (new para 136(4)(c)).

S-cl. 136(1)

(s-cl. 136(1) in the CB)
The references to 10% in the provision have been substituted by references to "the prescribed percentage".

August
CB

Nature of Change

New provision

(s-cl. 136(8) in the CB)

Inserted to set out the meaning of the references to "the prescribed percentage".

S-cl. 137(1)

(s-cl. 137(1) in the CB)

A substantial shareholder will be required to give the company a notification that states:-

- (a) his name and address;
- (b) prescribed particulars of his voting shares and those of his associates in which either has a relevant interest;
- (c) prescribed particulars of each such interest;
- (d) prescribed particulars of any contract etc. whereby he or his associates acquire that interest.

- the notice will also have to be accompanied by prescribed documents (CB s-cl.137(1)).

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CB

Nature of Change

- similar requirements will be made of a substantial shareholder whose interest changes or ceases (CB s-cl. 138(1) and 139(1)).

- S-cl. 138 (s-cl. 138(1) in the CB)
A substantial shareholder will have to advise changes to relevant interests of his associates as well as himself (s-cl. 138(1)).

- S-cl. 138(4) Omitted.

- S-cl. 147(11) (s-cl. 147(11) in the CB)
S-cl. 147(11) has been redrafted. The change is set out in para 323A of this ex memo.

- Cl. 148 (s-cl. 148 in the CB)
S-cl. 148(2) and (8) include a further condition relating to the carrying on of business. S-cl. 148(11) has been redrafted.

- S-cl. 152(1) (s-cl. 152(1) in the CB)
The words following CB para 152(1)(b) have been altered so that the reference to the Public Trustee becomes para 152(1)(c).

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CB

Nature of Change

The other paras of s-cl. 152(1)
have been renumbered accordingly.

Para. 152(5)(d)

(para 152(5)(d) in the CB)
\$2000 substituted by \$5000

Para. 154(1)(d)

(cl. 154 in the CB)
In para 154(1)(d) the words "to the
same extent as if the trustee for
the holders of the debentures or
any registered company auditor
appointed by the trustee were the
directors of the corporation" have
been omitted. Similar words have
been deleted from CB para.
154(2)(b).

S-para. 154(1)(d)(i)

(s-para. 154(1)(d)(i) in the CB)
A registered company auditor
appointed by the trustee will also
be able to inspect the records
of the borrowing corporation.
A similar change is made in
s-para.154(2)(b)(i) in relation
to a guarantor corporation.

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CB

Nature of Change

Para. 160(5)(a)

(para 160(5)(a) in the CB)
S-para. 160(5)(a)(ii) now requires written notice issued by the corporation to include an offer to repay money.

Cl. 162

(cl. 162 in the CB)
The headnote of this clause has been altered to "Compliance with laws of State or other Territory sufficient compliance for certain companies."

Sub-para 168(1)(ii)

(sub-para 168(1)(b)(ii) in the CB)
Amended to make it clear that the management company cannot sell or issue a prescribed interest to which the deed relates otherwise than at a price calculated in accordance with the provisions of the deed.

Sub-para 168(1)(b)(iii)

(sub-para 168(1)(b)(iii) in the CB) Amended to make it clear that the management company will at the request of the holder of a prescribed interest purchase or

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CB

Nature of Change

cause to be purchased that prescribed interest from the holder at a price calculated in accordance with the provisions of the deed.

Para. 168(1)(e)

(para. 168(1)(e) in the CB)

Amended to delete the reference to a trustee or his representative being provided with information as if he was a director.

S-cl. 171(2)

(s-cl. 171(2) in the CB)

Amended to include a reference to approvals granted under previous corresponding laws of participating States or Territories.

Cl. 175

(cl. 175 in the CB)

Drafting change. Penalty applies to cl. 175(4).

Cl. 181

(cl. 181 in the CB)

The words "referring to or relating to securities of the company" have been added so that it is clear the provision permits the use of the duplicate seal on documents other than share certificates.

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CB

Nature of Change

Cl. 188

(cl. 188 in the CB)

Redrafted to make it clear that the company is required to send or deliver the completed certificates within two months.

S-cl. 189(1)

(s-cl. 189(1) in the CB)

The definition of "beneficial owner" changed to include a reference to an authorized trustee corporation holding shares for the beneficial owner either alone or with another person.

The definition of "prescribed corporation" has been amended consequential on the changes made to the definition of "listed corporation" in CB cl. 5.

New provisions

(s-cl. 189(5) and (6) in the CB)

Two new sub-clauses have been inserted 189(5) and 189(6). These require the stamping of an instrument to be made by an ink stamp. This has also involved consequential changes to the following clauses: 193(4)(a),

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CB

Nature of Change

194(1), 194(2)(a), 195(1)(a),
195(1)(b), 195(1)(c), 198(1),
198(2) and 198(5).

New provisions

(Cl. 199 in the CB)

New definitions of "present liability", "prospective liability and "registrable charge" have been included.

Relocated provisions

A number of provisions in the registration of charges provisions have been relocated e.g. CB s-cl. 199(2), which provides that charges over property held by a company as trustee, was previously in the provision setting out details of the types of charges requiring registration. Similarly, s-cl. 199(3) and (4), concerning the time from which certain pre-existing charges become registrable, was previously in Schedule 5.

New provision

(s-cl. 199(8) in the CB)

A new s-cl. 199(8) has been added to make it clear that registered foreign companies formed within

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CB

Nature of Change

Australian jurisdiction which has created charges over property in each State would be required to register these charges separately in each jurisdiction (cf. an overseas incorporated company which has registered as a foreign company in a participating jurisdiction would only be required to register charges in that jurisdiction in respect of property situated in any of the other participating jurisdictions).

S-cl. 200(3)

(CB s-cl. 200(3))

This provision which defined the date of creation of a charge has been deleted as being unnecessary.

Cl. 202

(cl. 200 in the CB)

A number of changes have been made to the charges requiring registration. In the light of the distinction drawn in Re South

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CB

Nature of Change

Australian Barytes (1977) 3

A.C.L.R. 52 between uncalled share capital and uncalled share premiums, CB paras 200(1)(b) and (c) now include references to uncalled share premiums.

Paras 202(1)(c) and (e) of the 2nd exposure draft have been combined in CB para 200(1)(d), to require registration for all personal chattels. Similarly para 202(1)(f) of the second exposure draft relating to charges over aircraft and hovercraft, has been deleted as these are also covered by CB para 200(1)(d) relating to personal chattels. The requirement to register charges on book debts has been amended by the deletion of the exception relating to "interests secured or created by the deposit of a document of title to the book debt". The concept of a document of title was considered inappropriate in relation to a



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Nature of Change

book debt. There was also a need, given that book debts will frequently be marketable securities and vice versa, to ensure that the exemptions applicable to one category of registrable charge are also applicable to the other. See CB para 200(1)(g) and s-cl. 200(2) and ex memo para 482(g).

Crop and wool liens and charges and stock mortgages are required to be registered under CB para 200(1)(h). This involves a reversion to the position under the ICAC CA's and a rejection of the Eggleston Committee recommendation which had been reflected in the exposure drafts of the CB.

The exemption from registration of pledges of goods has been extended to all pledges, consistent with Bills of Sale legislation (See CB para 200(2)(b) and ex memo para 483(b)).

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CB

Nature of Change

The exemption from registration of crop and wool liens and charges and stock mortgages has been removed (See changes to CB s-cl. 202(1) mentioned above). Consequential amendments have been made in CB cl. 212 to avoid the consequences of non-registration under relevant State legislation.

S-cl. 202(3)

(s-cl. 200(3) in the CB)

The definition of "personal chattel" in CB s-cl. 200(3) has been amended to make it clear that it includes a fixture or a growing crop that is charged separately from the land to which it is affixed or on which it is growing.

S-cl. 202(4)

(s-cl. 200(4) in the CB)

Amendments have been made to the definition of "book debts" in respect of which charges are required to be registered. (See ex memo paras. 482(g) and 484(a).

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CB

Nature of Change

Cl. 203

(cl. 201 in the CB)

The notice of charges to be lodged with the Commission is to include a "short description of the property charged" (CB sub-para 201(1)(v) rather than "a description of the property sufficient to identify the property" as in the exposure drafts. This reversion to the existing law is aimed at minimising problems involved in attempting to state precisely what is in a charge, (problems which are increased in respect of descriptions of future acquired property). A consequential amendment has been made in CB para 203(2)(c). The notice to be lodged is also now simply to include "a short description of the liability (whether present or prospective) secured by the charge" rather than "the amount of the debt or the nature of the other liability (whether contingent or otherwise) secured by the charge (CB para. 201(1)(iv)). The notice is now required to be "in the prescribed

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CB

Nature of Change

form". The regulations will enable the notice to be signed by or on behalf of an interested party.

An amendment has been made to CB s-cl. 203(1) and (3) to indicate that a statement in writing verifying the execution of a charge is not required where the original instrument creating or evidencing the charge is lodged.

Cl. 205

(cl. 203 in the CB)

Amendments have been made in CB s-cl. 203(4) and (5) to ensure that persons wishing to lodge documents promptly so as to gain the benefits of the priority system will not be prejudiced by the existence of provisions in various Stamp Duties Acts preventing the Commission from accepting documents on which stamp duty is payable before the stamp duty has been paid.

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CB

Nature of Change

It is no longer an offence if the person who lodged a defective notice of a charge fails to comply with a direction given to him by the Commission to furnish a notice with all the required particulars (cf. s-cl. 205(5) of the August CB). A person who fails to comply with such a direction may, however, suffer the consequences as to priority which may flow from loss of provisional registration of the charge.

If a notice of charge containing all the required details is lodged after provisional registration has been lost, all those details are to be entered in the register (cf. s-cl. 205(6) of the second exposure draft which did not provide for re-entry on the register of information previously contained in an incomplete notice).

If there is more than 1 charge on the property of a corporation

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of the type which does not become registrable at the time when the charge is created but only when the corporation becomes subject to the provisions of this Act, then the Commission is required to insert details of these charges in its register in such a manner that as against other registrable charges they are all accorded the same priority by Schedule 5 (CB s-cl. 203(10) - (13) as to the categories of charge to which the provisions apply see ex memo para 493.

Cl. 206

(cl. 204 in the CB)

Three changes have been made to cl. 206 of the second exposure draft relating to:

- (a) limiting the reach of Schedule 5 to determination of priorities as between registrable charges;
- (b) consent to waiver of priority;
and

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CB

Nature of Change

(c) priorities as between fixed
and floating charges.

Further elaboration of these 3
changes is contained in ex memo
para 495.

New provision

(cl. 205 in the CB)

Priority questions between holders
of registrable charges and a
liquidator, which were addressed in
Schedule 5 of the 2nd exposure
draft, are now addressed as
questions of validity in CB clause
205. See ex memo paras 496 and
497.

CB cl. 205 now contains provisions
relating to extensions of time
for filing notices, based on ICAC
CAs s. 106. See also CB cl. 212
relating to rectification of the
register of charges, which is also
covered in ICAC CAs s. 106.

CB cl. 205 also now contains a
sub-clause 205(4), based on ICAC
CAs s-sec. 100(10) relating to
contrived extensions of time.

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CB

Nature of Change

Cl. 212

(cl. 211 in the CB)

The provision which exempts registration of charges under b of sale legislation if register under the CB has been extended eliminate the effect of any provisions as to priorities whi the bills of sale legislation m contain (CB s-cl. 211(2)).

New provision

(cl. 212 in the CB)

Included provision for rectification of the register of charges in certain circumstances along the lines of ICAC CA's s. 106.

Cl. 219(3)

(s-cl. 219(3) in the CB).

The word "natural" has been inserted before "persons" and "person" in CB s-cl. 219(3).

Cl. 224(2)

(s-cl. 224 in the CB).

A third party who deals with a director whose office has been vacated pursuant to CB s-cl. 222 will now only be protected if he acts in goods faith, for value ar without actual knowledge of the

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CB

Nature of Change

position of the director (CB s-cl. 224(2)). The equivalent provision in the August CB referred to "notice" rather than "actual knowledge".

S-cl 226(7)

(s-cl. 226(7) in the CB).

The procedures set out in CB s-cl. 226(7) for appointing or re-appointing a director who has attained the age of 72 years will now also apply to a corporation that is a public company within the meaning of the corresponding law of a State or of another Territory.

Cl. 227

(cl. 227 in the CB)

CB s-cl. 227(1) now prohibits an "insolvent under administration" rather than an "undischarged bankrupt" from taking part in the management of a company.

"Insolvent under administration" is defined in CB s-cl. 5(1).

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CB

Nature of Change

The penalty for a breach of CB s-cl 227 (1) is now the same as that applicable to CB s-cl. 227(2) ie "\$5,000 or imprisonment for 1 year or both."

Cl. 228

(cl. 228 in the CB).

The penalty at the end of CB cl. 228 has been omitted and specific penalties (\$1,000 or imprisonment for 3 months, or both) have been provided for breaches of CB s-cl. 228(1) and (5). For other breaches of CB cl 228 the general penalty will apply (see CB cl. 570).

S-cl. 228(5)

(s-cl. 228(6) in the CB).

The declaration required by CB s-cl. 228(5) will now only have to be made at the first meeting of directors after the director involved becomes aware of the relevant factors (see CB s-cl. 228(6)).

S-cl. 229(1)

(s-cl. 229(1) in the CB)

CB s-cl. 229(3) has been amended to make it clear that it applies to form officers or employees

August
CB

Nature of Change

New provision

(CB s-cl. 229(4))

Provides a penalty (\$20,000 or imprisonment for 5 years or both) for officers or employees of a corporation who make improper use of their position as such.

S-cl. 229(7)

(s-cl. 229(7) in the CB)

CB s-cl. 229(7) has been amended to make it clear that a corporation may institute an action under its provisions even if the relevant officer has not actually been convicted of an offence under CB cl. 229.

S-cl. 229(10)

(s-cl. 229(10) in the CB)

Amended to refer to "rule of law" rather than "other law in force in the Territory."

S-cl. 230(1)

(s-cl. 230(1) in the CB)

Sub-para (a)(iii) amended to make it clear that it only applies to a trustee who is acting in his capacity as such.

August
CB

Nature of Change

S-cl. 230(2)

(s-cl. 230(2) in the CB)

Amended to refer also to the situation where a company gives guarantee or provides a security connection with a loan made to a corporation.

S-cl. 230(3)

(s-cl. 230(3) in the CB)

Para (d) amended so that the exemption will only apply to loan for the purchase of an employee's "principal place of residence".

Para (e) amended to make it clear that it applies to a company which is a subsidiary of more than one listed corporation.

S-cl. 230(5)

(s-cl. 230(5) in the CB)

Para (b) is now CB para 230(5)(c) and has been amended to refer to director's "beneficial interest in shares in a corporation" rather than his "power in relation to interests in shares". The new wording is now in line with CB sub-para 230 1(a)(iv)

August
CB

Nature of Change

Para (c) is new and provides a penalty for breach of CB sub-para 230 1(a)(iii)

Para (c) is now para (d)
The penalty provided has been amended to that the applicable penalty is \$5,000. This amendment is in line with the amendment made to CB s-cl. 229(1).

S-cl. 230(6)

(s-cl. 230(6) in the CB)
Amended to take account of the possibility of a company being a subsidiary of more than one listed corporation.

S-cl. 231(12)

(s-cl. 231(12) in the CB)
The penalty has been omitted.

New provision

(CB s-cl. 232(3) in the CB)
Exempts from compliance with CB cl. 232 a director who had given the requisite notice under a corresponding previous law of the Territory.

August
CB

Nature of Change

S-cl. 232(1)

(s-cl. 232(1) in the CB)

Para (b) amended to delete the expression "of which notice has been given to the company."

New provision

(para 232(2)(c) in the CB)

Included to specify the period within which notice under CB para 232(1)(c) is required to be given. The relevant periods are 14 days in the case of CB cl. 238 notices and "forthwith" for notices required to be given under the CASA.

S-cl. 233(4)

(s-cl. 233(4) in the CB)

Amended to refer also to receipt of "benefits" other than money or valuable considerations.

S-cl. 233(5)

(s-cl. 233(5) in the CB)

Amended to ensure that, in the event of a conflict between the provisions of CB cl. 233 and any other rule of law the statutory provisions will prevail.

August
CB

Nature of Change

S-cl. 233(6)

(s-cl. 233(o) in the CB)

New sub-para (a)(iii) has been added to ensure that CB cl. 233 will also apply to payments for the loss of any office held by a person who also holds, or has held in the last 12 months, any of the offices mentioned in CB sub-paras 233(b)(a)(i) and (ii).

S-cl. 233(7)

(s-cl. 233(7) in the CB)

A definition of "emoluments" is now included in CB s-cl. 233(7).

Para (e) amended so that the payments described therein will only be regarded as exempt benefits if they do not exceed seven times the average of the total annual emoluments of that person in the period of 3 years preceeding the loss of office.

New provision

CB s-cl. 233(8) has been included to make it clear that approval of a CB cl 233 payment does not relieve the director of any duty to the company under CB cl. 229 or otherwise.

August
CB

Nature of Change

S-cl. 235(1)

(s-cl. 235(1) in the CB)

Redrafted so that the word
"forthwith" only applies to paras
(c) and (d) - not to para (e).

S-cl. 239(1)

(s-cl. 239(1) in the CB)

The penalty has been omitted.

New provision

(CB s-cl. 240(3))

Included to make it clear that
the general meeting of a company
will be regarded as its annual
general meeting (a.g.m.) if all
matters required to be dealt with
at an a.g.m. are dealt with at
the general meeting.

S-cl. 247(7)

(s-cl. 247(7) in the CB)

The penalty has been omitted.

S-cl. 248(1)

(s-cl. 248(1) in the CB)

Redrafted so that it also applies
to special resolutions of classes
of shareholders or members and not
just to special resolutions of all
the members.

August
CB

Nature of Change

S-cl. 250(1)

(s-cl. 250(1) in the CB)

Amended so that a resolution passed in accordance with CB cl 250 will be deemed to have been signed or at the time at which the document concerned was last signed by a member.

New provision

(CB s-cl. 260(3))

Extends the provisions of CB cl 260 to take account of the position of trustees of estates of incapable persons.

New provision

(CB s-cl. 260(5) and (6))

Included to allow Official Trustees in Bankruptcy to become registered as the holder of shares in which a bankrupt has a legal or equitable interest.

S-cl. 262(2) and (8)

(s-cl. 262(2) and (8) in the CB)

There is now a condition that a company must be carrying on business in a jurisdiction before it can be required to establish or maintain a branch share register.

August
CB

Nature of Change

S-cl. 267(2)

(s-cl 267(2) in the CB)

This sub-clause now extends to cover accounting records kept under a corresponding provision of a previous law of the Territory.

S-cl. 267(4)

(s-cl. 267(4) in the CB)

A company will have to produce its records at a place in the Territory not later than 14 days after the requirement to produce them is made.

S-cl. 268(1), (3), (4)

(s-cl. 268(1), (3) and (4) in CB)

The words "that is neither a foreign company nor a recognised company" have been deleted as the revised definition of "holding company" (introduced in the August CB) already excludes such companies.

S-cl. 268(13)

(s-cl. 268(13) in CB)

This sub-clause has been revised to make it clear that compliance with the terms of an order of the NCSC made under CB cl. 268 includes compliance with any limitations or conditions set out in the order.

August
CB

Nature of Change

S-cl. 269(6)

(s-cl. 269(6) in CB)

The exemption from the requirement to prepare group accounts will only apply to a company which is a wholly owned subsidiary of another corporation incorporated in the A.C.T. or in a participating State or a participating Territory.

Para 269(9)(c)

(para 269(9)(c) in CB)

The requirement on directors will now be one of stating whether there are reasonable grounds to believe that the company will be able to pay its debts as and when they fall due.

New provision

(para 270(1)(d) in CB)

Where a company was a holding company at any time during its financial year, the directors will be required to provide particulars of subsidiaries acquired and disposed of during the financial year.

August
CB

Nature of Change

S-cl. 270(2)

(s-cl. 270(2) in CB)

The directors of a company that at the end of its financial year was both a holding company and wholly owned subsidiary of another corporation incorporated in the A.C.T. or a participating State or a participating Territory, will not have to prepare a directors' report pursuant to CB s-cl. 270(2) (they will, however, have to prepare a report pursuant to CI s-cl. 270(1)).

Para 270(2)(c)

Omitted

Particulars of the extent to which each corporation in the group contributed to the consolidated profit or loss will now be required by the regulations.

S-cl. 270(4)

Omitted

Disclosure of a company's ultimate holding company and its country of incorporation will now be required by the regulations.

August
CB

Nature of Change

New provisions

(s-cl. 273(2) and (3) in CB)

The manner in which an application under CB s-cl. 273(1) will have to be made is now set out (cf. CB s.cls- 268(5) and (6)).

S-cl. 276(1)

(s-cl. 276(1) in CB)

The penalty under paragraph (a) is now restricted to a fine of \$5,000.

S-cl. 277(10)

Deleted.

Para 280(5)(b)

(para. 280(5)(1b) in the CB)

Amended to require approval for the non-appointment of an auditor to be given by the members of a company within 1 month after a vacancy in the office occurs.

Para 280(11)(b)

(para. 280(11)(b) in the CB)

Amended to require approval for the non-appointment of an auditor to be given by the members of a company within 1 month after an auditor is removed from office.

Para 285(4)(d)

(para 285(4)(d) in CB)

This paragraph has been redrafted to clarify its meaning.

August
CB

Nature of Change

S-cl. 285(5) and (6)	(s-cl. 285(5) and (6) in CB) These sub-clauses have been redrafted to delete the reference to the auditor of the company having access to the accounting records and other records relating to the transactions of the company as a trustee of the trading trust and the assets and liabilities of the trading trust.
S-cl. 292(9)	(s-cl. 292(9) in the CB) Introductory words, are replaced by "a certificate".
New provision	(s-cl. 295(3) in the CB) Included to allow an inspector to require the production of books where he believes they are relevant to an investigation.
S-cl. 296(6)	(s-cl. 296(12) and (13) in the CB) A lawyer will be able to address the inspector and examine the officer at such times during the examination as the inspector determines, rather than to the extent that the inspector permits.

August
CB

Nature of Change

New provisions

(s-cl. 296(12) and (13) in the CB)

A lawyer must not obstruct the examination in exercising his powers under (CB s-cl. 296(6).

S-cl. 299(2)

(s-cl. 299(2) in the CB)

Recast to apply the requirement that a person object to the admission of an answer in evidence only in relation to CB paras 299(2) (b) and (c). Formerly the requirement applied to paras 299(2)(a), (b) and (c).

New provision

(para. 299(2)(d) in the CB)

An additional ground relating to a claim of legal professional privilege is included.

S-cl. 315(5)

(s-cl. 315(5) in the CB)

This clause has been amended to take account of meetings of a class of creditors or a class of members.

S-cl. 315(7)

(s-cl. 315(7) in the CB)

This clause has been amended so that the Supreme Court will be able to give leave to allow a person excluded by the clause to administer a scheme of arrangement.

August
CB

New provision

(CB s-cl. 315(8))

CB s-cl. 315(8) deems an officer of a related corporation to be an officer of the company and former officers, promoters of the company or of a related corporation to be officers of the company. The NCSC has a discretion which it may exercise to direct that this deeming provision does not apply to such a person.

New provision

(CB s-cl. 317(4))

CB s-cl. 317(4) is a new provision. When an order corresponding to an order under sub-cl. 317(1) is made by the Supreme Court of a participating jurisdiction and a copy is filed with the Registrar of the ACT Supreme Court, the order takes effect and may be enforced as if it had been made by the ACT Supreme Court.

August
CB

Nature of Change

Cl. 320

(cl. 320 in the CB)

The words 'or unjust manner' have been added to the heading. CB para 320(1)(a) has been amended so that the directors may only have to act in any manner that is unfair or unjust to one or more of the members which includes the applicant to be in contravention of the clause.

CB para 320(1)(b) has been amended so that an application to the Court for an order under the clause may be made by the NCSC where the NCSC has made a report under Part VII to the relevant authority.

S-cl. 323(1)

(s-cl. 323(1) in the CB)

Para (b) amended to refer just to "an auditor or an officer of the company". There is a new para (c) which excludes from acting as a receiver "an officer of any corporation that is a mortgagee of property of the company".

August
CB

Nature of Change

New provision

(s-cl. 323(2) in the CB)
CB s-cl. 323 (2) deems certain persons to be officers of a corporation for the purposes of CB s-cl. 323(1). The NCSC does, however, have a discretion to exclude former officers from the operation of this provision (CB para 323 (1A((b))).

S-cl. 330(1)

(s-cl. 330(1) in the CB)
Amended so that the accounts lodged with the NCSC must be verified by a statement in writing.

S-cl 331(7)

(s-cl. 331(7) in the CB)
Amended to make it clear that the relevant date for the purposes of subdivision C of Division 4 of Part XX is the date of the appointment of the receiver or of possession being taken or control being assumed, as the case may be.

S-cl. 335(1)

(s-cl. 335(1) in the CB)
The amount which a judgement creditor must be owed before he

August
CB

Nature of Change

can request that a meeting be convened of the company's creditors for the purpose of placing the company under official management has been raised from \$500 to \$1,000.

S-cl 338(1)

(s-cl. 338(1) in the CB)

An additional sub-para CB

338(1)(b)(iii) states that the person appointed to be official manager by the creditors must not be an officer of a corporation that is a mortgagee of property of the company.

The requirement for the person appointed official manager to furnish a certificate stating that he is not an undischarged bankrupt in CB sub-para 338(1)(b)(iii) has been amended to state that he is now required to furnish a certificate stating that he is not an insolvent under administration.

August
CB

nature of Change

S-cl 338(4)

(s-cl. 338(4) in the CB)

Amended so that the capacity to object to the appointment of an official manager is limited to unsecured creditors.

S-cl 341(2)

(s-cl. 341(2) in the CB)

Amended to read that the official manager will be chairman of any meeting of the company, of its creditors or of the company and its creditors that is held or resumed while he holds office as official manager.

S-cl. 347(4)

(s-cl. 347(4) in the CB)

A further requirement has been added that the official manager must convene the meeting of creditors on a date that is convenient to the majority in value of the creditors as well as for a time and place that is convenient (CB cl. 347(4)).

S-cl. 348(1)

(s-cl. 348(1) in the CB)

Amended to provide that undue preferences will be void as against the official manager rather than the company.

August
CB

Nature of Change

Cl. 355

(cl. 335 in the CB)

CB cls 345 and 355 have been amalgamated to provide for one clause for the termination and release of official managers.

New provision

(s-cl. 355(7) in the CB)

A person who convenes a meeting for the purpose of considering a resolution that the appointment of a person as official manager be terminated must give to that person 14 days written notice of the meeting and the purpose of the meeting.

New provision

(s-cl 355(8) in the CB)

A person who is an official manager when he receives a notice given under sub-cl. 355(7) must prepare a report of his conduct of the official management to the meeting and within 7 days of the meeting lodge a notice of the holding of the meeting, the result of the resolution and a copy of his report with the NCSC.

August
CB

Nature of Change

S-cl. 357(2)

(s-cl. 357(2) in the CB)

The requirement for the person appointed official manager to furnish a certificate stating that he is not an undischarged bankrupt in CB sub-para 357(2)(a)(iii) has been amended to state that he is now required to furnish a certificate stating that he is not an insolvent under administration.

Cl. 363

(cl. 363 in the CB)

An additional category of applicant for winding up, in the case of general insurance companies is the Commonwealth Insurance Commissioner - see also CB cl. 364 and ex memo paras 770 to 772.

Cl. 375

(cl. 375 in the CB)

Directors and others will be required to give similar statements as to the affairs of a company to a provisional liquidator as they are currently required to give to a liquidator (CB s-cl. 315(11)).

August
CB

Nature of Change

Cl. 378

(cl. 378 in the CB)

The list of contributories to be settled by a liquidator is now required to be settled "in accordance with the regulations" (CB s-cl. 378(4) and para 576(1)(a)) - it is intended that the regulations will be modelled on existing N.S.W. Supreme Court rules.

S-cl. 389(b)

Omitted

S-cl. 389(b) of the August CB has been deleted consequential upon changes to CB cl. 378 viz that settlement of lists of contributories and rectification of the register of members can now be done by the liquidator directly rather than under a delegation from the Court under its rules.

Cl. 395

(cl. 395 in the CB)

The consequences have been clarified of making declarations of solvency without having reasonable grounds for doing so.

August
CB

Nature of Change

In these circumstances, the penal will be applicable even if CB s-cl. 395(3) has not been complied with and the declaration thereby has no effect for the purposes of the Act.

cl. 397

(cl. 397 in the CB)

The requirement that liquidators provide creditors with lists of other creditors, their addresses and the amounts of their claims has not been restricted to creditors whose debts exceed \$200 (See CB s-cl. 397(3)).

cl. 398

(cl. 398 in the CB)

The requirement in the August CB that a full statement as to the affairs of the company be available at the time that the notice of meeting is sent to creditors, has been replaced with a requirement that creditors be given a summary of those affairs. The 14 days notice requirement has also reverted to 7 days. An amendment has also been made in CB s-cl.

August
CB

Nature of Change

398(9) to enable a committee of inspection to be appointed at the meeting of creditors convened pursuant to CB cl. 398 - see ex memo para 839(g).

S-cl. 407(2)

(s-cl. 407(2) in the CB)
Amended to refer to "actual knowledge" rather than "notice" of a defect or irregularity.

S-cl. 417(6)

(s-cl. 417(6) in the CB)
Amended to allow the Commission to authorize the appointment of a liquidator who would otherwise be prevented from acting as such because he had been an officer etc of the relevant company within the preceding two years.

Cl. 420

(cl. 420 in the CB)
The power of the NCSC to "take such action as it sees fit" in relation to the supervision of liquidators (s-cl. 420(1) of the August CB) has been removed. Whilst the NCSC or the Court may inquire into any apparent breach of a liquidator's

August
CB

Nature of Change

duties, only the Court will be empowered to take such action as it sees fit.

S-cl. 422(1)

(s-cl. 422(1) in the CB)

Amended to provide that a liquidator is no longer required to lodge accounts on obtaining an order of release. He is, however, still required to lodge accounts on ceasing to act as a liquidator.

Cl. 426

(cl. 426 in the CB)

Liquidators are now to be permitted to invest surplus funds in authorised trustee investments or with authorised dealers in the short term money market in addition to being able to deposit it at interest with any bank.

Cl. 429

(cl. 429 in the CB)

The intent of the new sub-cl. 429(3) of the August CB has been made clearer - liquidators will be required to lodge certain accounts and reports even if the expense incurred in so doing cannot be recouped out of company property.

August
CB

Nature of Change

Cl. 441

(cl. 441 in the CB)

The priority accorded to the costs, charges and expenses properly incurred by a provisional liquidator has been elevated above costs associated with an official management (on the basis that being akin to costs etc incurred by a liquidator, the costs of a provisional liquidator should rank immediately after those of a liquidator).

S-cl. 451(1)

(s-cl. 451(1) in the CB)

Amended to make certain settlements etc void against the liquidator rather than the company.

Cl. 453

(cl. 453 in the CB)

The period prior to liquidation in respect of which a liquidator has a right to recover in respect of certain sales to or by a company has been extended from 2 to 4 years.

August
CB

Nature of Change

S-cl. 460(1)

(s-cl. 460(1) in the CB)

Amendment to make it clear the section refers to companies which have been dissolved before the commencement of the CB.

New provision

(s-cl. 461(3) in the CB)

This new provision requires directors of a disclosed company to retain the books of that company for a period of 3 years after dissolution.

New provision

(s-cl. 497(2) in the CB)

Provides a definition of "relevant securities" which are referred to in CB s-cl. 497(1).

Cl. 499

(cl. 499 in the CB)

Penalty amended so that only a monetary penalty of \$5,000 applies.

Cl. 509

(cl. 509 in the CB)

Amended so that recognized companies and recognized foreign companies will be subject to requirements similar to those

August
CB

Nature of Change

imposed on local companies in CB cl. 218 and will also be required in the case of limited liability recognized foreign companies, to cause notice of that fact to be exhibited on all relevant documents.

New provision

(CB para 512(2)(f))

Requires a foreign company to lodge details of registrable charges on its property when applying for registration under Division 5 of Part XII.

Cl. 516

(cl. 516 in the CB)

Amended so that registered foreign companies are also required to lodge a profit and loss account for their last financial year.

New provision

(s-cl. 516(6) in the CB)

CB s-cl. 516(6) has been included because of the new requirement that registered foreign companies lodge their profit and loss accounts.

August
CB

Nature of Change

The new provision deals with the situation where a registered foreign company is not required to prepare such accounts in their place of incorporation.

Cl. 517

(cl. 517 in the CB)

Amended to bring it into line with the requirements imposed on local companies in CB cl. 218 and to require limited liability foreign companies to cause notice of that fact to be placed on all relevant documents.

Cl. 521

(cl. 521 in the CB)

Amended to make it clear its provisions only apply if the registered foreign company is carrying on business in the relevant jurisdiction and more than 2 months has elapsed since a member resident in the jurisdiction has requested the establishment of a branch register.

Cl. 525

(cl. 525 in the CB)

The word "required" has been substituted for the word "directed."

August
CB

Nature of Change

New provision

(CB s-cl. 528(3))

CB s-cl. 528(3) is new and is designed to provide for the situation of a registered office of a company before it lodges a CB s-cl. 217(3) notice with the Commission.

New provision

(s-cl. 529(5) in the CB)

Provides for service of documents on official managers of recognised foreign companies.

Cl. 531

(now cl. 531 in the CB)

The expression "under Court order" has been omitted from the heading.

Para 535(4)

(now para 534(4) in the CB)

Amended to provide that the expert in question must be an expert in relation to the actual matter in question.

New provision

(para 538(c) in the CB)

Provides for appeals from decisions of official managers or deputy official managers.

August
CB

Nature of Change

S-cl. 539(3)

(s-cl. 539(3) in the CB)

Amended to make it clear that CB s-cl. 539(3) applies not only to meetings held for the purposes of the CB but also to meetings notice of which is required to be given in accordance with the provisions of the CB and to proceedings at both types of meetings.

S-cl. 540(1)

(s-cl. 540(1) in the CB)

Amended to refer to a "legal proceeding" rather than just a "proceeding"

S-cl. 541(6)-(9)
& (11)

(s-cl. 541(6)-(9) and (11) in the CB)

All these sub-clauses now refer to sub-section (3) rather than sub-section (2).

S-cl. 541(19)

Omitted
Omitted in view of the general provision in CB cl. 575 dealing with the power of the Court to punish for contempt of Court.

August
CB

Nature of Change

S-cl. 542(3)

(s-cl. 542(3) in the CB)

CB s-cl. 542(3) now allows a person in respect of whom a cl. 542 application has been made to employ a solicitor and counsel who may ask that person questions for the purpose of explaining any evidence given.

S-cl. 542(6)

Omitted

S-cl. 545(3)

(s-cl. 545(3) in the CB)

Amended so that it refers to the refusal of any "person" rather than the refusal of an "officer" of the corporation concerned."

S-para 552(3)(c)(11)

(now para 552(3)(e) in the CB)

Amended to refer to "debentures" rather than "deposits or loans".

New provision

(CB para 552(4)(c)

Ensures that CB s-cl. 552(3) will not apply where the provisions of Divisions 1 or 5 of Part IV of the CB have been complied with.

August CB	Nature of Change
New provisions	(CB para 552(8) and (9)). Included to cover the situation where a person goes from place to place offering shares to the public in a company which is proposed to be formed.
New provision	(CB para 553(1)(b) in the CB) States that CB s-cl. 554 to 557 will apply to a company in respect of which a winding up order has been stayed.
S-cl. 556(1)	(s-cl. 556(1) in the CB) Para (b) redrafted.
S-cl. 556(2)	(s-cl. 556(2) in the CB) Amended to provide an additional defence where the director does not have reasonable grounds to expect that the company will not be able to pay its debts.
New provision	(s-cl. 556(3) in the CB) Included to make it clear that a criminal conviction need not be obtained before civil proceedings can be instituted pursuant to CB s-cl. 556(1).

August
CB

Nature of Change

S-cl. 556(3)

(s-cl. 556(4) in the CB)

Amended to delete the reference to a company being discharged from liability by virtue of CB s-cl. 556(1).

S-cl. 557(1)

(now s-cl. 557(1) in the CB)

Amended so that the relevant Court order must be made in favour of the relevant creditor rather than the company.

New provision

(s-cl. 557(2) in the CB)

Provide that, in the case of a conviction under CB s-cl. 556(4) the Court may make an order that the officer involved is personally responsible to the company for as many of the debts of the company as the Court thinks proper.

New provision

(s-cl. 560(4) in the CB)

Defines officer, for the purpose of CB cl. 560, to include receivers who are not also managers.

August
CB

Nature of Change

New provision

(para 562(1)(b) in the CB)

Applies CB cl. 562 to a company in respect of which a winding up order has been stayed or terminated.

Para 562(4)(c)

(para 562(4)(c) in the CB)

Amended to ensure that a person need only be connected with 2 companies to which CB cl. 562 applies.

S-cl. 562(b)

Omitted.

S-cl. 563(4)

(s-cl. 563(4) in the CB)

Redrafted to ensure that CB cl. 563 will apply to an omission from, as well as to the making of, a statement.

Cl. 565

(cl. 565 in the CB)

Redrafted so that it is similar to s. 376 of the ICAC CAs.

S-cl. 571(5)

Omitted.

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CB

Nature of Change

S-cl. 574(1)

(now s-cl. 574(1) in the CB)

Amended to provide that the Court may, in addition to granting an injunction, require a person to do any act or thing.

S-cl. 574(6)

Omitted.

New provision

(s-cl. 574(2) in the CB)

Provides that the Court may grant an injunction requiring a person to take some action which would prevent the occurrence of an offence under the CB.

New provision

(s-cl. 574(6) in the CB)

Included consequential on the enactment of CB s-cl. 574(2).

New provision

(s-cl. 574(8) in the CB)

Allows the Court to make an order for damages in addition to, or in lieu of, an injunction.

New provision

(cl. 575 in the CB)

This is a general provision designed to ensure that the Court's

August
CB

Nature of Change

powers in relation to the punishment of contempt are not derogated from by any provision of the CB.

New provision

(cl. 578 in the CB)

Provides for the non-application of the rule against perpetuities to the trusts of certain funds established for the benefit of employees of a corporation.

New provision

(cl. 579 in the CB)

Provides that the CB does not apply to any trade union.

New provision

(cl. 580 in the CB)

Provides that nothing in the CB will affect the provisions of the Life Insurance Act 1945.

New provision

(cl. 581 in the CB)

Provides that CB cls. 437 - 450 apply subject to the provisions of s. 40 of the Workers Compensation Supplementation Fund Ordinance 1980.

August
CB

Nature of Change

Schedule 3

(Sch. 3 in the CB)

Table A Reg. 77(1)

Table B Reg. 61(1)

These paragraphs have been amended so that if the directors sign a document stating that they are in favour of a resolution set out in that document, then the resolution will be deemed to have been passed at a meeting of the directors held on the day and at the time at which the document was last signed by a director.

Schedule 5

(now Sch. 5 in the CB)

Major changes have been made to this schedule, foremost of which is the reduction in its reach: it no longer purports to determine the priorities between registrable charges and other unregistrable interests - this matter is to be left to the general law.

Other major changes are:

(a) competition between registrable charges and claims in liquidation

August
CB

Nature of Change

is now addressed in CB cl. 205 as a question of "validity" rather than as one of "priority" and "postponement"- see ex memo paras 496 to 499 and 1151.

(b) Schedule 5 no longer contains any reference to competition between registrable charges and execution creditors - see ex memo para 1150.

(c) extensive changes have been made to the provisions concerning tacking - see ex memo paras 1155 to 1160.

(d) the definition of "notice" in s-cl. 4 of Schedule 5 has been considerably shortened consequent upon the reduction in reach of the schedule to resolving priority questions only as between registrable charges, - see ex memo para 1161. See also ex memo para 1160 as to use of the term "actual knowledge".

August
CB

Nature of Change

(e) the effect of priority agreements and priorities as between fixed and floating charges (cl. 6 of the August CB's Schedule 5) are now covered in Division 9 of Part IV (CB cl. 204)

(f) many of the definitions in the August CB have been deleted as a consequence of the reduction in the reach of Schedule 5. A new definition of "priority time" has been inserted.

Schedule 6

Omitted

The contents of accounts and group accounts will now be prescribed by regulation.

CONCORDANCE

COMPANIES BILL 1981

1333. The concordance for the three Bills is as follows:-

PART I - PRELIMINARY

April ED August CB 1981
Bill

<u>Old clause</u>	<u>Clause</u>	<u>Clause</u>	<u>Title</u>
1	1	1	Short title
2	2	2	Commencement
3	3	3	Objects and application
4	4	4	Repeal
5	5	5	Interpretation
	6	6	References to affairs of a corporation
6	7	7	Subsidiaries, holding companies and related corporations
6A	8	8	Relevant interests in shares
6AA	9	9	Associated persons
6AB	Omitted		

PART II - ADMINISTRATION

Division 1 - Powers of Inspection

6B	10	10	Interpretation
6C	11	11	Commission may inspect books without charge
7	12	12	Power of Commission to require production of books
7A	13	13	Power of magistrate to issue warrant to seize books
7AA	14	14	Offences
-	15	15	Copies of extracts of books to be admitted in evidence
7B	16	16	Privilege

Division 2 - Registration of auditors and liquidators

8	17	17	Application for registration as auditor or liquidator
9	18	18	Registration of auditors
10	19	19	Auditor-General deemed to be registered as auditor
11	20	20	Registration of liquidators
11A	21	21	Registration of official liquidators
11B	22	22	Security to be given by liquidators
11C	23	23	Register of Auditors

11D	24	24	Registers of Liquidators and Official Liquidators
11E	25	25	Notification of certain matters
11F	26	26	Triennial statements by registered auditors and liquidators
11G	27	27	Cancellation or suspension of registration
11H	Omitted		
11J	28	28	Certain persons not to apply for registration as auditor or liquidator
11K	29	29	Certain persons deemed to be registered under this Act
	30	30	Auditors and other persons to enjoy qualified privilege in certain circumstances

Division 3 - Registers and Registration of Documents

12	31	31	Registers
13	32	32	Relodging of lost registered documents

PART III - CONSTITUTION OF COMPANIES

Division 1 - Incorporation

14	33	33	Formation of companies
15	34	34	Proprietary companies
16	35	35	Registration and incorporation
17	36	36	Membership of holding company
18	37	37	Requirements as to memorandum

Division 2 - Names

19	Relocated		
20	Relocated		
22,22A-22D	Substantially redrafted and expanded		
22	38	38	Interpretation
22A	39	39	Names of particular classes of companies
22B-22D	Substantially redrafted and expanded		
-	40	40	Reservation and registration of name of intended company
-	41	41	Reservation of name of intended recognised company
-	42	42	Registration of name of recognised company

- 43 43 Reservation and registration
of proposed new name of
company
- 44 44 Reservation of proposed new
name of recognised company
- 45 45 Registration of new name of
recognised company
- 46 46 Reservation and registration
of name of intended foreign
company or foreign company
- 47 47 Reservation of name of
intended recognised foreign
company or recognised
foreign company
- 48 48 Registration of name of
recognised foreign company
- 49 49 Reservation and registration
of proposed new name of
registered foreign company
- 50 50 Reservation of proposed new
name of recognised foreign
company
- 51 51 Registration of new name of
recognised foreign company
- 52 52 Reservation and registration
of name of recognised
company proposing to
transfer incorporation

-	53	53	Reservation of name of company or recognised company proposing to transfer incorporation
-	54	54	Registration of name of recognised company after transfer of incorporation
-	55	55	Reservation and registration of name of foreign company proposing to transfer incorporation
-	56	56	Reservation of name of foreign company proposing to transfer incorporation
-	57	57	Registration of name of foreign company that has become a recognised company after transfer of incorporation
-	58	58	Extension of reservation
-	59	59	Notification that registration of name desired in a State or another Territory
-	60	60	Registration of name of recognised company or recognised foreign company in the Territory

-	61	61	Notification that registration of name no longer desired in a participating State or Territory
-	62	62	Cancellation of registration where registration in the Territory no longer desired
-	63	63	Cancellation of registration where company or foreign company dissolved
-	64	64	Cancellation of registration where name registered by mistake
23	65	65	Change of name
24	66	66	Omission of "Limited" in names of charitable and other companies

Division 3 - Powers and Status

-	67	67	Powers
-	68	68	<u>Ultra Vires</u> transactions
25	69	69	Change of status
26	70	70	Change from public to proprietary company or from proprietary to public company

	71	71	Default in complying with requirements as to proprietary companies
A	72	72	General provisions as to alteration of memorandum
	73	73	Alterations of provisions of memorandum
	74	74	Articles of association
	75	75	Adoption of Table A or B
	76	76	Alteration of articles
	77	77	Memorandum and articles of companies limited by guarantee
	78	78	Effect of memorandum and articles
	79	79	Copies of memorandum and articles
	80	80	Confirmation of contracts and authentication and execution of documents
A	81	81	Ratification of contracts made before formation of company
B	Omitted		
	82	82	Prohibition of carrying on business with fewer than statutory minimum number of members

Division 4 - Transfer of Incorporation

36A	83	83	Certificate authorizing application for transfer o incorporation
36B	84	84	Application by recognised company for registration under Division
36C	85	85	Application by foreign company for registration under Division
36D	86	86	Registration of corporations as companies
36E	87	87	Effect of registration
36F	88	88	Alterations to constituent documents of foreign companies
36G	89	89	Effect of registration of company under corresponding law
36H	90	90	Application of this Act to corporations registered under this Division
36J	91	91	Establishment of registers and minute books
36K	92	92	Share warrants
36L	93	93	Certificate of registration conclusive evidence

PART IV - PROSPECTUSES, SECURITIES AND CHARGES

Division 1 - Prospectuses

37A	94	94	Interpretation
37AA	85	95	Prohibition of issue of certain documents in relation to proposed corporations
37	96	96	Forms of application for shares or debentures to be attached to prospectus
38	97	97	Invitation or offers in relation to borrowings by corporations
39	98	98	Contents of prospectuses
40	99	99	Certain notices, &c., not to be published
40A	100	100	Certain reports referring to prospectuses not to be published
40B	101	101	Evidentiary provisions, &c.
41	102	102	Retention of over-subscriptions in debenture issues
42	103	103	Registration of prospectuses
43	104	104	Document containing offer of shares for sale deemed to be prospectus

44	105	105	Allotment or issue of shares or debentures where prospectus indicates application for quotation on stock market
45	106	106	Expert's consent to issue of prospectus containing statement by him
46	107	107	Civil liability for untrue statement or non-disclosure in prospectus
47	108	108	Criminal liability for untrue statement or non-disclosure in prospectus
-	-	109	Power to exempt from compliance with Division or to declare that Division applies as if modified

Division 2 - Restrictions on Allotment and Variation
of Contracts

48	109	110	Prohibition of allotment unless minimum subscription received
49	110	111	Application moneys to be held in trust until allotment
53	111	112	Restriction on varying contracts referred to in prospectus

Division 3 - Shares

54	112	113	Return as to allotments
55, 56	113, 114	114	Differences in calls and payments, reserve liability, &c
57	115	115	Share warrants
57A	116	116	Restriction on application of capital of company
58	117	117	Power to make certain payments
59	118	118	Power to issue shares at a discount
60	119	119	Issue of shares at a premium
1	120	120	Redeemable preference shares
2	121	121	Power of company to alter its share capital
3	122	122	Validation of shares improperly issued
4	123	123	Special resolution for reduction of share capital
A	124	124	Commission to be informed of special rights carried by, or division or conversion of, shares
	125	125	Rights of holders of classes of shares
	126	126	Rights of holders of shares
	127	127	Rights of classes of members

66	128	128	Rights of holders of preference shares to be set out in memorandum or articles
67	129	129	Company financing dealings in its shares, &c.
67A	130	130	Consequences of company financing dealings in its shares, &c.
67B	131	131	Register of options
68	132	132	Options over unissued shares
69	133	133	Power of company to pay interest out of capital in certain cases

Division 4 - Substantial Shareholdings

69A	134	134	Application and interpretation
69B	135	135	Persons obliged to comply with Division
69C	136	136	Substantial shareholdings and substantial shareholders
69D	137	137	Substantial shareholder to notify company of his interests
69E	138	138	Substantial shareholder to notify company of change in his interests

69F	139	139	Person who ceases to be substantial shareholder to notify company
69G	140	140	References to operation of section 8
-	141	141	Copy of notice to be served on stock exchange
69J	142	142	Commission may extend period for giving notice under this Division
69K	143	143	Company to keep register of substantial shareholders
69L	144	144	Offences against certain sections
69M	145	145	Knowledge of servant or agent imputed to master or principal
69N	146	146	Powers of Court with respect to defaulting substantial shareholder

Division 5 - Debentures

0	147	147	Register of debenture holders and copies of trust deed
	148	148	Branch registers
	149	149	Specific performance of contracts
	150	150	Perpetual debentures

73	151	151	Re-issue of redeemed debentures
74	152	152	Qualifications of trustee for debenture holders
74A	153	153	Retirement of trustees
74B	154	154	Contents of trust deed
74C	155	155	Power of Court in relation to certain irredeemable debentures
74D	156	156	Duties of trustees
74E	157	157	Powers of trustee to apply to the Court for directions, &c.
74F	158	158	Obligations of borrowing corporation
74G	159	159	Obligation of guarantor corporation to furnish information
74H	160	160	Loans and deposits to be immediately repayable on certain events
74HA	161	161	Invitations or offers by prescribed corporations
74J	162	162	Compliance with laws of State or other Territory sufficient compliance for certain companies
75	163	163	Liability of trustees for debenture holders

Division 6 - Prescribed Interests

76	164	164	Interpretation
77	165	165	Approved deeds
78	166	166	Approval of deeds
79	167	167	Approval of trustees
30	168	168	Covenants to be included in deeds
1	169	169	Prescribed interests to be issued by companies only
2	170	170	Statement to be issued
3	171	171	No issue without approved deed
	172	172	Register of holders of prescribed interests
	173	173	Returns, information, &c., relating to prescribed interests
	174	174	Penalty for breach of certain provisions or covenants
	175	175	Winding up of schemes, &c.
	176	176	Power to exempt from compliance with Division and non-application of Division in certain circumstances
	177	177	Liability of trustees

Division 7 - Title to and Transfer of Securities

90	178	178	Nature of shares
91	179	179	Numbering of shares
92	180	180	Certificate to be evidence of title
93	181	181	Company may have duplicate common seal
94	182	182	Loss or destruction of certificates
95	183	183	Instrument of transfer
96	184	184	Registration of transfer at request of transferor
97	185	185	Notice of refusal to register transfer
-	186	186	Remedy for refusal to register transfer or transmission
98	187	187	Certification of transfers
99	188	188	Duties of company with respect to issue of certificates

Division 8 - Transfer of Marketable Securities

99A	189	189	Interpretation
99B	190	190	Sufficient instrument of transfer

99C	191	191	Transfer of marketable securities
99D	192	192	Transfers by authorised trustee corporations
99E	193	193	Execution of transfer by transferee
99F	194	194	Effect of certain stamps on prescribed instruments
99G	195	195	Registration of prescribed instruments.
99H	196	196	Operation of Division
99J & 99K	197 & 198	197	Occupation need not appear in register, instrument, &c
99L	199	198	Offences

Division 9 - Registration of Charges

100 & 101	200 & 201	199	Interpretation and application of Division
102	202	200	Charges required to be registered
103	203	201	Lodgment of notice of charge and copy of instrument
104	204	202	Acquisition of property subject to charge

105	205	203	Registration of documents relating to charges
107	206	204	Priorities of charges
-	-	205	Certain charges void against liquidator or official manager
108	207	206	Assignment and variation of charges
109	208	207	Satisfaction of, and release of property from, charges
110	209	208	Lodgement of notices, offences, &c.
110A	210	209	Company to keep documents relating to charges and register of charges
110B	211	210	Certificates
110C	212	211	Registration under <u>Instruments Ordinance</u> 1933
110D	213		Omitted
-	-	212	Power of Court to rectify Register, &c.
110E	214	213	Charges on property of recognized companies or recognized foreign companies
110F	215	214	Provisions applying when incorporation transferred
-	-	215	Power to exempt from compliance with certain requirements of Division

PART V - MANAGEMENT AND ADMINISTRATION

Division 1 - Office and Name

111	216	216	Registered office of company
112	217	217	Notice of address of registered office and office hours
113	218	218	Publication of name

Division 2 - Directors and Other Officers

114	219	219	Directors
115	220	220	Restrictions on appointment or advertisement of director
116	221	221	Qualification of director
117	222	222	Vacation of office
118	223	223	Appointment of directors to be voted on individually
119	224	224	Validity of acts of directors and secretaries
120	225	225	Removal of directors
121	226	226	Age of directors
122	227	227	Certain persons not to manage corporations
123	228	228	Disclosure of interests in contracts, property, offices, &c.

124	229	229	Duty and liability of officers
125	230	230	Loans to directors
126	231	231	Register of directors' shareholdings, &c.
127	232	232	General duty to make disclosure
128	Omitted		
129	233	233	Payments for loss of, or retirement from, office
130	234	234	Provisions as to assignment of office
131	235	235	Powers to require disclosure of directors' emoluments
132	236	236	Secretary
133	237	237	Provisions indemnifying officers or auditors
134	238	238	Register of directors, principal executive officers and secretaries

Division 3 - Meetings and Proceedings

135	239	239	Statutory meeting and statutory report
136	240	240	Annual general meeting
137	241	241	Convening of general meeting on requisition
138	242	242	Convening of meetings

139	243	243	Articles as to right to demand a poll
140	244	244	Quorum, chairman, voting, &c., at meetings
141	245	245	Proxies
142	246	246	Power of Court to order meeting
143	247	247	Circulation of members' resolution, &c.
144	248	248	Special resolutions
145	249	249	Resolution requiring special notice
145A	250	250	Resolutions of exempt proprietary companies
146	251	251	Lodgment with the Commission, &c., of copies of certain resolutions and agreements
147	252	252	Resolutions at adjourned meetings
148	253	253	Minutes of proceedings
149	254	254	Inspection of minute books

Division 4 - Register of Members

150	255	255	Non-application of the Division to mutual life assurance companies
151	256	256	Register and index of members

153	257	257	Inspection and closing of register
154	258	258	Consequences of default by agent
155	259	259	Power of Court to rectify register
156	260	260	Trustee, &c., may be registered as owner of shares
156A	261	261	Power of company to obtain information as to beneficial ownership of its shares
157	262	262	Branch registers

Division 5 - Annual Return

158	263	263	Annual return
159A	264	264	Auditor's statement
160	265	265	Exemption of certain companies

PART VI - ACCOUNTS AND AUDIT

Division 1 - Preliminary

161	266	266	Interpretation
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Division 2 - Accounts

161A	267	267	Accounts to be kept
161B	268	268	Financial years of grouped companies
162	269	299	Profit and loss account, balance-sheet and group accounts
162A	270	270	Directors' reports
162AA	271	271	Rounding off of amounts in accounts and reports
162B	272	272	Group accounts not to be issued, &c., until receipt of subsidiaries accounts, &c.
162C	273	273	Relief from requirements as to accounts and reports
164	274	274	Members of company entitled to balance-sheet, &c.
164A	275	275	Accounts and reports to be laid before annual general meeting
164B	276	276	Failure to comply with this Division

Division 3 - Audit

165	277	277	Qualifications of auditors
165A	278	278	Unlimited exempt proprietary company need not appoint

			auditor in certain circumstances
165B	279	279	Exempt proprietary company need not appoint auditor in certain circumstances
166	280	280	Appointment of auditors
166A	281	281	Nomination of auditors
166B	282	282	Removal and resignation of auditors
166BA	283	283	Effect of winding up on office of auditor
166C	284	284	Fees and expenses of auditors
167	285	285	Powers and duties of auditors as to reports on accounts
167AA	286	286	Obstruction of auditor
167A	287	287	Special provisions relating to borrowing and guarantor corporations
167B	Relocated		

Division 4 - Special Provisions Relating to Banking
and Life Insurance Corporations

167C	288	288	Banking and life insurance corporations
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PART VIAA - TRADING TRUSTS - OMITTED

PART VII - SPECIAL INVESTIGATIONS

168	289	289	Interpretation and application
169	290	290	Application for carrying out of investigation
170	291	291	Investigations
171	292	292	Conduct of investigations
172	293	293	Investigation of affairs of related corporation
172A	294	294	Powers of Commission and inspectors appointed under corresponding law
173	295	205	Powers of inspectors
174	296	296	Examination of officers
175	297	297	Officer failing to comply with requirements of this Part
176	298	298	Record of examination
176A	299	299	Admissibility of record of examination in evidence in proceedings against person examined
176B	300	300	Admissibility in other proceedings of questions and answers at an examination
176C	301	301	Weight of evidence
176D	302	302	Credibility of person who answered questions

176E	303	303	Determination of objection to admissibility of question and answer
177	304	304	Delegation by inspector
178	305	305	Reports of investigations
178AA	306	306	Provisions relating to reports
178A	307	307	Commission's powers in respect of books
178B	308	308	Privileged communications
179	309	309	Expenses of investigation
179A	310	310	Concealing, &c., of books of corporation
179B	311	311	Power of Commission to make certain orders
180	312	312	Application for winding up
180AA	313	313	Certain powers not to be delegated

PART VIIIA- ARRANGEMENTS AND RECONSTRUCTIONS

-	314	314	Crown to be bound
181	315	315	Power to compromise with creditors and members
182	316	316	Information as to compromise with creditors or members
183	317	317	Provisions for facilitating reconstruction and amalgamations of corporations

185	318	318	Acquisition of shares of shareholders dissenting from scheme or contract approved by majority
185A	319	319	Notification of appointment by scheme manager and power of Court to require report

PART IX - CONDUCT OF AFFAIRS OF COMPANY IN
OPPRESSIVE OR UNJUST MANNER

186	320	320	Remedy in cases of oppression or injustice
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PART X - RECEIVERS AND MANAGERS

186A	321	321	Interpretation
-	322	322	Crown to be bound
187	323	323	Disqualification for appointment as receiver
188	324	324	Liability of receiver
189	325	325	Power of Court to fix remuneration of receivers
190	Omitted		
191	326	326	Notification of appointment of receiver
192	327	327	Statement that receiver appointed
-	Relocated		

193	328	328	Provisions as to information where receiver appointed
194	329	329	Special provisions as to statement submitted to receiver
195	330	330	Lodging of accounts of receivers
196	331	331	Payments of certain debts out of property subject to floating charge in priority to claims under charge
197	332	332	Enforcement of duty of receiver to make returns

PART XI - OFFICIAL MANAGEMENT

198	333	333	Interpretation
-	334	334	Crown to be bound
199	335	335	Power of company to call meeting of creditors to appoint official manager
200	336	336	Statement of affairs of company to be submitted to meeting of creditors of company
201	337	337	Power to adjourn meeting
202	338	338	Power of creditors to place

			company under official management
202A	339	339	Appointment of committee of management
202B	340	340	Notice of appointment and address of official manager
203	341	341	Effect of resolution
203A	342	342	Six-monthly meetings of creditors and members
203B	343	343	Stay of proceedings
203C	344	344	Power to extend period of official management
203C(2)	344(3)	345	Extension of period of official management and release
204	345	345	Termination of appointment of official manager
205	346	346	Appointment of official manager not to affect appointment and duties of auditor
206	347	347	Duties of official manager
207	348	348	Undue preferences in the case of official management
208	349	349	Application and disposal of property during official management
208A	350	350	Official manager may apply to Court for directions

209	351	351	Certain provisions applicable to official management
-	Relocated		
210	352	352	Power of Court to terminate official management and give directions
211	353	353	Resolution to place company under official management effective, subject to appeal
211A	354	354	Lodgment of office copy of Court order
212, 204	355, 345	355	Termination of appointment and release of official manager
213	356	356	Notification that corporation is under official management
214	357	357	Functions of committee of management and appointment of deputy official manager

PART XII - WINDING UP

Division 1 - Preliminary

-	358	358	Crown to be bound
216	359	359	Modes of winding up
218	360	360	Liability as contributories of present and past members
218A	Omitted		

219	361	361	Nature of liability of contributory
220	362	362	Contributories in case of death or bankruptcy of member

Division 2 - Winding up by the Court

Subdivision A - General

221	363	363	Application for winding up
222	364	364	Circumstances in which company may be wound up by Court
223	365	365	Commencement of winding up by the Court
224	366	366	As to payment of preliminary costs, &c.
225 and 226	367	367	Powers of Court on hearing application
227 and 228	368	368	Avoidance of dispositions of property, attachments, &c.
229	369	369	Application to be <u>lis pendens</u>
230	370	370	Certain notices to be lodged with Commission
230A	371	371	Effect of winding up order

Subdivision B - Liquidators

231A	372	372	Power of Court to appoint official liquidator
232	373	373	General provisions as to liquidators
233	374	374	Custody and vesting of company's property
234	375	375	Statement of company's affairs to be submitted to liquidator
235	376	376	Preliminary report by liquidator
236	377	377	Powers of liquidator
-	378	378	Statement of list of contributories and application of property
237	379	379	Exercise and control of liquidator's powers
238	380	380	Payment by liquidator into bank
239	381	381	Release of liquidators and dissolution of company
240	382	382	As to orders for release or dissolution

Subdivision C - Committees of Inspection - relocated

Subdivision C - General Powers of Court

243	383	383	Powers to stay or terminate winding up
244	Relocated		
245	384	384	Delivery of property to liquidators
246	385	385	Appointment of special manager
247	386	386	Claims of creditors and distribution of property
248	387	387	Inspection of books by creditors and contributories
251	388	388	Power to arrest absconding contributory
252	389	389	Delegation to liquidator of certain powers of Court
253	390	390	Powers of Court cumulative

Division 3 - Voluntary Winding Up

Subdivision A - Introductory

253A	391	391	Limitation on rights to wind up voluntarily
254	392	392	Circumstances in which

company may be wound up
voluntarily

255	393	393	Commencement of winding up
256	394	394	Effect of voluntary winding up
257	395	395	Declaration of solvency

Subdivision B - Provisions applicable only to Members'
Voluntary Winding Up

258	396	396	Liquidators
259	397	397	Duty of liquidator to call creditors' meeting in case of insolvency

Subdivision C - Provisions applicable only to Creditors'
Voluntary Winding Up

260	398	398	Meeting of creditors
260A	399	399	Power to adjourn meeting
261	400	400	Liquidators
262	Relocated		
263	401	401	Execution and civil proceedings
-	402	402	Execution and civil proceedings against recognised companies

Subdivision D - Provisions applicable to every
Voluntary Winding Up

264	403	403	Distribution of property of company
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265	404	404	Appointment of liquidator
266	405	405	Removal of liquidator
267	406	406	Review of liquidator's remuneration
268	407	407	Acts of liquidator valid, &c.
269	408	408	Powers and duties of liquidator
270	409	409	Power of liquidator to accept shares, &c., as consideration for sale of property of company
271	410	410	Annual meeting of creditors
272	411	411	Final meeting and dissolution
273	412	412	Arrangement, when binding on creditors
274	413	413	Application to Court to have questions determined or powers exercised
275	414	414	Costs

Division 4 - Provisions applicable to every Mode of Winding Up

Subdivision A - General

276A	415	415	Interpretation
277	416	416	Books to be kept by liquidator
277A	417	417	Disqualification of liquidators
277B	418	418	Reports by liquidator
277C	419	419	Liquidators to enjoy qualified

			privilege in certain circumstances
278	420	420	Supervision of liquidators
279	Relocated		
280	421	421	Notice of appointment and address of liquidator
281	422	422	Liquidator's accounts
282	423	423	Liquidator to make good defaults
283	424	424	Notification that a corporation is in liquidation
284	425	425	Books of company
285	426	426	Investment of surplus funds on general account
286	427	427	Unclaimed property to be paid to Minister
-	428	428	Companies Liquidation Account
287	429	429	Expenses of winding up where property insufficient
288	430	430	Resolutions passed at adjourned meetings of creditors and contributories
289	431	431	Meetings to ascertain wishes of creditors or contributories

Subdivision B - Committees of Inspection

-	432	432	Convening of meetings by
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-	433	433	liquidator for appointment of committee of inspection Proceedings of committee of inspection
-	434	434	Vacancies on committee of inspection
-	435	435	Member of committee not to accept extra benefit
-	436	436	Powers of Court where no committee of inspection

Subdivision C - Proof and Ranking of Claims

Pt 290A	437	437	Interpretation
291	438	438	Proofs of debts
291(3) & (4)	438(3) & (4)	439	Computation of debts
291A	439	440	Debts proved to rank equally except as otherwise provided
-	440	-	Omitted
292	441	441	Priority payments
292A	442	442	Orders under section 179 or under section 33 of Securities Industry Act
292B	443	443	Debts due to employees
292C	444	444	Debts of a class to rank equally
292D	445	445	Advances in respect of wages and leave of absence
292E	446	446	Priority of employees' claims

			over floating charges
292F	447	447	Insurance against liabilities to third parties
292G	448	448	Provisions relating to injury compensation
292H	449	449	Priority where security given for payment of taxes
292J	450	450	Power of Court to make orders in favour of certain creditors

Subdivision D - Effect on other Transactions

293	451	451	Undue preferences
294	452	452	Effect of floating charge
295	453	453	Liquidator's right to recover in respect of certain transactions
296	454	454	Disclaimer of onerous property
298	455	455	Executions, attachments, &c., before winding up
299	456	456	Duties of sheriff after receiving notice of application

Subdivision E - Offences

306	457	457	Prosecution of delinquent officers and members
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Subdivision F - Dissolution

307	458	458	Power of Court to declare dissolution of company void
308	459	459	Power of Commission to deregister defunct company
309	460	460	Commission to act as representative of defunct company in certain events
310	461	461	Outstanding property of defunct company to vest in Commission
311	462	462	Outstanding interests in property, how disposed of
312	463	463	Liability of Commission and Commonwealth as to property vested in Commission
313	464	464	Accounts

Division 5 - Reciprocity with Participating
States and Participating Territories

313A	465	465	Recognition and enforcement in the Territory of order made in a participating State or participating Territory in relation to a recognized company or recognized foreign company
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313B	466	466	Exercise by the Court of powers or functions in relation to a recognized company or recognized foreign company
313C	467	467	Power of Registrar to request Supreme Court of a participating State or participating Territory to exercise or perform powers or functions
313D	468	468	Powers and functions in the Territory of liquidators of recognized companies or recognized foreign companies

Division 6 - Winding Up of Bodies other than Companies

314	469	469	Application
315	470	470	Winding up of bodies to which this Division applies
316	471	471	Contributories in winding up of a body to which this Division applies
317	472	472	Power of Court to stay or restrain proceedings

Division 7 - Miscellaneous

318	473	473	Outstanding property of defunct body formed within Australia
-	474	474	Outstanding property of defunct body formed outside Australia

PART XIII - VARIOUS TYPES OF COMPANIES

Division 1 - No Liability Companies

319	475	475	Application of Act to no liability companies
320	476	476	Shareholder not liable to calls or contributions
321	477	477	Dividends payable on shares held irrespective of amount paid upon shares
322	478	478	Calls, when due
323	479	479	Forfeiture of shares
324	480	480	Provisions as to sale of forfeited shares
325	481	481	As to shares held by or in trust for company
326	482	482	Sale of shares on non-payment of calls valid although specific numbers not advertised

327	483	483	Postponement of sale
328	484	484	Redemption of forfeited shares
329	485	485	Office to be open the day before sale
330	486	486	Distribution of surplus where cessation of business upon winding up
331	487	487	Distribution of surplus where cessation of business within 12 months
332	488	488	As to rights attaching to preference shares issued to promoters
333	489	489	Restrictions on tribute arrangements

Division 2 - Investment Companies

334	490	490	Interpretation
335	491	491	Restriction on borrowing by investment companies
336	492	492	Restriction on investments of investment companies
337	493	493	Restriction on underwriting by investment companies
338	494	494	Special requirements as to articles and prospectus

339	495	495	Investment company not to hold shares in other investment companies
340	496	496	Investment company not to speculate in commodities
341	497	497	Balance-sheets and accounts
342	498	498	Investment fluctuation reserve
343	499	499	Penalties

Division 3 - Companies Carrying on Business Outside the Territory

343AA	500	500	Interpretation
343AB	501	501	Notification of principal office in participating State or Territory
343AC	502	502	Notice to be given of change or alteration in principal office in participating State or Territory
343AD	503	503	Notice to be lodged of cessation of business in participating State or Territory
343AE	504	504	Offences

Division 4 - Recognized Companies and Recognized Foreign Companies

343AF	505	505	Interpretation
343B	506	506	Power to hold land

343C	507	507	Recognized company or recognized foreign company to have a principal office
343E	508	508	Name of recognized company or recognized foreign company to be reserved or registered
343F	509	509	Obligation of recognized company or recognized foreign company to exhibit name

Division 5 - Foreign Companies other than Recognized Foreign
Companies

344	510	510	Interpretation
345	511	511	Power of foreign companies to hold land
346	512	512	Unregistered foreign company not to establish place of business or carry on business in the Territory
346A	513	513	Registered office of registered foreign company
346AA	514	514	Agents
347	515	515	Return to be filed where documents &c., altered
348	516	516	Balance-sheets and other documents

350	517	517	Obligation to exhibit name of foreign company, &c.
352	518	518	Cessation of business, &c.
-	519	519	Name of foreign company to be struck off register
353	520	520	Restriction on use of certain names
354	521	521	Branch register of shares in foreign company
355	522	522	Registration of shares in branch register
356	523	523	Removal of shares from branch register
357	524	524	Index of members and inspection and closing of branch registers
359	525	525	Branch register to be <u>prima</u> <u>facie</u> evidence
360	526	526	Certificate as to shareholding
361	527	527	Penalties

PART XIV - MISCELLANEOUS

Division 1 - General

362	528	528	Service of documents on company
362AA	529	529	Service of documents on recognized company or recognized foreign company

362AB	530	530	Service of documents on registered foreign company
362A	531	531	Vesting of property
362B	Omitted		
362D	Omitted		
362E	532	532	Parts of dollar to be disregarded in determining majority in value of creditors, &c.
363	533	533	Costs
364	534	534	Disposal of securities if whereabouts of holder unknown
365	535	535	Power to grant relief
-	536	536	Power of Court to give directions with respect to meetings ordered by the Court
-	537	537	Appeals from decisions of Commission
-	538	538	Appeals from decisions of Commission, liquidators, &c.
366	539	539	Irregularities
366A	540	540	Power of Commission to intervene in proceedings

367A	541	541	Examination of persons concerned with corporations
-	542	542	Orders against persons concerned with corporations
-	543	543	Civil proceedings not to be stayed
369	544	544	Form and evidentiary value of books
370	545	545	Inspection of books
370A	546	546	Location of books kept on computers, &c.
370B	547	547	Location of registers
371	548	548	Translations of instruments
372	549	549	Certificate of incorporation conclusive evidence
372A	550	550	Admissibility of books in evidence
373	551	551	Court may compel compliance

Division 2 - Offences

374	552	552	Restriction on offering shares, debentures, &c., for subscription or purchase
-	553	553	Interpretation

374A	554	554	Offences by officers of certain companies
374B	555	555	Liability where proper accounts not kept
374C	556	556	Offences relating to incurring of debts or fraudulent conduct
374D	557	557	Powers of Court
374E	Relocated		
-	558	558	Certain rights not affected
374F	559	559	Inducement to be appointed liquidator or official manager
374FA	560	560	Falsification of books
374G	561	561	Frauds by officers
374H	562	562	Court may disqualify person from acting as director, &c., in certain circumstances
375	563	563	False or misleading statements
375A	564	564	False reports
376	565	565	Dividends to be paid out of profits
376A	Omitted		
376B	Omitted		
377	566	566	Restriction on use of words "Limited" and "No Liability"
378	567	567	Restriction on use of word "Proprietary"

378A	568	568	Reciprocity in relation to offences
378B	569	569	Offences committed partly in and partly out of the Territory
379	570	570	General penalty provisions
380	571	571	Continuing Offences
380A	572	572	Officers and other persons in default
381	Omitted		
381A	573	573	Power of Court to prohibit payment or transfer of moneys, securities or other property
381B	574	574	Injunctions
374(4) etc	562(6)	575	Power of Court to punish for contempt of court
	571(5) etc		

Divison 3 - Rules and Regulations

383	575	576	Rules
384	576	577	Regulations

Division 4 - Miscellaneous

- - 578 Non-application of rule
 against perpetuities to
 certain schemes
- - 579 Act not to apply to trade
 unions
- - 580 Operation of Life Insurance
 Act
- - 581 Operation of Workmen's
 Compensation
 Supplementation Fund
 Ordinance

Appendix 'F'

List of defined terms in CB s-cl. 5(1)
and a sample of the provisions in which they appear

Accounting record

Used in CB:-

(a) cls 5, 120, 267, 269, 270, 279, 285 and 286; and

(b) Schedule 3

Annual General Meeting

Used in CB:-

(a) Table of Provisions;

(b) cls 5, 154, 158, 168, 226, 230, 231, 240, 242, 247,
263, 264, 269, 270, 274, 275, 278, 279, 280, 281, 285,
288 and 516; and

(c) Schedules 3

Annual Return

Used in CB:-

(a) Table of Provisions; and

(b) cls. 5, 31, 66, 263, 264, 265, 279 and 347

Authorized Trustee Corporation

Used in CB:-

(a) Table of Provisions;

(b) cls. 5, 6, 189, 192, 195, 198 and 285; and

(c) Schedule 3

Article

Used in CB:-

(a) Table of Provisions;

(b) cls. 5, 34, 35, 66, 67, 69, 70, 71, 73, 74, 75, 76, 77, 78, 79, 80, 87, 92, 113, 114, 117, 120, 121, 122, 123, 124, 125, 126, 127, 128, 133, 147, 151, 178, 181, 183, 193, 196, 200, 219, 220, 221, 223, 225, 226, 228, 234,

236, 237, 239, 241, 242, 243, 244, 245, 246, 247, 248,
249, 250, 251, 263, 273, 320, 347, 394, 396, 403, 431,
477, 479, 480, 481, 488 and 494; and

(c) Schedule 3

Bankers Book

Used in CB:-

(a) cls 5 and 10

Banking Corporation

Used in CB:-

(a) cls 5, 97, 152, 168, 288, 290, 509 and 517

Books

Used in CB:-

(a) Table of Provisions; and

(b) cls 5, 10, 11, 12, 13, 14, 15, 91, 168, 253, 254, 264,
269, 295, 307, 310, 330, 342, 351, 355, 384, 387, 388,
389, 401, 416, 420, 422, 425, 541, 544, 545, 546, 550,
554 and 560.

Borrowing Corporation

Used in CB:-

- (a) Table of Provisions;
- (b) cls 5, 97, 129, 152, 153, 154, 155, 156, 158, 159, 162, 282 and 287; and

Branch Register

Used in CB:-

- (a) Table of Provisions; and
- (b) cls 5, 148, 178, 180, 260, 262, 263, 521, 522, 523, 524, 525, 526 and 547

Business Day

Used in CB:-

- (a) cls 5, 137, 138, 139 and 370

Certified

Used in CB:-

- (a) Table of Provisions
- (b) cls 5, 18, 20, 21, 26, 31, 32, 35, 69, 70, 72, 80, 83, 84, 85, 86, 87, 93, 97, 98, 101, 113, 123, 130, 136, 147, 158, 179, 180, 181, 182, 184, 187, 188, 194, 198, 199, 206, 210, 220, 227, 230, 238, 239, 244, 256, 265, 279, 282, 287, 292, 295, 296, 297, 306, 335, 338, 357, 427, 479, 501, 507, 512, 514, 526, 548, 549, 556, and 577; and
- (c) Schedules 3

Charge

Used in CB:-

- (a) Table of Provisions;
- (b) cls 5, 11, 14, 31, 68, 85, 97, 103, 131, 133, 143, 147, 148, 158, 199, 200, 201, 202, 203, 204, 206, 207, 208, 209, 214, 231, 238, 254, 257, 267, 270, 274, 298, 316, 317, 324, 331, 348, 349, 407, 440, 446, 451, 252, 455, 456, 500, 505, 510, 554, 557, 560, 561 and 563: and
- (c) Schedules 3, 5

Chargee

Used in CB:-

- (a) cls, 200, 201, 202, 203 and 204, and
- (b) Schedule 5

Companies Ordinance 1962

Used in CB:-

- (a) cls 5, 18, 20, 36, 65, 66, 132 and 209; and
- (b) Schedule 1

Company

Used in CB:-

- (a) Table of Provisions
- (b) cls 5, 7, 11, 12, 18, 20, 25, 26, 27, 31, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93, 94, 97, 98, 103, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 136, 137,

138, 139, 140, 141, 143, 145, 146, 147, 148, 149, 151,
152, 154, 158, 162, 164, 165, 166, 167, 168, 169, 170,
172, 173, 175, 176, 178, 179, 180, 181, 182, 183, 184,
185, 186, 187, 188, 189, 191, 192, 193, 194, 195, 196,
198, 199, 200, 201, 202, 203, 204, 206, 207, 208, 209,
211, 213, 214, 216, 217, 218, 219, 220, 221, 223, 225,
226, 228, 230, 231, 232, 233, 234, 235, 236, 237, 238,
239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249,
250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260,
261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271,
272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282,
283, 284, 285, 286, 288, 289, 291, 315, 316, 317, 318,
320, 323, 324, 325, 326, 328, 329, 330, 331, 332, 333,
335, 336, 337, 338, 339, 340, 341, 341, 342, 343, 344,
346, 347, 348, 349, 351, 352, 353, 355, 356, 357, 359,
360, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371,
372, 373, 374, 375, 376, 377, 378, 379, 381, 383, 384,
385, 387, 388, 390, 391, 392, 394, 395, 396, 397, 398,
399, 400, 401, 402, 403, 406, 407, 408, 409, 410, 411,
412, 413, 414, 417, 418, 422, 423, 425, 426, 427, 429,
430, 431, 432, 435, 437, 438, 440, 441, 442, 443, 444,
445, 446, 447, 448, 449, 451, 452, 453, 454, 455, 456,
457, 458, 459, 460, 461, 463, 465, 466, 467, 468, 469,
470, 472, 473, 477, 476, 477, 478, 479, 480, 481, 484,
485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495,
496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506,
507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517,
518, 519, 520, 521, 522, 523, 524, 526, 527, 528, 529,
530, 534, 538, 545, 547, 549, 553, 554, 555, 556, 557,
559, 560, 561, 562, 564, 565, 567 and 577; and

(c) Schedules 2, 3, 5

Company having a share capital

Used in CB:-

(a) cs 5, 34, 70, 85, 88, 120, 121, 125, 126, 244, 245, 256, 262, 315 and 376.

Company limited by guarantee

Used in CB:-

(a) cls 5, 33, 35, 36, 37, 69, 74, 77, 85, 86, 226, 274 and 360

Company limited by shares

Used in CB:-

(a) Table of Provisions;

(b) cls 5, 33, 35, 37, 69, 74, 75, 85, 86, and 360; and

(c) Schedule 3

Contributory

Used in CB:-

(a) Table of Provisions;

(b) cls 5, 20, 37, 90, 123, 312, 315, 351, 357, 360, 361, 362, 363, 367, 371, 377, 378, 379, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 396, 401, 408, 412, 413, 416, 418, 422, 423, 425, 429, 430, 431, 432, 434, 471, 472, 557 and 577; and

(c) Schedule 3

Corporation

Used in CB:-

(a) Table of Provisions;

(b) cl 5, 6, 7, 8, 9, 12, 15, 17, 18, 20, 22, 24, 25, 26, 27, 31, 32, 36, 38, 85, 86, 87, 88, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 129, 136, 146, 147, 148, 152, 153, 154, 155, 156, 158, 159, 160, 161, 162, 164, 168, 170, 187, 189, 192, 193, 194, 195, 196, 198, 200, 203, 220, 222, 224, 227,

228, 229, 230, 231, 233, 237, 238, 260, 266, 268, 269,
270, 277, 278, 280, 282, 285, 286, 287, 288, 289, 290,
291, 292, 293, 294, 295, 296, 297, 304, 305, 306, 309,
310, 311, 312, 315, 317, 318, 319, 321, 323, 327, 329,
333, 356, 375, 409, 417, 424, 453, 490, 492, 493, 495,
509, 516, 517, 521, 533, 535, 537, 538, 539, 541, 542,
544, 545, 546, 548, 550, 552, 561, 562, 563, 564 and
572; and

(c) Schedules 2, 3, 5

Creditors Voluntary Winding up

Used in CB:-

(a) Table of Provisions; and

(b) cls 5, 397, 398, 401, 402, 408, 409, 410, 411, 417 and
425.

Dealing in Securities

Used in CB:-

(a) cls 5, 8, 9, and 136

Debenture

Used in CB:-

(a) Table of Provisions;

(b) cls 5, 6, 7, 34, 68, 71, 73, 94, 95, 96, 97, 98, 99,
100, 102, 104, 105, 107, 110, 111, 119, 129, 130, 132,
147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157,
158, 160, 161, 163, 170, 182, 183, 184, 185, 186, 187,
188, 189, 201, 202, 203, 206, 207, 209, 225, 231, 232,
239, 244, 270, 274, 282, 287, 290, 316, 317, 328, 331,
332, 409, 491, 495, 552, 564, and 577; and

(c) Schedules 2, 3

Deed

Used in CB:-

(a) Table of Provisions; and

(b) cls 5, 7, 80, 97, 147, 150, 152, 153, 154, 155, 156,
158, 163, 164, 165, 166, 167, 168, 171, 172, 173, 174,
175, 177, 183, 196, 287, 377, 514.

Director

Used in CB:-

- (a) Table of provisions
- (b) cls 5, 7, 8, 9, 12, 18, 20, 25, 27, 30, 34, 66, 69, 83, 98, 99, 100, 101, 103, 104, 105, 107, 110, 129, 130, 136, 152, 154, 158, 159, 168, 170, 173, 182, 186, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 238, 239, 240, 241, 244, 246, 252, 253, 254, 266, 267, 268, 269, 270, 272, 273, 274, 275, 276, 278, 279, 280, 285, 288, 315, 316, 320, 329, 335, 336, 341, 346, 347, 352, 364, 367, 375, 383, 384, 395, 396, 398, 400, 453, 470, 479, 480, 500, 505, 510, 512, 515, 528, 529, 530, 534, 539, 552, 555, 556, 562 and 564; and
- (c) Schedules 2, 3

Emoluments

Used in CB:-

- (a) Table of Provisions,
- (b) cls 5, 233, 235 and 270; and

Executive Officer

Used in CB:-

- (a) Table of Provisions;
- (b) cls 5, 12, 66, 229, 238, 239, 470, 512 and 534; and
- (c) Schedule 3

Exempt proprietary company

Used in CB:-

- (a) Table of Provisions; and
- (b) cls 5, 230, 240, 250, 264, 277, 278, 279, 280, 282, 417 and 516.

Expert

Used in CB:-

- (a) Table of Provisions; and
- (b) cls 5, 98, 106, 107, 108 and 535.

Filed

Used in CB:-

- (a) Table of Provisions; and
- (b) cls 5, 312, 315, 320, 368, 375, 391, 465 and 515.

Financial Year

Used in CB:-

- (a) Table of Provisions;
- (b) cls 5, 158, 164, 168, 173, 235, 240, 266, 268, 269, 270, 275, 279, 516 and 552; and

Floating Charge

Used in CB:-

- (a) Table of Provisions;
- (b) cls 5, 68, 200, 201, 331, 446 and 452; and
- (c) Schedule 5

Foreign Company

Used in CB:-

- (a) Table of Provisions; and
- (b) cls 5, 11, 46, 47, 48, 49, 50, 51, 55, 56, 57, 59, 60, 61, 62, 63, 64, 98, 103, 147, 148, 164, 165, 194, 201, 211, 213, 214, 268, 289, 315, 326, 330, 465, 466, 467, 468, 469, 470, 473, 474, 490, 500, 501, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 526, 527, 529, 530, 545 and 547.

Guarantor Corporation

Used in CB:-

- (a) Table of Provisions;
- (b) cls 5, 97, 154, 156, 158, 159, 162, 287; and

Home Exchange

Used in CB:-

- (a) cls 5 and 141

Industrial Instrument

Used in CB:-

- (a) Cls 5, 233, 441 and 445

Injury compensation

Used in CB:-

- (a) Table of Provisions; and
- (b) cls 5, 441 and 448

Insolvent under administration

Used in CB:-

- (a) Cls 5, 222, 227, 338, 357, 361, 417 and 434
- (b) Schedule 3

Investment Contract

Used in CB:-

- (a) cls 5, 6, 170 and 290

Issue

Used in CB:-

- (a) Table of Provisions;
- (b) cls 5, 7, 8, 13, 14, 18, 20, 21, 26, 66, 68, 69, 70, 72, 73, 79, 82, 83, 84, 86, 87, 92, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 110, 111, 114, 115, 116, 118, 119, 120, 122, 125, 126, 128, 133, 136, 147, 148, 150, 151, 152, 154, 155, 158, 160, 163, 164, 166, 169, 170, 171, 179, 180, 182, 184, 187, 188, 189, 194, 195, 196, 198, 200, 201, 202, 210, 218, 220, 230, 235, 239, 242, 244, 245, 270, 272, 290, 311, 315, 327, 348, 356, 364, 367, 373, 376, 424, 453, 455, 456, 470, 481, 487, 488, 491, 493, 494, 501, 507, 509, 514, 517, 552, 553, 556, 557, and 563; and
- (c) Schedules 2, 3

Leave of absence

Used in CB:-

- (a) Table of Provisions; and
- (b) cl 5, 233, 41, 443 and 445

Limited Company

Used in CB:-

- (a) cls 5, 39, 66, 69, 239, 279, 360, and 384.

Listed Corporation

Used in CB:-

- (a) cls 5, 129 and 230

Lodged

Used in CB:-

- (a) Table of Provisions
- (b) cls 5, 22, 30, 31, 32, 35, 66, 72, 73, 79, 81, 83, 84, 85, 86, 87, 97, 98, 103, 107, 113, 117, 122, 123, 129, 158, 166, 173, 185, 187, 188, 195, 196, 198, 199, 200, 201, 202, 203, 206, 207, 208, 209, 210, 211, 216, 217, 220, 238, 239, 244, 251, 259, 277, 282, 315, 316, 320, 328, 330, 338, 354, 367, 370, 375, 395, 411, 422, 459, 501, 502, 507, 510, 513, 514, 515, 516, 518, 521, 528, 529, 530, 546, 563, and 577; and
- (c) Schedules 3 and 5

Machine copy

Used in CB:-

- (a) cl 5

Marketable securities

Used in CB:-

- (a) Table of Provisions;
- (b) cls 5, 189, 190, 191, 192, 193, 194, 195, 196, 198, 199, 200, 490 and 495; and
- (c) Schedules 1 and 3

Members voluntary winding up

Used in CB:-

- (a) Table of provisions; and
- (b) cls 5, 396, 408, 410, 417 and 425

Memorandum

Used in CB:-

(a) Table of Provisoins;

(b) cls 5, 31, 33, 34, 35, 37, 66, 67, 69, 70, 71, 72, 73, 74, 76, 77, 78, 79, 87, 88, 94, 98, 103, 113, 121, 122, 123, 124, 125, 126, 127, 128, 193, 196, 207, 217, 220, 226, 236, 244, 246, 250, 273, 315, 320, 347, 459, 460, 488, 510, 512 and 514; and

(c) Schedule 3

Minerals

Used in CB:-

(a) cl 5

Minimum subscription

Used in CB:-

(a) Table of Provisions; and

(b) cls 5 and 109

Mining Company

Used in CB:-

- (a) cls 5, 33 and 85

Mining purposes

Used in CB:-

- (a) cl 5

Negative

Used in CB:-

- (a) cl 5

No liability company

Used in CB:-

- (a) Table of Provisions;
- (b) cls 5, 33, 34, 35, 37, 39, 69, 70, 74, 75, 76, 78, 85, 86, 110, 113, 114, 118, 191, 192, 239, 475, 476, 477, 478, 479, 486, 487, 488, and 489, and

(c) Schedules 3

Nominee Corporation

U-:B h sed

(a) cls 5 and 136

Officer

Used in CB:-

(a) Table of Provisions

(b) cls 5, 7, 12, 31, 66, 68, 71, 72, 79, 80, 88, 95, 96, 97, 99, 100, 105, 110, 111, 113, 116, 118, 120, 123, 124, 125, 126, 127, 128, 129, 131, 143, 146, 147, 148, 152, 154, 159, 180, 185, 187, 188, 195, 199, 203, 208, 209, 216, 217, 218, 219, 228, 229, 230, 231, 236, 237, 238, 239, 240, 245, 247, 250, 251, 253, 254, 256, 257, 258, 261, 262, 263, 264, 265, 267, 273, 277, 280, 281, 285, 286, 289, 295, 296, 297, 304, 311, 315, 316, 319, 323, 327, 329, 335, 338, 352, 353, 356, 366, 375, 383, 384, 389, 392, 398, 401, 417, 418, 424, 453, 456, 457, 459, 466, 467, 470, 479, 497, 499, 504, 508, 509, 512, 517, 520, 521, 527, 534, 535, 540, 545, 547, 552, 553, 554, 555, 556, 557, 560, 561, 563, 565, 567, and 572;
and;

(c) Schedule 3

Official Liquidator

Used in CB:-

(a) Table of Provisions; and

(b) cls 5, 21, 24, 27, 29, 372 and 417

Official manager

Used in CB:-

(a) Table of Provisions;

(b) cls 5, 6, 12, 16, 229, 308, 325, 335, 338, 340, 341, 342, 344, 346, 347, 348, 349, 350, 351, 352, 353, 355, 357, 363, 441, 528, 541, 542, 553 and 559; and

(c) Schedule 5

Prescribed

Used in CB:-

(a) Table of Provisions;

(b) cls 5, 6, 8, 12, 17, 18, 20, 22, 25, 26, 27, 31, 40, 43, 46, 49, 52, 55, 69, 79, 83, 84, 85, 94, 97, 98, 100, 105, 110, 113, 124, 131, 133, 138, 143, 147, 153, 158, 161, 164, 166, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 182, 183, 184, 185, 186, 187, 188, 189, 191, 193, 194, 195, 196, 198, 201, 207, 209, 217, 227, 231, 232, 233, 238, 246, 250, 251, 254, 257, 263, 277, 282, 285, 288, 289, 290, 292, 295, 296, 298, 305, 316, 318, 328, 329, 330, 331, 335, 338, 340, 342, 347, 354, 357, 372, 375, 380, 395, 397, 398, 416, 417, 420, 421, 422, 427, 459, 462, 501, 502, 512, 514, 515, 516, 518, 534, 537, 541, 542, 544, 552, 557, 576 and 577; and

(c) Schedule 3

Prescribed Interest

Used in CB:-

(a) Table of provisions; and

(b) cls 5, 6, 94, 164, 166, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 182, 183, 184, 185, 186, 187, 188, 189, 231, 232, 290 and 552

Principal executive Officer

Used in CB:-

- (a) Table of provisions;
- (b) cls 5, 66, 238, 239, 512 and 534; and
- (c) Schedule 3

Principal register

Used in CB:-

- (a) cls 5, 85, 148, 262 and 265

Profit and loss account

Used in CB:-

- (a) Table of Provisions;
- (b) cls 5, 158, 266, 269, 270, 275, and 497; and
- (c) Schedules 3

Promoter

Used in CB:-

- (a) Table of Provisions; and
- (b) cls 5, 20, 25, 27, 81, 100, 107, 110, 117, 227, 277, 417, 453, 487, and 488.

Proprietary Company

Used in CB:-

- (a) Table of Provisions; and
- (b) cls 5, 33, 34, 35, 39, 70, 71, 82, 86, 129, 219, 220, 230, 240, 244, 245, 250, 260, 264, 277, 278, 279, 280, 282, 264, 277, 278, 279, 280, 282, 364, 417, 516 and 567.

Prospectus

Used in CB:-

- (a) Table of Provisions; and
- (b) cls 5, 94, 96, 97, 98, 99, 100, 102, 103, 104, 105, 106, 107, 109, 110, 112, 117, 118, 147, 156, 158, 160, 170, 171, 220, 239, 494, 509, 517 and 552.

Public Company

Used in CB:-

(a) Table of Provisions; and

(b) cls 5, 70, 71, 86, 129, 132, 164, 219, 223, 225, 226, 232, 234, 238, 239, 245, 265, 417, 475 and 516.

Recognized Company

Used in CB:-

(a) Table of Provisions; and

(b) cls 5, 41, 42, 44, 45, 52, 53, 54, 57, 60, 62, 64, 84, 162, 165, 170, 173, 211, 213, 214, 268, 315, 343, 402, 465, 466, 468, 473, 505, 506, 507, 508, 509, 512 and 529.

Recognized Foreign Company

Used in CB:-

(a) Table of Provisions; and

(b) cls 5, 47, 48, 50, 51, 60, 62, 64, 165, 211, 213, 465, 466, 468, 505, 506, 507, 508, 509, 510, 512, and 529.

Registered

Used in CB:-

(a) Table of Provisions

(b) cls 5, 11, 18, 19, 20, 21, 23, 24, 25, 26, 27, 29, 31, 32, 35, 37, 38, 40, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61, 62, 63, 64, 65, 66, 69, 72, 74, 75, 77, 78, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 96, 97, 98, 99, 100, 103, 123, 129, 137, 146, 147, 148, 152, 154, 156, 164, 165, 168, 170, 172, 183, 184, 186, 194, 200, 201, 203, 206, 207, 213, 214, 216, 217, 218, 220, 236, 241, 247, 251, 254, 260, 262, 267, 268, 274, 277, 280, 288, 289, 306, 311, 315, 316, 323, 326, 330, 335, 338, 342, 382, 398, 417, 422, 440, 454, 459, 467, 469, 470, 485, 490, 500, 501, 507, 508, 509, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 526, 528, 529, 530, 531, 545, 547, 548, and 552; and

(c) Schedules 2, 3, 5

Registered Company Auditor

Used in CB:-

- (a) Cls 5, 25, 26, 97, 129, 154, 168, 267, 268, 277, 280, 330, 338, 342, 382 and 422.

Registered Foreign Company

Used in CB:-

- (a) Table of Provisions; and
- (b) cls 5, 11, 49, 59, 61, 63, 103, 147, 148, 326, 330, 467, 513, 514, 515, 516, 518, 519, 520, 521, 522, 523, 530 and 547.

Registered Liquidator

Used in CB:-

- (a) cls 5, 21, 25, 26, 315, 323 and 417.

Registrar of Companies

Used in CB:-

- (a) cls 5, 31, 32, 210, 238, and 516.

Related Corporation

Used in CB:-

(a) Table of Provisions

(b) cls 5, 7, 9, 136, 233, 237, 238, 268, 270, 277, 293,
294, 417, and 561; and

Relative

Used in CB:-

(a) cls 5, 230, 233 and 453

Reproduction

Used in CB:-

(a) cls 5, 31 and 544

Resolution

Used in CB:-

- (a) Table of provisions; and
- (b) cls 5, 34, 65, 66, 69, 70, 72, 73, 76, 77, 79, 83, 87, 88, 90, 118, 121, 123, 124, 125, 126, 127, 129, 133, 151, 152, 175, 201, 202, 223, 225, 226, 230, 234, 239, 240, 241, 242, 244, 247, 248, 249, 250, 251, 252, 268, 269, 270, 280, 282, 283, 285, 290, 315, 320, 333, 335, 337, 338, 339, 341, 343, 344, 347, 349, 353, 364, 365, 373, 377, 379, 392, 393, 395, 398, 399, 408, 409, 412, 417, 425, 430, 434, 451, 455, 456, 479, 480, 481, 489, 532 and 577;
- (c) Schedules 3 and 5

Resolution for voluntary winding up

Used in CB:-

- (a) cls 5, 392, 393, 395, 398 and 409.

Rules

Used in CB:-

- (a) Table of Provisions
- (b) cls 5, 98, 101, 104, 150, 170, 228, 233, 250, 329, 367, 372, 375, 380, 389, 438, 528, 541, 552 and 576.
- (c) Schedule 3

Securities

Used in CB:-

- (a) Table of Provisions
- (b) cls 3, 5, 8, 9, 12, 22, 94, 99, 129, 136, 158, 178, 189, 190, 191, 192, 193, 194, 195, 196, 198, 227, 229, 289, 311, 329, 375, 384, 426, 441, 442, 490, 493, 494, 495, 497, 498, 500, 505, 510, 534, 560 and 573; and
- (c) Schedules 1, 2 and 3.

Share, Shares

Used in CB:-

- (a) Table of Provisions;

- (b) cls 5, 6, 7, 8, 9, 31, 33, 34, 35, 36, 37, 69, 70, 71, 73, 74, 75, 77, 78, 82, 85, 86, 88, 92, 94, 95, 96, 97, 98, 99, 100, 104, 105, 107, 110, 111, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 136, 137, 138, 139, 140, 143, 145, 146, 147, 152, 154, 168, 170, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 191, 192, 193, 200, 220, 221, 227, 230, 231, 232, 235, 239, 241, 242, 243, 244, 245, 246, 247, 248, 251, 252, 256, 257, 260, 261, 262, 263, 265, 270, 290, 311, 315, 317, 318, 320, 353, 360, 368, 376, 394, 409, 453, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 492, 493, 495, 497, 500, 505, 510, 515, 516, 521, 522, 523, 524, 526, 534 and 552; and

- (c) Schedules 2, 3, 5

Sheriff

Used in CB:-

- (a) Table of Provisions; and

- (b) cls 5, 455 and 456

Special Resolution

Used in CB:-

(a) Table of Provisions;

(b) cls 5, 34, 65, 66, 69, 70, 73, 7^c 83, 88, 90, 123,
125, 126, 127, 129, 133, 152, 234, 239, 241, 242, 244,
248, 251, 283, 290, 333, 335, 338, 339, 341, 343, 344,
347, 349, 364, 392, 408, 409, 412, and 489; and

(c) Schedule 3

Statutory Meeting

Used in CB:-

(a) Table of Provisions; and

(b) cls 5, 110, 112, 239, 364 and 367

Statutory Report

Used in CB:-

(a) Table of Provisions; and

(b) cls 5, 239, 364 and 367

Stock Exchange

Used in CB:-

(a) Table of Provisions;

(b) cls 5, 98, 99, 100, 105, 134, 141, 189, 191, 194, 195,
198, 552 and 564; and

(c) Schedules 3, 5

Stock Market

Used in CB:-

(a) Table of Provisions;

(b) cls 5, 98, 105, 134, 189 and 552; and

Table A

Used in CB:-

(a) Table of Provisions;

(b) Cls 5, 75, 76 and 242; and

(c) Schedule 3

Table B

Used in CB:-

(a) Table of Provisions;

(b) cls 5, 75, and 76; and

(c) Schedule 3

Transparency

Used in CB:-

(a) cls 5, 31 and 32

Unit

Used in CB:-

(a) cls 5, 107, 129, 130, 158, 256, 516, and 552; and

(b) Schedule 3

Unlimited Company

Used in CB:-

(a) cls 5, 33, 35, 36, 37, 39, 69, 74, 85, 86, 121, 123,
264, 278, 279 and 384.

Voting Share

Used in CB:-

(a) cls 5, 8, 9, 134, 136, 137, 138, 140, 152, 261, 521.

Wage, Wages

Used in CB:-

(a) Table of Provisions;

(b) cls 5, 441, 445; and