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The Parliament of the  
Commonwealth of Australia

House of Representatives

Companies and Securities Legislation  
(Miscellaneous Amendments) Bill 1981

Explanatory Memorandum

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

COMPANIES AND SECURITIES LEGISLATION  
(MISCELLANEOUS AMENDMENTS) BILL 1981

1. Companies And Securities Legislation (Miscellaneous Amendments) Bill 1981 will contain amendments to all the major pieces of cooperative scheme legislation.
2. In accordance with the Formal Agreement between the Commonwealth and the six States on the cooperative companies and securities scheme, the Companies And Securities Legislation (Miscellaneous Amendments) Bill has been approved by the Ministerial Council.
3. The main purpose of the Bill is to make various minor adjustments to the companies code before each State introduces its Companies (Application of Laws) Bill.
4. Different parts of the Bill will come into effect on different dates to be fixed by Proclamation depending on which Principal Act under the scheme is being amended.

INTRODUCTION

5. The remainder of this explanatory memorandum:
  - (a) contains a brief introduction to the cooperative companies and securities scheme (paras 6 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 And Securities Legislation (Miscellaneous Amendments) Bill (paras 46 to 183). This Bill is hereafter referred to as the 'Amendments Bill'.

COOPERATIVE COMPANIES AND SECURITIES SCHEME

Formal Agreement

6. On 22 December 1978 the commonwealth and the six States executed a Formal Agreement that provided the framework for a cooperative 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).

7. On 24 February 1981 the Commonwealth and the six States executed the First Amending Agreement to the Formal Agreement. This Amending Agreement:

- (a) clarifies the manner in which the Formal Agreement may be amended (see Amending Agreement cl 3);
- (b) enables the making of "translator" amendments by State regulations where necessary to ensure the meaningful application of the amending Commonwealth legislation in a particular State (see Amending Agreement cl 5); and
- (c) provides additional procedures for the extension of the Formal Agreement to the external Territories (see Amending Agreement cl 6).

8. The Formal Agreement sets out, among other things, the four basic elements of the cooperative 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 17 March 1977:

- (a) The establishment of a Ministerial Council for Companies and Securities comprising Ministers of the Commonwealth and each of the six States.
- (b) The establishment of a full-time National Companies and Securities Commission (NCSC) 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.

9. Each of these basic elements is discussed below.

#### The Ministerial Council for Companies and Securities

10. The first of the four basic elements of the cooperative companies and securities scheme is the Ministerial Council for companies and Securities, which is established by the Formal Agreement itself. The Ministerial Council is composed of one Ministerial representative from each party to the Formal Agreement.

11. 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."

12. 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 cooperative scheme (discussed in paras 23 to 43 of this Explanatory Memorandum). The initial legislation requires unanimous approval and amending legislation, with certain exceptions, requires approval by a simple majority (see Formal Agreement cl 29).

#### National Companies and Securities Commission

13. The second basic element in the cooperative 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.

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

15. Under the NCSC Act, the NCSC has responsibility for the companies and securities laws covered by the formal Agreement, subject to directions from the Ministerial Council. The NCSC has 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 tot the cooperative companies and securities scheme (hereafter referred to as the 'cooperative scheme legislation'). The administration of the cooperative scheme legislation within each State and Territory will, so far as practicable, be carried out in that State or Territory acting as the delegate of the NCSC.

16. Each State Parliament has passed a special Act, the NCSC (State Provisions) Act, to support the operation of the NCSC in its jurisdiction.

17. These Acts came into force on 1 July 1981 when the NCSC began to administer its first substantive legislation: the new codes relating to the acquisition of company shares (see paras 30 to 33, below) and the regulation of the securities industry (see paras 34 to 36, below).

#### Use of existing administrations

18. The existing State and Territory corporate affairs offices were identified by Mr Howard as the third basic element in the cooperative scheme.

19. 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).

20. 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 Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 provides that:

"A document that is required by a relevant Act to be lodged with the Commission (ie the NCSC) shall be lodged at the office of the Corporate Affairs Commission for the Territory (ie the ACT) 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."

21. The Companies and Securities (Interpretation and Miscellaneous Provisions) (Application of Laws) Act in each jurisdiction other than the ACT provides that s-sec 14(1) of Commonwealth Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 applies in that jurisdiction as if the reference to the office of the ACT Corporate Affairs Commission were a reference to the local corporate affairs office in that jurisdiction (see also cl 19 of the Amendments Bill).

#### The Legislative Framework

22. The final basic element of the cooperative companies and securities 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 cooperative scheme is set out in Commonwealth legislation that applies to the Australian Capital Territory. The initial Bills and draft 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 passes legislation which applies the relevant Commonwealth law (subject to any necessary local

modifications) as the law of that jurisdiction to the exclusion of its present legislation, as from the date of commencement of the relevant Commonwealth law (see Formal Agreement paras 9(a) and (b)). This date was 1 July 1981 in relation to the interpretation code, the share acquisition code, and the securities industry code.

(c) Any amendments of 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 Australian Capital Territory, to effect any necessary local modification 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 content of the legislation to give effect to the scheme

23. The initial Commonwealth legislation is based on what is known as the 'ICAC' companies and securities legislation that was or is in force, ie, the legislation of the States which are parties to the Inter-State Corporate Affairs Agreement, except to the extent that amendments have been agreed upon by the Ministerial Council or were required to give effect to the Agreement (see Formal Agreement para 8(2)(b)).

24. The initial Commonwealth legislation modifies the ICAC companies and securities legislation to take account of:

(a) the requirements of the Formal Agreement and the nature of the cooperative scheme: for example, one of the basic assumptions of the scheme (as recognised 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 cooperative 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 ICAC companies and securities legislation; and

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

25. All these modification in the initial legislation required the unanimous approval of the Ministerial Council.

26. The Commonwealth legislation 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.

27. These four codes are discussed, briefly, below.

#### The interpretation code

28. 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 has passed by the Commonwealth Parliament during the Autumn Session 1980 and received Royal Assent on 28 May 1980.

29. The interpretation code will provide for the interpretation of the Commonwealth Act under the cooperative scheme to be governed by the laws in force in the Act 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 1980 (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 1980 s-sec. 4(2)).

#### New Australian share acquisition code

30. 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.

31. The new share acquisition code regulates acquisitions by a person who holds between the prescribed percentage (at present 20%) and 90% of the voting share of a company, or whose holding would increase to more than the prescribed percentage through acquisition.

32. The new share acquisition code came into operation on 1 July 1981 in the 6 States and the ACT.

33. The new code is administered by the NCSC either directly or through its delegates. The NCSC has stated that:

In exercising its functions and powers, whether directly or by its delegates, the Commission's objectives will be to ensure:

(i) that the market for securities ie efficient, competitive and informed;

(ii) that fair dealing and equity exist between all members of a company involved in a takeover bid and that, as far as practicable, each member had equal access to information, equal opportunity to deal in the market and equal opportunity to participate in any benefits accruing to members under a bid;

(iii) that the premium for control of a company is shared by all members;

(iv) that all members of a company in receipt of a takeover offer are supplied with sufficient information to assess the offer's merits;

(v) that the directors of a company whose members are in receipt of a takeover offer do not, by exercising managerial powers, do anything to frustrate the offer before members have had an adequate opportunity to consider it; and

(vi) that actual or potential market manipulation is promptly detected.

#### New Australian securities industry code

34. 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 the Royal Assent on 28 May 1980.

35. The purpose of the new 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.

36. The new securities industry code came into operation on 1 July 1981 in the 6 States and the ACT.

#### Proposed new Australian companies code

37. The proposed new Australian companies code is set out in the Companies Act 1981 which was passed by the Commonwealth Parliament during the Autumn Session 1981 and received the Royal Assent on 18 June 1981.

38. In accordance with the Formal Agreement, the Companies Act was based on the Companies Acts of the four ICAC States modified in the same way as the other existing ICAC legislation (see para 24 of this Explanatory Memorandum).

39. One place of registration. The most important of these modifications are those that are required to ensure that an Australian company incorporated in a jurisdiction covered by the cooperative scheme (referred to in the Companies Act 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 "recognised company" in the Companies Act.

40. Similarly, overseas corporations will only have to register in one of the jurisdictions covered by the cooperative scheme: an overseas corporation that is registered as a foreign company in a participating State or another participating Territory is referred to as a "recognised foreign company" in the Companies Act. Any Australian body which is not a company in its jurisdiction of formation and any Australian 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 cooperative scheme in which that body wishes to carry on business or to establish a place of business.

41. Other modifications. 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 penalty provisions of the existing companies legislation.
- (b) New powers of inspection were included in Division 1 of Part II to ensure that the NCSC will have adequate powers of inquiry when performing its functions under the Companies Act.
- (c) A national system of registration for auditors, liquidators and official liquidators was formulated (see Division 2 of Part II).
- (d) The law in relation to pre-incorporation contracts is reformed (see s.81).
- (e) There were new provisions dealing with the transfer of incorporation of companies and of certain corporations (see Division 4 of Part III).
- (f) The State and Territory Marketable Securities Acts and Ordinances will be repealed, as similar provisions are contained in Division 8 of Part IV of the Companies Act.
- (g) Comprehensive reforms are made to the provisions relating to the registration of charges (see Division 9 of Part IV).
- (h) Significant amendments were made to the provisions relating to the preparation and laying of accounts, to remedy defects in the existing provisions of the ICAC Companies Acts that were identified in Jensen v Viney (1979) VR 597 (see Part VI and definition of "financial year" in s-sec 5(1)).
- (i) The special investigation provisions, while based generally on Part VIA of the ICAC CAs, were 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 Part VII).
- (j) There are new provisions designed to overcome jurisdictional problems that exist under the ICAC CAs in relation to schemes of arrangement (see s315). These new provisions are consistent with the "one place of registration" concept (see paras 39 to 40, above).

(k) 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 corporations registered as a foreign company in a participating jurisdiction (see Division 5 of Part XII).

(l) 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.

#### Commonwealth and State legislation

42. The Commonwealth legislation for each of the codes 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 ACT.

(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 ACT 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 is a Companies (Transitional Provisions) Act and Regulations to be made thereunder. These transitional provisions will apply in relation to the ACT. Similar provisions appropriate to the jurisdiction concerned will be contained in a separate Part of the Companies (Application of Laws) Bill for that jurisdiction.

43. 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 State 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 modification (sometimes referred to as 'translator regulations') which will be made as and when needed to ensure that particular amendments to the Commonwealth Acts or to the Commonwealth Regulations will have a meaningful application in a particular jurisdiction other than the ACT.

COMPANIES AND SECURITIES LEGISLATION  
(MISCELLANEOUS AMENDMENTS) BILL 1981

44. Companies And Securities Legislation (Miscellaneous Amendments) Bill 1981 (hereafter referred to as the "Amendments Bill") is divided into the following parts:

- Part I: Preliminary
- Part II: National Companies and Securities Commission Act 1979
- Part III: Companies (Acquisition of Shares) Act 1980
- Part IV: Securities Industry Act 1980
- Part V: Securities Industry (Fees) Act 1980
- Part VI: Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980
- Part VII: Companies Act 1981
- Part VIII: Companies (Fees) Act 1981
- Part IX: Companies (Transitional Provisions) Act 1981
- Part X: Companies (Miscellaneous Amendments) Act 1981
- Part XI: Amendment of other Acts

45. The remainder of this Explanatory Memorandum deals sequentially with the separate clauses in each of these parts.

PART I: PRELIMINARY

46. Part I of the Amendments Bill (cls 1 and 2) deals with various preliminary matters.

Cl 1: Short Title

47. When enacted the Amendments bill will be cited as the Companies and Securities Legislation (Miscellaneous Amendments) Act 1981. (Amendments Bill s-cl 1).

C1 2: Commencement

48. The preliminary part of the Amendments Bill will come into operation on the date on which the Bill receives the Royal Assent. (Amendments Bill s-cl 2(1)).

49. The following parts of the Bill will come into operation when proclaimed:

- (a) Part II - National Companies and Securities Commission Act;
- (b) Part III - Companies (Acquisition of Shares) Act;
- (c) Part IV - Securities Industry Act; and
- (d) Part VI - Companies and Securities (Interpretation and Miscellaneous Provisions) Act.

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

50. The amendment of the Securities Industry (Fees) Act 1980 will be deemed to have come into operation on 1 July 1981, the date on which the Securities Industry (Fees) Act 1980 itself came into operation. (Amendments Bill s-cl 2(3)).

51. The following parts of the Amendments Bill will come into operation on the date on which the Companies Act 1981 comes into operation:

- (a) Part VII - Companies Act;
- (b) Part VIII - Companies (Fees) Act;
- (c) Part IX - Companies (Transitional Provisions) Act;
- (d) Part X - Companies (Miscellaneous Amendments) Act; and
- (e) Part XI - Amendments of Other Acts

(Amendments Bill s-cl 2(4)).

PART II: NATIONAL COMPANIES AND SECURITIES COMMISSION ACT 1979

52. Part II of the Amendments Bill (cls 3 to 4) contains certain amendments to the National Companies and Securities Commission Act (NCSC Act).

C1 3: Principal Act

53. The NCSC Act is referred to in Part II of the Amendments Bill as the Principal Act (Amendments Bill cl 3).

C1 4: Delegation by NCSC

54. The NCSC is able to delegate any of its functions or powers under cooperative scheme legislation either to a State or Territory administration or to an officer of that administration (Principal Act s-sec 45(1)).

55. The NCSC will be able to delegate all or any of its functions under s-sec 45(1) of the Principal Act (Amendments Bill para 4(a)).

56. The NCSC is able to delegate its functions to a specified person or a person holding a specified office (Principal Act s-sec 45(3)).

57. The range of persons to whom the NCSC can delegate will be extended to include a person occupying a position in the Commonwealth or State Public Service (Amendments Bill para 4(b) - proposed para 45(3)(b)).

58. A delegate of the NCSC may authorise certain persons to perform a delegated function or power (Principal Act s-sec 45(4)). This authorisation will be able to be given to a specified person or a person occupying a position in the Commonwealth or State Public Service (Amendments Bill para 4(c) - proposed para 45(5)(b)).

PART III: COMPANIES (ACQUISITION OF SHARES) ACT 1980

59. Part III of the Amendments Bill (cls 5 to 7) contains certain amendments to the Companies (Acquisition of Shares) Act 1980. This Act contains the initial substantive provisions for the new Australian share acquisition code. It came into operation on 1 July 1981.

C1 5: Principal Act

60. The Companies (Acquisition of Shares) Act 1980 is referred to in Part III of the Amendments Bill as the Principal Act. (Amendments Bill cl 5).

C1 6: Schedule

61. The Schedule of the Principal Act sets out the detailed requirements in relation to the four different statements required under the share acquisition code:

- Part A: statement to be furnished by offeror
- Part B: statement to be furnished by target company to which takeover scheme relates

- Part C: statement to be furnished by on-market offeror
- Part D: statement to be furnished by target company to which takeover announcement relates.

62. The Schedule to the Principal Act at present requires that these statements should include all material information other than matter not permitted to be included without the written consent of the NCSC by virtue of sections 37 or 38 of the Principal Act.

63. The proposed amendments to the Schedule will ensure that all material information is required to be included in these statements, including matter referred to in sections 37 and 38 of the Principal Act, unless the NCSC has refused to consent to the inclusion of such matter in the statements (Amendments Bill cl 6).

#### C1 7: Other amendments

64. Some editorial amendments have been made to the Principal Act and these are set out in Schedule 1 to the Amendments Bill. (Amendments Bill cl 7).

### PART IV: SECURITIES INDUSTRY ACT 1980

65. Part IV of the Amendments Bill (cls 8 to 15) contains certain amendments to the Securities Industry Act 1980. This Act contains the initial substantive provisions for the Australian securities industry code. It came into operation on 1 July 1981.

#### C1 8: Principal Act

66. The Securities Industry Act 1980 is referred to in Part IV of the Amendments Bill as the Principal Act (Amendments Bill cl 8).

#### C1 9: Privilege

67. It is proposed to amend the existing provisions dealing with privilege in one respect. (Amendments Bill cl 9 - replacing Principal Act s11). Where, having been required by the NCSC to produce a book, a legal practitioner refuses to do so on the grounds of privilege, he will now also be required to give the NCSC sufficient particulars to identify the relevant book, together with the name and address of the person to whom or by whom a communication was made, if he knows the name and address of the person (proposed new s-sec 11(1)).

68. Where, having been required by the NCSC to give an explanation in relation to books, a legal practitioner refuses

to do so on the grounds of privilege, he will also be required to furnish the NCSC with sufficient particulars to identify the communication, it was made in writing, together with the name and address of the person to whom or by whom the communication was made, if he knows the name and address of the person (proposed new s-sec 11(2)). A similar change will be made to corresponding provisions in s 16 of the Companies Act 1981 (see paras 97-98 of this Explanatory Memorandum).

#### C1 10: Disclosure to Commission

69. The provisions dealing with disclosure to the NCSC are set out in s 12 of the Principal Act. Amendments to those provisions, giving the NCSC additional powers to obtain information, were made in s 10 of the Securities Industry Amendment Act 1981 (no 3 of 1981).

70. Amendments are proposed to s-sec 12(3C) of the Principal Act. The purpose of these amendments is to ensure that a person is not able to object to a document being admissible in evidence on the ground that it is self-incriminating.

71. A person will be required to disclose self-incriminating information to the NCSC pursuant to a requirement under s-sec 12(3A) of the Principal Act (Amendments Bill cl 10 - proposed new s-sec 12(3C)). An oral statement made pursuant to a requirement under s-sec 12(3A) of the Principal Act which is objected to on the grounds of self-incrimination will not be admissible in evidence in criminal proceedings other than proceedings under s 12 of the Principal Act (Amendments Bill cl 10 - proposed new s-sec 12(3CA)).

#### C1 11: Power of the Court to make certain orders

72. The power of the Supreme Court to make an order under s 14 of the Principal Act does not affect its power to punish for contempts (Principal Act s-sec 14(7)).

73. This provision will be omitted (Amendments Bill cl 11) and a general power preserving the power of the Court to punish for contempts will be included (Amendments Bill cl 14 - see paras 78 to 79 of this Explanatory Memorandum).

#### C1 12: Change of principals of representative

74. Section 50 of the Principal Act provides that the holder of a representative's licence may apply to the NCSC to alter the name of the dealer or investment adviser on whose behalf he may act.

75. The grounds on which the NCSC will be able to vary such a licence will be amended from being satisfied that the applicant is "a fit and proper person" to the NCSC not having

any reason to believe "the applicant will not perform the position efficiently, honestly and fairly" (Amendments Bill cl 12). Similar amendments were made to s60 of the Principal Act by s 20 of the Securities Industry Amendment Act (No 2) 1981 (No 96 of 1981).

Cl 13: Power of Court to prohibit payment or transfer of moneys, securities or other property

76. The Supreme Court is empowered, on the application of the NCSC, to make certain orders to ensure that a person who is subject to investigation or to legal proceedings does not transfer property out of the jurisdiction (Principal Act s 147).

77. A penalty will be provided for contravention of, or failure to comply with, an order of the Supreme Court made under s 147 of the Principal Act (Amendments Bill cl 13 - proposed s-sec 147(4)).

Cl 14: Power of Court to punish for contempt of Court

78. The power of the supreme Court in relation to the punishment of contempt will not be affected by any provision in the Principal Act (Amendments Bill cl 14 - proposed s 149A).

79. This new provision is identical to s 575 of the Companies Act 1981.

Cl 15: Other amendments

80. Some editorial amendments have been made to the Principal Act and these are set out in Schedule 2 to the Amendments Bill (Amendments Bill cl 15).

PART V: SECURITIES INDUSTRY (FEES) ACT 1980

81. Part V of the Amendments bill (cls 16 to 17) contains certain amendments to the Securities Industry (Fees) Act 1980. This Act came into operation on 1 July 1981.

Cl 16: Principal Act

82. The Securities Industry (Fees) Act 1980 is referred to in Part V of the Amendments Bill as the Principal Act (Amendments Bill cl 16).

Cl 17: Interpretation

83. Section 3 of the Principal Act is an interpretative provision. The interpretation of the Principal Act will be governed by the Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980.

84. The Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 applies to the principal Act (Amendments bill cl 17 – proposed s-sec 3(2)).

PART VI: COMPANIES AND SECURITIES (INTERPRETATION AND MISCELLANEOUS PROVISIONS) ACT 1980

85. Part VI of the Amendments bill (cls 18 to 20) makes certain amendments to the Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980. This Act contains the substantive provisions of the interpretation code relating to the cooperative scheme legislation.

Cl 18: Principal Act

86. The Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 is referred to in Part VI of the Amendments Bill as the Principal Act (Amendments Bill cl 18).

Cl 19: Lodging of documents and references to office of Commission

87. Where a document is required to be lodged with the NCSC, it must be lodged with the ACT Corporate Affairs Commission. Any document so lodged or submitted for lodgement will be deemed to have been lodged with the NCSC (Principal Act s 14).

88. The application legislation of other participating jurisdictions requires that documents and applications relating to the administration of the scheme in a particular jurisdiction should be lodged with the local registering authority in that jurisdiction.

89. Any provision in the substantive legislation that requires a document to be given or sent to the NCSC will be read as requiring the document to be delivered to or sent to the ACT Corporate Affairs Commission (Amendment Bill cl 19 – proposed s-sec 14(1A)).

Cl 20: Indictable offences and summary offences

90. Section 35 of the Principal Act contains provisions relating to the punishment either summarily or on indictment of offences against relevant Acts.

91. The definition section of the Principal Act provides that "indictment" includes information (see Principal Act s 9). The application of the general definition of "indictment" to section 35, which purports to distinguish between summary and indictable offences, is inappropriate.

92. The proposed amendment to the Principal Act will ensure that, for the purposes of section 35, "indictment" will not be interpreted as including "information" (Amendments Bill cl 20 - proposed s-sec 35(6)).

#### PART VII - COMPANIES ACT 1981

93. Part VII of the Amendments Bill (cls 21-85) contains certain amendments to the Companies Act 1981. This Act contains the initial substantive provisions for the Australian companies code.

##### C1 21: Principal Act

94. The Companies Act 1981 is referred to in Part VII of the Amendments Bill as the Principal Act (Amendments Bill cl 21).

##### C1 22: Interpretation

95. Section 5 of the Principal Act contains a series of definitions. Paragraph (b) of the definition of "banking corporation" in sub-section 5(1) of the Principal Act will be deleted as the Primary Industry Bank of Australia is already encompassed in paragraph (a) of the same definition. (Amendments Bill s-cls 22(a) and (b)).

96. To ensure that Commonwealth and State statutory corporations that are instrumentalities of the Crown are exempted from the requirements imposed by the Principal Act on foreign companies, and not merely Commonwealth instrumentalities, the meaning of "Crown" where it is found in the definition of "foreign company" will be altered. In the absence of such an amendment the provisions of the Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1981 would have applied with its narrower definition of Crown as including only the Crown in right of the Commonwealth or of a Territory (Amendments Bill para 22(c)).

##### C1 23: Privilege

97. It is proposed to amend the existing provisions dealing with privilege in one respect (Amendments Bill cl 9 - replacing Principal Act s 16). Where, having been required by the NCSC to produce a book, a legal practitioner refuses to do so on the grounds of privilege, he will now also be required to give the NCSC sufficient particulars to identify the relevant book, together with the name and address of the person to whom or by whom a communication was made, if he knows the name and address of the person (proposed new s-sec 16(1)).

98. Where, having been required by the NCSC to give an explanation in relation to books, a legal practitioner refuses

to do so on the grounds of privilege, he will also be required to furnish the NCSC with sufficient particulars to identify the communication, it was made in writing, together with the name and address of the person to whom or by whom the communication was made, if he knows the name and address of the person (proposed new s-sec 16(2)).

C1 24: Registration of auditors

C1 25: Registration of liquidators

C1 27: Cancellation of suspensions of registration

99. Section 18 of the Principal Act deals with the registration of auditors. One of the grounds for the NCSC refusing registration (see Principal Act para 18(3)(a)) is that an order has been made by the Supreme Court under s 562 of the Principal Act. Section 562 empowers the Supreme Court to make orders prohibiting a person from acting as director of a company.

100. An amendment is proposed to para 18(3)(a) of the Principal Act to make it clear that the NCSC is not permitted to register a person who has been prohibited from acting as a director under a provision corresponding to section 562 of the Principal Act. Similar amendments are proposed to the following provisions in the Principal Act:

(a) section 20 (which deals with the registration of liquidators) (Amendment Bill cl 25); and

(b) section 27 (which deals with the cancellation or suspension of registration) (Amendment Bills cl 27).

C1 26: Security to be given by liquidators

101. Regulation-making powers in relation to the application and discharge of securities and the release of sureties are contained in sub-section 22(3) of the Principal Act. The reference to 'the Commission' in sub-section 22(3) of the Principal Act will be deleted and replaced by a reference to the 'local authority' to bring it into line with the Securities Industry Code (see Securities Industry Amendment Act 1981 s 17). The result will be that the NCSC will determine the amount of any securities and sureties but they will be handled by the local Corporate Affairs office. (Amendments Bill cl 26).

C1 28: Registers

102. The NCSC is able to keep appropriate registers and the public is to have access to most documents lodged with the NCSC (Principal Act s 31). The list of exemptions from the

documents lodged with the NCSC which are available for public examination will be extended to triennial statements lodged by registered auditors and liquidators under s 26 of the Principal Act. These documents will contain information comparable to that contained in an initial application for registration under s 17 of the Principal Act in respect of which an exemption from inspection is already provided (Amendments Bill cl 28).

Cl 29: Omission of "Limited" in names of charitable and other companies

103. The NCSC has the power to issue a license to 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 (Companies Act s 66). The Companies Act includes provision for exemptions granted to such a company under the old law to continue in force (Companies Act s-sec 66(6)). This provision will be deleted as adequate provision for this purpose is already contained in s-sec 13(3) of the Companies (Transitional Provisions) Act 1981 (Amendments Bill cl 29).

Cl 30: Certificate authorising application for transfer of incorporations

104. A company is able to apply to the NCSC for a certificate authorising it to apply for registration as a company under the corresponding law of a participating State or Territory (Principal ct s 83). Paragraph 83(5)(a) will be amended to refer to an application to wind up the company having been filed rather than lodged so as to be consistent with subsection 365(2) of the Principal Act (Amendments bill cl 30).

Cl 31: Application of this Act to corporations registered under this Division

105. A typographical error in s-sec 90(6) of the Principal Act will be corrected. (Amendments Bill cl 31).

Cl 31: Invitations or offers in relation to borrowings by a corporation

106. A corporation is required to register a prospectus with the NCSC before making a public offering of debentures (Principal Act s 97). A document referred to in a prospectus can only be described as a debenture or certificate of debenture stock if the requirements in s-sec 97(5) of the Principal Act are satisfied.

An amendment, consequent on that in cl 33 of the Amendments Bill (see paras 107 to 109 of this Explanatory Memorandum), will be made to s-sec 97(5) to make it clear that the report

referred to in s-para 97(5)(b)(ii) is to be prepared by the registered company auditor who has prepared the "Investigating Accountant's Report" (Amendments Bill cl 32).

#### Cl 33: Contents of prospectuses

107. The requirements as to the contents of prospectuses are set out in s 98 of the Principal Act.

108. It is proposed to make a number of amendments to the provisions relating to the content of prospectuses. The primary purpose of these amendments is to amend the regulation making power so that regulations can be made in relation to the contents of prospectuses generally. The present regulation making power in para 98(1)(e) of the Principal Act makes provision for regulations to be made in relation to classes of prospectuses, or a prospectus to be issued in relation to shares or debentures included in a class of shares or class of debentures respectively. A prospectus will be required to contain:

- (a) a report by a registered company auditor containing prescribed matters and other matters required by the NCSC – this report will be headed "Investigating Accountant's Report" (proposed new para 98(1)(e));
- (b) matters and reports prescribed by regulation (proposed para 98(1)(ea));
- (c) other matters and reports required by the NCSC (proposed para 98(a)(eb)).

(Amendments Bill para 33(a)).

109. A report in a prospectus will also be required to either:

- (a) indicate by note necessary adjustments to figures contained therein; or
- (b) make those adjustments, indicating this fact and the nature of the adjustments.

(Amendments Bill para 33(c) – proposed s-sec 98(3A)).

110. The NCSC will be able to require a report included in a prospectus to contain accounts complying with prescribed requirements (Amendments Bill para 33(d) proposed s-sec 9894)).

#### Cl 34: Retention of over subscriptions in debenture issues

111. An amendment, consequential on para 9891)(ea), of the Amendments Bill, is proposed to s 102 of the Principal Act.

C1 35: rights of holder of classes of shares

C1 36: Rights of holders of shares

C1 37: Rights of classes of members

112. Provisions dealing with the variation of rights attached to classes of shares, the variation of rights attached to shares where the share capital is not divided into classes, and the variation of rights of members of a company which does not have a share capital, are contained in ss 125, 126 and 127 of the Principal Act.

113. An amendment is proposed to each of these provisions to ensure that they operate without being affected by s 73 (alteration of provision of memorandum) and s 76 (alteration of articles) of the Principal Act (Amendments Bill cls 35, 36 and 37).

C1 38: Register of options

114. A company is required to keep a register of options to take up unissued shares. (Principal Act s-sec 131(1)).

115. A company will be required to keep a copy of every instrument by which an option to take up unissued shares in the company is granted. This instrument will form part of the register and will be open for inspection to members without charge and to any other person on the payment of a fee. (Amendment Bill cl 38 - proposed s-sec 131(5A)).

C1 39: Qualifications of trustee for debenture holders

C1 40: Retirement of trustee

C1 41: Contents of trust deed

116. Amendments are proposed to the following provisions of the Principal Act:

- (a) s 152: qualifications of trustee for debenture holders;
- (b) s 153: retirement of trustee; and
- (c) s 154: contents of trust deed.

117. The effect of the proposed amendments will be to require the detailed prescription of the rights and duties of the parties to be contained in the trust deed rather than either the debenture or the trust deed (Amendments Bill cls 39, 40 and 41).

C1 42: Obligations of borrowing corporation

118. The obligations of a borrowing corporation are set out in s 158 of the Principal Act. The trustee for the holders of debentures must lodge forthwith notice of the fact that the directors of the borrowing corporation or the guarantor corporation have not carried out certain obligations imposed on them by s 158 (s-sec 158(18) of the Principal Act).

119. A company will be prohibited from issuing, offering or inviting public subscription or purchase of prescribed interest unless a statement has been registered by the NCSC under the prospectus provisions (Amendments Bill cl 43 - proposed new s-sec 170(1) - cf Principal Act s 96). This statement will be deemed to be a prospectus (Amendments Bill cl 43 - proposed new s-sec 17092)). The amendment to s-sec 17091) of the Principal Act is necessary because as presently drafted it would not permit the advertisement of a prescribed interest except by statement in writing.

120. All the provisions in the Principal Act and rules of law relating to prospectuses and the offering or invitation of shares to the public, or the issuing of forms of applications for shares will apply to prescribed interests (Amendments Bill cl 43 - proposed new s-sec 17093)).

C1 44: Certain charges void against liquidator or official manager

121. failure to lodge a notice of variation of the terms of a registered charge within the required period will not result in the entire charge being void against a liquidator or official manager but only to the extent that it secures the amount of the increase in the liability. (Amendments Bill para 44(a) to (h) - proposed s-sec 205(2A)).

122. A person purchasing property subject to an unregistered charge may only avoid the consequences of the charge being void against a liquidator if he establishes that the property was purchased in good faith and without notice of the commencement of winding up proceedings. (Amendments Bill para 44(j) - proposed s-sec 205(6)).

C1 45: company to keep documents relating to charges and register of charges

123. Section 209 of the Principal Act will be amended so that the register of charges will include a short description of the liability (whether present or prospective) secured by the charge (Amendments Bill cl 45). This will bring this provision into line with sub-para 201(1)(a)(iv) and para 203(2)(b) of the Principal Act.

C1 46: Power of Court to rectify Register &c

124. Certain drafting alterations will be made to s 212 of the Principal Act (Amendments Bill cl 46).

Cl 47: Notice of address of registered office and office hours

125. A notice in the prescribed form of the address of the proposed registered office shall accompany the memorandum when lodged for registration (Amendments Bill cl 47 - proposed s-sec 217(1)).

126. A new provision (proposed s 530A) which deals with the address of the registered office of the company, will also be included (Amendments Bill cl 79). (See para 160 of this Explanatory Memorandum).

Cl 48: Certain persons not to manage corporations

127. Section 227 of the Principal Act prohibits certain persons acting as directors or company managers. The proposed amendments are aimed at preventing persons insolvent under administration (see Principal Act s-sec 5(1)) and persons convicted of certain offences from being appointed as directors, even if they play no part in the management of a corporation. (Amendments Bill cl 48).

Cl 49: Provisions indemnifying officers or auditors

128. Provisions in the articles or in a contract exempting an officer or auditor from, or indemnifying him against, liability for negligence, default etc, are void. A company is, however, able to pay legal costs incurred by such a person in defending proceedings etc (Principal Act s 237). A new definition of "officer" is proposed for the purposes of s 237, which is the same as the definition in s 229 (and wider than the general definition in s 5). (Amendments Bill cl 49).

Cl 50: Statutory meeting and statutory report

129. Directors of a company that has issued its first prospectus are required to send each member the statutory report prior to the statutory meeting (Principal Act s 239). The effect of the proposed amendment is that copies of this report can be sent to members (Amendments Bill cl 50).

Cl 51: Officer or other person failing to comply with requirement of this part

130. An inspector may certify to the Supreme Court that an officer has failed without reasonable excuse to comply with a requirement made by the inspector under s 295 of the Principal Act. The Supreme Court is able to order compliance or punish the officer as if in contempt (Principal Act s 297). Amendments are proposed so that an inspector will be able to

certify to the Supreme Court that an officer or another person has failed to comply with a requirement, and the Supreme Court will be empowered to make an order etc against either person (Amendments Bill cl 51).

Cls 52 and 53: Power to compromise with creditors and members

131. The Court is not able to approve a compromise or arrangement if it considers that the compromise or arrangement has been proposed as a means of avoiding the Share Acquisition Code. (Principal Act s-sec 315(21)). This restriction will be eased so that the Court will be able to approve such a compromise or arrangement notwithstanding that the Court considers that it was proposed for this purpose if the NCSC has no objection to the compromise or arrangement. However, even if the NCSC has not objection to the scheme, the Court will still be able to reject the scheme (Amendments Bill cl 52).

132. A drafting alteration will be made to delete s-sec 31795) of the Principal Act. This provision repeated s-sec 315921) of the Principal Act (Amendments Bill cl 53). There is also a consequential drafting amendment to pick up a reference to proposed new s-sec 326(1A) (Amendments Bill para 52(a)).

C1 54: Notification of appointment of receiver

133. A person who is appointed as a receiver of the property of a company or registered foreign company will be required to lodge the address of his office with the NCSC in the prescribed form. He will also be required to give notice within 14 days to the NCSC in the prescribed form of any change in the situation of his office. Principal Act s-sec 326(3) will be omitted as the general penalty provision will apply. (Principal Act s 570) (Amendments Bill cl 54).

C1 55: Provisions as to information where receiver appointed

134. 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 (Principal Act s 328). An obligation will be placed on the management of the company to make out and submit to the receiver a report in the prescribed form as to the affairs of the company. Principal Act s-sec 328(6) will be omitted as the general penalty provisions will apply (s 570). A number of references in the Principal Act to a "statement of affairs" of the company will be replaced by a reference to a "report as to the affairs" of the company. Amendments to the following subsections are a result of this decisions ss 328(1), 335(4), 347(5), 375(1), 375(2) and 398(5) of the Principal Act.

135. Sub-section 328(2) of the Principal Act will be amended to make it clear that when notice of the receiver's appointment is served on the company, it is the responsibility of the directors and the secretary of the company to apply to the Court or to the receiver for extension of the 14 day period in which to prepare the report in the prescribed form as to the affairs of the company. (Amendments Bill para 559c)). Consequential amendments will be made to the Principal Act s-sec 328(3).

Cls 56, 57, 58, 59: Receiver may require reports

136. Sections 328 and 329 will be re-cast to bring the provisions more into line with s 375 concerning the comparable reports which a liquidator may require. References in these and other provisions to "statements" of affairs will be replaced by references to "reports" of affairs. As the "report of affairs" to be prescribed in various places throughout the Bill will be in the same form, a number of inconsistent references to such reports have been removed. (Amendments Bill cls 56, 57, 58, 59).

Cl 57: Lodging of accounts of receivers

137. A receiver will no longer be required when lodging the accounts of the company with the NCSC to furnish a statement in writing verifying the accounts (s-sec 330(1) of the Principal Act). As the receiver would sign the accounts, he could be prosecuted under s-sec 56392) of the Principal Act for any false or misleading statements.

Cl 60: Notice of appointment and address of official manager

138. The word "situation" in s-sec 340(1) of the Principal Act will be omitted and substituted by "address" to bring it into line with the amendment to s 326 of the Principal Act (Amendments Bill cl 60).

Cl 61: Duties of official manager

139. The duties of an official manager are set out in s 347 of the Principal Act. The official manager will be required to lay before a meeting of creditors a report in the prescribed form as to the affairs of the company made up to a date not more than 30 days before the notice of the meeting. The purpose of the amendment is simply to bring the provision into line with other comparable provisions relating to reports of affairs (previously statements of affairs) given that the same form is intended to be prescribed in each case (Amendments Bill cl 61 - proposed s-sec 347(5)).

Cl 62: Functions of committee of management and appointment of deputy official manager

140. The powers and functions of the committee of management including its powers to appoint a deputy official manger are set out in s 357 of the Principal Act. The purpose of the proposed amendment to s-sec 357(7) of the Principal Act is to clear up an ambiguity in the provision between the references to the committee of inspection appointed under Part XII of the Principal Act and the committee of management appointed under Part XI (which deals with official management ) (Amendments Bill cl 62).

Cl 63: Report as to company's affairs to be submitted to liquidator

141. A statement of affairs of the company is required to be submitted to the liquidator by the persons who were the directors and secretary at the relevant time (Principal Act s-sec 375(1)). In order to clarify the information to be submitted to the liquidator, the directors and secretary will be required to submit a report (in the prescribed form) to the liquidator. This report will be verified by a statement in writing in the prescribed form. (Amendments Bill para 63(a)). A similar amendment is proposed to s-sec 375(2) of the Principal Act (Amendments Bill para 63(b)), and consequential amendments are proposed to s-secs 375(4) - (8) of the Principal Act (Amendments Bill paras 62(c) and (d)).

142. A liquidator will be able to specify the information he requires from the persons listed in s-sec 375(2) by reference to the requirements of the Principal Act or regulations made thereunder (Amendments Bill para 62(b)).

Cl 64: Preliminary report by liquidator

143. An amendment consequential upon those in Amendments Bill cl 63 will be made to s 376 of the Principal Act (Amendments Bill cl 64).

Cl 65: Delegation to liquidator of certain powers of Court

144. Section 389 of the Principal Act enables rules of court to be made delegating powers and duties of the court under Part XII to the liquidator in relation to a number of matters including the holding and conduct of meetings, the making of calls and the adjusting of the rights of contributories.

145. Section 389 of the Principal Act will be amended to enable these powers and functions to be conferred on the liquidator by rules or regulations. Section 389 will also be amended to enable the rules or regulations to confer power on a liquidator to distribute any surplus among the persons entitled to it. However a liquidator will not be able to distribute any surplus without the special leave of the Court (Amendments Bill cl 65).

#### C1 66: Declaration of solvency

146. The directors of a company that is to be wound up voluntarily may, subject to certain conditions, make a declaration of solvency (Principal Act s 395).

147. A technical drafting amendment will be made to s-sec 395(3) of the Principal Act to more accurately reflect the nature of an extension of time granted by the Commission viz that a meeting may be held more than 5 weeks after the making of a declaration of solvency (Amendments Bill para 66(a)).

148. Sub-section 395(5) of the Principal Act will be amended to cover the situation where the NCSC grants an extension of time for a declaration of solvency and a company is wound up within that time period and debts are not paid in the period stated in the declaration. In such a case there will be a presumption that the responsible director did not have reasonable grounds for making the declaration (Amendments Bill s-cl 669b)).

#### C1 67: Meeting of creditors

149. Section 398 of the Principal Act deals with the meeting of creditors where there is a creditors voluntary winding up. The directors will be required to lay before the meeting of creditors a report in the prescribed form and verified by all the directors as to the affairs of the company (Amendments Bill para 67(a)). The directors will also be required to lodge a copy of this report with the NCSC within 7 days after it is laid before the meeting of creditors (Amendments Bill para 67(b) - proposed s-sec 398(6A)).

#### C1 68: Final meeting and dissolution

150. Provisions dealing with the final meeting and dissolution of a company being wound-up are contained in s 411 of the Principal Act. The proposed amendments are designed to overcome the conflict between existing s-secs 411(5) and (6) which provide on the one hand for a dissolution to "take effect" and yet on the other hand for the dissolution to be deferred even after having taken effect (Amendments Bill cl 68).

#### C1 69: Disqualification of liquidators

151. 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 (s 417 of the Principal Act) has been reduced to 7 days. This will bring this period into line with the period set in s-sec 398(2) of the Principal Act and

with the previous s-sec 277A(2) of the ICAC Companies Act (Amendments Bill cl 69).

Cl 71: Unclaimed property to be paid to Minister

153. Unclaimed dividends and accounts remaining after final dividend payment are paid to the Minister administering unclaimed moneys legislation by the liquidator (Principal Act s 427). The receipt which will be given for such property will be the usual form of receipt for public monies in the Territory (Amendments bill cl 71).

Cl 72: Disclaimer of onerous property

154. A liquidator may on behalf of the company disclaim onerous property. Sub-section 454(2) of the Principal Act will be amended so as to remove from the committee of inspection the power to extend beyond 12 months after the commencement of the winding up the period of time during which the liquidator may disclaim onerous property (on the basis that the committee of inspection may not be completely disinterested) (Amendments Bill cl 72).

Cl 73: Application of Act to no liability companies

155. Paragraph 378(1)(c) of the Principal Act provides that as soon as practicable after making a winding up order, the liquidator shall cause the property of the company to be collected and applied in discharge of its liabilities. An amendment will be made to s 475 of the Principal Act to ensure that paragraph 378(1)(c) applies to no liability companies in the same way that it applies to all other companies (Amendments Bill cl 73).

Cl 74: Unregistered foreign company not to establish place of business or carry on business in the Territory

156. A foreign company must lodge prescribed documents in order to operate within the Territory. Paragraph 512(2)(c) of the Principal Act will be amended to require the foreign company seeking registration to lodge a list of its directors or a list of the persons who comprise the management of the company. The proposed amendment will recognise the fact that some foreign companies do not have directors (Amendments Bill para 74(a)).

157. The foreign company will not be required to have its memorandum of appointment of a person willing to accept service of process on its behalf in the Territory verified by a statement in writing (Amendments Bill para 74(b)). The foreign company will be required to lodge with the NCSC notice of the address of its registered office or its principal place

of business in its place of incorporation or formation (Amendments bill para 74(c)).

C1 75: Agents

158. The document lodged with the NCSC under the s-sec 514(1) of the Principal Act will now be verified by a statement in writing in the prescribed form, to be a true copy (Amendments Bill cl 75).

C1 76: Notice to be filed where documents &c altered

159. Where there is any change in the situation of the registered office of a registered foreign company in its place of incorporation or formation, the NCSC is to be notified within one month (Amendments Bill cl 76 – para 515(2)(d) of the Principal Act).

C1 77: Publication of name, &c of foreign company

160. A foreign company is required to place on all relevant documents its name and place of incorporation and to exhibit its name outside its place of business etc (Principal Act s 517). A minor drafting change will be made so that an officer of a foreign company or any person on behalf of the foreign company will be guilty of an offence if he fails to comply with the requirements set out in paras 517(2)(a) and (b) of the Principal Act (Amendments Bill cl 77).

C1 78: Branch register of shares in foreign company

161. A registered foreign company or a foreign company formed outside Australia must notify the NCSC if it opens a branch register (Principal Act s-sec 521(10)), and must notify any change in the place where it is kept or where the branch register is discontinued (Principal Act s-sec 521(11)). A new offence provision will provide that if a registered foreign company fails to comply with these provisions any officer of the foreign company or any agent of that company who is in default are each guilty of an offence. (Consequential to this amendment s-sec 521(5) of the Principal Act is omitted) (Amendments Bill cl 78).

C1 79: Address of registered office, principal office, &c

162. The information required from a company or a person when the Act requires a notice to be lodged with the NCSC setting out the address of an office of a corporation or a person or a change in the situation of an office of a corporation or a person will be contained in proposed s 530A (new provision – Amendments Bill cl 78 – cf s 217(1) of the Principal Act and cl 47 of Amendments Bill).

C1 80: Power to grant relief

163. The Supreme Court is empowered to provide relief for officers and other persons who are charged with offences involving negligence, default, a breach of duty or breach of trust (Principal Act s 535). A wider definition of "officer" will be used in this provision so that the power of the court to provide relief extends to all categories of receivers, and receivers and managers whether appointed by the court or under an instrument (Amendment Bill cl 80 - proposed s-sec 535(5)).

C1 81: Location of registers

164. The references to a branch register of shares in a registered foreign company under section 521 of the Principal Act will be deleted from s-sec 547(1) and (2) of the Principal Act as s 521 itself provides for the location of branch registers kept pursuant to its provisions (Amendments Bill cl 81).

C1 82: Translation of instruments

165. A minor drafting amendment will be made to s 548 of the Principal Act which requires that the translation of the document that is required to be lodged with the NCSC will be a translation into the English language (Amendments Bill cl 82).

C1 83: Offences by officers of certain companies

166. It is an offence for a past or present officer of a company to may any material omission in any "statement" relating to affairs of the company (Principal Act s-sec 554(1)(d)). It will also be an offence to make a material omission in any "report", this change being consequential on the changes being made throughout the Act from "statement of affairs" to "report of affairs" (Amendments Bill cl 83).

C1 84: Certain rights not affected

167. Where debts have been incurred by a company or activities have been carried on in such a fraudulent manner that personal liability is imposed on the directors of the company in the circumstances outlined in sections 556 and 557 of the Principal Act, those provisions do not affect any rights of the director to indemnity, subrogation and contribution (Principal Act s 558). However, this saving of those rights is not to be so extensive as to cut across the specific provisions in s-sec 556(4) which indicates that a director who becomes personally liable cannot seek reimbursement from the company (Amendments Bill cl 84).

C1 85: Court may disqualify person from acting as director, etc, in certain circumstances

168. Where persons have been involved in the management of a number of companies which have been wound up at least partly because of the manner in which affairs of the companies had been managed, the Court may disqualify such persons from taking part in the management of a company for up to 5 years. "Company" is given a very extensive definition so as to include not only local companies but also any other corporation (defined in Principal Act s 5) and any partnership, association or other body (whether corporate or unincorporated) that consists of more than 5 members. (Principal Act s-secs 562(5) and 469(1)). The proposed amendment overcomes the overlap between "corporations" and "bodies to which Division 6 of Part XII applies" in the existing definition of company (Amendments Bill cl 85).

#### Cl 86: Regulations

169. The regulation making power in s-sec 577(1) will be amended to ensure that the power to make regulations will extend to the following matters:

- (a) the payment of dividends to creditors by a liquidator;
- (b) the holding and conduct of meetings by a liquidator;
- (c) the making of calls and the adjusting of the rights contributories by a liquidator;
- (d) the distribution of any surplus by a liquidator; and
- (e) the duties of a liquidator in relation to proofs of debt.

(Amendments Bill para 86(a)).

170. A new provision will also be inserted in s 577 of the Principal Act to enable regulations of specially limited application to be made. This will bring the regulation making provision in the Principal Act into line with s-sec 150(3) of the Securities Industry Act 1980.

#### Cl 87: Other amendments

171. Some editorial amendments have been made to the Principal Act and these are set out in Schedule 3 to the Amendments Bill (Amendments Bill cl 87).

### PART VIII - COMPANIES (FEES) ACT 1981

#### Cl 88: Principal Act

172. The Companies (Fees) Act 1981 is referred to in Part VIII as the Principal Act (Amendments Bill cl 88).

#### Cl 89: Interpretation

173. The Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 applies to all scheme legislation specifically identified in s 3 of that Act, any subsequent amendments to those Acts and any subsequent Act which contains a provision stating that the Companies and Securities (Interpretation and Miscellaneous Provisions) Act applies to that Act. The proposed amendment to the Companies (Fees) Act is such a provision (Amendments Bill cl 89).

PART IX - COMPANIES (TRANSITIONAL PROVISIONS) ACT 1981

Cl 90: Principal Act

174. The Companies (Transitional Provisions) Act 1981 is referred to in this Part as the Principal Act (Amendments Bill cl 90).

Cl 91: Acts of Minister under Companies Ordinance deemed to be acts of Ministerial Council or Commission &c

175. Certain exemptions, consents, declarations, notices etc made under the Companies Ordinance (old law) are given continued operation under the Companies Act (new law) by virtue of the Companies (Transitional Provisions) Act 1981. Proposed amendments to section 13 of the (Transitional Provisions) Act are designed to ensure that the deeming provisions result in an exemption, order, notice etc under the old law operating in precisely the same manner under the new law. Minor changes have been made to s-secs 13(8), (14) and (21) to achieve this effect (Amendments Bill paras 90(a), (b) and (d)). A new deeming provision has been included to ensure the continued operation of orders made under the old law exempting a company or class of companies from complying with specified requirements relating to the form and content of accounts or directors' reports (Amendments Bill para 91(c)).

Cl 92: Existing prospectuses and section 82 statements

176. Prospectuses and statements issued in relation to the offering for subscription or purchase of interests ("section 82 statements") which are registered less than 6 months before the commencement of the Companies Act 1981 shall be deemed to be registered under the Companies Act for 6 months after registration (section 16 of the Companies (Transitional Provisions) Act). Amendments are proposed to the Companies Act to reflect the fact that "section 82 statements" are not actually registered "as prospectuses" although the effect is the same. They are actually registered under the interest provisions (Amendments Bill cl 43). Consequential amendments are proposed to the Companies (Transitional Provisions) Act 1981 (Amendments Bill cl 92).

Cl 93: Registration of charges

177. The Principal Act will be amended to cover a problem which could otherwise arise in respect of charges created before the commencement of the new law that are required to be registered under the old law (ACT Companies Ordinance 1962) but are not required to be registered under the new law. Section 100 of the old law requires certain charges to be lodged for registration within 30 days after their creation and, among other things, provides in s-sec 100(9) that those charges need not be registered under the Instruments Ordinance. Without amendment, s-sec 18(9) of the Principal Act 1981 would have deprived the charges to which it refers of the protection of s-sec 100(9) of the old law, ie they would be subject to the Instruments Ordinance if they were bills of sale of personal chattels as defined in that Ordinance. The effect of the proposed amendment is to continue the provisions of the old law in relation to such charges, notwithstanding the repeal of the ACT Companies Ordinance (Amendments Bill cl 92).

C1 94: Application of Companies Act to financial years ending before commencement of Act

178. Companies which have failed to prepare accounts and directors reports in accordance with their obligations under the old law will be required to prepare those accounts and reports and submit them to annual general meetings within a specified time after commencement of the new law (Companies (Transitional Provisions) Act 1981 s 20). To the extent that those companies had already been granted exemptions from complying with specified requirements as to the form and content of accounts or directors reports if lodged within time, those exemptions will also apply to the accounts and reports required to be lodged under this provision (Amendments Bill cl 94).

C1 95: Special investigations

179. Consequential amendments will be made to section 22 of the Principal Act in order to take account of the ACT Companies (Amendment) Ordinance (No 2) 1980, which replaced Part VIA of the Principal Ordinance with a new Part VIA. This new Part VIA does not contain a provision similar to the old section 170 of the original Companies Ordinance 1962 on which section 22 was based (Amendments Bill cl 95).

C1 96: Repeal of section 23

180. Section 23 of the Principal Act will be repealed because s 170 of the Companies Ordinance 1962 was repealed by the ACT Companies (Amendment) Ordinance (no 2) 1980 (Amendments Bill cl 95).

C1 97: Principal Act

181. The Companies (Miscellaneous Amendments) Act 1981 is referred to in Part X of the Amendments Bill as the Principal Act (Amendments Bill cl 97).

C1 98: Repeal of Part IX

182. Part IX of the Companies (Miscellaneous Amendments) Act 1981 contained amendments to the Industrial Research and Development Grants Act 1967 consequent upon enactment of the Companies Act 1981. the subsequent repeal of the Industrial Research and Development Grants Act 1967 has now rendered those amendments unnecessary (Amendments Bill cl 98).

PART XI – AMENDMENTS OF OTHER ACTS

C1 99: Amendments of other Acts

183. A number of amendments to Commonwealth Acts not forming part of the cooperative scheme are proposed to replace references to the ACT Companies Ordinance 1962 with references to the Companies Act 1981. These amendments are set out in Schedule 4 (Amendments Bill cl 99).