

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

COMPANIES AND SECURITIES LEGISLATION (MISCELLANEOUS
AMENDMENTS) BILL 1983

EXPLANATORY MEMORANDUM

(Circulated by Authority of
the Attorney-General,
Senator the Honourable
Gareth Evans)

COMPANIES AND SECURITIES LEGISLATION
(MISCELLANEOUS AMENDMENTS) BILL 1983

CONTENTS

<u>ITEM</u>	<u>PARAGRAPH</u>
<u>OUTLINE</u>	1
Explanatory Memorandum	4
<u>CO-OPERATIVE COMPANIES AND</u> <u>SECURITIES SCHEME</u>	
Formal Agreement	5
The Ministerial Council for Companies and Securities	8
NCSC	11
Use of existing administrations	14
The legislative framework	17
The content of the legislation to give effect to the scheme	18
Interpretation code	20
State legislation	22
<u>BILL</u>	
Brief Outline of Major Changes	23
Contents of Bill	25

<u>PART I - PRELIMINARY</u>	27
Cl. 1 Short Title	28
Cl. 2 Commencement	29
<u>PART II - AMENDMENTS OF COMPANIES</u> <u>(ACQUISITION OF SHARES) ACT 1980</u>	
Introduction	31
Share acquisition code	32
Cl. 3 Principal Act	33
Cl. 4 Other interpretative and evidentiary provisions	34
Cl. 5 Take-over offers	38
Cl. 6 Part B statement	41
Cl. 7 Offer or connected with target company	44
Cl. 8 Provisions relating to dissenting shareholders	49
Cl. 9 Rights of remaining shareholders and holders of options and notes	52
Cl. 10 Liability for mis-statements	60

Cl. 11	Orders where prohibited acquisitions take place	62
Cl. 12	Orders where offers not dispatched pursuant to Part A statement	65
Cl. 13	Orders to protect rights under take-over schemes or announcements	67
Cl. 14	Miscellaneous provisions relating to orders	69
Cl. 15	Power to exempt from compliance with Act	73
Cl. 16	Power to declare that Act applies as if modified	75
Cl. 17	Repeal of section 60 and substitution of new section -	77
60.	Power of Commission to declare acquisition of shares or other conduct to be unacceptable	
Cl. 18	Power of Commission to make certain orders	81
Cl. 19	Schedule	83
<u>PART III - AMENDMENTS OF COMPANIES ACT 1981</u>		
	Companies Code : Introduction	88
Cl. 20	Principal Act	91

Cl. 21	Interpretation	92
Cl. 22	Relevant interests in shares	102
Cl. 23.	Insertion of Subdivision heading	105
Cl. 24	Registration of auditors	107
Cl. 25	Registration of liquidators	109
Cl. 26	Register of auditors	111
Cl. 27	Registers of liquidators and official liquidators	114
Cl. 28	Notification of certain matters	117
Cl. 29	Repeal of section 27	119
Cl. 30	Certain persons not to apply for registration as auditor or liquidator	122
Cl. 31	Insertion of new Subdivision - Subdivision B - Cancellation or Suspension of Registration	125
30A.	Interpretation	130
30B.	Cancellation at request of registered person	131
30C.	Official liquidators	134

30D.	Powers of Board in relation to auditors and liquidators	137
30E.	Hearings	144
30F.	Power to summon witnesses and take evidence	152
30G.	Proceedings at hearings	153
30H.	Failure of witnesses to attend and answer questions	157
30J.	Contempt of Board	162
30K.	Protection of members, &c.	163
30L.	Hearings deemed to be judicial proceedings	166
30M.	Notice of Board's decision	168
30N.	Time when Board's decision comes into effect	170
30P.	Effect of suspension	172
30Q.	Costs	173
30R.	Appeal from decision of Board	174
30S.	Operation of section 27	175
Cl. 32	Registers	176

Cl. 33	Requirements as to memorandum	181
Cl. 34	Repeal of sections 67 and 68 and substitution of new sections -	185
	67. Powers	189
	68. Restrictions on companies	196
	68A. Persons having dealing with companies, &c.	203
	68B. Certain assumptions not to be made	208
	68C. Lodgment of documents, &c., with Commission not to constitute constructive notice 211	
	68D. Effect of fraud	215
Cl. 35	General provisions as to alteration of memorandum	217
Cl. 36	Alterations of provisions of memorandum	221
Cl. 37	Confirmation of contracts and authentication and execution of documents	237
Cl. 38	Certificate authorizing application for transfer of incorporation	240
Cl. 39	Application by foreign company for registration under Division	246

Cl. 40	Establishment of registers and minute books	248
Cl. 41	Interpretation	250
Cl. 42	Forms of application for shares or debentures to be attached to prospectus	252
Cl. 43	Invitations or offers in relation to borrowings by a corporation	254
Cl. 44	Certain notices, *Sc., not to be published	257
Cl. 45	Certain reports referring to prospectuses not to be published	259
Cl. 46	Registration of prospectuses	261
Cl. 47	Repeal of section 109	263
Cl. 48	Restriction on application of capital of company	265
Cl. 49	Power to make certain payments	267
Cl. 50	Power of company to alter its share capital	270
Cl. 51	Special resolution for reduction of share capital	272
Cl. 52	Substantial shareholdings and substantial shareholders	274

Cl. 53	Insertion of new section - 144A. Civil remedy where failure or default under Division	276
Cl. 54.	Knowledge of employee or agent imputed to employer or principal	279
Cl. 55.	Powers of Court with respect to defaulting substantial shareholder	282
Cl. 56	Register of debenture holders and copies of trust deed	285
Cl. 57	Branch registers	287
Cl. 58	Compliance with laws of State or other Territory sufficient compliance for certain companies	289
Cl. 59	Interpretation	291
Cl. 60	Approved deeds	301
Cl. 61	Approval of deeds	305
Cl. 62	Approval of trustees	309
Cl. 63	Covenants to be included in deeds	312
Cl. 64	Statement to be issued	319
Cl. 65	Register of holders of prescribed interests	323

Cl. 66	Power to exempt from compliance with Division and non-application of Division in certain circumstances	331
Cl. 67	Duties of company with respect to issue of certificates	333
Cl. 68	Insertion of new Division -	335
	Division 10 - Exemption from, and modification of the application of, Divisions of this Part	
	215B. Banking business	
	215C. Powers of Commission	
Cl. 69	Vacation of office	344
Cl. 70	Insertion of new section -	348
	227A. Court may order persons not to manage corporations	
Cl. 71	Duty and liability of officers	352
Cl. 72	Loans to directors	357
Cl. 73	Insertion of new section -	358
	238A. Register of Disqualified Company Directors and Other Officers	

C1. 74	Convening of general meeting on requisition	362
C1. 75	Circulation of members' resolutions, &c.	368
C1. 76	Repeal of section 261 and substitution of new sections -	370
	261. Power of company to obtain information as to beneficial ownership of its shares	371
	261A. Powers of Court	385
C1. 77	Exemption of certain companies	393
C1. 78	Interpretation	396
71. 79	Insertion of new sections -	
	266A. Dormant corporations	406
	266B. Approved accounting standards	409
	266C. Application of approved accounting standards	415
	266D. Board to have regard to possibility of disallowance	422
	266E. Interpretation, &c., of accounting standards	424
	266F. Power of Board to require copy of accounts or group accounts	426

Cl. 80	Profit and loss account, balance-sheet and group accounts	429
Cl. 81	Directors' reports	444
Cl. 82	Repeal of section 272 and substitution of new section - 272. Directors of holding company to obtain all necessary information	452
Cl. 83	Failure to comply with this Division	454
Cl. 84	Removal and resignation of auditors	457
Cl. 85	Powers and duties of auditors as to reports on accounts	460
Cl. 86	Examination of officers	463
Cl. 87	Power of Commission to make certain orders	468
Cl. 88	Application for winding up	471
Cl. 89	Remedy in cases of oppression or injustice	474
Cl. 90	Repeal of section 321 and substitution of new section - 321. Interpretation	483

C1. 91	Disqualification for appointment as receiver, &c.	489
C1. 92	Liability of receiver	493
C1. 93	Insertion of new sections -	496
	324A. Powers of receiver	499
	324B. Duties of receiver with respect to bank accounts and accounting records	505
	324C. Reports by receiver	508
	324D. Prosecution of delinquent officers and members	513
	324E. Supervision of receivers	516
	324F. Receiver may apply to Court	519
C1. 94	Power of Court to fix remuneration of receivers	522
C1. 95	Insertion of new section -	526
	325A. Receiver to enjoy qualified privilege in certain circumstances	
C1. 96	Notification of appointment of receiver	529
C1. 97	Statement that receiver appointed	540

Cl. 98	Provisions as to information where receiver appointed	543
Cl. 99	Receiver may require reports	552
Cl. 100	Insertion of new section - 329A. Receiver may inspect books	557
Cl. 101	Lodging of accounts of receiver	560
Cl. 102	Payment of certain debts out of property subject to floating charge in priority to claims under charge	565
Cl. 103	Enforcement of duty of receiver to make returns	- 570
Cl. 104	Notice of appointment and address of official manager	575
Cl. 105	Effect of resolution	579
Cl. 106	Six-monthly meetings of creditors and members	582
Cl. 107	Circumstances in which company may be wound up by Court	587
Cl. 108	Repeal of section 380	590
Cl. 109	Final meeting and dissolution	592
Cl. 110	Reports by liquidator	596

C1. 111	Supervision of liquidators	598
C1. 112	Insertion of new section -	601
	421A. Regulations relating to money, &c., received by liquidator	
C1. 113	Prosecution of delinquent officers and members	603
C1. 114	Power of Commission to deregister defunct company	606
C1. 115	Special requirements as to articles and prospectus	609
C1. 116	Notice to be lodged where documents, &c., altered	615
C1. 117	Cessation of business, &c.	620
C1. 118	Location of registers	624
C1. 119	Interpretation	626
C1. 120	Court may disqualify person from being a director, &c., in certain circumstances	629
C1. 121	Insertion of new section -	633
	570A. Penalty notices	
C1. 122	Continuing offences	643

C1. 134 Insertion of new section - 681

38A. Evidence

PART VI - AMENDMENT OF NATIONAL COMPANIES AND SECURITIES COMMISSION ACT
1979

introduction 683

C1. 135 Principal Act 684

C1. 136 Interpretation 685

C1. 137 Application of moneys 688

C1. 138 Power to summon witnesses and take
evidence 692

C1. 139 Insertion of new section - 694

43A. Accounting Standards Review
Board

PART VII - AMENDMENTS OF SECURITIES INDUSTRY
ACT 1980

introduction 699

1. 140 Principal Act 701

1. 141 Interpretation 702

1. 142 Power of Court to make certain orders 707

Cl. 143	Conditions to which licence is subject	710
Cl. 144	Further provisions relating to revocation and suspension of licences	713
Cl. 145	Deposits to be invested by stock exchange	716
Cl. 146	Prohibition of dealings in securities by insiders	719
Cl. 147	Insertion of new section - 141A. Penalty notices	722
Cl. 148	Continuing offences	725
Cl. 149	Injunctions	729
Cl. 150	Regulations	731
Cl. 151	Further amendments	732
<u>Appendix A</u>		
	Major changes between the exposure draft and the Bill.	733

ABBREVIATIONS

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

- T CO - Australian Capital Territory Companies Ordinance
- SA - Commonwealth Companies (Acquisition of Shares) Act 1980 as subsequently amended
- ;(AofL)A - Companies (Acquisition of Shares) (Application of Laws) Act
- Commonwealth Companies Act 1981 as subsequently amended
- SIB - Corporations and Securities Industry Bill 1975
- :S(I&MP)A - Commonwealth Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 as subsequently amended
- S(I&MP) - Companies and Securities (Interpretation and
▶ofL)A Miscellaneous Provisions) (Application of Laws) Act
- (TP)A - Commonwealth Companies (Transitional Provisions) Act 1981
-) - Exposure draft of Companies and Securities Legislation (Miscellaneous Amendments) Bill 1983

- ICAC CAs - Companies Acts of the States which were parties to the Interstate Corporate Affairs Agreement
- ICAC SIAs - Securities Industry Acts of the States which were 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 as subsequently amended
- NCSC(SP)A - National Companies and Securities Commission (State Provisions) Act
- NT CO - Northern Territory Companies Ordinance
- SIA - Commonwealth Securities Industry Act 1980 as subsequently amended
- SI(AofL)A - Securities Industry (Application of Laws) Act
- VIC CA - Victorian Companies Act
- SA CA - South Australian Companies Act
- WA CA - Western Australian Companies Act

OUTLINE

The Companies and Securities Legislation (miscellaneous Amendments) Bill 1983 (hereafter referred to as "the Bill") makes various amendments to the Commonwealth Acts under the co-operative companies and securities scheme further background on the scheme is at paras 5 to 22 of this explanatory memorandum).

This Bill has been approved by the Ministerial Council for Companies and Securities following consideration of the Council of comments that were received on an earlier draft of the Bill that was made available to the public in December 1982.

The substantive provisions of the Bill will come into operation on such date or dates as are fixed by Proclamation.

Explanatory Memorandum

4. The remainder of this explanatory memorandum:
 - (a) contains a brief introduction to the co-operative companies and securities scheme (paras 5 to 22);
 - (b) contains a brief outline of the major proposals contained in the Bill (paras 23 and 24); and
 - (c) deals sequentially with each clause of the Bill (paras 27 to 732).

CO-OPERATIVE COMPANIES AND SECURITIES SCHEME

Formal Agreement

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 general company law and the general regulation of the securities industry in the six States and the Australian Capital Territory. (A copy of this Formal Agreement is set out in the Schedule to the Commonwealth National Companies and Securities Commission Act 1979). Since then, the Commonwealth and the six States have executed the First Amending Agreement to the Formal Agreement. 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).

The Formal Agreement sets out, among other things, four basic elements of the co-operative scheme:-

- (a) The establishment of a Ministerial Council for Companies and Securities comprising one Minister from each of the Commonwealth and 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.

7. Each of these basic elements is discussed below.

The Ministerial Council for Companies and Securities

8. The first of the four basic elements of the co-operative 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.

9. 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."

10. In exercising its review functions over legislation, the Ministerial Council is responsible for approving all the co-operative scheme legislation. The initial legislation required unanimous approval and amending legislation, with certain exceptions, requires approval by a simple majority (see Formal Agreement cl. 29).

onal Companies and Securities Commission

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

The NCSC has such functions and powers as are conferred on it by the various pieces of Commonwealth and State legislation that are required to give effect to the co-operative companies and securities scheme (hereafter referred to as the 'co-operative scheme legislation').

Each State Parliament has passed a special Act, the National Companies and Securities Commission (State Provisions) Act, (hereafter referred to as the NCSC(SP)A) to govern the operation of the NCSC in that State. These State Acts came into force on 1 July 1981.

of existing administrations

The third basic element in the co-operative scheme is the corporate affairs office in each jurisdiction covered by the scheme.

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 due regard to the maximum development of a decentralized administrative capacity (see Formal Agreement cl. 35).

In recognition of these requirements, all documents are required to be lodged with the NCSC under the law of the particular jurisdiction must be lodged with the local

corporate affairs office in that jurisdiction (see for example, s-sec. 14(1) of the Commonwealth Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980).

The Legislative Framework

17. The final basic element of the co-operative companies and securities scheme is the legislative framework. The basic features of the proposal for legislative uniformity (sometimes referred to as 'the legislative device') can be summarised as follows:-

- (a) The content of the substantive laws under the co-operative scheme is set out in Commonwealth legislation that applies to the Australian Capital Territory.
- (b) Each other jurisdiction that is covered by the Formal Agreement has legislation which applies the relevant Commonwealth law (subject to any necessary local modifications) as the law of that jurisdiction to the exclusion of its previous legislation, as from the date of commencement of the relevant Commonwealth law (see Formal Agreement paras 9(a) and (b)).
- (c) Any amendments of the Commonwealth Acts must be approved by the Ministerial Council, and then submitted 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 modifications (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 has 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).

e content of the legislation to give effect to the scheme

The initial Commonwealth legislation was substantially in conformity with what is known as the 'ICAC' companies and securities legislation (the legislation of the States which were parties to the Interstate Corporate Affairs agreement) that was in force at the time of the execution of the Formal Agreement except for amendments that were agreed on by the Ministerial Council or were required to give effect to the Parts of the Formal Agreement dealing with names and with special investigations (see Agreement para 8(2)(b)).

The Commonwealth legislation can be divided into five groups:-

- the NCSC Act (see paras 11 to 13, above) 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.

The interpretation code

20. 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 (hereafter referred to as "C&S (I&MP) A") .

21. The interpretation code provides 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 as at 1 July 198 except for:-

- the matters covered by the provisions in Parts II and IV of the Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 (apart from 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 save (see Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 s-sec. 4(2)).

to legislation

The legislation for each State in relation to each e also consists of several parts:-

(a) The (Application of Laws) Act relating to each code. This State Act, in effect:-

(i) applies the code set out in the relevant Commonwealth Act, the Regulations under that Commonwealth Act and the relevant Commonwealth Fees Regulations;

(ii) enables to be printed as they apply in that jurisdiction, the code, the Regulations under the Commonwealth Act and the relevant Fees Regulations.

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

(c) Any regulations effecting necessary local modifications (sometimes referred to as 'translator regulations') which are made as and when needed to ensure that particular amendments to the initial Commonwealth legislation have a meaningful application in a particular jurisdiction other than the A.C.T.

BILL Brief outline of
major changes

23. Some of the amendments contained in the Bill are designed to clear up ambiguities or uncertainties that are thought to exist in the present legislation or to improve the administration of the co-operative scheme.

24. Others, if passed, would involve major changes in t] law. A brief outline of these is as follows:-

(a) Objects and powers of companies : It is proposed to amend the existing provisions of the Companies Act 1981 relating to the objects and powers of companies, to enable a company to exercise, in addition to those powers peculiar to companies, all the rights, powers and privileges of a natural person. In the earlier exposure draft two alternative approaches were proposed, one based on the requirement that companies have stated objects, the other on this basis that it be optional for companies to have stated objects. Following consideration of public comments it has been decided to follow the second approach that it be optional for companies to have stated objects.

(b) Remedies in case of oppression : A number of amendments are proposed to be made to the provision (CA s. 320) which deals with the statutory remedy for members of a company who complain that the affairs of the company are being conducted to their detriment.

- (c) Tracing beneficial interests in shares : Section 261 of the Companies Act 1981 enables a company 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. The amendments proposed to this provision by ED cl. 36 sought to enable a company to trace the ownership of its shares through a series of nominees. Public submissions on this proposed amendment indicated that further substantial amendments were required to CA s. 261 if the provision were to be effective.
- (d) Directors' statement : Directors are required to attach to the accounts, before the auditor reports on them, a statement as to whether they consider that the accounts are drawn up so as to give a true and fair view of the state of affairs of the company as at the end of the financial year. It is proposed to extend this provision to require directors to bring persons reading the accounts up to date in relation to the state of affairs of the company, having regard to circumstances that have arisen and information that has become available since the end of the financial year.
- (e) Directors' reports : Proposed amendments to the Companies Act 1981 will require more informative directors' reports, but not so as to require the disclosure of information which would be prejudicial to the interests of the company.

- (f) Receivers and managers : The duties and powers of receivers will be set out in the Companies Act 1981. The proposed amendments will also involve an extension of the jurisdictional reach of the receivership provisions.
- (g) Disqualification of directors : Amendments to the Companies Act 1981 are proposed to enable the NCSC, an official manager, liquidator, member or creditor of a corporation to seek a court order prohibiting a director, secretary or executive officer of a corporation from taking part in the management of any corporation if such an officer has repeatedly contravened provisions of the scheme legislation, or has been involved in the contravention by a corporation of scheme legislation.
- (h) Companies Auditors and Liquidators Disciplinary Boards : Provisions dealing with the conduct of hearings before the Companies Auditors and Liquidators Disciplinary Boards will be included in the Companies Act 1981.
- (i) NCSC powers of exemption and modification : A new provision will be included in the Companies Act 1981 which will rationalise the various discretionary powers which the NCSC has in relation to the disclosure requirements required of companies when issuing prospectuses, debentures and prescribed interests.

- (j) Approval of trustee for holders of prescribed interests : An amendment to the Companies Act 1981 is proposed which will enable the NCSC to approve a person (not just a company) as a trustee for the holders of prescribed interests.

- (k) Accounting Standards Review Board : Amendments to the Companies Act 1981 are proposed which will require accounts and group accounts to be prepared in accordance with accounting standards approved by the proposed Accounting Standards Review Board.

- (l) Penalty notice system : Amendments are proposed to the Companies Act 1981 and to the Securities Industry Act 1980 to enable breaches of the companies and securities legislation which are of a minor character to be dealt with by means of a penalty notice system.

Contents of Bill

5. The Bill is divided into the following parts:-

- Part I - Preliminary

- Part II - Amendments of Companies
(Acquisition of Shares) Act 1980

- Part III - Amendments of Companies Act 1981

- Part IV - Amendment of Companies
(Transitional Provisions) Act 1981

- Part V - Amendments of Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980
- Part VI - Amendment of National Companies and Securities Commission Act 1979
- Part VII - Amendments of Securities Industry Act 1980

26. The remainder of this explanatory memorandum deals sequentially with the separate clauses in each of these Parts.

BILL PART I - PRELIMINARY

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

Cl. 1 : Short title

28. When enacted the Bill will be cited as the Companies and Securities Legislation (Miscellaneous Amendments) Act 1983 (Bill cl. 1).

Cl. 2 : Commencement

29. Part I of the Bill will come into operation on the day on which the Act receives the Royal Assent (Bill s-cl. 2(1)).

30. The remaining provisions of the Bill will come into operation on such date or dates as are fixed by Proclamation by the Governor-General published in the Commonwealth of Australia Gazette (Bill s-cl. 2(2) - see also C+S (I+MP)A s. 9 for definitions of 'Gazette' and 'Proclamation').

BILL PART II - AMENDMENTS OF COMPANIES
(ACQUISITION OF SHARES) ACT 1980

Bill: Part II : Introduction

L. Part II of the Bill (cls. 3 to 19) contains various amendments to the Companies (Acquisition of Shares) Act 1980 hereafter referred to as 'CASA'). This Act contains the substantive provisions of the share acquisition code.

2. Share acquisition code The new share acquisition code regulates 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. The new share acquisition code came into operation on 1 July 1981 in the 6 States and the A.C.T.

1. 3 : Principal Act

3. CASA is referred to in Part II of the Bill as the principal Act (Bill cl. 3).

1. 4 : Other interpretative and evidentiary provisions

4. Background A number of provisions in the operative companies and securities legislation use the terms "master" and "servant". It is proposed to replace these terms with the terms "employer" and "employee". This is being done on the basis that:-

- (a) The employer/employee relationship is in substance the relationship that is referred to at common law as "master and servant".

(b) The general tendency now is to use the terms "employer" and "employee" instead of "master" and "servant".

35. The terms "employer" and "employee" are already used in the following provisions of the co-operative companies and securities legislation:-

National Companies and Securities Commission Act 1979
: ss. 3, 22, 23, 24, 25, 38, 50.

Securities Industry Act 1980 : ss. 4, 8, 9, 15, 33,
65, 71, 75, 90, 111, 114, 128, 130, 132, 143, 148.

Companies Act 1981 : ss. 5, 12, 13, 100, 129, 189,
229, 237, 270, 277, 289, 309, 417, 441, 443, 446,
497, 535, 540, 578, Schedule 2.

36. Proposed amendment The only provision in the CASA which uses the term 'master' and 'servant' is s-sec. 8(10) which provides that in any proceedings under the CASA, a principal or master is presumed, in the absence of proof to the contrary, to be aware of anything of which his agent or servant is aware. The references to 'master' and 'servant' will be replaced by references to 'employer' and 'employee' (Bill cl. 4).

37. Similar amendments elsewhere Similar amendments have also been made to:-

(a) the following provisions of the Companies Act 1981 (see Bill cis. 54 and 128 and Schedule 1):

- (i) S-sec 130(8) There is a special procedure under CA s-sec 129(10) whereby a company may give financial assistance for the acquisition of its shares. If directors certify that s-sec 129(10) has been complied with, the person to whom the certificate is given is protected unless he is aware that s-sec 129(10) has not been complied with (CA s-secs. 130(6) and (7)). For the purposes of CA s-sec 130(7) a person is deemed, in the absence of proof to the contrary, to be aware of any matter of which his servant or agent is aware (CA s-sec 130(8)).

- (ii) S. 145 In proceedings under CA ss, 144 or 146 for offences against the substantial shareholding provisions, the knowledge of a servant or agent is imputed to his master or principal in the absence of proof to the contrary (CA s. 145).

- (iii) S-sec 232(5) In any proceedings against a director of a company for failure to disclose (as required by s. 232) relevant interests in securities and other matters relating to himself, the director is presumed, in the absence of proof to the contrary, to have been aware of facts or occurrences of which his servant,

acting in relation to his master's interests in securities, was aware (CIS-sec 232(5)).

(iv) S. 258 An agent of the company, or his servant, who causes the company to breach the requirements of the CA in regard to the register of members is liable as if he were an officer of the company (CA s. 258).

(v) Part XIII Various types of companies are regulated by CA Part XIII. These include:-

- (a) companies carrying on business outside the ACT (Division 3);
- (b) recognized companies and recognized foreign companies (Division 4);
- (c) foreign companies other than recognized foreign companies (Division 5).

A reference in these Divisions to a company carrying on business within the ACT includes a reference to the company establishing a share transfer or registration office in the ACT or dealing with property situated in the Territory, whether by servants or agents or otherwise (CA s-secs. 500(2), 505(1), 510(2)).

- (b) the following provisions of the Securities Industry Act 1980 (see Bill cl. 151 and Schedule 2):

- (i) S-sec 91(2) A licensee or financial journalist who is prosecuted for failure to maintain a register of interests in securities as required by SIA ss. 89 or 90 may rely on a defence of ignorance (SIA s-sec 91(1)). However, the awareness of a servant or agent will be imputed to his master or principal (SIA s-sec 91(2)).

- (ii) S. 111 Compensation payable out of the fidelity fund established to compensate persons who suffer loss because of defalcation by stock exchange members or, in certain circumstances, by former stock exchange members, will also be payable for defalcations by their servants (SIA s-secs 111(1), 111(9)).

- (iii) S. 121 A stock exchange may insure itself against liability in respect of claims under the fidelity fund provisions (SIA s-sec 121 (1)). No action lies against a stock exchange or its servants in relation to the publication in good faith of a statement that a contract entered into under s. 121 does or does not apply to a particular stock exchange member (SIA s-sec. 121(3)).

(iv) S. 144 The NCSC may require an officer, servant or agent of an individual or body corporate defendant to assist in a prosecution (SIA s-sec 144(1)). "Agent" is defined to include a banker or auditor employed by the defendant whether or not that person is a servant or officer of the defendant (SIA s-sec 144(4)).

Cl. 5 : Take-over offers

38. Background The general prohibition (CASA s. 11) on the acquisition of shares which would bring a person within the 20% to 90% range of the voting shares in a company does not apply to an acquisition of shares that is made pursuant to formal offers made under a take-over scheme that complies with the detailed requirements of CASA s-sec. 16(2)-. These requirements relate, among other things, to the contents of a formal take-over offer (CASA para 16(2)(f)).

39. One of the requirements in relation to the contents of a formal take-over offer is that a formal offer must be accompanied by:-

- (a) a copy of the Part A statement relating to the offer; and
- (b) if the target company has given to the offeror a Part B statement in relation to the offer - a copy of that statement and a copy of any report that accompanied that statement (CASA s-para. 16(2) (f) (viii)) .

0. Proposed amendment A target company that has received a Part A statement must give a Part B statement to the offeror either within 14 days of receiving the Part A statement or within 14 days after the last of the formal take-over offers is dispatched (ASA s.22). The proposed amendment makes it clear that the obligation to accompany a normal offer by a copy of the Part B statement (and a copy of any report that accompanied that statement) applies only where the target company has given the offeror a Part B statement within 14 days of receiving the Part A statement (Bill cl.5).

1. 6 : Part B statement

1. Background Where a target company receives a Part A statement it must prepare a Part B statement which it must give to the offeror :-

- (a) within 14 days of receiving the Part A statement (CASA para 22(1)(a)) in which case the offeror will have to send copies of the Part B statement out with its offer documents (see CASA s-s-para 16(1) (f) (viii) (B)) ; or
- (b) within 14 days after the last of the formal take-over offers is dispatched, in which case the target company must copy the Part B statement to its shareholders (CASA para 22(1) (b)).

2. Proposed amendment It is proposed to amend CASA para 2(1)(b) so that, in future, the obligation on a target company which elects to wait until after the last of the normal take-over offers is dispatched will be to give the Part statement to the offeror and to "give, or cause to be given" copy of the Part B statement to the relevant shareholders (Bill cl. 6).

43. This means that if the offeror agrees at the request of the target company to dispatch copies of the Part B statement with the take-over offers, the target company will have complied with s. 22 because it will have caused those copies to be given to the shareholders. The purpose of this amendment is to introduce a degree of flexibility into the process of dispatching Part B statements.

Cl. 7 : Offeror connected with target company

44. Background Where an offeror has 30% or more of the voting shares in the target company, or the offeror and target company have common directors, the Part B statement from the target company must be accompanied by a report of an expert who is not associated with the offeror or the target company (CASA s. 23).

45. The purpose of the provision was explained in para 84 of the explanatory memorandum on the Bill that became the CASA as follows:-

"This provision will prevent the recurrence of situations where an offeror after gaining control of the offeree, makes a further and lower offer to minority shareholders, thus giving rise to an understandable scepticism in relation to recommendations in Part B statements, notwithstanding any assurances given that the common directors have taken no part in the deliberations prior to the second offer being recommended. A similar requirement was included in the European Economic Community Third Draft Directive on Company Law (chapter 2 - article 5) prepared in 1970, but not yet adopted by the E.E.C. It is a requirement of the London City Code on Take-overs and Mergers that the board of an offeree

company must obtain competent independent advice on any offer (not only offers from companies with substantial holdings in the offeree or common directorships), and the substance of such advice must be made known to the shareholders."

5. Proposed amendment It is proposed that, in future, the expert who prepares a report pursuant to s. 23 will be required to set out:

- particulars of any relationship he has with the offeror, the target company or any of their associates;
- particulars of any pecuniary or other interest he has that could reasonably be regarded as being capable of affecting his ability to give an unbiased opinion in relation to the take-over offers in question; and
- particulars of any fee and any benefit that he has received, or will or may receive, in connection with the making of the report (Bill cl. 7).

7. The existing prohibition in CASA s. 23 on an expert being associated with the offeror or target company does not extend to certain commercial relationships. For example, an expert is not taken to be associated with the offeror or target company if he furnishes advice to, or acts on behalf of, either party in his professional capacity or pursuant to a business relationship with either party (see CASA para (6)(a)). Similarly, for the purpose of CASA no association will be taken to exist where an offeror or target company instructs an expert to acquire shares on its behalf in the ordinary course of the expert's business as a dealer in

securities (see CASA para 7(6)(b)). In future, an expert will be required to disclose relationships of this kind. The proposed amendment will enable shareholders to take into account, in assessing the expert's report, any factor which might be considered to influence his independence.

48. A similar amendment is proposed to the provisions dealing with the holders of non-voting shares, convertible notes and renounceable options (CASA s. 43 - see Bill cl. 9).

Cl. 8 : Provisions relating to dissenting shareholders

49. Background A person who proposes to acquire all the shares in a company (and who makes offers under a take-over scheme or an on-market announcement accordingly) may acquire compulsorily the interests of the remaining minority shareholders provided that:-

- (a) the required acquisition notice to dissenting offerees is given within one month after the close of the bid;
- (b) during the bid that person becomes entitled (by any means) to 90% of the shares in the company; and
- (c) where the outstanding shares represent less than 90% of the company, 75% of the offerees have disposed of their shares in response to the bid

(CASA s-secs. 42(2) and (3)).

50. A copy of the acquisition notice must be lodged with the NCSC (CASA s-sec. 42(5)). However, as the notice is addressed to individual shareholders, each such notice is a

separate notice and the question arises whether, in order to comply strictly with the terms of this sub-section, it is necessary to lodge copies of all such notices.

L. Proposed amendment It is proposed to amend the judgment requirements (in CASA s-sec 42(5)) to make it clear that it is only necessary to lodge with the NCSC a copy of one of the acquisition notices (Bill cl. 8).

L. 9 : Rights of remaining shareholders and holders of options and notes

2. Background The share acquisition code contains special provisions (in CASA s. 43) which apply where a person:-

- (a) makes a take-over offer under a take-over scheme or makes an on-market announcement; and then
- (b) becomes entitled (irrespective of the time or method of acquisition) to more than 90% of the voting shares in the target company.

3. Such a person is required to do two things:-

- (a) He must notify the remaining shareholders of his entitlement to more than 90% of the voting shares (CASA s-sec. 43(1) - form of notice set out in Companies (Acquisition of Shares) Regulations, Form 5 or 6). Those shareholders then have 3 months in which to require the person to acquire their shares on the same terms as applied in relation to the offer or on-market announcement as the case may be (CASA s-secs. 43(2) and (3)).

- (b) He must also give a similar notice to the holders of non-voting shares, convertible notes and renounceable options (CASA s-sec. 43(4) - form of notice in Companies (Acquisition of Shares) Regulations Form 7). If this notice proposes terms for acquisition, it must be accompanied by an expert's report (CASA s-sec. 43(5)).

54. The expert who prepares the report must not be associated with the target company, the offeror or the on-market offeror (previously it was only necessary for him not to be associated with the offeror or on-market offeror) and will be required to set out his reasons for forming his opinion whether or not the terms proposed in the notice are fair and reasonable (Bill cl. 9 : amendment of s-sec. 43(5)).

55. Where there are 2 or more experts' reports, a copy of each report will be required to accompany the notice (Bill cl. 9 : proposed new s-sec. 43(5A)).

56. The expert will be required to set out in his report:

- particulars of any relationship he has with the offeror, the on-market offeror, the target company or any of their associates;
- particulars of any pecuniary or other interest he has that could reasonably be regarded as being capable of affecting his ability to give an unbiased opinion in relation to the proposed terms; and

particulars of any fee and any benefit that he has received, or will or may receive, in connection with the making of the report (Bill cl. 9 : proposed new s-sec. 43(5B)).

7. The purpose of the requirement that the expert should independent of the target company is to enable shareholders take into account, in assessing the expert's report, any factor which might be considered to influence his independence. The proposed amendment will also clear up an anomaly between the existing ASA s-sec. 43(5) and ASA s-sec. 3(1) (which requires an expert opinion as to the reasonableness of the offer where the offeror is connected with the target company). Whereas s-sec. 23(1) requires an expert to set out reasons for forming his opinion, s-sec. 3(5) does not. In future, an expert will be required to set out his reasons under both provisions.

3. The purpose of this requirement is to ensure that an offeror or on-market offeror does not make selective use of experts' reports.

The purpose of the requirement for particulars of relevant relationships or interests (contained in proposed new s-sec. 43(5B)) is to ensure that experts who prepare reports for the purposes of s. 43 are seen to be independent by the shareholders and holders of convertible notes and renounceable options to whom the reports are sent.

10 : Liability for mis-statements

Background Criminal and civil liability is imposed on certain specified persons for false or misleading material or omissions) in documents and statements relating to the company, SA (CASA s. 44). In particular, it is an offence to include materially false or materially misleading matter in

statements, advertisements or documents (see CASA para 44(8)(a)) relating to the affairs of or to marketable securities of the target company or of a related corporation, or of the bidder (see CASA para 44(8)(b)) where take-over offers have been dispatched or an on-market announcement is made (CASA s-sec. 44(7) - see CASA s-sec. 44(14) for persons covered).

61. Proposed amendment It is proposed to make two minor drafting changes to CASA s-sec. 44(7) to make it clear that:

- (a) the provision is to be read with CASA s-sec. 44(14) (Bill para 10(a)); and
- (b) the offence applies to the dispatch of a document with or in connection with take-over offers (Bill para 10(b)).

Cl. 11 : Orders where prohibited acquisitions take place

62. Background The Supreme Court has wide powers to make orders where prohibited acquisitions take place (CASA s. 45).

63. Proposed amendments The proposed amendments are consequent upon changes proposed to CA s. 261 (Power of company to obtain information as to beneficial ownership of its shares - see Bill cl. 76) and to the substantial shareholdings provisions (see Bill cis. 52 to 55). Other consequential amendments have been made to CASA ss. 46, 47 and 49 (see Bill cis. 12, 13 and 14).

64. The effect of the proposed amendments to CASA s. 45 is as follows:

- (a) The Supreme Court will be able to make such orders as it thinks fit and will not be limited to the orders specified in CASA paras 45(1)(a) to (g) (Bill para 11(a)) ;
- (b) The Supreme Court will be able, if it thinks fit, to make an order vesting in the NCSC the shares of, or interests in shares held by, a person who has acquired shares in contravention of the CASA (Bill para 11(b)); and
- (c) There is a minor drafting change to CASAs-sec. 45(3) (Bill para 11(c)).

. _12 : Orders where offers not dispatched pursuant to Part A statement

Background Where an offeror serves a Part A statement on the target company and subsequently acquires shares (by virtue of the enabling provision in CASA para (3)(a)) but then does not dispatch offers to shareholders, the NCSC may apply to the Supreme Court for an order requiring the offeror to dispatch offers and/or for an order of the kind set out in s-sec. 45(1) - see Bill cl. 11) that can be made where a prohibited acquisition takes place (CASAs-sec. 46(1)).

Proposed amendment The Supreme Court will be empowered to make such orders as it thinks fit and will not be limited to the orders specified in CASAs-sec. 46(1) (Bill cl.).

Cl. 13 : Orders to protect rights under take-over schemes or announcements

67. Background The Supreme Court is empowered to make a wide range of orders to protect the rights of a person affected by a take-over scheme or take-over announcement where the CASA has not been complied with (CASA s. 47).

68. Proposed amendment In addition to the orders which the Supreme Court may already make, it will now be able to make an order vesting in the NCSC shares or any interest in shares in the target company (Bill cl. 13).

Cl. 14 : Miscellaneous provisions relating to orders

69. Background There are general provisions relating to orders under CASA ss. 45 to 48 and ss. 57 and 60 (CASA s.49).

70. Among other things:

- (a) Before making an order under those provisions the Supreme Court must satisfy itself that the order would not unfairly prejudice any person (CASA s-sec. 49(1));
- (b) The disposal procedure set out in CA s. 462 applies where shares or interests in shares are vested in the NCSC (CASA s-sec. 49(6)); and
- (c) The liability of the NCSC under CA s. 463 in relation to property vested in it, and the obligation of the NCSC under CA s. 464 to keep accounts of its dealings with such property, apply where shares or interests in shares are vested in the NCSC (CASA s-sec. 49(6A)).

71. Proposed amendments Apart from minor drafting changes to CASA s-secs. 49(1) and (6A) (Bill para 14(a) and proposed CASA para 49(6)(c)) it is proposed to make more detailed amendments to CASA s-sec. 49(6) (Bill para 14(b)).

72. Where a share or an interest in a share vests in the NCSC by virtue of an order or direction of the Supreme Court, the NCSC will, subject to any directions of the Court, be able to get in, dispose of, or deal with, the share or interest as it sees fit (proposed CASA para. 49(6)(a), cf. CA s--sec. 462(1)). Other consequential drafting changes are proposed to CASA s-sec 49(6) (proposed CASA para. 49(6)(b)).

Cl. 15 : Power to exempt from compliance with Act

73. Background The NCSC may grant exemptions from compliance with any provisions of the CASA (CASA s. 57). All exemptions and declarations must be notified in the Commonwealth Gazette (CASA s-sec. 57(2)).

74. Proposed amendment In future, failure of the NCSC to have an instrument of exemption published in the Commonwealth Gazette will not render the instrument invalid (Bill cl. 15). A similar amendment is proposed to CASA 's-sec 58(2) (Bill cl. 16). (See also Bill cl. 68 - proposed CA s-sec 215C(8)).

Cl. 16 : Power to declare that Act applies as if modified

75. Background The NCSC may, by instrument in writing published in the Commonwealth Gazette, declare that provisions of the CASA apply in a particular case as if modified or varied, and where such a declaration is made, the code has effect accordingly (CASA s. 58).

76. Proposed amendment In future, failure of the NCSC to publish an instrument in the Commonwealth Gazette will not render the instrument invalid (Bill cl. 16).

Cl. 17 : Power of NCSC to declare acquisition of shares or other conduct to be unacceptable

77. Background At present the NCSC is empowered within 90 days to declare that, for the purposes of the CASA, a specified acquisition is an unacceptable acquisition and that specified conduct (once a Part A statement has been served, or a take-over announcement has been made) is unacceptable conduct (CASA s.60).

78. Before the NCSC makes a declaration under s.60 it must be satisfied that:

(a) shareholders and directors of the company concerned:

(i) did not know the identity of proposed acquirers of a substantial interest;

(ii) did not have reasonable time to consider a proposal for an acquisition of a substantial interest; or

(iii) were not supplied with sufficient information; or

(b) shareholders did not all have reasonable and equal opportunities to participate in benefits of the acquisition or proposed acquisition. (CASA s-secs. 60(7) and (7A)).

Proposed amendment The proposed amendment will allow the NCSC to make a declaration of unacceptable conduct irrespective of whether a Part A statement has been served or a takeover announcement has been made (Bill cl. 17). However, before, the NCSC will not be able to make a declaration unless it is satisfied of certain matters (Bill cl. 17 : proposed new new s-secs 60(1) and (3), based on existing s-secs 60(7) and (7A) outlined at para 78 above).

This proposed amendment will ensure that the usefulness of s.60 will not be substantially limited in suations where:

- (a) objectionable conduct takes place, prior to a take-over offer or announcement, which is designed to ensure that an acquirer does not have to make a fair offer to all shareholders; or
- (b) defensive conduct takes place in anticipation of a take-over offer.

cl. 18 : Power of Commission to make certain orders

Background Where the NCSC has declared an acquisition of shares or other conduct to be unacceptable under CASA s.60, it may make certain orders by written instrument published in the Commonwealth Gazette (CASA s.60A).

Proposed amendment The proposed amendment makes several renumbering changes in view of the proposed amendment CASA s.60 (Bill cl. 18).

cl. 19 : Schedule

Background Part B of the Schedule to CASA sets out the required contents of the Part B statement to be given by a target company for which a formal take-over bid is made. The

requirements correspond closely to those in Part D of the Schedule, which sets out the required contents of the Part D statement to be given by a listed target company for which an on-market bid is made.

84. The requirements of para 2(e) of Part D of the Schedule are, however, less onerous than the requirements of the corresponding para 2(e) of Part B of the Schedule. Whereas para 2(e) of Part B requires to be set out in a Part B statement any particulars of proposed compensatory payments or benefits to officers of the target company or of a related corporation, para 2(e) of Part D only requires such particulars to be set out in a Part D statement in so far as it is proposed that a payment or benefit will be made or given in connection with a take-over announcement.

85. Proposed amendment It is proposed to extend the operation of para 2(e) in both the Part B and the Part D statement and to make the new provisions identical (Bill cl. 19).

86. In future the Part B and D statements will have to set out:

- (a) particulars of any payment, consideration or benefit (other than retirement or leave of absence payments referred to in CA paras 233(7)(e) and (g)) as compensation for the loss of office of a person that will or may be given to certain prescribed persons (currently existing or former directors, principal executive officers, or managers; their spouses; their relatives or relatives' spouses; their associates or associates' spouses - see CA s-sec. 233(6)); and

(b) particulars of any payment, consideration or benefit that will or may be given to the above prescribed persons in connection with the transfer of the whole or any part of the undertaking or property of the target company.

BILL PART III - AMENDMENTS OF COMPANIES ACT 1981

87. Part III of the Bill (cis 20 to 128) contains various amendments to the Companies Act 1981 (hereafter referred to as 'CA'). This Act contains the substantive provisions of the companies code.

Companies code - Introduction

88. The companies code is set out in the Companies Act 1981 (hereafter referred to as 'CA').

One place of registration

89. One of the most important features of the companies code is that an Australian company incorporated in a jurisdiction covered by the co-operative scheme (referred to in the CA 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. Similarly, overseas corporations only have to register in one of the jurisdictions covered by the co-operative scheme. Any Australian body which is not a company in its jurisdiction of formation and any Australian company incorporated in a non-participating Australian jurisdiction is still 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.

90. The new companies code came into operation on 1 July 1982 in the 6 states and the ACT.

Cl. 20 : Principal Act

91. CA is referred to in Part III of the Bill as the Principal Act (Bill cl. 20).

Cl. 21 : Interpretation

92. Background. CA s. 5 contains a series of definitions for the purposes of the CA. In particular:

- (a) "borrowing corporation" is defined to exclude a banking corporation (CA s-sec. 5(1));
- (b) "debenture" is defined to include, subject to various exceptions, any document evidencing or acknowledging indebtedness of a corporation (CA s-sec. 5 (1)) ;
- (c) "director" is defined in CA s-sec. 5(1) to include any person (apart from a professional adviser - see CA s-sec. 5(2)) on whose directions or instructions the directors of a corporation are accustomed to act;
- (d) "mining company" is defined in CA s-sec. 5(1) to mean a company the sole objects of which are mining purposes;
- (e) "officer", in relation to a corporation, is defined in CA s-sec. 5(1) to include a receiver and manager of the property or any part of the property of the corporation;

(f) a receiver of property of a company is deemed b
CA s-sec. 5(7) to be also a manager if he
manages, or is empowered to manage, affairs of
the company.

93. Proposed amendment - Definition of "borrowing corporation" It is proposed to amend the definition of "borrowing corporation" so as to bring banking corporations within the definition (Bill para. 21(a)). Having regard to proposed CA para. 215B(1)(c) (see Bill cl. 68) the main consequence of this provision will be to require a banking corporation that acts as a borrowing corporation, otherwise than in the ordinary course of its banking business, to comply with CA Part IV Division 5 (Debentures).

94. Proposed amendment - Definition of "debenture" It is proposed to exclude from the definition of "debenture" a document issued or executed by a banking corporation in the ordinary course of its banking business that evidences or acknowledges its indebtedness (Bill para. 21(b)). This will ensure that documents such as deposit slips signed by bank customers and clients' pass books will not be caught by the definition. See also proposed CA s. 215B (Bill cl. 68).

95. Proposed amendment - Professional advisers not directors A minor drafting change is proposed to CA s-sec. 5(2) to make it clear that a professional adviser or a person who gives advice to directors in the course of business with the directors or the body corporate is not to be regarded as a director (Bill para. 21(e), see also definition of "director" in CA s-sec. 5(1)).

96. Proposed amendment - Definition of "mining company"

It is proposed to define a mining company as a company which has included in its memorandum the stated objects of the company, and the sole objects of the company are stated to be mining purposes (Bill para. 21(c)).

97. Proposed amendments to the objects and powers provisions of the CA will provide that it is optional, not mandatory, for the memorandum of a company to state the objects of the company (see paras 181 to 184 of ex memo on Bill cl 33). Accordingly, the definition of "mining company" will be amended so as to retain the requirement that mining companies must have stated objects (which must be mining purposes).

98. Proposed amendment - Definition of "officer" The reference in para. (b) of the definition of "officer" to "receiver and manager of the property or any part of the property of the corporation" will be replaced by a reference to "receiver and manager of property of the corporation" (Bill para. 21(d)). This proposed amendment is a change in drafting style which will be adopted throughout the CA (see paras 491 to 492 of ex memo on Bill cl. 91).

99. Similar amendments are proposed to:

- (a) CA ss. 323, 559, s-sec. 560(4), paras 12(10)(b), 84(3)(b), 85(2)(b), 237(4)(b), 535(5) (b), 538(b) and 562(1)(f), and s-paras 6(d)(i), 315(11) (a) (i) and (ii) and 562(1)(f) (see Bill cis. 91, 128 and Sch. 1).
- (b) SIA, paras 8 (8) (b) , 128(11)(b) and 143(2) (b) and s-paras 48(b) (ii) and 59(1) (b) (ii) (see Bill cl. 151 and Sch. 2).

100. Proposed amendment - Receiver also a manager in certain cases It is proposed to make the following changes to CA s-sec. 5(7):

- (a) The reference to "receiver of the whole or any part of the property of ..." will be replaced by a reference to "receiver of property of ...". This proposed amendment is a change in drafting style which will be adopted throughout the CA (see paras 491 to 492 of ex memo on Bill cl. 91).
- (b) The references to "company" will be replaced by references to "corporation" to ensure that a receiver of property of a corporation who also has the powers of a manager will be subject to the obligations imposed on all other "officers" (see CA s-sec. 5(1): definition of "officer").

(Bill para. 21(f)).

101. Proposed amendment Three new interpretation provisions will be inserted in CA s. 5 which will set out for the purposes of the CA, the circumstances in which a person shall be taken to be, or become:

- (a) subject to a s.227 prohibition (proposed s-sec.5 (8A)) ;
- (b) subject to a s.227A order (proposed s-sec.5 (8B)) ; or
- (c) subject to a s.562 order (proposed s-

sec.5(8C)). (Bill para. 21(g)).

22 : Relevant interests in shares

102. Background In certain circumstances a person is regarded as having a relevant interest in securities for the purposes of the CA (CA s. 8). However, a relevant interest will be disregarded in certain circumstances (CA s-sec. 8(8)).

103. In particular, a relevant interest in a share will be disregarded for the purposes of CA s. 261 (which deals with the power of a company to obtain information as to the beneficial ownership of its shares - see Bill cl. 76) if:

- (a) the ordinary business of the person who has the relevant interest includes the lending of money and he has authority to exercise his powers as the holder of the relevant interest only by reason of a security given for the purposes of a money lending transaction; -
- (b) a person has the relevant interest by reason of his holding a prescribed office;
- (c) the share is subject to a trust, the relevant interest is that of a trustee and a beneficiary has a relevant interest in the share; or the trustee is a bare trustee;
- (d) the ordinary business of the person who has the relevant interest includes dealing in securities and he has authority to exercise his powers as the holder of the relevant interest only by reason of instructions given to him to dispose of that share; or

(e) the relevant interest is that of a person who has it by reason only of his having been appointed as a proxy or representative to vote at a particular meeting of members.

104. Proposed amendment It is proposed that CA s-sec. 8(8) be amended to remove the reference to CA s. 261 so as to ensure that the existing capacity to disregard certain relevant interests does not break the chain of persons from whom information can be sought under s. 261 (Bill cl. 22).

Cl. 23 : Insertion of Subdivision heading

105. Background Currently CA Division 2 of Part II, ("Registration of Auditors and Liquidators") contains no subdivisions.

106. Proposed amendment CA Division 2 of Part II will be subdivided into:-

"Subdivision A - Registration"; and

"Subdivision B - Cancellation or Suspension of
Registration"

(Bill cis. 23 and 31).

Cl. 24 : Registration of auditors

107. Background In certain circumstances (set out in CA s-sec 18(3)) the NCSC is precluded from registering a person as an auditor.

108. Proposed Amendment An additional circumstance precluding registration in future will be that that applicant has been prohibited by virtue of an order made under proposed s 227A of the CA (see Bill cl. 70).

Cl. 25 : Registration of liquidators

109. Background In certain circumstances (set out in CA s-sec 20(4)) the NCSC is precluded from registering a person as a liquidator.

110. Proposed amendment An additional circumstance precluding registration in future will be that the applicant has been prohibited by virtue of an order made under proposed s. 227A of the CA (see Bill ci. 70)

Cl. 26 : Register of Auditors

111. Background CA s. 23 requires the NCSC to keep a register of auditors and enter particulars of any person registered as an auditor. The particulars include such details as the name and principal place of practice of the auditor. By CA para. 23(1)(e) the NCSC must record particulars of any disciplinary action taken against an auditor including suspension of registration, or any action taken against the auditor under CA s-sec. 27(10).

112. Proposed amendment CA para. 23(1)(e) will be amended to require the NCSC to also record particulars of any action taken against an auditor by the Companies Auditors and Liquidators Disciplinary Board under proposed CA paras 30D(7) (a), (b) or (c) (Bill cl. 26).

113. This proposed amendment to CA para. 23(1)(e) is consequential upon the proposed repeal of CA s. 27. The alternative penalty provisions which are currently contained in CA s. 27 will be included in proposed CA s-sec. 30D(7). (see Bill cis. 29 and 31).

Cl. 27 : Registers of Liquidators and Official Liquidators

114. Background CA s-sec. 24(1) requires the NCSC to keep a register of liquidators and enter particulars of any person registered as a liquidator or as a liquidator of a specified corporation. The particulars include such details as the name of the liquidator and the principal place of practice. By CA sub-para. 24 (1) (a) (v) and CA sub-para. 24 (1) (b) (vi) the NCSC must record particulars of any suspension of registration, and particulars of any action taken against the liquidator under CA s-sec. 27(10).

115. Proposed amendment CA sub-paras 24(1)(a)(v) and 24(1)(b)(vi) will be amended to require the NCSC to also record particulars of any disciplinary action taken against a liquidator by the Companies Auditors and Liquidators Disciplinary Board under proposed CA paras 30D(7) (a) , (b) or (c) (Bill cl. 27).

116. The amendments to CA s. 24 detailed above are consequential upon the proposed repeal of CA s. 27. The alternative penalty provisions which are currently contained in CA s. 27 will be included in proposed CA s-sec. 30D(7) (see Bill cis. 29 and 31).

Cl. 28 : Notification of certain matters

117. Background Where a registered auditor or liquidator (including a liquidator of a specified corporation):

- (a) becomes an insolvent under administration;
- (b) becomes subject to a disqualification order made under CA s-sec 227(2); or
- (c) becomes subject to a disqualification order made under CA s. 562,

he is required to notify the NCSC within 3 days after the occurrence of such an event (CA s-sec. 25(4)).

118. Proposed amendment CA s-sec. 25(4) will be amended to require a registered auditor or liquidator (including a liquidator of a specified corporation) who becomes subject to a CA s. 227 prohibition, or an order made under proposed s. 227A (see Bill cl. 70) or CA s. 562, to lodge notice of these particulars with the NCSC within three days of becoming subject to such a prohibition or order (Bill cl. 28). A registered auditor or liquidator who becomes an insolvent under administration will still be required to lodge notice of his insolvency with the NCSC because, by virtue of CA s-sec 227(1), he will have become subject to a CA s. 227 prohibition.

Cl. 29 : Repeal of section 27

119. Background CA s. 27 currently contains provisions relating to the disciplinary action that may be taken against registered auditors and liquidators by the NCSC and by the Companies Auditors and Liquidators Disciplinary Board.

120. Proposed Amendment CA s. 27 will be repealed (Bill cl. 29).

121. The substance of the repealed CA s. 27 will be included in proposed "Subdivision B" of CA Part II, Division 2. Subdivision B will contain proposed CA ss 30A to 30S. The repealed CA s. 27 will, however, continue to have effect for certain purposes (see Bill cl. 31, proposed s. 30S).

Cl. 30 : Certain persons not to apply for registration as auditor or liquidator

122. Background CA s. 28 sets out the circumstances in which certain individuals are precluded from applying to the NCSC to be registered as an auditor or liquidator. CA s-sec. 28(3) provides that a person, whose registration as an auditor or liquidator has been cancelled or suspended under the provisions of a law of a participating jurisdiction that correspond with CA s. 27 (other than CA s-sec. 27(1)), may not apply to the NCSC for registration without leave of the Court.

123 Proposed amendment CA s-sec. 28(3) will be amended to preclude a person from applying to the NCSC (without leave of the Court) to be registered as an auditor or liquidator where that person's registration as an auditor or liquidator has been cancelled or suspended under either:

- (a) the provisions of a law of a participating State or Territory that correspond with CA s. 27 (other than CA s-sec. 27(1)); or
- (b) the provisions of a law of a participating State or Territory that correspond with proposed CA s. 30D.

(Bill cl. 30).

124. This proposed amendment is consequential upon the proposed repeal of CA s. 27 (Bill cl. 29) and the operation of proposed CA s. 30D (see Bill cl. 31, proposed s. 30D).

COMPANIES AUDITORS AND LIQUIDATORS DISCIPLINARY

BOARD Background

125. The Companies Auditors and Liquidators Disciplinary Board Ordinance 1982 established a Companies Auditors and Liquidators Disciplinary Board for the Australian Capital Territory. Section 5 of that Ordinance states that the Board is to perform the functions and exercise the powers as conferred upon it by Division 2 of Part II of the Companies Act. Corresponding legislation exists in each participating jurisdiction.

Proposed Amendments

126. Proposed amendments. It is proposed that a new Sub-division B will be incorporated into CA Part II, Division 2.

127. Proposed Sub-division B will be incorporated into the CA in order to achieve uniformity and consistency of approach and application throughout Australia of the disciplinary powers of the Companies Auditors and Liquidators Disciplinary Boards (hereafter referred to as 'Boards'). Reciprocal enforcement and uniformity is highly desirable especially where an auditor or liquidator under examination has dealings in more than one jurisdiction.

128. Currently the powers and functions conferred upon the Boards are contained in CA s. 27. This provision will be repealed (see ex memo on Bill cl. 29) and replaced by a new "Sub-division B" of CA Part II, Division 2 ("Cancellation, or Suspension of Registration").

C1. 31 : Insertion of new Sub-division -

Sub-division B - Cancellation or Suspension of
Registration

129. Proposed Sub-division B will contain proposed ss. 30A to 30S. These new sections are in substance an expanded re-enactment of the current CA s. 27.

S. 30A - Interpretation

130. This provision will contain definitions for the purposes of proposed Sub-division B. It will define the following terms: 'Board', 'Chairman', 'decision', 'hearing', 'member' and 'registered'.

S. 30B - Cancellation at request of registered person

131. If requested, the NCSC will be able to cancel the registration of a person as an auditor, liquidator, liquidator of a specified corporation or official liquidator (proposed s-sec. 30B(1)).

132. The decision of the NCSC to cancel a registration will come into effect upon the making of the decision (proposed s-sec. 30B(2)).

133. This provision is similar to those contained in current CA s-secs. 27(1) and (16).

S. 30C - Official liquidators

134. The NCSC will be able, in its discretion and without right of appeal, to cancel or suspend the registration of an official liquidator (proposed s-sec. 30C(1)).

135. Where the NCSC does so exercise its discretion to cancel or suspend the registration of an official liquidator, it must, within 14 days of the decision, provide the affected person with a notice of the decision, setting out the findings on material questions of fact, referring to the evidence on which the findings were based and giving the reasons for the decision. However, the failure of the NCSC to give such notice will not affect the validity of the decision (proposed s-sec. 30C(2)).

136. A decision of the NCSC under proposed s-sec. 30C(1) will come into effect at the expiration of the day on which a notice of the decision is given to the affected person (proposed s-sec. 30C(3)). This provision is currently contained in CA s-sec. 27(17).

S. 30D - Powers of Board in relation to auditors and liquidators

137. The Board will be given power to hear applications by the NCSC regarding the conduct or capacity of an auditor, a liquidator or a liquidator of a specified corporation.

138. The Board will be able to cancel or suspend registration where it is satisfied that the respondent:-

- (a) is an insolvent under administration (CA s-sec. 227(1));
- (b) is prohibited from taking part in the management of a corporation due to a prior conviction (CA s-sec. 227(2));

- (c) has been prohibited by the court from being involved in the management of a corporation under proposed s. 227A (see paras 348 to 351 of ex memo on Bill cl. 70);
- (d) has been prohibited by the court from acting as a director of, or from being concerned in the management of a company under CA s. 562;
- (e) has failed to comply with a provision of CA s. 26;
- (f) is incapable, by reason of mental infirmity, of managing his affairs;
- (g) has ceased to be a resident in Australia; or
- (h) has failed to carry out adequately and properly the duties of his office or is otherwise not a fit and proper person to remain registered as an auditor, liquidator or liquidator of a specified corporation, as the case may be.

(Proposed s-secs 30D (1) to (3)).

139. An order made under proposed s-secs. 30D(1), (2) or (3), may, if the Board sees fit, be deemed to have the effect of cancelling the registration of the respondent for all purposes, viz: if the respondent is a liquidator and an auditor and the Board cancels his registration as an auditor, the Board may also deem his registration as a liquidator to be cancelled. Similarly, the same consequence may result where an auditor is also registered as a liquidator of a specified

corporation, or where a liquidator is also registered as a liquidator of a specified corporation (proposed s-secs 30D(4) to (6)). This deeming power is currently contained in CA s-secs 27(7), (8) and (9).

140. Proposed s-sec. 30D(7) complements the Board's power to cancel or suspend the registration of an auditor, liquidator or liquidator of a specified corporation under proposed s-sec. 30D(1). As an alternative penalty the Board may:

- (a) impose a penalty;
- (b) admonish or reprimand the respondent; or
- (c) require the respondent to give an undertaking in appropriate terms.

141. To ensure compliance with an undertaking made under proposed s-sec. 30D(7), the Board may cancel or suspend a respondent's registration where the respondent has failed to give such an undertaking, or contravened or failed to comply with such an undertaking.

142. These alternative penalty provisions are currently contained in CA s-sec. 27(10).

143. The amount of any penalty imposed on a respondent under proposed s-sec. 30D(7) may be recovered as a debt due to the Commonwealth (proposed s-sec. 30D(8)). This power is currently contained in CA s-sec. 27(21) and differs only in that the current provision refers to the debt being due to the Crown, not the Commonwealth. The Board will be able to exercise any of its powers under proposed s. 30D 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 to be brought in relation to that conduct (proposed s-sec. 30D(9)). This power is currently contained in CA s-sec. 27(14).

S. 30E - Hearings

144. The Board will be given power to conduct hearings for the purpose of exercising its functions or powers with respect to the cancellation or suspension of registration (proposed s-sec. 30E(1)).

145. The Board will not be able to exercise its disciplinary functions without enabling a respondent to attend a hearing and present his case to the Board (proposed s-sec. 30E(2)).

146. Where the Board is required to allow a respondent the opportunity of attending a hearing to present his case, the Board will be required to afford the NCSC a similar opportunity (proposed s-sec. 30E(3)). No corresponding right exists in CA s. 27.

147. Subject to proposed s-sec. 30E(5), a hearing must be conducted in private (proposed s-sec. 30E(4)). The Board will be entitled to give directions as to the persons who will be entitled to be present at a hearing that is conducted in private (proposed s-sec. 30E(6)).

148. A respondent who is entitled to present his case at a hearing will be entitled to request that the hearing be conducted in public (proposed s-sec. 30E(5)).

149. Where such a hearing is conducted in public and where the Board is satisfied that the evidence is of a confidential nature or may affect the interests of any other person, the Board will be entitled to:

- (a) direct that part of the hearing take place in private; or
- (b) prevent or restrict the publication of evidence or documents produced to the Board.

(Proposed s-sec. 30D(7)).

150. A person who must be afforded the opportunity of being present at a hearing (i.e. the NCSC and the respondent) must be given proper notice of the hearing (proposed s-sec. 30E(10)).

151. A person who is entitled to appear at a hearing and who does not wish to appear in person or provide a representative, will be able to lodge written submissions with the Board. The Board will be required to take such submissions into account in relation to the matter (proposed s-secs 30E(11) and (12)).

S. 30F - Power to summon witnesses and take evidence

152. A person may be summoned to appear at a hearing to give evidence and produce documents referred to in the summons (proposed s-sec. 30F(1)). For the purposes of giving evidence a person may be required to take an oath or make an affirmation at the instance of the Chairman (proposed s-sec. 30F(2)).

S. 30G - Proceedings at hearings

153. At a hearing, the Board will not be bound by the rules of evidence (proposed s-sec. 30G(1)) but will be required to observe the rules of natural justice (proposed s-sec. 30G(2)).

154. Any party who appears at a hearing may have legal representation (proposed para. 30G(3)(e)).

155. A person who attends a hearing pursuant to a summons is entitled to be paid such allowances and expenses as are provided for by the regulations (proposed s-sec. 30G(4)).

156. The Board will be entitled to permit a person appearing at a hearing as a witness to give evidence by a written statement. If the Board thinks fit, that person will be required to verify the statement by oath or affirmation (proposed s-sec. 30G(5)).

S. 30H - Failure of witnesses to attend and answer questions

157. A person summoned to appear as a witness at a hearing shall not fail to attend unless excused or released from further attendance (proposed s-sec. 30H(1)). A witness shall not refuse to answer a question, produce a document, take an oath or make an affirmation when directed to do so (proposed s-sec. 30H(2)).

158. A legal practitioner who is required to answer a question or produce a document may refuse to do so where compliance would have the effect of disclosing a privileged communication. The person with whom the privileged communication was made may agree to waive the privilege (proposed s-sec. 30H(4)).

159. Contravention of the requirements in proposed s-secs 30H (1) to (4) will be punishable by a fine of \$1,000 or imprisonment for 3 months (proposed s-sec. 30H(6)).

160. A witness will not be entitled to refuse to answer a question on the ground that the answer might tend to incriminate him. However, where such a person claims, before answering, that the answer may incriminate him, the answer will not be admissible in evidence against him in separate criminal proceedings (proposed s-sec. 30H(5)).

161. Where the Board is satisfied that a person summoned to appear has failed to attend and give evidence, has attended and refused to take an oath or make an affirmation, or has failed to answer a question or produce a document, the Chairman may certify such non-compliance to the Court (proposed s-sec. 30H(7)). The Chairman of a recognised Board in another participating jurisdiction may certify non-compliance to the Court where the refusal or non-compliance took place under the corresponding law of that State or Territory (proposed s-sec. 30H(8)). The Court may then inquire into the case and may either order the person to comply with the requirement and/or punish the person as if he had been guilty of contempt of court (proposed s-sec. 30H(9)).

S. 30J - Contempt of Board

162. It is an offence punishable by fine or imprisonment to, inter alia, do any act that would constitute contempt of court if the Board were a court of record (proposed s. 30J).

S. 30K - Protection of Members, &c.

163. The Chairman or a member of the Board will have, in the performance of his duties, the same protections and immunities as are possessed by a High Court Judge (proposed s-sec. 30K(1)).

164. The Board or a member of the staff of the Board, will not be liable for any action for damages done in the performance of any function or the exercise of any power conferred by proposed Sub-division B (proposed s-sec. 30K(4)).

165. Legal practitioners and witnesses will also be afforded the same immunities, protection and privileges as they would be afforded in proceedings conducted in the High Court of Australia (proposed s-secs 30K(2) and (3)).

S. 30L - Hearings deemed to be judicial proceedings

166. A hearing before the Board shall, for the purposes of Part III of the Commonwealth Crimes Act 1914, be deemed to be a "judicial proceeding" (proposed s. 30L).

167. Under s. 31 of the Crimes Act 1914 "judicial proceeding" means a proceeding in or before a Federal Court or Court exercising Federal jurisdiction, or Court of a Territory, and includes a proceeding before a body or person acting under the law of the Commonwealth, or of a Territory, in which evidence may be taken an oath.

S. 30M - Notice of Board's Decision

168. The Board must, within 14 days of a decision to exercise any of its powers under proposed s. 30D, give notice in writing to the affected person, referring to the decision and to material on which the decision was based (proposed

para. 30M(1) (a)) . The Board will also be required to lodge a copy of the notice with the NCSC, and to arrange to have a notice of the decision published in the Gazette (proposed paras 30M(1)(b) and (c)). If the Board refuses to exercise its powers under proposed s. 30D, it will be required (within 14 days) to give notice of this decision to the affected person, and to lodge a copy of this notice with the NCSC (proposed s-sec. 30M(2)).

169. Failure to comply with the notification requirements in proposed s-secs 30M(1) and (2) will not affect the validity of the Board's decision (proposed s-sec. 30M(3)).

S. 30N - Time when Board's decision comes into effect

170. A decision of the Board to cancel or suspend the registration of an auditor, liquidator or liquidator of a specified corporation will come into effect at the expiration of the day on which notice of the decision is given (proposed s-sec. 30N(1)). Notice of the decision will be required under proposed para. 30M(1)(a) although the decision will still be valid even if such notice is not given (proposed s-sec. 30M(3)). By proposed s-sec. 30N(1) the decision will not come into effect until the expiration of the day on which notice is actually given to the person affected.

171. The Board may postpone the coming into effect of a decision to enable the NCSC or the respondent to appeal against the decision. The decision will then come into effect:

- (i) if the parties fail to appeal within the period prescribed by the regulations under proposed s. 30R, at the end of that period;

- (ii) if the appeal is withdrawn, upon the withdrawal of the appeal; or
- (iii) where the Court confirms or modifies the decision, at a time fixed by the Court.

(Proposed s-sec. 30N(2)).

S. 30P - Effect of suspension

172. The effect of the suspension of a registration of an auditor, liquidator, liquidator of a specified corporation, or official liquidator will be that the person whose registration is suspended shall be deemed not to be registered during the suspension (proposed s. 30P).

S. 30Q - Costs

173. Proposed s. 30Q will deal with the recovery of costs (including the costs of and incidental to the hearing) by the respondent and by the NCSC.

S. 30R - Appeal from decision of Board

174. A person affected by a decision of the Board will be able to appeal to the Court within such period as is prescribed in the regulations. The Court may confirm, reverse or modify the decision of the Board and may make such orders and give such directions as it thinks fit (proposed s-sec. 30R(1)). The NCSC may similarly appeal against a decision of the Board (proposed s-sec. 30R(2)).

S. 30S - Operation of section 27

175. Proposed s. 30S will have the effect of preserving applications made, before the commencement of Bill cl. 31, in relation to auditors and liquidators under the current

legislation. The new procedures set out in proposed Sub-division B will not be applicable to requests, decisions or applications made or pending under the current legislation (proposed s. 30S). CA s. 27 will have continuing effect in relation to such proceedings.

Cl. 32 : Registers

176. Background A person may inspect any document lodged with the NCSC except:

- (i) an application under CA s. 17;
- (ii) a document lodged under CA ss. 25 or 26;
or
- (iii) a document that has been destroyed
or otherwise disposed of.

(CA para 31(2)(a)).

177. Proposed amendment The exceptions to the general rule that a person may inspect any document lodged with the NCSC will be extended to also include a document lodged under proposed para. 30M(2)(b) (i.e. a notice lodged with the NCSC where the Board has refused to exercise its disciplinary powers under proposed s. 30D) (Bill cl. 32).

OBJECTS AND POWERS OF

COMPANIES Introduction

178. It is proposed that substantial amendments be made to the provisions of the CA relating to the objects and powers of companies. For the purpose of obtaining public comment, two alternative approaches were proposed in the exposure draft of the Companies and Securities Legislation (Miscellaneous Amendments) Bill 1983 (hereafter referred to as 'ED'). Alternative 1 (ED cls 76 and 77) was based on the continuation of the existing requirement that companies have stated objects. Alternative 2 (ED cls 78 to 85) was based on a proposal that it should be optional for companies to have stated objects.

179. The majority of public submissions relating to these proposed amendments to the objects and powers provisions of the CA were in favour of Alternative 2. The following proposed amendments are accordingly based on Alternative 2, in that it will be optional for companies to have stated objects.

180. A brief outline of the proposed amendments is set out below:

- (a) CA ss 67 and 68 and Schedule 2 will be replaced with new sections 67 and 68 (see paras 185 to 216 of ex memo on Bill cl. 34 and paras 658 to 659 of ex memo on Bill cl. 125). Proposed ss 68A to 68D will also be inserted in the CA (Bill cl. 34).

- (b) CA s. 37 will be amended to provide that it will be optional, not mandatory, for the memorandum of a company to state the objects of the company (see paras 181 to 184 of ex memo on Bill cl. 33).
- (c) As a consequence of this proposed amendment to CA s. 37, certain amendments will be made to various provisions in the CA which refer to the objects of a company. The most significant of the proposed consequential amendments are:-
- (i) amendment of the definition of "mining company" in CA s-sec. 5(1) (see paras 96 to 97 of ex memo on Bill cl. 21);
 - (ii) amendment to CA s. 73 which provides that a company may, by special resolution, alter its memorandum (see paras 221 to 236 of ex memo on Bill cl. 36); and
 - (iii) amendment to CA s. 494 which specifies special requirements for investment companies which seek to issue a prospectus (see paras 609 to 614 of ex memo on Bill cl. 115).

Cl. 33 : Requirements as to memorandum

181. Background The memorandum of a company must, in addition to other specified requirements as to form and content, state the objects of the company (CA para. 37(1)(b)).

182. Proposed amendment CA para. 37(1) (b) will be omitted and a new s-sec. 37(1A) will be inserted after s-sec 37(1) of the CA.

183. It will be optional for a company to include a statement of its objects in its memorandum (proposed s-sec. 37(1A)) (Bill cl. 33).

184. The purpose of this new provision is to make it clear that a company may choose whether or not to have stated objects (cf. proposed definition of "mining company" - see Bill cl. 21).

Cl. 34 : Repeal of sections 67 and 68 and substitution of new sections

185. Background A company has the power to make donations for patriotic and charitable purposes, and to transact lawful business in aid of the Commonwealth in the prosecution of a war. A company also has, unless expressly modified or excluded by its memorandum or articles, the powers set out in Schedule 2 (CA s. 67).

186. No act of a company is invalid by reason only that the company did not have the capacity or power to do the act (CA s. 68).

187. Proposed amendments CA ss. 67 and 68 will be replaced by six new provisions:

- (a) s. 67 - Powers (see paras 189 to 195).
- (b) s. 68 - Restrictions on companies (see paras 196 to 202).
- (c) s. 68A - Persons having dealings with companies etc. (see paras 203 to 207).

(d) s. 68B - Certain assumptions not to be made
(see paras 208 to 210).

(e) s. 68C - Lodgment of documents, &c., with
Commission not to constitute constructive
notice (see paras 211 to 214).

(f) s. 68D - Effect of fraud (see paras 215 to

216). (Bill cl. 34). 188. The purpose of these proposed
new provisions is to:

(i) abolish the doctrine of ultra vires,
whereby, in effect, a company has the
legal capacity to do only such acts as
are expressly or by reasonable
implication conferred upon the company
by its memorandum and articles. This is
to be achieved by providing companies
with all the rights, powers and
privileges of a natural person, in
addition to those powers peculiar to
companies. The abolition of the doctrine
of ultra vires will ensure that persons
dealing in good faith with a company
will be protected against any assertion
that the company lacked the necessary
capacity. If the members are concerned
that the management of a company should
operate only in a particular
business then it is a matter between the
members and management and any default
of management should not prejudice an
innocent third person; and

- (ii) ensure that a person who deals in good faith with persons who can be reasonably supposed to have the authority of the company should be protected against later denials by the company that the persons purporting to act for it lacked authority. This involves clarifying and codifying the so called "indoor management rule" which has developed from the decision in Royal British Bank v. Turquand (1856) 119 E.R. 886.

Notwithstanding the amount of litigation in this area and the development of various rules by the courts, many of which protect third persons, the present state of the case law is still not wholly clear or satisfactory.

Proposed s. 67 : Powers

189. It is proposed to enable a company -
- (a) to have the rights, powers and privileges of a natural person (see para 190 below);
 - (b) to do those things peculiar to companies (see para 191 below);
 - (c) to do anything authorised by law (see para 192 below).
 - (d) to restrict or prohibit the exercise of any of its powers (see para 193 below); or
 - (e) to exercise its powers outside Australia (see para 194 below).

190. A company will have the rights, powers and privileges of a natural person (proposed s-sec 67(1) - based on s-sec 15(1) of the Canada Business Corporations Act).

191. A company will have specific power to do those things peculiar to companies (proposed paras 67(1) (a) to (f) - based on NCB paras 32(1)(b) to (h)). The purpose of these provisions is to ensure that it is clear that *by* expressing a company's powers as those of a natural person, it is not intended to impliedly withhold from companies those powers peculiar to companies (e.g. power to issue debentures (proposed para 67(1) (b))) .

192. A company will have power to do anything authorised by law (proposed para 67(1)(g) - based on NCB para 32(1)(j)).

193. A company will be able to restrict or prohibit the exercise of any of the powers conferred by proposed s-sec 67(1) by so providing in its memorandum or articles (proposed s-sec. 67(2) - based on NCB s-cl. 32(3)). Nevertheless, no act of a company will be invalid merely because it is contrary to a prohibition imposed under proposed s-sec. 67(2) (see proposed s-sec. 68(4)).

194. A company will have the capacity to exercise its powers outside the Territory (proposed s-sec. 67(3) - based on NCB s-cl. 32(4) and s-sec. 15(2) of the Canada Business Corporations Act).

195. Any restriction on the exercise by a company of its powers, being a restriction included in the memorandum or articles of the company before the commencement of Bill cl. 34, will not be affected by this proposed section (proposed s-sec. 67(4)). The purpose of this provision is to

ensure the continued validity of restrictions on the exercise of a company's power included in the memorandum or articles of a company before the commencement of Bill cl. 34.

Proposed s. 68 : Restrictions on companies

196. It is proposed that:

- (a) a company will be prohibited from acting contrary to its memorandum or articles (see para 197 below) ;
- (b) an officer of a company may not be, in any way, knowingly concerned in or a party to such a contravention by the company (see para 199 below) ;
- (c) notwithstanding the general penalty provision in CA s. 570, a company which acts contrary to its memorandum or articles, or an officer who is knowingly involved in such a contravention by the company will not be guilty of an offence against the section (see para 200 below);
- (d) an act of a company will not be invalid by reason only that it is contrary to the company's memorandum or articles (see para 202 below);
- (e) similarly, an act of an officer of a company will not be invalid by reason only that he was knowingly concerned in such a contravention by the company (see para 202 below);

(f) the fact that a company has acted contrary to its memorandum or articles, or an officer of a company has been knowingly concerned in such a contravention by the company, may be relied upon in certain proceedings (see para 201 below).

197. A company will be prohibited from exercising a power contrary to any restrictions on the exercise of the company's powers included in the company's memorandum or articles. In addition, where the memorandum of the company contains a provision stating the objects of the company, the company will be prohibited from acting other than in pursuance of those stated objects (proposed s-sec. 68(1) - based on NCB s-cl. 33(1)).

198. The purpose of this provision is to provide that a company must act in accordance with its objects (if any are included in the memorandum) and in accordance with any restrictions, included in the memorandum or articles, on the exercise of any of the powers conferred by proposed s. 67.

199. An officer of a company will be prohibited from being, in any way, knowingly concerned in such a contravention by the company (proposed s-sec. 68(2)).

200. Notwithstanding the general penalty provision contained in CA s. 570, a company which contravenes the prohibition in proposed s-sec. 68(1), or an officer who is knowingly concerned in such a contravention by the company, will not be guilty of an offence against the section (proposed s-sec. 68(3)).

201. However, where:

- (a) a company has contravened proposed s-sec. 68(1), or acted contrary to its memorandum or articles; or
- (b) an officer has contravened proposed s-sec. 68(2) by being knowingly concerned in a contravention by the company of proposed s-sec. 68(1),

these facts may be relied upon or asserted in the following matters:

- (i) a prosecution for an offence under the CA;
- (ii) an application for an order under proposed s. 227A;
- (iii) an application for an order under CA s. 320;
- (iv) an application for an injunction under CA s. 574;
- (v) proceedings against past or present officers of the company by the company or members of the company; or
- (vi) an application by the NCSC or by a member of the company for the winding up of the company.

(proposed s-sec. 68(6) - based on CA s-sec. 68(2)).

202. Notwithstanding that a company will be required, by proposed s-sec. 68(1), to observe any restrictions in its memorandum or articles, an act of a company will not be

invalid merely because such an act would be prohibited by proposed s-sec. 68(1), or by the memorandum or articles of the company (proposed s-sec. 68(4) - based on NCB s-cl. 33(2) and CA s-sec. 68(1)). Similarly, an act of an officer will not be invalid merely because such an act would be in contravention of proposed s-sec. 68(2) (proposed s-sec. 68(5)). The purpose of these provisions is to protect persons dealing with a company against later assertions that the company or the director lacked capacity to enter into a transaction.

Proposed s. 68A : Persons having dealings with companies &c.

203. A person dealing with a company, or with a person who has acquired title, or purports to have acquired title, to property from a company, will be entitled to make certain assumptions which will be binding on the company in any proceedings in relation to those dealings (proposed s-secs. 68A (1) and (2) - based on NCB s-cl. 34(1) and s.142 of the Ghana Companies Code). The specific assumptions which a person will be entitled to make are set out in proposed s-sec. 68A(3).

204. The purpose of these provisions is to make clear:

- (a) who may make and rely upon the assumptions set out in proposed s-sec. 68A(3); and
- (b) that a company will not be able to deny the validity of an assumption made under proposed s-sec. 68A(3).

205. A person dealing with a company or with a person who has acquired, or purports to have acquired, title to property from a company, will be entitled to assume:

- (a) that the memorandum and articles of the company have been complied with (proposed para 68A(3)(a) - based on NCB para 34(2)(a) and s-sec. 142(1) of the Ghana Companies Code - except that the NCB referred to "rules" of the company and the Ghana Companies Code referred to the "Regulations" of the company, not the memorandum and articles of the company). The purpose of this provision is to restate the general rule that an outsider dealing with a company is entitled to assume that the internal rules of the company have been complied with (Royal British Bank v. Turquand (1856) 119 E.R. 886).
- (b) that a person described as a director, principal executive officer or secretary, of a company in a relevant return, has been duly appointed and has authority to exercise the powers normally exercised by such a person (proposed para 68A(3) (b) - based on NCB para 34(2) (b) and s-sec. 142(2) of the Ghana Companies Code). The purpose of this provision is to:
- (i) restate the common law rule that the protection afforded to persons under the "indoor management rule" is not affected merely because the directors etc. have not been properly appointed (Mahoney v. East Holyford Mining Co. (1875) L.R. 7 H.L. 869). This extends the protection afforded by CA s-sec 224(1). In a decision on the equivalent provision in the UK Companies Act 1948, s.180, the House of Lords drew a distinction between

defective appointments to which the provision applied and non-existent appointments to which it did not : Morriss v Knassen (1946) AC 459. Proposed para. 68A(3)(b) is drafted in such a way as to avoid this problem; and

(ii) provide that a person dealing with an officer of the company (either actual or assumed) may assume that the officer is able to exercise the customary powers belonging to that type of office. It is believed that this also is in accordance with existing case law and normal agency principles. What is "customary" will vary with the nature of the particular office and the particular company. Thus, for example, a person will usually not be able to assume, in dealings with a company secretary, that the secretary has the authority to exercise powers normally the responsibility of a managing director.

(c) that a person held out by a company to be an officer or agent of the company has been duly appointed with authority to exercise the powers normally exercised by such an officer or agent (proposed para 68A(3)(c) - based on NCB para 34(2)(c) and s-sec. 142(2) of the Ghana Companies Code - except that the NCB and the Ghana Companies Code referred to a person "represented by the company (acting through its

members in general meeting, through its directors or through its principal executive officer) to be an officer or agent of the company"). Proposed para 68A(3)(c) refers only to a person "held out by the company to be an officer or agent of the company". The purpose of this provision is to achieve the same effect in relation to officers and agents as proposed para 68A(3)(b) is intended to achieve in relation to directors, principal executive officers and secretaries (see (b) above).

- (d) that an officer or agent with authority to issue documents, or certified copies of documents, on behalf of the company, has authority to warrant that the document or copy is genuine (proposed para 68A(3) (d) - based on NCB para 34(2)(d) and s-sec. 142(3) of the Ghana Companies Code). The purpose of this provision is to make it clear that a company will not be able to escape liability for false documents issued by an officer or agent if it has authorised the officer or agent to issue true documents.

- (e) that a document has been duly sealed by the company if it bears what appears to be the seal of the company attested by two persons, one of whom may be assumed to be a director, and the other a director or a secretary of the company (proposed para 68A(3)(e) -based on NCB para 34(2)(e) and s-sec. 142(4) of the Ghana Companies Code). The purpose of this provision is to make it clear that a company will not be able to escape liability for fraudulently sealed documents.

(f) that the directors, principal executive officer, secretaries, employees and agents of the company have properly performed their duties to the company (proposed para 68A(3) (f) - based on NCB 34(2)(f)). This statutory presumption of regularity restates the common law rule (e.g. see Richard Brady Franks Ltd v. Price (1937) 58 C.L.R. 112 at 142).

206. A person dealing with a company, or with a person who has acquired, or purports to have acquired, title to property from a company, will not be entitled to make assumptions under proposed s-sec. 68A(3) where that person knows or ought to know that the assumption is incorrect (proposed s-secs 68A(4) and (5) - based on NCB s-cl. 34(3) and proviso (a) to s.142 of the Ghana Companies Code).

207. The purpose of these provisions is to make it clear that the protection afforded by the "indoor management rule" is only available to "innocent" parties.

Proposed s. 68B : Certain assumptions not to be made

208. Background It has been argued at common law that where a person who deals with a single director of a company has actual knowledge of a power in the articles of the company to appoint a one-man committee, that person is entitled to assume that the director has been so appointed and that the board has delegated its powers to that director (cf Rama Corporation v. Proved Tin & General Investments Ltd (1952) 2 Q.B. 147).

209. Proposed amendment A person will not be able to assume either:

- (a) that one or more directors of a company have been appointed a committee of the board of directors of a company, merely because the director(s) are acting in a matter which the memorandum or articles of the company provide may be delegated to a committee of directors; or
- (b) that an officer or agent of a company has authority to act in a matter, merely because the officer or agent is acting in a matter which the memorandum or articles of the company provide may be delegated to an officer or agent.

(Proposed s. 68B - based on NCB s-cl. 34(4) and proviso (b) of s.142 of the Ghana Companies Code).

210. The purpose of this provision is to make it clear that:

- (a) no person will be entitled to assume that there has been any appointment of, or delegation to, a committee; and
- (b) no person will be entitled to assume that there has been a delegation of authority to an officer or agent of a company,

merely because the memorandum or articles of the company contain such a power.

Proposed s. 68C - Lodgment of documents, &c., with Commission not to constitute constructive notice

211. Background At common law, anyone dealing with a company is deemed to have notice of the contents of the "public documents" of the company filed with the Companies

Office. It is not clear at common law what documents are included within the term "public documents". The doctrine of constructive notice is a legal fiction which operates to restrict the protection afforded to outsiders under the "indoor management rule".

212. Proposed amendment A person will not be held to have constructive notice of documents, including the memorandum and articles of a company, which are lodged with the Commission or with the Registrar of Companies or which are referred to in such documents (proposed s-sec. 68C(1) - based on NCB cl. 35 and s. 141 of the Ghana Companies Code).

213. However, the doctrine of constructive notice will be retained for the purpose of registerable charges lodged with the Commission under CA Part IV, Division 9 or with the Registrar of Companies under the corresponding provisions of a previous law (proposed s-sec. 68C(2) - based on s. 141 of the Ghana Companies Code).

214. The purpose of this provision is to abolish the doctrine of constructive notice as it relates to documents lodged with the Commission or Registrar of Companies with the exception of registered charges.

Proposed s. 68D : Effect of fraud

215. Proposed amendment A person will be entitled to make assumptions under proposed s-sec. 68A(3) even where the apparent director etc. or an officer, agent or employee about whom the assumption may be made has acted fraudulently in relation to either:

- (i) the dealings, or acquisition or purported acquisition of title to property concerned;
- or

(ii) the forgery of a document that appears to have the company seal,

unless the person has actual knowledge that the apparent director etc., or the officer, agent or employee has or is acting fraudulently or has forged a document.

(Proposed s. 68D - based on NCB cl. 36 and s. 143 of the Ghana Companies Code).

216. The purpose of this provision is to restate the common law rule that a company will not escape liability for the acts of its directors etc. merely because the director etc. has acted fraudulently if the company would otherwise be made liable by his act. It also does away with an interpretation that has been placed on Ruben v. Great Fingall Consolidated 1906 A.C. 439 to the effect that the rule in Turquand's Case cannot assist when there has been a forgery.

Cl. 35 : General provisions as to alteration of memorandum

217. Background It would appear that there is ambiguity surrounding the precise time at which certain alterations to a memorandum of association take effect. There are two exceptions to the general rule in CA s-sec. 72(5) that the alteration of the memorandum takes effect on the registration by the NCSC of the relevant resolution, order, or other document:-

- (a) The first exception which is specifically exempted from the operation of CA s-sec. 72(5) is an alteration to the memorandum by way of resolution to alter a company's share capital under CA s. 121. However, CA s. 121 is silent as to the time at which such an alteration takes effect.

(b) The second exception concerns reductions of capital. CA s-sec. 123(9) provides that the alteration of the memorandum is deemed to be made upon lodgment under CA s-sec. 123(7) of the Court's order confirming a reduction of capital. CA s-sec. 123(7) provides that a company may not 'act upon' a resolution for reduction until the resolution and an office copy of the order have been 'lodged with the Commission', although the resolution may specify a date earlier than the date of lodgment but not earlier than the date of resolution "as the date from which the reduction of capital is to have retrospective effect."

218. Since CA s. 123 is not specifically exempted in CA s-sec. 72(5), it is not clear whether the precise time at which the alteration to the memorandum under CA s. 123 takes effect is the time of "lodgment" (CA sec. 123(7)) or the time of "registration" (CA s-sec. 72(5)).

219. Proposed amendment A reference to CA s.123 will be included in CA s-sec. 72(5) so as to make it clear that special resolutions for reduction of share capital generally take effect on "lodgment" of the resolution with the NCSC (CA s-sec. 123(9)) rather than "registration" by the NCSC under CA s-sec. 72(5), although they may also take effect at any time between passing of the resolution and lodgment of a copy with the NCSC (CA s-sec. 123(7)).

220. It will also be made clear by proposed s-sec. 121(1A) that a resolution under CA s. 121 will take effect on the date of the resolution or such later date as is specified in the resolution (see paras 270 to 271 of ex memo on Bill cl. 50).

Cl. 36 : Alterations of provisions of memorandum

221. Background A company may, by special resolution, alter the provisions of its memorandum with respect to its objects or powers (CA sec. 73(1)).

222. Proposed amendment CA s-sec. 73(1) will be omitted and replaced by proposed s-sec. 73(1)(Bill para. 36(a)).

223. Where the memorandum of a company includes the objects of the company, the company will be able to alter, by special resolution, the provisions of its memorandum with respect to its objects by altering or omitting such provisions (proposed para. 73(1)(a) - based on CA s-sec. 73(1)).

224. Where the memorandum of a company does not include the objects of the company, the company will be able to alter, by special resolution, its memorandum by inserting a statement of the company's objects in the memorandum (proposed para 73(1) (b)).

225. A company will be able to alter, by special resolution, its memorandum by altering, inserting or omitting any provision with respect to the objects of the company or any provision with respect to the powers of the company (proposed para. 73(1)(c)).

226. The purpose of this amendment is to ensure that the provisions relating to the alteration of a company's memorandum are consistent with the proposed amendment to provide that the statement of a company's objects in the company's memorandum will be optional (see paras 181 to 184 of ex memo on Bill cl. 33).

227. Background A company may, by special resolution alter a provision of its memorandum that could lawfully have been contained in the articles of the company unless the memorandum prohibits the alteration of that provision (CA s-sec. 73(2)).

228. Proposed amendment CA s-sec. 73(2) will be replaced by proposed s-sec. 73(2)(Bill para. 36(a)).

229. Proposed s-sec. 73(2) will specify that a company may, by special resolution alter or omit a provision of the memorandum which could have been included in the articles unless:

(a) the memorandum prohibits the alteration of that provision; or

(b) the memorandum prohibits the omission of that provision.

230. Proposed s-sec. 73(1) will specify the manner in which the memorandum of a company may be altered (i.e. by alteration or omission). The proposed amendment to CA s-sec. 73(2) will bring this provision into line with the proposed amendment to CA s-sec. 73(1).

231. Similar amendments will be made to:

(i) CA s-sec. 73(3) (Bill para. 36(b)); and

(ii) CA s-sec. 73(5)(Bill para. 36(d)).

232. Background Where an application is made to the Court for the cancellation of an alteration of the memorandum of a company by either:

- (a) where the alteration is made to the objects or powers of the company - the holders of not less than 10% of the nominal value of the company's debentures; or
- (b) where the alteration is to any provision of the memorandum - the holders of not less than 10% of the nominal value of the company's issued capital or a class of issued capital, or 10% of the members where the company is not limited by shares,

the alteration has no effect unless it is confirmed by the Court (CA s-sec. 73(8)).

233. The relevant part of CA s-sec. 73(8) is as follows:

"If an application for the cancellation of an alteration is made to the Court"

234. Proposed Amendment CA s-sec. 73(8) will be amended by inserting the words "of the memorandum of a company" after the word "alteration" (Bill para 36(g)). The purpose of this amendment is to make it clear that the alteration to which CA s-sec. 73(8) applies is an alteration to the memorandum of a company.

235. Proposed Amendment CA para. 73(8)(a) will be omitted and the following paragraph inserted:

"(a) in the case of an alteration provided for by sub-section (1) - the holders of not less than 10% in nominal value of the company's debentures; or".

(Bill para 36(h)).

236. The purpose of this amendment is to make CA para. 73(8)(a) consistent with the proposed amendment to CA s-sec 73(1) (see paras 222 to 231 above, on Bill para. 36(a)). Similar amendments will be made to CA s-sec. 73(6) (Bill para. 36(f)) and CA para. 73(8)(b) (Bill para. 36 (j)) .

Cl. _____ 37 : Confirmation of contracts and authentication and execution of documents

237. Background Where the objects of a company require or comprise the transaction of business outside the ACT, the company may, if authorized by its articles, have one or more official seals for use outside the ACT (CA s-sec. 80(10)).

238. Proposed Amendment CA s-sec. 80(10) will be amended by omitting the words:

"the objects of which require or comprise the transaction of business outside the Territory".

(Bill cl. 37).

239. The purpose of this amendment is to make CA s-sec. 80(10) consistent with the proposed amendment which will provide that the statement of a company's objects in the company's memorandum will be optional (see paras 181 to 184 of ex memo on Bill cl. 33).

Cl. 38 : Certificate authorizing application for transfer of incorporation

240. Background A company may 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 (CA s. 83). Such an application to the NCSC must be accompanied by, inter alia, "a statement of affairs of the company ..." (CA sub-para. 83(2) (b) (ii)) .

241. Proposed Amendment The reference in CA sub-para 83(2) (b) (ii) to "a statement of affairs of the company ..." will be replaced by a reference to a "report in the prescribed form as to affairs of the company ..." (Bill para. 38(a)).

242. This proposed amendment is consistent with similar amendments made to the CA by the Companies and Securities Legislation (Miscellaneous Amendments) Act 1981. A number of references in the CA to a "statement of affairs" of the company were replaced by a reference to a "report as to the affairs" of the company. Similar amendments have already been made to CA s-secs. 328(1), 335(4), 347(5), 375(1), 375(2) and 398(5).

243. Background A company is not entitled 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 if, inter alia, a receiver has been appointed and is acting in respect of the property or part of the property of the company (CA para. 83(5)(b)).

244. Proposed amendment The reference in CA para. 83(5)(b) to "the property or part of the property of" will be replaced by a reference to "property of" (Bill para 38(b)).

245. This proposed amendment is a change in drafting style which will be adopted throughout the CA (see paras 491 to 492 of ex memo on Bill cl. 91).

Cl. 39 : Application by foreign company for registration
under Division

246. Background The Commission may not grant an application by a company for registration as a foreign company unless the constituent documents of the company specify the objects of the company (CA s-para 85(3) (a) (iii)) .

247. Proposed amendment Sub-paragraph 85(3)(a)(iii) of the CA will be omitted (Bill cl. 39). The purpose of this amendment is to make CA s-sec. 85(3) consistent with the proposed amendment to provide that the statement of a company's objects in the company's memorandum will be optional (see paras 181 to 184 of ex memo on Bill cl. 33).

Cl. 40 : Establishment of registers and minute books

248. Background Within 14 days of registration under CA Part III, Division 4, a company must comply with all the requirements of the CA relating to the maintenance of registers and to books of minutes (CA s-sec 91(1)). Where the CA 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 is deemed to begin at the end of the 14 day period mentioned above (CA s-sec. 91(2)).

249. Proposed amendment It is proposed to extend the application of CA s. 91 to the register required to be kept by a company under proposed new s. 261 (Bill cl. 40).

Cl. 41 : Interpretation

250. Background Various provisions of CA Part IV, Division 1 (ss. 96, 97 and 103) require a prospectus to be registered by the NCSC under the CA or the corresponding law of a

participating State or of a participating Territory. A prospectus relating to any Australian company need only be registered in one participating jurisdiction to be valid in all other participating jurisdictions.

251. Proposed amendment In future, only a prospectus relating to a recognized company or recognized foreign company that has been registered in a participating jurisdiction will be valid in another participating jurisdiction without the need for further registration (Bill cl. 41, proposed s-sec. 94(4)). This will ensure that only companies incorporated in a participating jurisdiction or overseas companies registered in a participating jurisdiction will be able to take advantage of the co-operative scheme.

Cl. 42 : Forms of application for shares or debentures to be attached to prospectus

252. Background 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 under the CA or the corresponding law of a participating State or participating Territory (CA s-sec. 96(1)).

253. Proposed amendment It is proposed to omit the reference to a prospectus having to be registered by the NCSC under the corresponding law of a participating State or of a participating Territory (Bill cl. 42). This amendment is consequent upon the amendment made by Bill cl. 41 (discussed at paras 250 to 251 above).

Cl. 43 : Invitations or offers in relation to borrowings by a corporation

254. Background As a general rule, a corporation is required to register a prospectus with the NCSC before making a public offering of debentures (CA s. 97). However, a banking corporation that is raising funds from the public by way of debentures is not required to comply with this rule and is not required to issue a prospectus (CA s-sec. 97(6) and para. 97(7)(a)). A subsidiary of a banking corporation enjoys a similar exemption provided its parent company guarantees the repayment of all deposits with and loans to the subsidiary (CA s-para. 97(7) (c) (iii)) .

255. Proposed amendments The proposed amendment to CA para. 97(1)(a)(Bill para. 43(a)) is consequent upon the amendment made by Bill cl. 41 (discussed at paras 250 to 251 above).

256. It is also proposed to remove from CA s-sec. 97(7) the general exemption given to banking corporations. In future only those banking corporations that have been declared by the NCSC to be prescribed corporations will be exempted from the operation of CA s. 97 and from the need to issue a prospectus (Bill paras 43(b) and (c)).

Cl. 44 : Certain notices, &c., not to be published

257. Background The publication of certain notices amounting to an invitation to the public to subscribe for shares or to purchase debentures is prohibited unless the conditions set out in CA s. 99 are satisfied. However, a notice for the purposes of that section does not include a registered prospectus. "Registered prospectus" is defined to

include a prospectus registered under the corresponding law of a participating State or participating Territory (CA s-sec. 99(1)).

258. Proposed amendment In view of the amendment proposed by Bill cl. 41 (discussed at paras 250 to 251 above) it is proposed to omit from CA s-sec. 99(1) the definition of "registered prospectus" (Bill cl. 44).

Cl. 45 : Certain reports referring to prospectuses not to be published

259. Background The publication of certain reports referring to prospectuses is prohibited except in specified circumstances (CA s. 100). For the purposes of CA s. 100 "registered prospectus" is defined to include a prospectus registered under the corresponding law of a participating State or participating Territory (CA s-sec. 100(1)).

260. Proposed amendment In view of the amendment proposed by Bill cl. 41 (discussed at paras 250 to 251 above) it is proposed to omit from CA s-sec. 100(1) the definition of "registered prospectus" (Bill cl. 45).

Cl. 46 : Registration of prospectuses

261. Background The issue of a prospectus is prohibited unless a copy has been registered by the NCSC (CA s. 103).

262. Proposed amendment The proposed amendment to CA s-sec. 103(1)(Bill cl. 46) is consequent upon the amendment made by Bill cl. 41 (discussed at paras 250 to 251 above).

Cl. 47 : Repeal of section 109

263. Background The NCSC is empowered 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 (CA s. 109).

264. Proposed amendment It is proposed to repeal CA s. 109 (Bill cl. 47) and to replace it with a wider provision that will allow the NCSC to grant exemptions from compliance with, and modify the operation of the provisions of Divisions 1 (Prospectuses), 2 (Restrictions on Allotment and Variation of Contracts), 5 (Debentures) and 6 (Prescribed Interests) of Part IV (see Bill cl. 68 - proposed CA s. 215C).

Cl. 48 : Restriction on application of capital of company

265. Background Except as provided by CA ss. 117 or 118, a company is prohibited from applying any shares or capital to make a payment to a person in consideration of his subscribing or procuring subscriptions for shares in the company. (CA s. 116).

266. Proposed amendment A consequential amendment will be made to CA s. 116 following the proposed amendment of CA s. 117 (Bill cl. 48).

Cl. 49 : Power to make certain payments

267. Background A company may make a payment to a person in consideration of his subscribing or procuring subscriptions for shares, so long as certain conditions are met, and the payment does not exceed 10% of the amount payable on shares upon their allotment, or such amount as is authorized by the articles, whichever is the lesser (CA s-sec. 117(1)).

268. Proposed amendment CA s-secs. 117(1) and (2) will be omitted and new s-secs 117(1) and (2) will be substituted (Bill cl. 49).

269. The principal changes contained in these proposed provisions are as follows:-

- (a) The words "make a payment" will be replaced by the words "make a payment by way of brokerage or commission" in order to make it clear that these are the only payments authorized by the section.
- (b) Proposed s-sec. 117(2) will make it clear that a payment of brokerage or commission in respect of shares in the company is not permitted by the section, if it, or if the total amount of other such payments made in respect of those shares together with the proposed payment exceeds 10% of the total of the amount payable in respect of the shares upon their allotment or such amount as is authorized by the articles, whichever is the lesser.

Cl. 50 : Power of company to alter its share capital

270. Background A company may, if so authorized by its articles, alter by resolution the provisions of its memorandum, in relation to its share capital in a number of specified ways (CA s-sec. 121(1)).

271. Proposed amendment An alteration made to the memorandum in accordance with CA s-sec. 121(1) will take effect on the date of the resolution or such later date as is specified in the resolution (Bill cl. 50) (see also paras 217 to 220 of ex memo on Bill ci. 35).

Cl. 51 : Special resolution for reduction of share capital

272. Background A company is not empowered to act upon a resolution for a reduction of share capital before a copy of the resolution is lodged with the NCSC. However, the resolution may specify the date of the resolution as the date from which the reduction of share capital is to have effect. This is phrased in the CA as the resolution having "retrospective effect". The term "retrospective" is a misnomer since the passing of the resolution to reduce share capital will have a prospective rather than a retrospective effect (CA s-sec. 123(7)).

273. Proposed amendment The term "retrospective" will be omitted. (Bill cl. 51).

Cl. 52 : Substantial shareholdings and substantial shareholders

274. Background 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 is deemed to have a substantial shareholding in that company (CA s. 136). The shares to which a person is "entitled" includes voting shares in which an associate of that person has a relevant interest except for a nominee corporation in respect of which the NCSC has issued a certificate under CA s-sec 136(6).

275. Proposed amendment CA para. 136(2) (b) will be amended so that a certificate can be issued by any participating State or participating Territory. This will bring this section into line with CASA s-sec 7(3) (Bill cl. 52)

Cl. 53 : Civil remedy where failure or default under Division

276. Background Division 4 of Part IV of the CA (ss 134 to 146) deals with the notification of substantial shareholdings in listed companies and declared companies and bodies.

277. Proposed amendment It is proposed that a civil remedy be available where there has been a failure or default in complying with the substantial shareholdings provisions.

278. A person who fails to comply with the notification requirements in CA ss 137, 138 or 139 will be liable to pay damages to a person who suffers loss or damage as a result of that failure unless the failure to comply was unintentional (Bill cl. 53, proposed s-sec. 144A(1)). A company that defaults or any of its officers who knowingly default in complying with CA s 143 (which requires a company to keep a register of substantial shareholders), will be liable to pay damages to a person who suffers loss or damage as a result of that failure (Bill cl. 53, proposed s-sec 144A (2)). (See also Bill cl. 76, proposed s-secs. 261(17) and (18)).

Cl. 54 : Knowledge of employee or agent imputed to employer or principal

279. Background The CA contains numerous references to master and servant (see general comments at paras 34 to 37 of ex memo).

280. One such provision is that which imputes an awareness of a fact or occurrence to an employer (or principal) if his servant (or agent) was aware of it (CA s. 145).

281. Proposed amendment The terms "master" and "servant" will be replaced by the terms "employer" and "employee" respectively (Bill cl. 54). Similar changes to other sections of the CA are set out in Bill Schedule 1 (see Bill cl. 128).

Cl. 55 : Powers of court with respect to defaulting
substantial shareholder

282. Background The Supreme Court is empowered to make certain orders in respect of a failure to comply with the obligations relating to notice under the substantial shareholding provisions (CA s. 146).

283. 'Proposed amendments A number of amendments are proposed to CA s. 146 which are consequent upon amendments being made to CA s. 261 (Power of company to obtain information as to beneficial ownership of its shares - see Bill cl. 76).

284. The proposed amendments are as follows:

- (a) Whereas at present only the NCSC is able to make an application to the Supreme Court under s. 146, it is proposed that, in addition, the company will be able to apply (Bill para 55(a));
- (b) The Supreme Court will be able to make such orders as it thinks fit and will not be limited to the orders specified in CA s-sec 146(1) (Bill para 55(b));
- (c) The Supreme Court will be able to make an order or give a direction vesting in the NCSC the shares of, or interests in the shares held by, the defaulting substantial shareholder (Bill paras 55(c), (d) and (e));

- (d) Where a share or an interest in a share vests in the NCSC by virtue of an order or direction of the Supreme Court, the NCSC will, subject to any directions of the Court, be able to get in, dispose of, or deal with, the share or interest as it sees fit (proposed CA s-sec 146(12), Bill para. 55(h) - cf. proposed CASA s-sec 49(6), discussed at paras 70 to 72 of ex memo); and
- (e) There are several minor or consequential drafting changes (Bill paras 55(b) and (g) and proposed CA paras 146(12) (b) and (c)).

Cl. 56 : Register of debenture holders and copies of trust deed

285. Background In general, companies that issue debentures are required to keep a register of debenture holders (CA s-sec 147(1)). However, "debenture" is defined for the purposes of CA s. 147 so as to exclude, inter alia, an acknowledgement issued by a banking corporation of the receipt of money deposited with it (CA para 147 (11) (c)) .

286. Proposed amendment It is proposed to omit from the definition of "debenture" the exclusion in CA para 147(11)(c) (Bill cl. 56): this exclusion will now be contained in the general definition in CA s.5 (see Bill cl. 21). The reason for this amendment is to remove doubts as to whether customers signing deposit slips etc are adequately excluded from the list of persons required to be included in the register of debenture holders.

Cl. 57 : Branch registers

287. Background In general, 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 is permitted to keep a branch register of debenture holders outside the Territory (CA s-sec 148(1)). However, "debenture" is defined for the purposes of CA s.148 so as to exclude, inter alia, an acknowledgement, issued by a banking corporation, of the receipt of money deposited with it (CA s-sec 148 (11)).

288. Proposed amendment It is proposed to omit from the definition of "debenture" the exclusion in respect of a banking corporation (Bill cl. 57). The effect of this amendment in relation to branch registers of debenture holders is the same as the amendments proposed by Bill cl. 56 in respect of the principal register of debenture holders.

Cl. 58 : Compliance with laws of State or other Territory
sufficient compliance for certain corporations

289. Background A recognized borrowing company or its guarantor corporation is deemed to have complied with Division 5 of Part IV (Debentures) if it has complied with corresponding laws of its State or Territory of incorporation (CA s. 162).

290. Proposed amendment It is proposed to amend CA s. 162 to make it clear that a recognized, or a recognized foreign, borrowing company will be deemed to have complied with Division 5 if it has complied with corresponding laws of its State or Territory of incorporation or registration (Bill cl. 58).

Cl. 59 : Interpretation

291. Background For the purposes of CA Part IV, Division 6 ("Prescribed Interests") certain definitions and interpretative provisions are included in CA s. 164.

292. Proposed amendments Certain amendments will be made to the definition of "company" in CA s-sec 164(1), and to the deeming provision in CA s-sec 164(3) (Bill cl. 59). These proposed amendments are set out below in more detail.

Definition of "company"

293. Background For the purposes of CA Part IV, Division 6, "company" is defined as a public company, and includes -

- (a) a corporation that is a public company under the corresponding law of a participating State or Territory; and
- (b) a corporation that is a public company under the law of a declared State or Territory, and is registered as a foreign company in any of the participating States or Territories.

(CA s-sec 164 (1) - definition of "company")

294. Proposed amendments For the purposes of CA Part IV, Division 6, the definition of "company" in CA s-sec. 164(1) will be omitted and replaced by a new definition of "company" (Bill para. 59 (a)) .

295. In accordance with the present definition of "company", the proposed new definition of "company" will include both a public company, and a corporation that is a public company under the corresponding law of a participating jurisdiction (proposed paras (a) and (b) of definition of "company").

296. A corporation that is a public company under the law of a declared State or Territory will come within the proposed definition of "company" if it is also registered as a foreign

company in the ACT (proposed para. (c) of definition of "company"). Proposed para. (c) of the definition of "company" is narrower than the present para. (b) of the definition of "company" in CA s-sec. 164(1), in that, in order to come within the definition of "company" under the law of a participating jurisdiction, it will be necessary for such a corporation to register as a foreign company in that participating jurisdiction. It will no longer be sufficient if such a corporation registers as a foreign company in any one of the participating jurisdictions. This proposed amendment is consistent with the general approach adopted in the CA which requires an Australian company incorporated in a non-participating Australian jurisdiction to register as a foreign company in each participating jurisdiction in which that company wishes to carry on business.

297. The proposed new definition of "company" will also be extended to include, in relation to a prescribed interest that relates to an undertaking, scheme, enterprise etc. (hereafter referred to as a 'relevant undertaking') the following bodies corporate:-

- (i) a body corporate (other than a public company) that is formed or incorporated in the ACT, and that is declared by the NCSC to be a "company" for the purposes of CA Part IV, Division 6 in relation to the relevant undertaking, or in relation to a class of undertakings that includes that relevant undertaking (proposed para. (d) of definition of "company"). This proposed amendment will enable the NCSC to "declare" a body corporate formed or incorporated in the ACT to be a "company" for the purposes of the prescribed interests provisions of the CA. Such a "declaration", however, will

only be effective in relation to the relevant undertaking or class of undertakings specified in the NCSC's "declaration". The "declared" body corporate will not be a "company" for the purposes of the prescribed interests provisions in relation to any other undertaking not covered by the terms of the NCSC's "declaration".

- (ii) a body corporate (other than a corporation that is a public company under the law of a participating jurisdiction) that is formed or incorporated in a participating jurisdiction, and that is declared by the NCSC to be a company for the purposes of CA Part IV, Division 6 in relation to the relevant undertaking or in relation to a class of undertakings that includes that relevant undertaking (proposed para. (d) of definition of "company").

- (iii) a body corporate (other than a corporation that is a public company under the law of a declared State or Territory and is registered as a foreign company in the ACT) that is:
 - (a) formed or incorporated in a declared State or Territory;

 - (b) registered as a foreign company in the ACT; and

(c) "declared" by the NCSC to be a "company" for the purposes of CA Part IV, Division 6 in relation to the relevant undertaking or in relation to a class of undertakings that includes that relevant undertaking.

(Proposed para. (d) of definition of "company"). This proposed amendment will enable the NCSC to "declare" a body corporate formed or incorporated in a declared State or Territory and registered as a foreign company in the ACT, to be a "company" for the purposes of CA Part IV, Division 6.

(iv) a body corporate (other than a corporation that is a public company under the law of a participating jurisdiction) that is formed or incorporated in a participating jurisdiction and is declared by the NCSC to be a company for the purposes of the prescribed interests provisions of the law of that jurisdiction in relation to the relevant undertaking, or in relation to a class of undertakings that includes the relevant undertaking (proposed para. (e) of definition of "company"). The purpose of this proposed amendment is to provide for the recognition in a participating jurisdiction of bodies corporate formed or incorporated in another participating jurisdiction and "declared" by the NCSC to be a "company" for the purposes of the prescribed interests provisions of the law of that jurisdiction.

Deemed covenants

298. Background Any deed approved under a corresponding previous law of the Territory, which does not contain the covenants concerned is deemed to contain certain covenants required by CA s-sec 168(1) (CA s-sec 164 (3)).

299. Proposed amendment The reference in this provision to "approved" will be replaced by a reference to "to which an approval has been granted" (Bill para. 59(b)).

300. The purpose of this proposed drafting change is to bring the wording in CA s-sec 164(3) into line with the wording used throughout CA Part IV, Division 6. This amendment should ensure that the phrase presently used in CA s-sec 164(3) (ie "any deed approved") is not confused with the phrase "approved deed" as defined in CA s-sec 165 (1).

Cl. 60 : Approved deeds

301. Background A deed is an approved deed if:

- (a) approval has been granted to the deed under CA Part IV, Division 6, or under any corresponding previous law of the Territory; and
- (b) an approval has been granted under CA Part IV, Division 6 or under any corresponding previous law of the Territory, to the trustee or representative acting as trustee or representative, and that approval has not been revoked.

(CA s- sec 165(1))

302. Where the management company is a recognized company or a recognized foreign company a deed is an approved deed if the deed and the company acting as trustee or representative have been approved under the law of the participating State or Territory in which the company is incorporated, or registered as a foreign company (CA s-sec 165(2)).

303. Proposed amendment CA s-sec. 165(2) will be replaced by proposed new s-sec 165(2) (Bill cl. 60). Under proposed s-sec 165(2) where a management company is formed or incorporated in a participating State or Territory, a deed will be an "approved deed" if:

- (a) an approval has been granted to the deed under the corresponding law or previous law of that State or Territory; and
- (b) an approval has been granted under the corresponding law or previous law of that State or Territory to the trustee or representative acting as trustee or representative and that approval has not been revoked, and the trustee or representative has not ceased to hold office.

(Proposed s-sec 165(2)).

304. Proposed s-sec. 165(2) will effect the following changes to the existing law:-

- (a) Where the approval of the trustee or representative has been revoked, or where the trustee or representative ceases to hold office, the deed will no longer be an approved deed under proposed s-sec 165(2). The purpose of this proposed amendment is to remove the anomaly

under CA s-sec 165(2) whereby a deed would continue to be an approved deed in a recognizing jurisdiction even after it had ceased to be an approved deed in its home jurisdiction.

- (b) A deed will also be an approved deed under proposed s-sec 165(2) if the deed, and the trustee or representative have been granted approval under the previous corresponding law of the State or Territory in which the management company is formed or incorporated. The purpose of this proposed amendment is to cover the situation where a deed has been approved under the previous corresponding law of a participating jurisdiction. At present, such a deed would not be an approved deed under CA s-sec 165(2). Proposed new s-sec 165(2) will extend the recognition conferred by CA s-sec 165(2) to approvals granted to a deed and trustee or representative under the previous corresponding law of a participating jurisdiction

Cl. 61 : Approval of deeds

305. Background The NCSC may grant its approval of a deed if the deed makes provision for the appointment of a company as trustee or representative for the holders of prescribed interests (CA s-sec 166(1)).

306. Proposed amendments CA s-sec 166(1) will be amended so that the NCSC will be able to grant its approval of a deed where the deed makes provision for the appointment of a person as trustee or representative for the holders of prescribed interests (Bill para. 61(a)).

307. This proposed amendment is consequential upon the proposed amendment to CA s167 which will enable a person (not just a company) to be approved as a trustee (see paras 309 to 311 below on Bill cl. 62).

308. The reference in CA s-sec 166(3) to "a deed has been approved" will be replaced by a reference to "approval has been granted to a deed" (Bill para. 61(b)). The purpose of this proposed drafting change is to bring the wording in CA s-sec 166(3) into line with the wording used throughout CA part IV, Division 6 (see also paras 298 to 300 of this ex memo on Bill cl. 59).

Cl. 62 : Approval of trustees

309. Background The NCSC may grant its approval, on such terms and conditions as it thinks fit, to a company acting as trustee or representative for the purposes of a deed (CA s-sec 167(1)).

310. Proposed amendment At present the following persons cannot be approved as a trustee under CA s-sec 167(1):

- (a) a body corporate that is a public authority or an instrumentality or agency of the Crown;
- (b) a corporation incorporated otherwise than under the CA or State Codes or previous corresponding laws;
- (c) a proprietary company, or a natural person.

311. CA s-sec 167(1) will be amended to provide that the NCSC may grant its approval to a person acting as trustee for the purposes of a deed (Bill ci. 62).

Cl. 63 : Covenants to be included in deeds

312. Background The covenants required to be contained in the deed which will bind the company issuing the prescribed interests (the management company) and the trustee or representative, are set out in CA s. 168.

313. The NCSC may, by notice published in the Gazette, declare that a particular deed is not required to contain certain covenants referred to in CA s-sec 168(1), or to contain certain matters provided in the regulations for the purposes of CA para 166(2)(b)(CA s-sec 168(2)).

314. Proposed amendments Throughout CA s. 168, wherever reference is made to a trustee or representative, amendments will be made to take account of the possibility that the trustee or representative may be a natural person (Bill paras 63(a), 63(b), 63(d), 63(e) and 63 (h)) .

315. In addition, CA para 168(1)(d) will be amended to extend the categories of persons to whom moneys, available for investment, may not be lent. Under proposed para. 168(1)(d) such moneys may not be lent to:

- (a) the management company, the trustee or representative, and
- (b) any person (including a natural person) who is associated with the management company, the trustee or representative.

(Bill para. 63(c))

316. These proposed amendments are consequential upon the proposed amendment to CA s. 167 which will enable a natural person (not just a 'company') to be approved as a trustee or representative (see paras 309 to 311 of ex memo on Bill cl. 62).

317. CA s-sec 168(2) will be omitted and replaced by proposed new s-secs 168(2) and 168(2A). Under proposed s-sec 168(2) the NCSC will be able to declare, by instrument in writing, that a specific deed is not required to contain certain covenants referred to in CA s-sec 168(1), or to contain certain matters provided by the regulations for the purposes of CA para 166(2) (b). The existing requirement in CA s-sec 168(2) that a copy of such a notice should be published in the Gazette will be included in proposed s-sec 168(2A). However, under proposed s-sec 168(2A), failure by the NCSC to publish such an instrument in the Gazette will not affect the validity of the instrument (proposed s-sec 168(2A) - Bill para 63(g)).

318. The purpose of this proposed amendment is to overcome timing problems which are presently caused by delays in obtaining gazettal of the notice of exemption under CA s-sec 168(2). Proposed s-sec 168(2A) will also be consistent with proposed s-sec 215C (11) which provides that failure by the NCSC to publish in the Gazette a copy of an instrument of exemption made under proposed s. 215C, will not affect the validity of the instrument (see paras 337 to 343 of ex memo on Bill cl. 68 - proposed s. 215C).

Cl. 64 : Statement to be issued

319. Background Prior to any issue, offer or invitation for subscription or purchase of any prescribed interest, a company or its agent is required to issue a statement in

connection with the issue, offer or invitation. Such a statement is deemed for all purposes to be a prospectus issued by the company (CA s-secs 170(1) and 170(2)).

320. Where a statement, in respect of a company incorporated in a participating jurisdiction, has been registered under the law of that participating jurisdiction, the statement is deemed to have been registered by the NCSC under CA Part IV, Division 1 ('Prospectuses') (CA s-sec 170(6)).

321. Proposed amendment CA s-sec 170(6) will be amended so that it will be applicable to a statement in respect of a management company that is:

- (a) a company incorporated in a participating jurisdiction; and
- (b) a body corporate, formed in a participating jurisdiction, which has been 'declared' by the NCSC to be a 'company' for the purposes of the prescribed interests provisions of the law of that jurisdiction.

(Bill cl. 64)

322. This proposed amendment is consequential on the proposed amendments to the definition of "company" in CA s-sec 164(1). Pursuant to the proposed definition, a body corporate formed (though not necessarily incorporated) in a participating jurisdiction may be 'declared' by the NCSC to be a 'company' for the purposes of the prescribed interests provisions of the law of that jurisdiction. A similar amendment will also be made to CA s-sec 165(2) concerning the

recognition in a participating jurisdiction of an approval granted to a deed, or trustee or representative under the law of another participating jurisdiction (see Bill cl. 60).

Cl. 65 : Register of holders of prescribed interests

323. Background A management company is required to keep at its registered office, its principal place of business or at another place in the ACT approved by the NCSC, a register of holders of prescribed interests in respect of each deed with which the company is concerned (CA s-sec 172(1)).

324. A management company which is incorporated in a participating jurisdiction, or in a declared State or Territory, and which:

- (a) keeps a register of holders of prescribed interests in its jurisdiction of incorporation; and
- (b) keeps within the ACT a register of holders of prescribed interests, being holders who are resident in the ACT,

will be deemed to have complied with CA s-sec 172(1) (CA s-sec 172(2)).

325. Proposed amendment The reference in CA s-sec. 172(1) to "Subject to sub-section (6)", will be omitted (Bill para. 65(a)). This proposed amendment is consequential upon the proposed deletion from CA s. 172 of CA s-sec. 172(6) (see paras 329 to 330 below on Bill para. 65(d)).

326. Proposed amendment The reference in CA s-sec 172(2) to "a management company incorporated in ..." will be replaced by a reference to "a management company formed or incorporated in" (Bill para 65(b)).

327. This proposed amendment is consequential upon the proposed amendments to the definition of "company" in CA s-sec 164(1) (see paras 293 to 297 of ex memo on Bill cl. 59). Pursuant to the proposed definition of "company", a body corporate formed (though not necessarily incorporated) in a participating jurisdiction, or in a declared State or Territory, may in certain circumstances be declared by the NCSC to be a "company" for the purposes of the prescribed interests provisions. The proposed amendment to CA s-sec 172(2) will cover the situation where a management "company" is formed (although not incorporated) in a participating jurisdiction, or in a declared State or Territory.

328. Proposed amendment The reference in CA para 172(2)(a) to "the preceding provisions of this section" will be replaced by a reference to "sub-section (1) " (Bill para 65 (c)) . This proposed amendment is a minor drafting change.

329. Background The NCSC may, by order in writing published in the Gazette, declare that a certain management company is not required to comply with the provisions of CA s-sec 172(1) in respect of a specified deed (CA s-sec 172(6)).

330. Proposed amendment CA s-sec. 172(6) will be omitted (Bill para 65(d)), and replaced by a new provision (proposed s. 215C - Bill cl. 68). Proposed s. 215C will enable the NCSC, by instrument in writing to exempt certain corporations from compliance with all or any of the provisions in:

(a) Division 1 (Prospectuses);

- (b) Division 2 (Restrictions on allotment and variation of contracts);
- (c) Division 5 (Debentures);
- (d) Division 6 (Prescribed Interests);
- (e) any regulations made for the purposes of those Divisions; and
- (f) CA s. 552 (the prohibition on sharehawking).

(See paras 337 to 343 of ex memo on Bill cl. 68 for a detailed explanation of proposed s. 215C).

Cl. 66 : Non-application of Division in certain circumstances

331. Background The NCSC may, by notice published in the Gazette, exempt any company from complying with all or any of the prescribed interests provisions in relation to any specified prescribed interest, or class of prescribed interests. The NCSC may also vary or revoke such an exemption (CA s-sec 176(1)).

332. Proposed amendment CA s-sec 176(1) will be omitted (Bill cl. 66), and replaced by a new provision (proposed s. 215C - Bill cl. 68). Proposed s. 215C will enable the NCSC, by instrument in writing, to exempt certain corporations from compliance with all or any of the provisions in:

- (a) Division 1 (Prospectuses);
- (b) Division 2 (Restrictions on allotment and variation of contracts);

- (c) Division 5 (Debentures) ;
- (d) Division 6 (Prescribed Interests);
- (e) any regulations made for the purposes of those Divisions; and
- (f) CA s. 552 (the prohibition on sharehawking).

(See paras 337 to 343 of ex memo on Bill cl. 68 for a detailed explanation of proposed s. 215C)

Cl. 67 : Duties of company with respect to issue of certificates

333. Background Within 2 months after the allotment of shares, the issue of debentures, or the making available of interests and within 1 month after the date on which a transfer of shares, debentures or interests is lodged with a company, the company must complete and have ready for delivery all the appropriate certificates, debentures or other relevant documents (CA s. 188).

334. Proposed amendment Apart from a minor drafting change (Bill para. 67(a)) it is proposed to amend CA s. 188 so as to allow the NCSC to exempt a company from compliance with the section if the allottee of shares, the debenture holder, the interest holder, or the transferee is declared by the NCSC to be a person to whom the section does not apply (Bill para. 67(b) - proposed CA s-sec. 188(2A)).

Cl. 68 : Insertion of new Division - Division 10 - "Exemption from, and modification of the application of, Divisions of this Part and related provisions"

335. Background - Banking Business At present a banking corporation is not required to register a prospectus with the NCSC before making a public offering of debentures (CA s-sec. 97(6) and para. 97(7)(a)).

336. Proposed amendment It is proposed to limit the exemption relating to banking corporations to anything done or to be done in the ordinary course of their banking business. (Bill cl. 68, proposed CA s. 215B).

337. Background - Powers of Commission The NCSC is at present empowered to grant exemptions from compliance with:

- (a) the fund raising provisions in Division 1 of Part IV (CA s. 109).
- (b) the requirement to keep a register of holders of prescribed interests (CA s-sec. 172(6)); and
- (c) the provisions of Division 6 of Part IV relating to prescribed interests (CA s-sec. 176(1)).

338. Proposed amendments These exemptions are proposed to be repealed (see Bill cis. 47, 65 and 66) and replaced by a new provision (Bill cl. 68, proposed CA s. 215C). Proposed CA s. 215C will permit the NCSC a considerable degree of flexibility in applying CA s. 552 and certain of the provisions in CA Part IV. Experience with similar exemption powers in CA s. 109 and CASA ss. 57 and 58 has shown that it has been possible to reduce the costs of compliance with the

relevant provisions while maintaining investor protection or to enable compliance without loss of the investor protection which the provisions are designed to provide.

339. The NCSC will, by instrument in writing, be able to exempt a person from compliance with all or any of the provisions in:

- (a) Division 1 (Prospectuses);
- (b) Division 2 (Restrictions on Allotment and Variation of Contracts);
- (c) Division 5 (Debentures);
- (d) Division 6 (Prescribed Interests);
- (e) any regulations made for the purposes of those Divisions;
- (f) CA s. 552 (the prohibition on

sharehawking) (proposed CA s-secs 215C(1) and (2)).

340. If a person contravenes or fails to comply with a condition to which an exemption is subject, the NCSC may apply to the Supreme Court for an order requiring the person to comply with the condition (see proposed CA s-secs 215C(4) and (5)).

341. The NCSC will also have the power to declare, by instrument in writing, that all or any of the above provisions are omitted, modified or varied in their application to a particular person (proposed CA s-secs 215C(6) and (7)).

342. There is a general requirement for the NCSC to publish a copy of an instrument executed under s. 215C in the Gazette, but failure to do so will not affect the instrument's validity (proposed CA s-sec. 215C(8)).

343. Instruments, orders or notices executed or published under the superseded law will continue in force and may be revoked or varied (proposed CA s-secs. 215C(9), (10) and (11)).

Cl. 69 : Vacation of Office

344. **Background** By CA s-sec. 222(1) the office of director of a corporation is **automatically** vacated in certain circumstances such as the conviction of a director of an offence referred to in CA s-sec. 227(2). By CA s-sec. 222(4) a person whose office is vacated by reason of such a conviction is incapable of being re-appointed as a director within the period of 5 years referred to in CA s-sec. 227(2).

345. **Proposed amendments** The circumstances in which the office of director is **automatically** vacated will be extended to include action taken against a person under proposed s. 227A (see Bill cl. 70). Automatic vacation of office will also take place where the Court has disqualified a person from acting as an officer of a corporation under CA s. 562 (Bill paras. 69(b) and (c)).

346. A person, whose office is vacated under CA s-sec. 222(1) by reason that he has become subject to an order under proposed s. 227A, or an order under CA s. 562, will be incapable of being re-appointed as a director until the expiration of the period specified in the order (proposed s-sec. 222(4A) - Bill para. 69 (e)) .

347. Notwithstanding a person's automatic disqualification from holding the position of director if he is convicted of an offence referred to in CA s-sec.227(2), it is arguable that a person could be reappointed as a director if the five year period referred to in the sub-section (i.e. 5 years after his conviction) expired prior to the person being released from prison. CA s-sec. 222(4) will be amended so that the person cannot be reappointed as a director until the expiration of 5 years from the date of his release from prison (Bill para. 69(d)).

Cl. 70 : Court may order persons not to manage corporations

348. Background Persons who have been convicted of certain offences are not permitted, without the leave of the Supreme Court, to act as director or promoter or take part in the management of a corporation within 5 years of being convicted (CA s. 227).

349. Proposed Amendment Proposed s. 227A will be inserted enabling the NCSC or certain other persons to seek court orders prohibiting a wider class of persons from taking part in the management of any corporation. A similar provision appears in the N.Z. Companies Act (see s. 189 of that Act). The provision will be inserted in order to provide protection to creditors from persons who continually set up businesses which fail.

350. A brief outline of the new provision is as follows: (a) The application to the Court can be made by:-
(i) the NCSC (proposed s-sec. 227A(1));

- (ii) an official manager, liquidator or provisional liquidator of the corporation (proposed sub-para 227A(7) (a) (i)) ;
 - (iii) a member or creditor of the corporation (proposed sub-paras 227A(7) (a) (ii) and (iii)); or
 - (iv) a person authorized by the NCSC (proposed sub-para. 227A(7) (a) (iv)) .

- (b) On such an application, where the Court is satisfied that, during a period that a person has been or was a director, secretary or executive officer of a corporation, that corporation repeatedly breached the 'relevant legislation', and the relevant person failed to take reasonable steps to prevent the corporation so breaching the 'relevant legislation', then the Court may prohibit that person from being a director or promoter of, or from taking part in the management of any corporation (proposed para. 227A(1) (a)) .

- (c) Where each of 2 or more corporations has breached relevant legislation at a time when the relevant person was a director, secretary or executive officer of the corporation, and the relevant person in each case failed to take reasonable steps to prevent the corporation breaching the relevant legislation, the Court may prohibit that person from being a director or promoter of, or from taking part in the management of any corporation (proposed para 227A (1) (b)) .

- (d) Where the relevant person has repeatedly breached relevant legislation, and on 2 or more occasions such a person was a director, secretary or executive officer of a corporation (even if not a director, secretary or executive officer of the same corporation on each of those occasions), the Court may prohibit that person from being a director or promoter of, or from taking part in the management of any corporation (proposed para 227A(1)(c)).
- (e) Where the relevant person was a director, secretary or executive officer of a corporation and that person has acted dishonestly or failed to exercise a reasonable degree of care and diligence in the performance of his duties as an officer of the corporation, the Court may prohibit that person from being a director or promoter of, or from taking part in the management of any corporation (proposed para 227A(1)(d)).
- f) The reference to a contravention of, or failure to comply with a provision of a 'relevant Act' will include a reference to such a contravention or failure to comply that occurred before the commencement of Bill cl. 70 (proposed para. 227A(5)(a)). A reference to a period in which a person has been a relevant officer of a corporation will include a reference to a period that has elapsed before the commencement of Bill cl. 70 (proposed para. 227A(5)(6)).

- (g) The reference to repeated breaches of relevant legislation by a corporation or by another person, is a reference to a corporation or a person who has contravened or failed to comply on 2 or more occasions with a particular provision of a relevant Act, or has contravened or failed to comply with 2 or more provisions of a relevant Act, or with provisions of 2 or more relevant Acts (proposed para. 227A(6)(b)).
- (h) The reference to 'relevant Acts' is a reference to the Companies Act 1981, Companies (Acquisition of Shares) Act 1980, the Securities Industry Act 1980 and to the current, and previous corresponding laws of the States and of the Territories (proposed para. 227A(7)(b)).
- (i) An order by the Court made on the application of a person other than the NCSC must be lodged with the NCSC within 7 days of the making of the order (proposed s-sec. 227A(2)). A person contravening an order made against him will be subject to a fine of \$5,000 or imprisonment for one year, or both (proposed s-secs 227A(3) and (4)).

351. Consequential amendments will be made to the following provisions of the CA dealing with the disqualifying factors applying to auditors and liquidators, namely, CA s-secs, 18(3), 20(4), 25(4), 27(4), 27(5) and 27(6). This is to take account of the new prohibition on persons managing a corporation.

Cl. 71 : Duty and liability of officers

352. Background The duties and liabilities of officers (which are set out in CA s. 229) apply, inter alia, to receivers of the property or part of the property of a corporation (CA para. 229(5)(b)).

353. Proposed amendment These duties and liabilities will also now be imposed on any other authorised person who assumes control of property of the corporation for the purpose of enforcing a charge (Bill para. 71 (b)) .

354. The purpose of this amendment is to pick up the references to "authorised persons" in CA Part X and subject such persons (e.g. a mortgagee in possession) to the duties of an officer as set out in the CA.

355. The reference in CA para. 229(5)(b) to "the property or part of the property" will be replaced by a reference to "property of" (Bill para. 71(a)).

356. This proposed amendment is a change in drafting style which will be adopted throughout the CA (see paras 491 to 492 of ex memo on Bill cl. 91).

Cl. 72 : Loans to directors

357. A cross referencing error will be corrected in sub-para. 230(4) (b) (i) of the CA (Bill cl. 72).

Cl. 73 : Register of disqualified company directors and other officers

358. Background A company is required to keep a register of its directors, principal executive officers and

secretaries. A company has to furnish the NCSC with the particulars contained in the register and notify the NCSC of any change (CA s. 238).

359. Proposed amendment The NCSC will be required to keep a register of disqualified company directors and other officers for the purposes of the Act and must enter in the register the names of any persons against whom an order has been made (proposed s-sec. 238A(1) - Bill cl. 73).

360. The register must contain a copy of the court order made under CA s-sec. 562(2) or proposed s-sec. 227A(1), prohibiting the person from being a director, promoter of, or from taking part in any way in the management of any corporation.

361. There is also provision for any person to inspect and take extracts from the register of disqualified company directors and other officers (proposed s-sec. 238A(2)).

Cl. 74 : Convening of general meeting on requisition

362. Background A general meeting must be convened by the directors of a company on the requisition of not less than 200 members, or members holding at least 5% of the paid up capital, or entitled to at least 5% of the voting rights (CA s.241).

363. Proposed amendments CA s-sec. 241(1) will be amended so that the number of members necessary for a requisition for the convening of a general meeting is, in the case of a company having a share capital, not less than 100 members holding shares in the company on which there has been paid an average sum, per member, of not less than \$200, and in the case of a company not having a share capital, the requisition is by not less than 200 members. Alternatively, in either

case, a general meeting will be able to be requisitioned by a member who is entitled or by members who are together entitled to not less than 5% of the total voting rights of all the members having at the date of the deposit of the requisition a right to vote at general meetings (Bill para. 74(a)).

364. CA s-sec. 241(2) will be amended to provide for the situation where a requisition for a general meeting is made by one member of the company who is entitled to not less than 5% of the total voting rights of all members (Bill para. 74(b)). A similar amendment will also be made to CA s-sec. 241(4) (Bill para. 74(d)).

365. CA s-sec. 241(3) will be amended so that where the directors have not proceeded to convene a meeting following a requisition and the requisitioning member or members proceed to convene a meeting, they may request the company to supply the names and addresses of those persons who are entitled to receive notice of general meetings of the company. The directors will be required to send this statement to the person or persons who requested this statement within 7 days of the date of the request (see proposed s-sec. 241(3A)).

366. Where a requisitioning member or members proceed to convene a general meeting of the company, such a meeting must be held within 3 months of the date of the deposit of the requisition (proposed s-sec. 241(3B))(Bill para. 74(c)).

367. The purpose of these amendments is to bring CA s. 241 into line with the requirements relating to the circulation of members' resolutions by the company following a requisition in writing by a specified number of members. This consistency has been achieved by combining the most appropriate features from existing ss. 241 and 247 (Bill cis. 74 and 75).

Cl. 75 : Circulation of members' resolutions etc

368. Background A company is 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 when requested to do so by a specified proportion of its members (CA s-sec 247(1)). The number of members necessary for such a requisition are set out in s-sec. 247(2) of the CA.

369. Proposed amendment This section will be restructured so as to be consistent with CA s. 241 (as amended)(Bill cl. 75) (see paras 362 to 367 of ex memo on Bill cl. 74).

Cl. 76 : Repeal of section 261 and substitution of new sections

261. Power of company to obtain information as to beneficial ownership of its shares

261A. Powers of Court

370. Background A company has the power 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 (CA s. 261).

371. Reasons for requiring disclosure Section 261 forms part of the shareholding disclosure provisions of the CA, and is complementary to the substantial shareholdings disclosure provisions. There are several reasons why it may be important to ascertain the nature, extent and identity of the beneficial interests in the voting shareholdings (that are less than the substantial shareholdings threshold) in a listed public company:

- (a) Lack of such knowledge may have an unsettling effect on the company and its operation as a result of uncertainty as to the identity and therefore intentions of significant voting shareholders.
- (b) A party with a total beneficial interest in the voting shares less than 10% of the issued voting shares may be in a position to covertly influence decision making or establish a basis from which to launch a takeover bid, without the company or other shareholders being aware of the situation.
- (c) Members of the company have a legitimate interest in the control of the company, because the policies of those with influence within the company can significantly affect the value of each share and each shareholding.
- (d) Disclosure may help identify possible instances of insider trading.
- (e) Disclosure may act to better inform the public market. As stated by the Company Law Advisory Committee (Eggleston Committee) in its Second Interim Report:

"In the case of companies whose shares are traded on stock exchanges, shareholders are entitled to know whether there are in existence substantial holders of shares which might enable a single individual or corporation or small group, to control the destinies of the

companies, and if such a situation does exist, to note who are the persons on whose exercise of voting power the future of the company may depend."

372. Principal amendments The principal amendments that are proposed are as follows:

- (a) the NCSC or 5% of the shareholders in a company be empowered to direct the company to exercise its powers under CA s. 261;
- (b) the company be required to issue notices under CA s. 261 within 7 days of receiving such a direction;
- (c) the information received by a company under CA s. 261 be entered on a register within 2 days of receipt and be available for public inspection;
- (d) the NCSC be empowered to exempt a person from lodging any or all of the information sought where it considers that there are special reasons;
- (e) *sanctions* for not complying with the notice issued by the company under CA s. 261 include sanctions similar to those available under s. 146 in relation to defaulting substantial shareholders;
- (f) the Supreme Court be empowered under s. 146 to order that the shares of, or interests in shares held by, a defaulting substantial shareholder be vested in the NCSC, and that the company as well

as the NCSC be able to make an application for an order. Amendments similar to those proposed to CA s. 146 are proposed to CASA ss. 45, 47 and 49; and

(g) a specific civil remedy be provided for breach of CA s. 261 and the substantial shareholding provisions.

373. The proposed amendments are considered in detail below.

374. Definitions Proposed CA s-sec. 261(1) contains certain definitions for the purposes of the provision. "Company" will have the same meaning as that contained in CA s. 134 in relation to the substantial shareholding provisions. The written notices that a company will be able to give to a holder of shares ("sub-section (2) notice") or to another person ("sub-section (3) notice") will require him to give the company a written statement setting out, amongst other things, particulars of any relevant interest he holds, particulars of other persons whom he knows hold a relevant interest and details of relevant instructions given to him in relation to the shares. "Relevant instructions" will mean directions or instructions in relation to the acquisition, disposal or exercise of voting rights, or some other matter in relation to shares.

375. Sub-section (2) notice A company will be able to give a notice to a holder of shares at any time (proposed CA para. 261(2)(a)), and, after receiving a written notice from the NCSC or a member or members of the company holding at least 5% of the voting shares (hereafter referred to as "5% of the shareholders") of the company, will be required to do so within 7 days (proposed CA para. 261(2)(b)).

376. Sub-section (3) notice If a company receives information following the issuing of a notice that another person has a relevant interest in any of the shares or that another person has given relevant instructions in relation to the shares, it will be able to issue a notice to that other person at any time. If such information is received by the company following a requirement from the NCSC or 5% of the shareholders of the company, it will be required to issue a notice to that person within 7 days (proposed CA s-sec. 261(3)), unless the NCSC or 5% of the shareholders notify the company otherwise (proposed CA s-sec. 261(4)).

377. The proposal that 5% of the shareholders of the company be empowered to require the company to give a notice is based on s. 76 of the UK Companies Act 1981 except that:

- (a) the threshold has been lowered from 10% to 5%;
- (b) the NCSC will also be able to require the company to issue a notice; and
- (c) the shareholders will not be required to "give reasonable grounds for the company to exercise these powers". (See, however, proposed CA s-sec. 261(19) and para. 382 below).

378. Offence and civil remedy provisions A company, and any of its officers who are in default, will be guilty of an offence for failure to comply with proposed CA s-secs 261(2) or (3) (proposed CA s-sec. 261(13)) and will, in addition, be liable to pay damages to any person who suffers loss or damage as a result of that failure (proposed CA s-sec. 261(16)).

379. NCSC certificate A person who receives a notice will be able to apply to the NCSC for a certificate (proposed CA s-sec. 261(5)) which the NCSC will be able to give if it is

satisfied that there are special reasons why the information either should not be provided or should be provided only in a particular form (proposed CA s-sec. 261(6) - it is thought that the type of information for which exemption may be sought could be family or personal matters).

380. Compliance with notice A person who receives a notice will be required to comply within 2 business days of receipt unless an application is made (under proposed CA s-sec. 261(5)) to the NCSC for a certificate (proposed CA s-sec. 261(7)). A person who applies to the NCSC for a certificate must notify the company of this, and will be required to comply with the notice as specified in the certificate issued by the NCSC (proposed CA s-sec. 261(8)).

381. Other offence and civil remedy provisions A person will be guilty of an offence for failing to comply with proposed CA s-sec. 261(7) or (8) (proposed CA s-sec. 261(14)) and he will be liable to pay damages to any person who suffers loss or damage by reason of that failure unless the failure to comply was unintentional (proposed CA s-sec. 261(17)).

382. Defence A person will not be guilty of an offence (under proposed CA s-sec. 261(14)) or liable to pay damages (under proposed CA s-sec. 261(17)) if it is proved that the information being sought was already in the possession of the company or the giving of the notice was frivolous or vexatious (proposed CA s-sec. 261(19)).

383. Company register A company will be required to keep a register containing amongst other things (unless the NCSC approves otherwise) the name of each holder of voting shares to whom a notice has been given and against each name the particulars of other persons who hold a relevant interest and persons who have given relevant instructions (proposed CA s-sec. 261(9)). This information must be entered within 2

business days of receipt (proposed CA s-sec. 261(12)). The register will be open for inspection to members of the company (without charge) and to the public (proposed CA s-sec. 261(10)) and copies may be requested (proposed CA s-sec. 261(11)). The company and any officer in default will be guilty of an offence if there is default in complying with these provisions (proposed CA s-sec. 261(15)) and will, in addition, be liable to pay damages to any person who suffers loss or damage as a result of that failure (proposed CA s-sec. 261(18)).

384. Transitional provisions Transitional provisions are contained in proposed CA s-secs 261(20), (21) and (22).

Powers of Supreme Court

385. A new provision, based on CA s. 146, will be included dealing with the powers of the Supreme Court to make orders where:

- (a) there has been a failure to comply with proposed CA s-secs 261(7) or (8) (see para. 380 above and also proposed CA s-secs 261A(9) and (10) which allow the Court to excuse failure to comply where the information sought was already on a company register, or a notice was given frivolously or vexatiously, or where the failure to comply was unintentional);
- (b) a company is unable to ascertain (under proposed CA s-secs 261(2) or (3)) the identity of persons who have a relevant interest in any of the shares or who have given relevant instructions in relation to the shares (proposed CA s. 261A).

386. An application for an order will be able to be made by the person initiating the notice given under CA s. 261, i.e. the company, the NCSC or 5% of the shareholders as the case may be (proposed CA s-sec. 261A(1)).

387. The Supreme Court will be able to make such orders as it thinks fit, including an order vesting the shares, or any interest in the shares, in the NCSC (proposed CA para. 261A(2)(e)). An order under CA s. 261A may include such ancillary or consequential provisions as the Court thinks just (proposed CA s-sec. 261A(5)).

388. Interim Orders The Supreme Court may, before considering an application for an order, grant an interim order (proposed CA s-sec. 261A(3)). The Court shall not require the NCSC or any other person to give any undertakings as to damages as a condition of granting an interim order (proposed CA s-sec. 261A(4)).

389. Disposal procedure The Supreme Court may, if it thinks fit, make an order directing the disposal of shares or of any interest in shares (proposed CA para. 261A(2)(d)). Such an order may provide that the disposal be made within such time and subject to such conditions as the Court thinks fit (proposed CA s-sec. 261A(6)). Where a share is not disposed of in accordance with an order of the Court, the Court may direct that it vest in the NCSC (proposed CA s-sec. 261A(7)).

390. Where a share vests in the NCSC by virtue of an order or direction of the Court, the NCSC will, subject to any directions of the Court, be able to get in, dispose of, or deal with, the share as it sees fit (proposed CA s-sec. 261A(15)).

391. Other provisions relating to orders The Supreme Court shall not make an order under CA s. 261A if satisfied that the order would unfairly prejudice any person (proposed CA s-sec. 261A(8)). Before making an order, the Court may require notice of the application to be given to certain persons or to be published (proposed CA s-sec 261A(11)). The Court may rescind, vary, discharge or suspend an order (proposed CA s-sec. 261A(12)).

392. Penalties Penalties for contravention or failure to comply with an order under CA s. 261A are set out in proposed CA s-secs 261A(13) and (14).

Cl. 77 : Exemption of certain companies

393. Background A public company that has more than 500 members, and keeps its principal share register within 25 kilometres of the office of the Corporate Affairs Commission for the relevant jurisdiction, and provides reasonable access to its share register, is not 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 the provision applies (CA s.265).

394. Proposed amendment This exemption will be extended so that a company limited by guarantee, being a company the memorandum or articles of which prohibit the payment of any dividend to its members, will be exempted from having to provide a list of members with their annual return. The secretary will not have to file a certificate that the company is one to which the provision applies (proposed s-sec. 71(1A) - Bill cl. 77).

395. The purpose of this amendment is to remove the requirement for certain incorporated bodies (e.g. large incorporated clubs, that are not within 25 kilometres of the Corporate Affairs Office of the home jurisdiction) to supply a list of members with their annual return.

Cl. 78 : Interpretation

396. Background CA s. 266 contains special definition and interpretation provisions for the purposes of CA Part VI ("Accounts and Audit").

397. A number of submissions received during the exposure periods of the Companies Bill suggested that a definition of the term "current assets" should be included.

398. A definition of "current assets" (and related definitions) is included in the NCSC "green paper" in relation to the revision of Schedule 7 to the Companies Regulations. It is proposed that the interpretation of current assets in the CA (viz CA s-sec. 269(7)) should rely on the definition that is ultimately adopted for the purposes of Schedule 7 to the Companies Regulations.

Proposed amendments

399. "Current liability" The definition of "current liability" will be omitted from CA s. 266 because that term is not used in the CA (Bill para. 78(a)). For the purposes of balance sheet classification that term will be defined in Schedule 7 to the Regulations.

400. The definition of "non current liability" will similarly be omitted from CA s. 266 (Bill para. 78(b)).

401. "Board" For the purposes of CA Part VI ("Accounts and Audit"), "Board" will be defined as meaning the body, known as the Accounting Standards Review Board, established by the Ministerial Council (Bill para. 78(a)).

402. It is proposed that the Accounting Standards Review Board (hereafter referred to as 'ASRB') will consider existing and proposed accounting standards and approve such standards as it sees fit, provided that the Ministerial Council for Companies and Securities may disallow such approval within 60 days. The accounting standards approved by the ASRB will be given legislative force by requiring in the CA that such standards be followed in preparing the accounts or group accounts required under the CA (see paras 437 to 442 on Bill cl. 80).

403. "Approved accounting standard" The term, "approved accounting standard" will be defined in CA s. 266 as meaning an accounting standard that has been approved by the ASRB, other than an accounting standard in relation to which a copy of a notice of disallowance (by the Ministerial Council) has been published in the Gazette pursuant to proposed para. 266B(3)(b)(Bill para. 78(a))(see paras 409 to 414 on Bill cl. 79 and proposed s. 266B).

404. Applicability of approved accounting standards to accounts or group accounts An approved accounting standard will be taken to be applicable to the accounts or group accounts of a company if, at the time when the accounts or group accounts are made out, the approved accounting standard:

- (a) applies in relation to the financial year of the company or holding company; and

(b) is relevant to those accounts or group accounts.

(Proposed CA s-sec. 266(2) - Bill para. 78(c)).

405. Whether an approved accounting standard applies in relation to a certain financial year of the company or holding company is dealt with in proposed s. 266C ("Application of approved accounting standards") (See paras 415 to 421 on Bill cl. 79).

Cl. 79 : Insertion of new sections -

Proposed s.266A : Dormant corporations

406. This is a new provision which defines dormant corporations for the purposes of the exemption which will be provided by proposed CA s-sec. 270(9) to directors of such a corporation from making a report under CA s-secs 270(1) or (2).

407. In order that a corporation may be regarded as dormant it is not sufficient that it has not undertaken a transaction which it would be required to enter in the accounting records; it also must not have taken any action which would be likely, in the ordinary course of business, to lead to such a transaction.

408. The provision is mainly intended to apply to "shelf-companies" which have not commenced business and to corporations referred to in CA s. 459 which are not carrying on business or are not in operation. A similar provision has been enacted in the 1981 UK Companies Act.

409. Proposed s. 266B : approved accounting standards Proposed s. 266B sets out the procedures by which:

- (i) the ASRB may approve an accounting standard;
- (ii) the ASRB may revoke an approved accounting standard; and
- (iii) the Ministerial Council may disallow an approved accounting standard, or a revocation by the ASRB of an approved accounting standard.

410. For the purposes of CA Part VI, the ASRB may, by notice published in the Gazette, approve an accounting standard (proposed s-sec. 226B(1)).

411. The ASRB may, similarly, by notice published in the Gazette, revoke an approved accounting standard (proposed s-sec. 266B(4)).

412. The notice of approval published in the Gazette will be required to specify a place at which copies of the approved accounting standard can be purchased. However, failure to do so will not affect the validity of the notice (proposed s-sec. 266B(3)).

413. Within 60 days after an accounting standard has been approved, the Ministerial Council may disallow the accounting standard. In such an event, the Ministerial Council will be required to:

- (i) give to the ASRB, within 2 business days, notice that the accounting standard has been disallowed; and
- (ii) arrange for a copy of the notice of disallowance to be published in the Gazette as soon as practicable after the disallowance.

(proposed s-sec. 266B(3)).

414. The Ministerial Council may similarly, disallow a revocation by the ASRB of an approved accounting standard (proposed s-sec. 2668(5)).

Proposed s. 266C : Application of approved accounting standards

415. If an accounting standard has been approved by the ASRB, the financial year in relation to which the approved accounting standard shall apply, will be determined in accordance with proposed s. 266C. The details of this provision are set out below.

416. Where an approved accounting standard does not expressly provide otherwise, the approved accounting standard will not apply until the commencement of the first financial year commencing after the date of approval of the accounting standard. The approved accounting standard will then continue to apply in relation to subsequent financial years of the company (proposed para. 266C(1)(a)). The effect of this application provision will be that a company will not have to change its accounting system or methods during a financial year to take account of such an accounting standard approved by the ASRB during that financial year.

417. However, where an approved accounting standard is expressed to apply in relation to financial years that end after:

- (i) the date of approval of the accounting standard; or
- (ii) the expiration of a specified period after the date of approval of the accounting standard,

the approved accounting standard will apply in relation to the first financial year of the company that ends after the date of approval, or after the expiration of the specified period. The approved accounting standard will then continue to apply in relation to subsequent financial years of the company

(proposed para. 266C(1)(b)). The effect of this application provision will be that such an approved accounting standard may commence to apply in relation to the current financial year of a company as at the date expressed in the approved accounting standard (i.e. the date of approval, or the expiration of the specified period after approval).

418. Where an approved accounting standard is expressed to replace another approved accounting standard, the earlier approved accounting standard will continue to apply until the first financial year when the replacement approved accounting standard commences to apply (proposed s-sec. 266C(2)).

419. Where an approved accounting standard, which is expressed to replace another approved accounting standard, is disallowed by the Ministerial Council (and therefore ceases to be an approved accounting standard), the earlier approved accounting standard will continue to apply as if the replacement accounting standard had not been approved. Nevertheless, this provision will not affect the operation of the replacement accounting standard for the period during which it was an approved accounting standard (proposed s-sec. 266C(3)).

420. Where an approved accounting standard is revoked by the ASRB, the financial year in relation to which the approved accounting standard shall cease to apply, will be determined in accordance with proposed s-sec. 266C(4).

421. Where the revocation by the ASRB of an approved accounting standard is disallowed by the Ministerial Council, the approved accounting standard will continue to apply as if it had not been revoked. However, this provision will not alter the effect of the revocation during the period before the revocation was disallowed (proposed s-sec. 266C(5)).

Proposed s. 266D : Board to have regard to possibility of disallowance

422. In considering whether to approve an accounting standard which is expressed to apply in relation to financial years of companies which end after the date of approval (or after the expiration of a period after approval), the ASRB will be required to have regard to:

- (a) the fact that the Ministerial Council may disallow an approved accounting standard within 60 days of its approval; and
- (b) if the accounting standard is expressed to replace another accounting standard, the fact that the Ministerial Council may disallow the replacement accounting standard and the effect of such a disallowance (see para. 419 on proposed s-sec. 266C(3)).

(proposed s-sec. 266D(1)).

423. Similarly, in considering whether the revocation of an approved accounting standard should be expressed to have effect in relation to financial years of companies that end after the day on which the approved accounting standard is to be revoked (or after the expiration of a period after the date of revocation), the ASRB will be required to have regard to:

- (a) the fact that the Ministerial Council may disallow a revocation within 60 days of the revocation; and

(b) the effect on the operation of the approved accounting standard if the revocation is disallowed by the Ministerial Council (see para. 421 on proposed s-sec. 266C(5)).

(proposed s-sec. 266D(2)).

Proposed s. 266E : Interpretation &c., of accounting standards

424. An expression used in an approved accounting standard will have the same meaning as the expression has in CA Part VI ("Accounts and Audit") unless the contrary intention appears in the accounting standard (proposed s-sec. 266E(1)).

425. In proceedings under the CA, a document (or a copy of a document) which purports to be issued by or on behalf of the ASRB and which purports to set out an approved accounting standard, will be prima facie evidence that the accounting standard has been approved by the ASRB (proposed s-sec. 266E(2)).

Proposed s. 266F : Power of Board to require copy of accounts or group accounts

426. Pursuant to proposed CA s-sec. 285(11), the auditor of a company or holding company will be required to send a copy of his report to the ASRB where the accounts or group accounts of the company or holding company have not been drawn up in accordance with one or more of the approved accounting standards (see paras 460 to 462 on Bill cl. 85).

427. Where, pursuant to proposed s-sec. 285(11), an auditor has sent to the ASRB a copy of his report, the ASRB will be entitled to require, by notice in writing, the company or holding company to supply the ASRB with a copy of its accounts or group accounts (proposed s-sec. 266F(1)).

428. Any failure by the company or holding company (or by any officers of the company or holding company) to comply with a request made under proposed s-sec. 266F(1) will constitute an offence (proposed s-sec. 266F(2)).

C1. 80 : Profit and loss account, balance-sheet and group accounts

429. Background Company directors are required to cause a profit and loss account, balance sheet and group accounts to be made out for the last financial year (CA s-secs 269(1), (2) and (3)).

430. Directors are 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 (CA para 269(9)(a));
- (b) the balance sheet is drawn up so as to give a true and fair view of the state of affairs of the company as at the end of the financial year (CA para 269(9)(b));
- (c) there are reasonable grounds to believe that the company will be able to pay its debts as and when they fall due (CA para 269(9)(c)).

431. A similar statement about the profit and loss account and the balance sheet is required of directors of a holding company (CA s-sec 269(10)).

432. Where circumstances have arisen or information has become available since the end of the financial year, being circumstances or information that would affect the determination of an amount or particular in the accounts (or group accounts) if those accounts had been made out when the statement is made, either the statement or those accounts could be misleading unless the circumstances are or the information is allowed for.

433. Proposed amendment In forming their opinion in relation to the matters now required by CA paras 269(9)(a) and (b) and CA s-sec. 269(10), directors will be required to have regard to circumstances that have arisen and information that has become available since the end of the financial year to which the accounts (or group accounts) relate, being circumstances or information that would if those accounts had been made out when the statement is made, have affected the determination of an amount or particulars in those accounts. Where they have not already made adjustments in those accounts to reflect the circumstances or information, they will be required to include in their statement such information and explanations as will prevent those accounts from being misleading (proposed s-secs 269(11) and (12) - Bill para. 80(b)).

434. The aim of the new requirements is to ensure that all information that is relevant to the preparation of the accounts (or group accounts) is either incorporated in those accounts or, where not incorporated, the directors' statement is qualified so as to prevent those accounts from being misleading. In practice where the directors have complied with Statement of Accounting Standards AAS8, their statement would only be required to include the additional information and explanations in relation to the period from when the accounts (or group accounts) were finalised (i.e. not able to be adjusted) and the date of the statement.

435. Proposed amendment The directors' statement will be required to be made out not more than 56 days before the date of the annual general meeting or the date by which that meeting is required by section 240 to be held (proposed s-secs 269(9) and (10) - Bill para. 80(b)). The purpose of this time limit is to ensure that directors have regard to recent circumstances and information that would affect the accounts.

436. Proposed amendment When the company (or, in the case of a group, the group) has been dormant from the beginning of the last financial year to within 14 days before the annual general meeting, or the date by which that meeting is required to be held, the directors will be exempted by proposed s-sec. 270(9) from making out the directors' report required by CA s-sec. 270(1) or (2). In such circumstances the directors will be required in their statement attached to the accounts to state that the company (or group) has been dormant (proposed paras 269(9)(d) and 269(10)(d) - Bill para. 80(b)). In the absence of such a statement, a person referring to the accounts (or group accounts) would not be aware of the reason for not including the directors' report required by CA s. 270.

437. Proposed amendment It is proposed that accounting standards approved by the ASRB will be given legislative force by requiring in the CA that such standards be followed in preparing the accounts or group accounts required under the CA.

438. Accordingly, the directors of a company will be required to ensure that the accounts (or where the company is a holding company, the group accounts) are prepared in accordance with applicable approved accounting standards (proposed s-sec. 269(8A) - Bill para. 80(b)). (See para. 404 of ex memo on Bill para. 78(c) as to when an approved accounting standard will be taken to be applicable to the accounts (or group accounts) of a company).

439. However, the directors of a company (or holding company) will not be required to ensure that the accounts (or groups accounts) are prepared in accordance with a particular applicable approved accounting standard, where non compliance with that accounting standard would result in the accounts (or group accounts) not giving a true and fair view (proposed s-sec. 269(8B) - Bill para. 80(b)).

440. The directors of a company will be required to state in the directors' statement made pursuant to proposed s-sec. 269(9), whether the accounts of the company have been prepared in accordance with applicable approved accounting standards (proposed para. 269(9)(b) - Bill para. 80(b)).

441. Where the accounts have not been prepared in accordance with a particular applicable accounting standard, the directors will be required to include in their directors' statement:

- (i) the reasons for their opinion that compliance with that accounting standard would have resulted in the accounts not giving a true and fair view; and
- (ii) particulars of the quantified financial effect on the accounts of non compliance with that accounting standard.

(proposed para. 269(9)(c) - Bill para. 80 (b)) .

442. The directors of a holding company will also be required to include this information in their directors' statement on the group accounts (proposed paras 269(10)(b) and (c) - Bill para. 80(b)).

443. Proposed amendment Proposed s. 269, as amended and in force at any time after the commencement of Bill cl. 80, will apply in relation to the financial year of a company or holding company in accordance with proposed s-sec. 269(13) (proposed s-sec. 269(13) - Bill para. 80(b)).

Cl. 81 : Directors' reports

444. Background Directors are required to prepare a report with respect to the profit or loss of the company and the group in the last financial year and the state of the affairs of the company and the group as at the end of that financial year (CA s. 270).

445. Submissions received during the exposure periods of the Companies Bill were critical of the existing requirements and suggested that -

- (a) some of them do not provide useful information; and
- (b) others would be more appropriate in the context of the requirements in relation to accounts and group accounts (Schedule 7 to the Companies Regulations).

446. In practice, directors' reports in Australia tend to fall into two main categories -

- (a) reports that simply give a list of the prescribed statements and information - the form of these reports is generally regarded as stereotype with the content not being attuned closely to events and circumstances that were,

or are likely to be, important in the development of the business since the beginning of the last financial year;

- (b) two tiered reports that contain a commentary on the operations, results and state of affairs, given voluntarily and, as an appendage, a "Statutory Report" as in (a) - many of the commentaries in these reports are regarded as being of a high standard and serve as examples of the needs of users, as perceived by the companies themselves.

447. The present proposals have taken into consideration the above comments and are aimed at providing information which is useful (especially in terms of relevance and reliability) for economic decision-making by persons who lack the individual authority to prescribe the information they need. They reflect the voluntary reporting practices of many of the larger Australian Companies (without imposing them on all companies) as well as developments in the reporting requirements in several other countries (e.g. All EEC countries and the U.S.A.).

448. Proposed amendment The existing requirements in relation to directors' reports will be replaced by three basic sets of requirements -

- (a) in relation to all companies except dormant corporations - for a report stating the names of directors, the principal activities, the net amount of profit or loss and the amount of dividends that directors recommend should be paid (proposed para. 270(1)(a) - Bill para. 81 (a)) ;

- (b) in relation to all companies except dormant corporations, exempt proprietary companies and wholly owned subsidiaries - for a report containing a review of the operations and results of those operations and giving particulars of any significant change in the state of affairs of the company during the financial year; giving particulars of matters or circumstances that have arisen since the end of that year; and referring to likely developments in the operations and expected results of those operations (proposed paras 270(1)(b),(c),(d) and (e) - Bill para. 81(a)); and

- (c) in relation to public companies except those that are dormant or wholly owned subsidiaries - for a report stating particulars of directors' qualifications, shareholdings and interests in contracts with the company (proposed s-sec. 270(3A) - Bill para. 81(a)).

449. Similar requirements to those referred to above will apply to directors of holding companies, and will be set out in proposed s-sec. 270(2) - Bill para. 81(a)).

450. The directors' report will be required to be made out not more than 56 days before the date of the annual general meeting or the date by which that meeting is required by CA s. 240 to be held. The purpose of this time limit is to ensure that the directors' report is reasonably up to date (proposed s-secs 270(1) and (2) - Bill para. 81(a)).

451. It has been proposed that some of the existing requirements in CA s. 270 be transferred to Schedule 7 to the Companies Regulations because the information would be more appropriate if given in the accounts (or group accounts) (see NCSC "green paper" in relation to the revision of Schedule 7).

Cl. 82 : Directors of holding company to obtain all necessary information

452. Background Directors of a holding company are prohibited by CA s. 272 from causing to be made out the group accounts referred to in CA s-sec 269(3) or to make out the report referred to in CA s-sec. 270(2) unless they have received from each subsidiary the statements required under CA s. 269 and the directors' report in accordance with CA s. 270.

453. Proposed amendment CA s. 272 will be amended simply to require directors to "have available to them sufficient information" before they cause to be made out the group accounts, their report and their statement. These changes are necessary because directors of some subsidiaries may be exempted (in whole or in part) by the provisions which will be set out in proposed s-secs 270(9), (10), (11) and (12) from making out separate directors' reports. The proposed amendments will also provide greater flexibility in obtaining information in relation to the group of companies by allowing for centralised data storage and modern forms of communication that might otherwise cut across the previous requirements of CA s. 272.

Cl. 83 : Failure to comply with this Division

454. Background If a director of a company fails to take all reasonable steps to comply with any of the provisions (other than CA s. 267) of CA Part IV, Division 2 ("Accounts"), he is guilty of an offence (CA s-sec. 276(1)).

455. Proposed amendment The directors of a company (or holding company) will be required to ensure that the accounts (or group accounts) of a company are prepared in accordance with applicable approved accounting standards, unless compliance with such accounting standards would result in the accounts (or group accounts) not giving a true and fair view (see paras 437 to 439 of ex memo on proposed s-secs 269(8A) and (8B)).

456. CA s. 276 will be amended to provide that the onus of proving that the accounts (or group accounts) would not, if made out in accordance with an applicable approved accounting standard, give a true and fair view, lies on the director of the company (or holding company) (proposed s-sec. 276(2A) - Bill para. 83(b)).

Cl. 84 : Removal and resignation of auditors

457. Background An auditor of a company may 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 (CA s. 282).

458. Proposed amendment The company will be required to lodge with the NCSC a notice in the prescribed form of the auditor's resignation or removal from office within 14 days of the auditor's resignation or removal from office. If there is a trustee for debenture holders, the company will also be required to give the trustee a copy of the notice lodged with the NCSC (Bill cl. 84).

459. The purpose of this amendment is to remove the contradictory requirements of CA s-secs 282(5) and 282(13).

Cl. 85 : Powers and duties of auditors as to reports
on accounts

460. Background An auditor of a company is required to report to the members of the company on the accounts, the accounting records and other records relating to the accounts. Where the company is a holding company, the auditor is also required to report to the members on the group accounts (CA s-sec. 285(1)). The contents of the auditor's report required under CA s-sec. 285(1) are set out in CA s-sec. 285(3).

461. Proposed amendment CA s-sec. 285(3) will be amended to require the auditor to include the following information in his report:

(a) whether the accounts or group accounts have been prepared in accordance with applicable approved accounting standards (proposed sub-para. 285 (3) (a) (iii)) ;

(b) where the accounts or group accounts have not been prepared in accordance with a particular applicable approved accounting standard -

(i) whether, in his opinion, compliance with that standard would have resulted in the accounts or group accounts giving a true and fair view;

(ii) if, in his opinion, the accounts or group accounts would not have given a true and fair view if prepared in accordance with that standard - his reasons for such an opinion;

- (iii) if the directors have included in their statement particulars of the quantified financial effect on the accounts or group accounts of non compliance with the standard - his opinion concerning the directors' quantification; and
- (iv) where the auditor is of the opinion that the accounts or group accounts would have given a true and fair view if prepared in accordance with the standard, and where the directors have not included in their statement particulars of the quantified financial effect of non compliance - particulars of the quantified financial effect on the accounts or group accounts of non compliance with the standard.

(proposed para. 285(3)(aa) - Bill para. 85(c)).

462. Proposed amendment The auditor of a company or holding company will be required to send a copy of his report to the ASRB where he is not satisfied that the accounts or group accounts have been prepared in accordance with a particular applicable approved accounting standard, or where he is of the opinion that the accounts or group accounts have not been prepared in accordance with a particular applicable approved accounting standard (proposed s-sec. 285(11) - Bill para. 85(e)). (See also paras 426 to 428 of ex memo on proposed s. 266F).

Cl. 86 : Examination of officers

463. Background An officer of a corporation, the affairs of which are being investigated under CA Part VII is guilty of an offence if, without reasonable excuse, he refuses or fails to comply with a requirement of an inspector under CA s.295 (CA s-sec. 296(2)).

464. Under CA s-sec. 295(1) an inspector may, by notice, 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.

465. An inspector may also require any person to produce books in his custody or control, where the inspector has reasonable grounds to believe that the books may be relevant to his investigation (CA s-sec. 295(3)).

466. At present, however, a person (not being an officer of the corporation) who fails to comply with a requirement made by an inspector under CA s-sec. 295(3) is not guilty of an offence under CA s-sec. 296(2).

467. Proposed amendment CA s-sec 296(2) will be amended to provide that a person who, without reasonable excuse, refuses or fails to comply .with a requirement of an inspector under CA s. 295 shall be guilty of an offence (Bill cl. 86)

Cl. 87 : Power of Commission to make certain orders

468. Background Where it appears that facts relevant to an investigation cannot be ascertained because a specified person has failed to comply with an inspector's requirements, the NCSC may, by instrument in writing published in the Gazette, make certain orders (CA s-sec. 311(1)).

469. The NCSC may vary or revoke an order made under CA s-sec. 311(1) (see s. 22 of the C & S (1 & MP) A). Although the NCSC is required to publish in the Gazette any order made under CA s-sec. 311(1), there is no similar requirement to publish in the Gazette any instrument varying or revoking such an order.

470. Proposed amendment In order to resolve this inconsistency, the NCSC, when varying or revoking an order made under CA s-sec. 311(1), will be required to publish the instrument of variation or revocation in the Gazette (proposed s-sec. 311(1A) - Bill cl. 87).

Cl. 88 : Application for winding up

471. Background Where a report of a special investigation has been made by an inspector under CA Part VII, the NCSC may apply to the Supreme Court for the winding up of the corporation if that corporation is a body which could be wound up within the jurisdiction (ie a local company, or a body to which CA Part XII, Division 6 applies) (CA s-sec. 312(1)).

472. However, if a report is made under CA Part VII in respect of a corporation that is a recognized company, the NCSC is not empowered under the CA or under the legislation of any participating jurisdiction to make such an application for the winding up of that recognized company.

473. Proposed amendment CA s.312 will be amended to provide that the NCSC may also apply to the Court for the winding up of a corporation where a report of an investigation of that corporation has been made under the corresponding provisions of the law of a participating jurisdiction (Bill cl. 88).

Cl. 89 : Remedy in cases of oppression or injustice

474. Background Part IX of the CA sets out the remedy for members who are seeking relief from oppressive conduct of the controllers of a company. 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), may apply to the Supreme Court for an order under the section. On receiving such an application, the Court may make an order that the company be wound up, or make any other order it thinks appropriate in the circumstances (CA s.320).

475. The Jenkins Committee proposed that a number of limitations which had been imposed on the oppression remedy by the restrictive interpretation given to it by the Courts and which substantially limited its effectiveness should be removed. These recommendations have previously been adopted in the UKCA and NZCA.

476. At the present time, the petitioner when seeking a remedy, in a situation where the directors are not the oppressive party, must satisfy the Court that the affairs of the company are being conducted in a manner oppressive i.e. burdensome, harsh and wrongful, to some part of the members (CA s. 320). This has been held to necessitate a course of conduct continuing up to the time of the petition involving an invasion of legal rights, displaying lack of probity on the part of those conducting the company's affairs and affecting

the petitioner in his capacity as a member. The remedy's effectiveness has been limited by the requirement that all of these elements must be in effect in operation at the time of the petition.

477. It is proposed that this statutory remedy for members of a company who complain that the affairs of the company are being conducted to their detriment will be amended in many respects along the lines recommended by the Jenkins Committee (para. 212).

478. Proposed Amendment This provision will now provide that an application can be made to the Supreme Court for an order by a member of the company or the NCSC. The grounds for the application by a member will be:

- (i) that affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members, or in a manner that is contrary to the interests of members as a whole; or
- (ii) that an act or omission, or a proposed act or omission, by or on behalf of the company, or a resolution, or a proposed resolution, of a class of members, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was or would be contrary to the interests of the members as a whole.

479. The NCSC will be able to apply to the Court for an order under CA s. 320 where:

- (a) the NCSC has received a report by an inspector under CA Part VII or under the corresponding provisions of the law of a participating jurisdiction; or
- (b) the NCSC has made a report to the 'relevant authority' under CA Part VII or under the corresponding provisions of the law of a participating jurisdiction.

480. If the Supreme Court is of the opinion that the grounds for the application in (i) or (ii) have been established, then the Court can make such orders as it thinks fit, with the proviso however, that the Court cannot make an order for the winding up of a company if it is of the opinion that the winding up of the company would unfairly prejudice the oppressed member or members. Note that 'affairs of a corporation' is defined in CA s. 6.

481. Express reference will be given to the following types of orders in the provision. These orders are:

- (i) an order directing the company to institute, prosecute, defend or discontinue specified proceedings, or authorising a member or members of the company to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company. This adopts a Jenkins Committee recommendation (para 212 (e)) that the provision should be extended to give a court an express power, where it thinks fit, to authorise the bringing of proceedings in the name of the company against a third party on such terms as a

Court may direct. Similar reforms have been enacted in other jurisdictions eg. Canada and Ghana

(ii) an order appointing a receiver or a receiver and manager of property of the company. This amendment will remove any doubt that the court could make an order appointing the receiver see Re Hannetta Ltd 216 L.T. JO 639 Pennington's Company Law 4th ed. p606 footnote 80.

(iii) an order restraining a person from engaging in specified conduct or from doing a specified act or thing. Both the Jenkins Committee Report (para 208) and the Macarthur Committee Report (para 367) recommended a form of order which would enable the court to restrain the commission or continuance of any act which would suffice to support a petition under the section. The Macarthur Committee added that such a provision would prove useful in restraining an anticipated wrongful act.

(iv) an order requiring a person to do a specified act or thing.

482. The principal amendments to CA s. 320 will be:

(a) Extension of remedy The remedy will be extended

to allow a petition to be made where there has been conduct which is oppressive or unfairly prejudicial to, or unfairly discriminatory against one or more of the members of the

company or where there is conduct which is not in the interests of the members of the company as a whole, by some party other than the directors. The Jenkins Committee (para 212(b)) recommended that it should be clear that the provision extends to cases where the affairs of the company are being conducted in a manner unfairly prejudicial to the interests of some part of the members and not merely in an "oppressive" manner. Gower at page 668 states that the use of the words "unfairly prejudiced" are intended to make it clear that it is not necessary to show "actual illegality or invasion of legal rights". The new terms are objective in nature and would cover cases where the company is run, even if in the best of good faith, in a way which is clearly unfair in its consequences to the complaining shareholder.

- (b) Application The provisions will apply irrespective of whether the conduct complained of is that of the directors, of the controlling shareholders in general, of the de facto controllers of the company or, as in Scottish Co-operative Wholesale Society Ltd v Meyer [1959] A.C. 324 of an associated company. In Re Harmer Ltd [1959] 1 W.L.R. 62, it was held that anyone taking part in the conduct of a company's affairs, whether de facto or de jure may be guilty of oppression.
- (c) Detriment The provisions will apply irrespective of whether the member or members can show detriment to his or their financial interests as a shareholder. It shall be sufficient to show

detriment or anticipated detriment to the proper interests, whether financial or otherwise of a member or members, whether in their capacity as a member, director, servant or any other capacity under the company. The aim of this amendment is to overcome the restrictive interpretation placed upon the oppression remedy by the courts that the conduct complained of has to affect members qua members and not qua directors or creditors. As pointed out in the Final Report of the NZ Special Committee to review the Companies Act, the most common form of oppression in the partnership company is directed at the interest of the members as directors or employees. It is expected that by enabling the provision to apply to members not only in their capacity as members but also in their capacity as directors or employees or any other capacity with the company, this will provide a remedy to minority members who have been ousted from office as directors, or dismissed from paid employment with the company or denied other rights by the majority.

- (d) Conduct The provision will apply to conduct constituted by a resolution (or proposed resolution) of the members of the company or of a class of members of the company which unfairly discriminates against or is unfairly prejudicial to a person or persons who are relevant persons in relation to the company. This provision was proposed in para 136(2)(b) of the NCB as a result of the adoption of a recommendation of the General Revision Bill. This amendment will protect the rights of minorities from oppressive conduct of majority interests.

(e) The provision will apply:

(i) both to actual and to anticipated or proposed conduct. The Jenkins Committee (para 212(d)) recommended that the provision should be amended to enable the Court to restrain the commission or continuance of any act which would suffice to support a petition under the section. It is thought that it is desirable that shareholders be able to prevent conduct which damages their interests, as well as seek remedies after the event;

(ii) to conduct constituted by an omission. Commentators have expressed the view that a reference to an 'omission', actual or purported might be helpful where the board of directors have consistently refused to declare dividends where ample distributable profits have been made. This, it is hoped, would meet the situation of preference shareholders, specifically the non-cumulative ones as the Jenkins Committee Report (para 205) indicates.

(f) Isolated Acts Remedies will be allowed in respect of an isolated act as well as a course of conduct. This implements a recommendation of the Jenkins Committee and is consistent with UKCA, NZCA and NCB. It would appear that the words of CA sub para 320(1) (a) (i) , "that the affairs of the company are being conducted" etc.

do presuppose a continuing course of action and do not seem to cover isolated acts of oppression. However, as a number of commentators have pointed out, an isolated act of sufficient gravity may be no less harmful than a course of conduct.

- (g) Rights of application The right to make an application will be extended to the legal personal representative of a member and to a person to whom the rights of shares of a member have been transmitted by will or *by* operation of law. This is the adoption of a Jenkins Committee recommendation (para 212(f)). The Jenkins Committee (para 205) exposed the abuse which this amendment would cover, namely, where the directors, having power to do so under the articles, refuse to register personal representatives in respect of shares devolving upon them in that capacity, and *by* this expedient (coupled with the absorption of profits in payment of director's remuneration) force the personal representatives to sell their shares to the directors at an inadequate price eg. Re Smith and Fawcett Ltd. [1942] Ch 304.

Cl. 90 : Interpretation

483. Background In Part X of the CA, unless the contrary intention appears, a reference to a receiver includes a reference to a receiver and manager of property of a corporation (CA s. 321).

484. Proposed amendment S. 321 of the CA will be repealed and a new s. 321 will be substituted (Bill cl. 90).

485. The present interpretation of "receiver" will be included in proposed para. 321(1)(a). In addition, proposed s. 321 will include interpretations of the following phrases:

- (i) "property of a company" (proposed para. 321 (1) (b)) ;
- (ii) "property of a registered foreign company" (proposed para 321(1)(c));
- (iii) "property of a corporation" (proposed para 321(1)(d));
- (iv) "Australia" (proposed s-sec. 321(2)); and
- (v) "officer" (proposed s-sec. 321(2)).

These definitions will apply unless the contrary intention appears. One example of a contrary intention is to be found in the proposed amendments to CA s.327 (see para. 542 of this ex.memo on Bill cl. 97).

486. The additional definitions in proposed s-sec. 321(1) have been included as part of the extension of the jurisdictional reach of many of the provisions in CA Part X. Receivership provisions currently are directed at a receiver of property of a "company" (i.e. a company incorporated in the A.C.T. for the purposes of the CA). Accordingly, many of the provisions do not touch a receiver of property of a foreign company or a recognised company.

487. Not all of the provisions will be extended to cover receivers of property of all types of bodies corporate. For example, provisions imposing obligations on receivers to lodge documents with the NCSC, such as CA s. 328, will only be extended to receivers of property of registered foreign

companies. It will not be extended to receivers of property of recognised companies as this would involve a receiver being required to lodge identical documents with delegates of the NCSC in more than one State or Territory, having regard to the existence of identical provisions in the laws of each State.

488. On the other hand, provisions conferring powers or imposing duties will be extended to receivers of property of all "corporations". However, in this situation, it will be necessary to ensure that there is a sufficient nexus between a particular corporation in respect of which a receiver has been appointed and the law under which duties are imposed. This function will be achieved by the definitions in proposed new s. 321. For example, the statutory liabilities presently imposed on a receiver of property of a company incorporated in the A.C.T. (s. 324) will now also be imposed on a receiver of property of a company incorporated in, say, N.S.W. but only if he has been appointed a receiver in respect of property within the A.C.T. of that N.S.W. company (Bill cis. 90 and 92; proposed s-para. 321(d)(iii) and proposed amendments to CA s. 324).

Cl. 91 : Disqualification for appointment as receiver

489. Background The following persons are prohibited from being appointed or acting as receiver of the property or part of the property of a company:

- (a) a mortgagee of property of the company;
- (b) an auditor or officer of the company;
- (c) an officer of any corporation that is a mortgagee of property of the company;

(d) a person who is not a registered liquidator.

(CA s-sec. 323(1)).

490. Proposed amendment The prohibition on acting as a receiver will be extended to acting as a receiver of property of a corporation (Bill cl. 91, proposed s-sec. 323(1A)). However, the prohibition on being appointed as a receiver will continue to be limited to being appointed as a receiver of property of a company (CA s-sec. 323(1)), there being no power to enforce Australian legislation which purports to regulate appointments made overseas.

491. A number of consequential changes will be made to other sub-sections (Bill cl. 91; s-secs 323(2) - (4) and proposed s-sec. 323(4A)). The references throughout this and other provisions in the CA to "receiver of the property or part of the property of ..." will be replaced simply by references to "receiver of property of" consistent with s. 321 (proposed para. 321(1)(a)). This is a drafting change not designed to affect the substance of the provisions (cf ICAC CA's which referred to "receiver of the property of", and arguably did not cover a receiver appointed in respect of only part of the property).

492. Similar drafting changes will also be effected by the following clauses in the Bill:

- (i) Clause 94 (see para 524 of this ex memo);
- (ii) Clause 96 (see para 536 of this ex memo);
- (iii) Clause 97 (see para 541 of this ex memo);
- (iv) Clause 98 (see para 546 of this ex memo);

(v) Clause 99 (see para 553 of this ex memo);

(vi) Clause 101 (see para 561 of this ex
memo);

(vii) Clause 103 (see para 571 of this ex

memo). Cl. 92 : Liability of receiver

493. Background A receiver who assumes control of any property of a company in order to enforce any charge, is liable for the debts that he incurs in the course of the receivership. This liability does not, however, prejudice his rights against the company or any other person (CA s-sec 324(1)). A person who assumes control of any property of a company, may apply to the Supreme Court for relief where he has incurred civil liability which he would not have incurred had he been properly appointed as receiver of that property (CA s-sec 324(3)).

494. Proposed amendments CA s-sec. 324(4), which entitles a receiver appointed under the powers contained in an instrument to apply to the Supreme Court for directions will be omitted (Bill para. 92(c)). However, an equivalent provision will be relocated as proposed s.324F (see paras 519 to 521 of this ex memo on Bill cl. 93).

495. The operation of s. 324 of the CA will also be extended to the receiver (or any person assuming control) of property of a corporation (Bill cl. 92). (See paras 486 to 488 of ex memo on Bill cl. 90 and the proposed interpretation of "property of a corporation".)

Cl. 93 : Powers of receiver; Duties of receiver with respect to bank accounts and accounting records; Reports by receiver; Prosecution of delinquent officers and members; Supervision of receivers; Receiver may apply to Court

496. Background The CA does not purport to provide a code for determining the powers and duties of receivers or the manner in which the exercise of their responsibilities is to be supervised. However, during the public exposure periods of the Companies Bills, a number of submissions were received from the private sector which called for some of these matters to be set out in statutory form.

497. Proposed amendments Six new provisions are proposed to be inserted after CA s. 324:

- (a) s.324A - Powers of receiver (see paras. 499 to 504 below)
- (b) s.324B - Duties of receiver with respect to bank accounts and accounting records (see paras. 505 to 507 below)
- (c) s.324C - Reports by receiver (see paras. 508 to 512 below)
- (d) s.324D - Prosecution of delinquent officers and members (see paras. 513 to 515 below)
- (e) s.324E - Supervision of receivers (see paras 516 to 518 below)
- (f) s.324F - Receiver may apply to Court (see paras 519 to 521 below)

(Bill cl. 93).

498. Proposed ss.324A to 324E are new provisions which will set out certain statutory powers, duties and responsibilities for receivers. These new responsibilities are similar to those imposed on other officers of the company. It is anticipated that these new provisions will remove some of the uncertainties concerning the law relating to receivers. Each of these provisions is dealt with in turn.

Proposed s.324A - Powers of receiver

499. Background At present the powers of a receiver depend upon the terms of the court order, or instrument under which he is appointed.

500. Proposed amendment Subject to any term to the contrary in the court order or instrument under which the receiver is appointed, the powers of a receiver of property of a corporation will be set out in proposed s.324A (see paras 486 to 488 of this ex memo on Bill cl. 90 and the proposed interpretation of "property of a corporation").

501. Subject to proposed s.324A, a receiver will have power to do, in Australia and elsewhere, all things necessary or convenient to be done with respect to the attainment of the objectives for which he was appointed (proposed s-sec 324A(1) based on NCB s-cl 239(1)). By virtue of the proposed new definitions in s. 321 and the existence of comparable provisions in the laws of each State, a receiver of property of a company incorporated in a participating State or Territory will take his powers (to the extent that they are not derived from the court order or instrument of appointment) from the law of the place in which the property is situated as well as having identical powers conferred under the law of the place of incorporation in respect of property wherever situated.

502. In addition to any powers conferred on a receiver by the court order, or by the instrument under which he is appointed, or by any other law, and without limiting the generality of proposed s-sec 324A(1), a receiver will have conferred on him, for the purpose of attaining the objectives for which he was appointed, certain specific powers (set out in proposed paras.324A(2)(a)-(v) - based on NCB s-cl. 239(2), (3) and (4)). These powers, however, may be excluded or modified if any provision in the court order or instrument under which the receiver is appointed, purports to limit his powers in any way.

503. The fact that powers, in relation to the property of a corporation, will be conferred on a receiver by proposed s.324A, will not affect the rights, with respect to that property, of any other person (not being the corporation) (proposed s-sec 324A(3) - based on NCB s-cl. 239(5)).

504. Proposed s.324A will not apply to a receiver who has been appointed prior to the commencement of Bill ci. 93. In addition, the powers of such a receiver appointed before the commencement of Bill cl. 93, are not to be taken as having been limited by implication by proposed s. 324A (proposed s-sec.324A(5)).

Proposed s.324B - Duties of receiver with respect to bank accounts and accounting records

505. Background The CA does not specify the duties of a receiver. Much of the law regarding the duties of a receiver is to be derived instead from case law.

506. Proposed amendments The duties of a receiver with respect to bank accounts and accounting records will be set out in proposed s.324B (based on certain aspects of s. 96 of the Canada Business Corporations Act):-

- (a) A receiver of property of a corporation will be required to open a separate bank account and to pay into that account any money of the corporation which comes into his control (proposed paras 324B (1) (a) , (b) and (c)).
- (b) Such a receiver will also be obliged to keep detailed accounting records of all transactions entered into by him as a receiver (proposed para. 324B (1) (d)) .

507. Unless the Supreme Court otherwise orders, a director, creditor or member of a corporation will be entitled to inspect these records kept by the receiver (proposed s-sec.324B(3)). A receiver will be guilty of an offence if he fails to comply with any of the duties specified in proposed s-sec.324B(1) (proposed s-sec. 324B(2)).

Proposed S.324C - Reports by receiver,

508. A receiver will be required to report to the NCSC and to make available to the NCSC any information the NCSC may require if it appears to the receiver of property of a company or registered foreign company that:

- (a) a past or present officer or member may have been guilty of an offence in relation to the company or registered foreign company;
or
- (b) a person who took part in the formation, promotion, administration or winding up of the company or registered foreign company -
 - (i) may have misappropriated any money or property of the company or registered foreign company; or

(ii) may have been guilty of any negligence, default, breach of duty or breach of trust in relation to the company or registered foreign company.

(proposed s-sec. 324C(1)).

509. The receiver will also be able to lodge with the NCSC further reports specifying any other matter which, in the opinion of the receiver, should be brought to the notice of the NCSC (proposed s-sec 324C(2)).

510. The operation of proposed s. 324C will only extend to the receiver of property of a company or registered foreign company (see paras 483 to 488 of ex memo on Bill cl. 90 and proposed interpretations of "property of a company" and "property of a registered foreign company"). Accordingly, such a receiver will be required to make his report to the delegate of the NCSC in the place of incorporation or registration even if the offences by directors etc. occurred in another State or Territory. However, this would not preclude the delegate of the NCSC in the place where offences by directors occurred from instituting proceedings against such persons by virtue of the provision concerning reciprocity in relation to offences i.e. CA s. 568.

511. Where the receiver of property of a company or registered foreign company has not made a report to the NCSC, and it appears to the Supreme Court (in the jurisdiction of incorporation of the company, or registration as a foreign company, as the case may be) that a report should have been made by the receiver pursuant to proposed paras 324C(1)(a) or 324C(1)(b), then the Supreme Court may direct the receiver to make such a report (proposed s- sec.324C(3)). In other words, the place of incorporation or registration of the company

(rather than the place where the offences by officers of the company were committed) will determine which Supreme Court may direct a receiver to make a report.

512. The statutory responsibility that will be imposed on a receiver by proposed s. 324C is similar to the responsibility imposed on a liquidator by CA s. 418 (dealing with reports by liquidator).

Proposed s.324D : Prosecution of delinquent officers and members

513. Where a report is made by a receiver (under proposed s. 324C), the NCSC will be able to investigate the matter (proposed s-sec. 324D(1)).

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

(a) The NCSC will be able to require the following persons to give all reasonable assistance in connection with any prosecution that the NCSC decides to institute (proposed s-sec. 324D(2)):-

- an officer of the company or registered foreign company;
- any person who has at any time been such an officer;
- in relation to a registered foreign company, any person who has been an agent of the registered foreign company; and

any person who has acted as banker, solicitor, auditor or in any other capacity for the company or registered foreign company.

(proposed s-sec 324D(5)).

(b) Any person who is required to give such assistance to the NCSC pursuant to proposed s. 324D will not be able to refuse to comply with such a request, nor will he be able to furnish information that is false or misleading in a material particular (proposed s-sec. 324D(3)).

(c) Any person who is required to comply with a request for assistance under proposed s-sec. 324D(2), will be required to give such assistance even if the information sought by the NCSC may be incriminating (proposed s-sec. 324D(4)).

15. Proposed s. 324D is based on CA s. 457 (dealing with the prosecution of delinquent officers and members) which applies where a report is made by a liquidator under CA s. 418.

proposed S. 324E - Supervision of receivers

16. If it appears to the Supreme Court, or to the NCSC, that a receiver of property of a corporation has not faithfully performed his duties, or if a complaint is made to the Court or to the NCSC with respect to the receiver's performance of his duties, the Court or the NCSC will be able to enquire into the matter, and the Court will be able to take such action as it thinks fit (proposed s-sec. 324E(1)).

517. A brief outline of the new provisions is as follows:-

(a) The NCSC will be able to report to the Court any misfeasance, neglect or omission on the part of the receiver. In such a case, the Court will be able to order the receiver to make good any loss thereby sustained by the estate of the corporation (proposed s-sec. 324E(2)).

(b) The Court will be able to :

(i) require a receiver to answer any inquiry relating to the performance of his duties;

(ii) examine the receiver or any other person on oath or affirmation with respect to the performance of his duties; and

(iii) direct that an investigation be made of his books

(proposed s-sec. 324E(3)).

(c) The operation of proposed s. 324E will extend to the receiver of property of a corporation (see paras 483 to 488 of ex memo on Bill cl. 90 and proposed interpretation of "property of a corporation").

(d) By virtue of this definition and the existence of comparable provisions in the laws of each State, the Supreme Court in the State or

Territory in which the property is situated, and the Supreme Court in the place where the company is incorporated will both be able to take such action as it thinks fit in respect of a receiver who has not faithfully performed his duties.

518. Proposed s. 324E is based on CA s. 420 (dealing with supervision of liquidators) which confers on the Supreme Court similar powers of supervision over the conduct of liquidators.

Proposed s. 324F - Receiver may apply to Court

519. Background A receiver of property of a company appointed under the powers contained in an instrument is currently able to apply to the Supreme Court for directions (CA s-sec 324(4)).

520. Proposed amendment This provision will be omitted from CA s. 324 (see paras 494 of this ex memo on Bill cl. 92), and will be relocated as proposed s. 324F. S-secs 324(1) and 324(3) of the CA deal with the liability of a receiver for debts incurred by him in the course of the receivership. S-sec. 324(4) of the CA, however, deals with the power of a receiver appointed under the terms of an instrument to apply to the Supreme Court for directions. Since s-sec. 324(4) of the CA deals with the power of a receiver, it was considered that it would be more appropriate to locate this provision in proposed s. 324F. Proposed ss. 324A to 324E, which will precede proposed 324F, set out other statutory powers, duties and responsibilities of receivers.

521. The operation of proposed s. 324F will only extend to the receiver of property of a company or registered foreign company (see paras 483 to 488 of this ex memo on Bill cl. 90 and proposed interpretations of "property of a company" and "property of a registered

a receiver will be required to apply to the court in the jurisdiction of incorporation of the company, or in the jurisdiction of registration of the foreign company, as the case may be.

Cl. 94 : Power of Court to fix remuneration of receivers

522. Background On the application of the liquidator or official manager of a company, or on the application of the NCSC, the Supreme Court is currently able to fix, by order, the remuneration to be paid to any person who has been appointed under the powers contained in an instrument as receiver of the property or part of the property of the company (CA s-sec. 325(1)).

523. Proposed amendment The right to apply for an order of the Supreme Court fixing the remuneration of a receiver will be extended to the liquidator or official manager of a registered foreign company. In addition, the Supreme Court will also be able to fix the remuneration of a receiver of property of a registered foreign company (Bill cl. 94). (See also paras 483 to 488 of this ex memo on Bill cl. 90 and proposed interpretations of "property of a company" and "property of a registered foreign company").

524. The reference to "the property or part of the property of the company" will be replaced by a reference to "property of the company or registered foreign company" (Bill cl. 94).

525. This proposed amendment is a change in drafting style which will be adopted throughout the CA. (See para 491 to 497 of this ex memo on Bill cl. 91).

Cl. 95 - Receiver to enjoy qualified privilege in certain circumstances

526. Background An auditor currently has qualified privilege under the laws of defamation, in respect of statements and reports made by the auditor in the course of his duties and the sending of accounts and reports to the NCSC (CA s-sec. 30(1)). A liquidator has a similar qualified privilege (CA s. 419).

527. However, there is no equivalent provision in the CA conferring qualified privilege on a receiver. A receiver may accordingly be reluctant to comment adversely on the management of the company, or draw attention to situations where the directors may be in breach of, for example, CA s. 229 (which sets out the general duties and liabilities of officers).

528. Proposed amendment In order to resolve this inconsistency, a receiver of property of a corporation will be accorded qualified privilege in respect of any matter contained in a report made by him pursuant to proposed s. 324C, or, in respect of any comments made by him pursuant to CA para. 328(1)(c) (Bill cl. 95).

Cl. 96 - Notification of appointment of receiver

529. Background The NCSC must be notified within 14 days of the appointment of a receiver of the property or part of the property of a company, or of a receiver of the property or part of the property within the ACT of a registered foreign company (CA s-sec. 326(1)).

530. When a person appointed as receiver of the property or part of the property of a company or registered foreign company, ceases to act as such, he is required to notify the NCSC of this fact within 14 days of his ceasing to act as receiver (CA s-sec. 326(2)).

531. Proposed amendments Four amendments are proposed.

532. First, the period within which the NCSC must be notified of:

- (i) the appointment of a receiver; or
- (ii) the fact that a receiver has ceased to act,

will be reduced from 14 days to 7 days. (proposed paras. 326(1)(a) and 326(2)(a)).

533. This proposed amendment is consistent with the requirement in para. 392(2)(a) that a copy of a resolution for voluntary winding up should be lodged with the NCSC within 7 days of the passing of such a resolution. A similar amendment will also be made to s. 340 of the CA (see paras. 576 to 577 of this ex memo on Bill cl. 104).

534. Secondly, in addition to notifying the NCSC, notification in the Gazette will be required within 21 days of a receiver being appointed, or within 21 days of a receiver ceasing to act as such (proposed paras. 326(1)(b) and 326(2)(b)).

535. This proposed amendment is consistent with the requirement in CA para. 392(2)(b) that the passing of a resolution for voluntary winding up should be notified in the

Gazette. A similar amendment will also be made to CA s. 340 relating to the notification of the resignation or removal of an official manager (see para. 578 of ex memo on Bill cl. 104).

536. Thirdly, the reference in CA s-secs. 326(1), 326(1A) and 326(2) to "receiver of the property or part of the property of " will be replaced in proposed s-secs 326(1) 326(1A) and 326(2) by a reference to "receiver of property of " (Bill cl. 96).

537. This proposed amendment is a change in drafting style which will be adopted throughout the CA. (see paras. 491 to 492 of ex memo on Bill cl. 91).

538. Fourthly, the reference in CA s-sec. 326(1) to "a receiver of the property or part of the property within the Territory of a registered foreign company" will be replaced in proposed s-sec.326(1) by a reference to "a receiver of property of a ... registered foreign company" (Bill cl. 96).

539. It will not be necessary to specify the location of the property of a registered foreign company since a reference in Part X of the CA to "property of a registered foreign company" is to be interpreted in accordance with proposed para. 321(c) (see paras 483 to 488 of this ex memo on Bill cl. 90).

Cl. 97 : Statement that receiver appointed

540. Background If a receiver of the property or part of the property of a corporation has been appointed, every document on or in which the name of the corporation appears is required to set out a statement, immediately following the name of the corporation, that a receiver or a receiver and manager has been appointed (CA s-sec.327(1)).

541. Proposed amendments The reference in this requirement to "receiver of the property or part of the property of a corporation" will be replaced by a reference to "receiver of property of a corporation" (Bill cl. 97). This proposed amendment is a change in drafting style which will be adopted throughout the CA. (see paras 491 to 492 of ex memo on Bill cl. 91).

542. In addition, CA s. 327 will be made expressly applicable to the receiver of property wherever situated of a corporation. In other words, the definitions in s. 321 will not apply (Bill cl. 97). This will ensure that a receiver of property of a corporation will be required by the law of the jurisdiction in which he is operating to set out in every document in which the name of the company appears, a statement that a receiver or a receiver and manager has been appointed. It may be that such a receiver will also be subject to a corresponding requirement in the law of a participating jurisdiction. However, it was not considered necessary to restrict the operation of s. 327 by the proposed definitions in s. 321, since the duplicate requirements of the laws of participating jurisdictions should not cause the problems which arise where, for example, a receiver is required to lodge a report with the delegate of the NCSC (see proposed s. 324C and paras 508 and 509 of this ex memo).

Cl. 98 : Provisions as to information where receiver

appointed

543. Background Where a receiver of the property or part of the property of a company is appointed, he must provide certain information to the NCSC, the company and any trustee for debenture holders (CA s.328).

544. The persons who were, at the date of the receiver's appointment, the directors and secretary of the company, are required to make out and submit a report as to the affairs of the company as at the date of the receiver's appointment (CA para. 328(1) (b)) .

545. Within one month of the receipt of the report as to the affairs of the company, the receiver is required to:

- (i) lodge with the NCSC a copy of the report, and any comments he may have made in relation to the report;
- (ii) send to the company a copy of any comments he may have made on the report, or a notice to the effect that no comments were made; and
- (iii) send to the trustees (if any) for the debenture holders, a copy of the report and comments (if any) lodged with the NCSC.

(CA para. 328(1)(c)).

546. Proposed amendment The reference in CA s-sec.328(1) to "receiver of the property or part of the property of ..." will be replaced by a reference in proposed s-sec 328(1) to "receiver of property ..." (Bill cl. 98).

547. This proposed amendment is a change in drafting style which will be adopted throughout the CA. (see paras 491 to 492 of ex memo on Bill cl. 91).

548. One important effect of the proposed amendment to CA s-sec 328(1) will be that where a receiver does not see fit to make any comments on a report as to the affairs of the company or registered foreign company, he will be required to lodge a notice to this effect with the NCSC and to send copies of this notice to the company or registered foreign company, and to the trustee (if any) for debenture holders (proposed para. 328(1)(c)).

549. In addition, the operation of s.328 of the CA will be extended to the receiver of property of a registered foreign company (Bill cl. 98) (see paras 483 to 488 of ex memo on Bill cl. 90 and the proposed interpretation of "property of a registered foreign company").

550. At present, a receiver can be appointed over the property of a registered foreign company. However, many of the receivership provisions in CA Part X (including CA s.328) can have no application to such an appointee. This proposed amendment to CA s.328 will ensure that the receiver of property of a registered foreign company will also be subject to the requirements of s.328. Similar amendments will also be made by the following clauses in the Bill:

- (i) Clause 99 (see paras 552 to 556 of this ex memo) ;
- (ii) Clause 102 (see paras 565 to 569 of this ex memo) ; and
- (iii) Clause 103 (see paras 570 to 574 of this ex memo).

551. One consequence of the proposed extended operation of CA s. 328 is that the person who will be required to make And submit to the receiver of property of a registered foreign

company a report as to the affairs of the registered foreign company will be the person who was, at the date of the receiver's appointment, the agent of the registered foreign company (proposed para. 328(1)(b)).

Cl. 99 : Receiver may require reports

552. Background A receiver of the property or part of the property of a company may require certain persons to submit to him a report containing information as to the affairs of the company (CA s.329).

553. Proposed amendments The reference in CA s-sec. 329(1) to "receiver of the property or part of the property of ..." will be replaced by a reference to "receiver of property of ..." (Bill cl. 99).

554. This proposed amendment is a change in drafting style which will be adopted throughout the CA. (see paras 491 to 492 of ex memo on Bill cl. 91).

555. In addition, the operation of CA s. 329 will be extended to the receiver of property of a registered foreign company (Bill cl. 99) (see paras 483 to 488 of ex memo on Bill cl. 90 and proposed interpretation of "property of a registered foreign company").

556. This proposed amendment is consistent with other amendments in the Bill which will ensure that certain of the receivership provisions in Part X of the CA will also be applicable to a receiver of property of a registered foreign company (see paras 549 to 550 of ex memo on Bill cl. 98).

Cl. 100 : Receiver may inspect

books

557. Background Experience has shown that the instrument under which a receiver is appointed does not always give the receiver of property of a corporation any right to inspect the books of the corporation. In addition, no such right of inspection is given to a receiver by the CA.

558. Proposed amendment A receiver of property of a corporation will be entitled to inspect at any reasonable time any books of the corporation that relate to that property. Any person who refuses or fails to allow the receiver to inspect such books at such a time will be guilty of an offence (proposed s. 329A - Bill cl. 100).

559. By virtue of the proposed new definitions in s. 321 (see paras. 483 to 488 of ex-memo on Bill cl. 90) and the existence of comparable provisions in the laws of each State, a receiver of property of a company incorporated in a participating State or Territory will derive this power of inspection from the law of the place in which the property is situated, as well as deriving an identical power of inspection from the law of the place of incorporation of the company in respect of any property wherever situated.

Cl. 101 : Lodging of accounts of receiver

560. Background A receiver of the property or part of the property of a company or of the property or part of the property within the A.C.T. of a registered foreign company, is required to lodge accounts with the NCSC every 6 months (CA s.330).

561. Proposed amendment The reference in this requirement of the CA to "receiver of the property or part of the property of ..." will be replaced by a reference to "receiver of property of ..." (Bill cl. 101).

562. This proposed amendment is a change in drafting style which will be adopted throughout the CA. (see paras. 491 to 492 of ex memo on Bill cl. 91).

563. In addition, the reference in CA s-sec.330(1) to "a receiver ... of the property or part of the property within the Territory of a registered foreign company" will be replaced by a reference to "a receiver of property of a ... registered foreign company" (Bill cl. 101).

564. It will not be necessary to specify the location of the property of a registered foreign company since a reference in Part X of the CA to "property of a registered foreign company" is to be interpreted in accordance with proposed para. 321(1)(c) (see paras 483 to 488 of this ex memo on Bill cl. 90).

Cl. 102 : Payment of certain debts out of property subject to floating charge in priority to claims under charge

565. Background Where a receiver has been appointed on behalf of the holders of any debentures of a company that are secured by a floating charge, certain debts are to be paid in priority to claims made in respect of the debentures (CA s.331).

566. The receiver is required to pay in priority to claims made in respect of the debentures:

- (i) any amount that in a winding up would be payable in priority to unsecured debts pursuant to CA s.447;
- (ii) the reasonable fees and expenses incurred by an auditor after he has been refused permission by the NCSC to resign; and
- (iii) any amount that in a winding up would be payable in priority to unsecured debts pursuant to CA paras 441(e) or 441(g), or CA s.445

(CA s-sec.331(2)).

567. Proposed amendment The operation of CA s. 331 will be extended to the situation where a receiver is appointed on behalf of the holders of debentures of a registered foreign company (Bill cl. 102).

568. This proposed amendment is consistent with other amendments in the Bill which will ensure that a receiver of property of a registered foreign company will be subject to certain of the obligations imposed on a receiver of property of a company (see paras 549 and 550 of this ex-memo on Bill cl. 98).

569. Proposed new s-sec.331(2A) will be inserted after CA s-sec. 331(2) (Bill cl. 102):-

- (a) Whereas CA s-sec. 331(2) specifies the debts that a receiver of property of a company should pay out of the property of the company coming into his hands in priority to claims made in respect of the debentures, proposed s-sec.

331(2A) will specify the debts that a receiver of property of a registered foreign company will be required to pay out of the property of the registered foreign company coming into his hands in priority to claims made with respect to the debentures.

- (b) The priority accorded in CA s-sec. 331(2) to the reasonable fees and expenses incurred by an auditor after he has been refused permission to resign, will not however be provided for in proposed s-sec. 331(2A). It would not be possible for an auditor of a registered foreign company to apply to the NCSC under CA s-sec. 282(6) for its consent to his resignation as auditor. Accordingly, it would not be appropriate for priority to be conferred by proposed s-sec. 331(2A) in respect of the reasonable fees and expenses incurred by an auditor of a registered foreign company.

Cl. 103 : Enforcement of duty of receiver to make returns

570. Background The Supreme Court currently has the power to make orders directing a receiver of the property or part of the property of a company to make good certain defaults (CA s.332).

571. Proposed amendment The reference in this power to "receiver of the property or part of the property of ..." will be replaced by a reference to "receiver of property of ..." (Bill cl. 103).

572. This proposed amendment is a change in drafting style which will be adopted throughout the CA. (see paras. 491 to 492 of ex memo on Bill cl. 91).

573. This power will also be extended to the receiver of property of a registered foreign company (Bill cl. 103) (see paras 483 to 488 of this ex memo on Bill cl. 90 and proposed interpretation of "property of a registered foreign company").

574. This proposed amendment is consistent with other amendments in the Bill which will ensure that a receiver of property of a registered foreign company will be subject to certain of the obligations imposed on a receiver of property of a company (see paras 549 and 550 of this ex memo on Bill cl. 98).

Cl. 104 : Notice of appointment and address of official manager

575. Background The official manager of a company is required to notify the NCSC of:

- (a) his appointment and address of his office;
- (b) any change in the situation of his office; and
- (c) his resignation or removal from office

(CA s.340).

576. Proposed amendment The period within which the NCSC must be notified of:

- (i) the appointment and address of the office of the official manager of a company; or
- (ii) the resignation or removal from office of the official manager,

will be reduced from 14 days to 7 days (proposed paras. 340(1)(a) and 340(2)(a)).

577. This proposed amendment is consistent with the requirement in para. 392(2)(a) that a copy of a resolution for voluntary winding up should be lodged with the NCSC within 7 days of the passing of such a resolution. A similar amendment will also be made to s. 326 of the CA (see paras. 532 and 533, above, on Bill cl. 96).

578. In addition to notifying the NCSC, notification in the Gazette will be required within 21 days of an official manager resigning or being removed from office (proposed para 340(2)(b)). Notification in the Gazette of the appointment of an official manager is already required by CA para 338(2) (b). CA para. 392(2)(b) requires that the passing of a resolution for voluntary winding up should be notified in the Gazette. A similar amendment will also be made to CA s.326 relating to the notification of the appointment of a receiver or of his ceasing to act. (see paras. 534 to 535, above, on Bill cl. 96).

Cl. 105 : Effect of resolution

579. Background The effect of the special resolution placing a company under official management is dealt with in CA s.341. The official manager is to be the chairman of any meeting of the company, of its creditors, or of the company and its creditors, being a meeting that is held while he is official manager (CA s-sec. 341(2)).

580. Proposed amendment The reference in s-sec.341(2) of the CA to "of the company and its creditors" will be replaced by a reference to "of the creditors and members of the ;company" (Bill cl. 105).

581. This amendment is proposed in order to achieve consistency of expression throughout the CA by replacing references to meetings of the company and its creditors by references to meetings of the creditors and members of the company (see also paras. 593 to 595, below, on Bill cl. 109).

Cl. 106 : Six monthly meetings of creditors and members

582. Background The official manager of a company is required to convene six-monthly meetings of members and creditors to consider the statement and report he is required to prepare in relation to the affairs of the company. Within 7 days of such a meeting, the official manager is required to lodge with the NCSC a notice of the holding of the meeting, and a copy of each statement and report laid before the creditors and members at the meeting (CA s.342).

583. However, where there is no meeting held through lack of a quorum, there is no requirement to lodge with the NCSC a notice of the holding of the meeting and a copy of the statement and report prepared in accordance with CA s-sec.342 (1) .

584. Proposed Amendment If a quorum is not present at a meeting convened in accordance with s.342, the official manager will be required to lodge with the NCSC within 7 days after the day for which the meeting was convened, or if the meeting was adjourned and no quorum is present at the adjourned meeting, within 7 days after the day to which the meeting was adjourned:

- (a) a notice stating that the meeting was duly convened and no quorum was present, or a notice that the meeting was duly convened and adjourned and that no quorum was present at the adjourned meeting; and

(b) a copy of the statement and of the report prepared for the purpose of that meeting.

(Bill cl. 106 - proposed s-sec.342(6A)).

585. This proposed amendment will ensure that the statement and report which are required to be prepared pursuant to CA s-sec.342(1) will be lodged with the NCSC even though a quorum was not present at the meeting of creditors and members convened to consider that statement and report.

586. The proposed amendment will also bring CA s.342 into line with the requirement (in CA s-sec.355(13)) that, where a quorum is not present at a meeting convened (under para. 355(9)(b)), the official manager must still lodge with the NCSC:

- (a) a notice stating that the meeting was convened but that no quorum was present; and
- (b) a copy of the report prepared pursuant to CA para. 355(9)(a).

Cl. 107 : Circumstances in which company may be wound up by Court

587. Background One of the grounds on which a company may be wound up by the Supreme Court is if the directors have acted in affairs of the company in their own interests rather than in the interests of the members as a whole or in any other manner whatsoever that appears to be unfair or unjust to other members (CA para. 364(1)(f)).

588. Proposed amendment Two more grounds for winding up will be inserted in CA s-sec. 364(1) to take account of the grounds for winding up of a company set out in proposed CA s-sec. 320(2)(see paras 474 to 482 of ex memo on Bill cl. 89).

589. Accordingly, the Court will be able to wind up a company if:

- (a) the affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or in a manner that is contrary to the interests of the members as a whole (proposed CA para. 364 (1) (fa)) ; or
- (b) an act or omission, or a proposed act or omission, by or on behalf of the company, or a resolution, or a proposed resolution, of a class of members of the company, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was or would be contrary to the interests of the members as a whole (proposed CA para. 364(1) (fb)) .

(Bill cl. 107).

Cl. 108 : Repeal of section 380

590. Background CA s. 380 deals with payment of money by a liquidator into a bank.

591. Proposed amendment CA s. 380 will be repealed (Bill cl. 108). A new provision (proposed s. 421A) will be inserted in the CA dealing with regulations relating to money etc. received by a liquidator (see paras 601 to 602 below on Bill cl. 112).

Cl. 109 : Final meeting and dissolution

592. Background Once the affairs of a company are fully wound up, the liquidator is required to make up an account showing how the winding up has been conducted and how the company's property has been disposed of. He is required to convene a meeting of the company, or, in the case of a creditors' voluntary winding up, a meeting of the company and the creditors, and to lay the account before this meeting (CA s-sec. 411(1)). This meeting is described as a general meeting of the company or, in the case of a creditors' voluntary winding up, "a meeting of the company and the creditors" (CA s-secs 411(1) and 411(4)).

593. Proposed amendment The description of the meeting that is required in the case of a creditors' voluntary winding up will be changed so that it is described as a meeting of "the creditors and members of the company" (Bill para. 109(a)).

594. A consequential change will be made to the quorum provisions (Bill para. 109(b)). The number of persons constituting the quorum will remain unchanged (2 in the case of a general meeting of the company; 2 creditors and 2 members in the case of meetings of the "creditors and members of the company" (CA s-sec 411(4))).

595. These amendments are proposed in order to achieve consistency of expression throughout the CA by replacing references to meetings of the company and the creditors by

references to meetings of the creditors and members of the company. (See also paras 580 to 581 of this ex memo on Bill cl. 105).

Cl. 110 : Reports by liquidator

596. Background If it appears, among other things, to a liquidator in the course of winding up a company that:

- (a) an officer, member or contributory of the company may have been guilty of an offence in relation to the company; or
- (b) a person who took part in the formation, promotion, administration, management or winding up of the company may have misappropriated any money or property of the company or may have been guilty of any negligence, default, breach of duty or breach of trust in relation to the company,

the liquidator is required to report the matter to the NCSC (CA para 418(1)(d)). The Supreme Court is also able to direct the liquidator to make such a report (CA s-sec. 418(3)).

597. Proposed amendment It will be made clear that the power of the Supreme Court to direct the liquidator to make a report will extend to situations where it appears to the Court that either of the circumstances outlined in CA paras. 418(1)(a) or (b) exist. (Bill cl. 110).

Cl. 111 : Supervision of liquidators

598. Background If it appears to the Supreme Court or to the NCSC that a liquidator has not faithfully performed or is not faithfully performing his duties, or has not observed or

is not observing any of the prescribed requirements or requirements of the Court, the Court or the NCSC may inquire into the matter and the Court may take such action as it thinks fit (CA para. 420(1)(a)).

599. Proposed amendment This provision will be amended so that the requirements to be observed by a liquidator are not only "prescribed requirements", but any requirement of the CA, of the Companies Regulations or of the Rules of Court (Bill cl. 111).

600. The purpose of this amendment is to make it clear that the requirements to be observed may be located in either the CA, the regulations, or the rules.

Cl. 112 : Regulations relating to money &c received
by liquidator

601. Background CA s. 380 sets out provisions dealing with the payment of money into a bank by a liquidator in court windings up. Part IX of the Companies Regulations contains regulations dealing with payments into and out of banks by liquidators in voluntary windings up.

602. Proposed amendment CA s. 380 will be repealed (see paras 590 to 591 above on Bill cl. 108). A new provision will be inserted after CA s. 421 which will specifically authorize the Companies Regulations to contain provisions relating to matters dealt with in CA s. 380 and in Part IX of the Companies Regulations (Bill cl. 112). Proposed CA s. 42IA will specifically authorize the Companies Regulations, to cont , 1 { , provisions relating to:-

- the payment or deposit by a liquidator into a bank of money received by him or of bills, notes or other securities payable to the company or its liquidator;
- the circumstances and manner in which such money or bills, notes or other securities are to be paid or delivered out;

the giving by the Court of directions with respect to the payment, deposit or custody of money or of bills, notes or other securities payable to or into the possession of a liquidator;

certain consequences where a liquidator contravenes or fails to comply with the regulations under proposed CA s. 421A. (proposed CA s-sec. 421A(1)).

These regulations may apply generally or to a particular class of winding up (proposed CA s-sec. 421A(2)).

Cl. 113 : Prosecution of delinquent officers and members

603. Background Where the NCSC institutes a prosecution against a person following a report to the NCSC under CA s. 418, the NCSC may require an officer to give the NCSC all reasonable assistance in connection with the prosecution (CA s-sec. 457(2)).

604. Such an officer is not excused from furnishing information or a document on the ground that the information or document might tend to incriminate him. Where the officer claims, before furnishing the information, that such

information might tend to incriminate him, such information is not admissible as evidence against him in any proceedings other than proceedings under CA s. 457 (CA s-sec. 457(4)).

605. Proposed amendment The reference in CA s-sec. 457(4) to the requirement that an officer should produce a "document" will be deleted from this sub-section (Bill para. 113(a)). CA s-sec. 457(4) (as amended) will only be applicable to "information" that an officer is required to furnish to the NCSC.

Cl. 114 : Power of Commission to deregister defunct company

606. Background Where the NCSC has reasonable cause to believe that a company is not carrying on business, the NCSC may, after sending certain notices to the company, by notice published in the Gazette cancel the registration of that company. The NCSC may also, in certain circumstances, cancel the registration of a company where the company is being wound up (CA s-secs 459 (1) - (3)).

607. Where a company has been deregistered as the result of an administrative error, the NCSC may restore the company to the register (CA s-sec. 459(5)). The Supreme Court may also order a deregistered company to be reinstated under CA s-sec. 459(6). Where the registration of a company is reinstated under these provisions the NCSC is required to notify such reinstatement in the Gazette (CA s-sec. 459(7)).

608. Proposed amendment Failure by the NCSC to publish a notice of reinstatement in the Gazette will not affect the validity of the reinstatement (Bill cl. 114). A similar amendment will be made to CA s. 518 by Bill cl. 117.

Cl. 115 : Special requirements as to articles and prospectus

609. Background An investment company may not issue a prospectus, or allow a prospectus to be issued on its behalf, unless the prospectus specifies the types of securities the company may invest in in accordance with its objects, and whether investment within or outside Australia, or both, is authorised by the company's objects (CA s-sec 494(1)).

610. Proposed amendment Sub-section 494(1) of the CA will be omitted and a new s-sec. 494(1) inserted (Bill cl. 115).

611. A prospectus issued by an investment company or on its behalf will have to contain certain statements relating to whether or not the company has objects. The prospectus will be required to either:

- (a) specify the types of securities the company may invest in in accordance with its objects, and whether investment within or outside Australia, or both, is authorised by the company's objects; or
- (b) state that the memorandum of the company does not include the objects of the company.

(proposed s-sec. 494(1)).

612. Background Three months after a company is declared to be an investment company, the company may not invest or borrow moneys, or underwrite an issue of securities, unless the articles state both matters referred to in paras 494(1)(a) and (b) (CA s-sec. 494(2)).

613. Proposed amendment The reference in CA s-sec. 494(2) to "paragraphs (1)(a) and (b)" will be replaced by a reference to "paragraph (1)(a) or (b) as the case requires" (Bill cl. 115).

614. The purpose of this amendment is to make s-sec 494(1) of the CA consistent with the proposed amendment to provide that the statement of a company's objects in the company's memorandum will be optional (see paras 181 to 184 of ex-memo on Bill cl. 33).

Cl. 116 : Notice to be lodged where documents, &c., altered

615. Background Where certain changes or alterations are made in relation to a registered foreign company (such as its constituent documents, directors, agents, name, or registered office in the place of incorporation) the NCSC is required to be notified within one month of the change (CA s-sec.515(2)).

616. Proposed amendments The requirement (in CA para. 515(2) (b)) to notify any change in the directors of a registered foreign company will be extended to any changes in the directors, members of the committee of management, council or other governing body of a registered foreign company (Bill para. 116(a)).

617. The purpose of this amendment is to extend the operation of the provision to situations where members of the management body of the registered foreign company are not known by the term 'directors'.

618. The requirement (in CA para. 515(2)(d)) to notify any change in the situation of the registered office of a registered foreign company in its place of incorporation or formation will be extended so that when the registered foreign company has no registered office in its place of incorporation

or formation, it will be required to notify any change in the situation of its principal place of business in its place of incorporation or formation (Bill para 116(b)).

619. The purpose of this proposed amendment is:-

- (a) to cater for the situation where a registered foreign company has a principal place of business rather than a registered office in its place of incorporation or formation; and
- (b) to bring the wording of the requirement to notify changes (in CA para 515(2)(d)) into line with the wording of the initial lodgment requirements (in CA para 512(2)(fa)).

Cl. 117 : Cessation of business, &c.

620. Background 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 (or where the company is formed or incorporated overseas, in any participating jurisdiction), the NCSC may initiate a procedure which can result in the company's name being struck off the register (CA s-secs 518(3), (4), (5) and (6)).

621. Provision is 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 (CA s-secs 518(7) and (8))

622. When the name of a foreign company is restored to the register under CA s-secs 518(7) or (8), the NCSC must publish in the Gazette notice of the restoration (CA s-sec. 518(9)).

623. Proposed amendment Failure by the NCSC to publish in the Gazette such a notice of restoration will not affect the validity of the restoration (Bill cl. 117). A similar amendment will be made to CA s. 459 by Bill cl. 114.

Cl. 118 : Location of registers

624. Background A local company or a registered foreign company is required to keep certain registers at its registered office or principal place of business except in certain circumstances in which case it will be able to keep the registers in another place ((IA s-sec. 547(1))).

625. Proposed amendment It is proposed to extend the application of CA s-sec. 547(1) to the register required to be kept by a company under proposed CA s. 261 (Bill para. 118(a) - see also Bill cl. 76).

Cl. 119 : Interpretation

626. Background CA ss. 554 to 558 deal with offences committed by officers of certain companies. For the purposes of these sections special application and definition provisions are included in CA s. 553.

627. Proposed amendment The references throughout CA s. 553 to "the property or (any) part of the property" will be replaced by a reference to "property" (Bill cl. 119).

628. These proposed amendments are a change in drafting style which will be adopted throughout the CA (see paras 491 to 492 of ex-memo on Bill cl. 91).

Cl. 120 : Court may disqualify person from being a director
&c. in certain circumstances

629. Background CA s. 562 applies, inter alia, to a company in respect of the property or part of the property of which a receiver has been appointed (CA para. 562(1)(f)).

630. On an application by the NCSC, the Supreme Court may make an order prohibiting a person from acting as a director of, or being concerned or taking part in the management of a company for a period of up to 5 years (CA s-sec. 562(2)).

631. Proposed amendments The reference in CA para. 562(1)(f) to "the property or part of the property" will be replaced by a reference to "property" (Bill para. 120(a)). This proposed amendment is a drafting change which will be adopted throughout the CA (see paras 491 to 492 of ex memo on Bill cl. 91).

632. CA s-sec. 562(2) will be amended so that an order made under the sub-section will prohibit a person from being a director (not "acting as a director") or promoter of, or from being in any way (whether directly or indirectly) concerned in or taking part in the management of a company for a period up to 5 years (Bill para. 120(b)). The purpose of this proposed amendment is to bring CA s-sec. 562(2) into line with the wording used in proposed s. 227A ("Court may order persons not to manage corporations"). (See paras 348 to 351 of ex memo on Bill cl. 70).

Cl. 121 : Penalty notices

633. Background Amendments to the CA and the SIA are proposed to enable breaches of the companies and securities legislation which are of a minor character to be dealt with by means of a penalty notice system rather than having the matter

taken to court. It is anticipated that this will lead to a reduction in the number of cases proceeding to a court hearing, thereby resulting in a saving of time and cost for both the enforcing authority and the alleged offender.

634. Proposed amendment A new provision dealing with penalty notices will be inserted after the present general penalty provisions (CA s. 570) (Bill cl. 121).

635. Where the NCSC has reason to believe that a person has committed a prescribed offence, whether before or after the commencement of Bill cl. 121, it will be able to serve a penalty notice on that person alleging the commission of the offence and setting out the prescribed penalty (proposed paras. 570A(1) (a) and (b)).

636. The main elements of the penalty notice procedure will be as follows:-

- (a) Payment pursuant to a penalty notice will not be regarded, for any purpose, as an admission of liability in relation to the alleged offence (proposed s-sec.570A(6)).
- (b) Only one notice will be able to be served on a person in respect of each alleged offence (proposed para 570A(2)(a)). Service may be effected on a natural person either personally or by post (proposed s-sec 570A(3)).
- (c) A person may not be served with a penalty notice unless proceedings could be instituted against that person for that offence under s.34 of the Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 (which allows

proceedings to be instituted within 5 years of the alleged offence, or, with the consent of the Ministerial Council, at any later time)

(proposed para 570A(2) (b)) .

- (d) This procedure (except as provided in proposed paras. 570A(4) (a) and (b) and 570A(5) (a)) will not affect the operation of any provision of the CA, the regulations, the rules or any other Act relating to the institution of proceedings for offences in respect of which penalty notices may be served (proposed s-sec.570A(7)).

637. Offences constituted by a failure to do an act or thing Where the penalty notice relates to an offence constituted by a failure to do a particular act or thing:

if the penalty is paid and the act or thing is done within the period specified in the notice, no proceedings will be instituted in respect of that offence;

if the penalty is paid, but the act or thing is not done within the specified period, no proceedings will be instituted in respect of that offence, but the obligation to do the act or thing will continue, and the provisions relating to continuing offences (CA s.571) will apply in relation to the continued failure to do that act or thing as if, on the day the penalty was paid, the person had been convicted of an offence constituted by a failure to do that act or thing;

if the act or thing is done but the penalty is not paid within the specified period, proceedings may be instituted in respect of that offence; and

if neither the penalty is paid nor the act or thing done within the specified period, the obligation to do the act or thing will continue, and proceedings may be instituted in respect of that offence.

(proposed s-sec. 570A(4)).

638. Where the offence is constituted by a failure to do an act or thing, the penalty notice will be required to state that:-

- the obligation to do the act or thing continues notwithstanding the service of the notice or the payment of the penalty;
- the payment of the penalty and the doing of that act or thing within the specified period will result in no further action being taken in respect of that offence; and

failure to do either of these things may result in proceedings being instituted.

(proposed s-para.570A(1) (c) (i)) .

639. Other offences Where the penalty notice relates to any other prescribed offence, and the penalty is paid within the specified period, no proceedings will be instituted in respect of that offence. However, failure to pay within the specified time may result in proceedings being instituted.

(proposed s-sec 570A(5)). This information will be required to be set out in the penalty notice itself (proposed s-para.570A(1) (c) (ii)) .

640. Prescribed offences Proposed s-sec. 577(7) will restrict the offences which may be prescribed for the purposes of proposed s. 570A (Bill cl. 124 - see paras 650 to 657 of this ex memo for an explanation of this proposed sub-section).

641. It is expected that offences constituted by, for example:

- (a) failure to lodge prescribed documents;
- (b) failure to maintain prescribed registers; or
- (c) failure to exhibit name at premises,

may be appropriately dealt with by way of the penalty notice system.

642. However, offences involving, for example:

- (a) failure to comply with a direction of the NCSC;
- (b) matters subject to the general supervision or approval of the Court, unless the offence falls into categories (a), (b) or (c) in para. above; or
- (c) complex matters,

would not appear to be appropriately dealt with by way of the penalty notice system.

Cl. 122 : Continuing offences

643. Background Where the CA requires an act or thing to be done within a particular period or before a particular time, but that act or thing is not done within the period or before the time and that failure constitutes an offence, the obligation to do that act or thing continues until the act or thing is done (CA para 571(1)(d)).

644. Where a person is convicted of an offence that (by virtue of CA para. 571(1)(d)) is constituted by failure to do that act or thing after the expiration of that period or after that time, that person is guilty of a separate and further offence for each day after the day of conviction that the failure to do the act or thing continues (CA para.571(1)(e)).

645. Proposed amendments The provision creating the continuing offence (CA para. 571(1)(e)) will be amended in two ways (Bill cl. 122):-

(a) The words "by virtue of paragraph (d)" will be omitted.

(b) The words "after the expiration of that period or after that time" will be replaced by the words "within that period or before that time".

646. These amendments are designed to bring the wording of CA para. 571(1)(e) into line with that of paras 571(1)(a), (b) and (c).

Cl. 123 : Injunctions

647. Background The Supreme Court is currently able, on the application of the NCSC or of any person whose interests have been, are, or would be affected by certain 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 is able to award damages to any person. The Court is also able to grant an interim injunction and rescind or vary any injunction granted (CA s. 574).

648. Proposed amendments Three amendments are proposed to the present provisions relating to injunctions (Bill cl. 123) (cf, Bill cl. 149 for corresponding amendments to the SIA):-

The power (in CA s-sec 574(1)) to issue a restraining or mandatory injunction has been widened to cover the situation where a person has engaged, is engaging or is proposing to engage in any conduct that constituted, constitutes or would constitute a contravention of the CA (as distinct from an offence against the CA as is the case at present (Bill para. 123(a)). The purpose of this amendment is to cover provisions of the CA under which a company is prohibited from doing a particular act, but only the officers of the company can be liable for commission of that offence.

A similar amendment will be made to the power (in CA s-sec 574(2)) to issue an injunction requiring a person to do an act or thing.

649. The words "engages in conduct of that kind" in CA Para 574(6)(b) will be omitted and "refuses or fails to do that act or thing" will be substituted. It is thought that the latter form of words is more appropriate given that the provision relates to the granting of a mandatory injunction.

Cl. 124 : Regulations

650. Three new sub-sections are proposed to be inserted in CA s. 577, which deals with regulations. (Bill cl. 124).

651. Background Proposed CA s-sec. 30G(4) provides that a person who attends at a hearing of the Companies Auditors and Liquidators Disciplinary Board pursuant to a summons issued under proposed CA s-sec. 30F(1) is entitled to be paid such allowances and expenses as are provided for by the regulations (Bill cl. 31 - see para 155 of this ex-memo for an explanation of this proposed sub-section).

652. Proposed amendment Proposed s-sec. 577(6) will provide that regulations providing for allowances and expenses for the purposes of proposed CA s-sec. 30G(4) may do so by reference to a scale of expenses for witnesses who attend before a court specified in the regulations, being a federal court or the Supreme Court of a State or Territory.

653. Background The regulation making power will be extended to deal with the penalty notice system.

654. Proposed amendment Proposed s-sec. 577(7) will provide for the regulations to prescribe offences against the CA and the companies regulations, for the purposes of the proposed s. 570A (proposed s. 570A deals with penalty notices - see paras. 633 to 642 of this ex memo for an explanation of this proposed section).

655. Any offence against the CA, the applicable penalty for which includes a term of imprisonment or a pecuniary penalty in excess of \$1,000, may not be prescribed under this provision.

656. The regulations will be required to prescribe, in relation to each offence prescribed under this provision, the particulars of that offence to be given in the penalty notice, and the amount of the penalty that is payable pursuant to a penalty notice. The prescribed penalty may not exceed half the amount of the penalty applicable to that offence (proposed s-sec. 577(7)). However, it is expected that the penalty will actually be prescribed at the rate of one quarter of the amount of the penalty applicable to the offence.

657. A reference to a penalty applicable to an offence in proposed s-sec. 577(7) will be a reference to the penalty applicable to that offence by virtue of any of the provisions of CA s. 570 (proposed s-sec. 577(8)).

Cl. 125 : Repeal of Schedule 2

658. Background The powers of a company include,- inter alia, the powers set out in Schedule 2 of the CA, unless expressly excluded or modified by the memorandum or articles of the company (CA s. 67).

659. Proposed amendment Schedule 2 of the CA will be repealed (Bill cl. 125). The repeal of Schedule 2 is consistent with the proposed amendments to the powers of companies (see paras 185 to 195 of ex-memo on Bill cl. 34).

Cl. 126 : Amendment of Schedule 3

660. Background The CA contains (in Schedule 3) standard forms of articles of association for:-

a company limited by shares : Table A;

and a no-liability company : Table B.

A company to which the relevant Table applies is able to adopt all or any of the regulations in that Table. The regulations will automatically apply to such companies except insofar as the articles of the company exclude or modify the regulations. (CA s. 75).

661. Regs 5 of Table A and Table B of Schedule 3 permit a company to exercise the power to pay commissions conferred by the CA if the rate or amount of the commission paid or agreed to be paid is disclosed in the manner required by the CA, and the commission does not exceed 10% of the price at which the shares in respect of which the commission is paid are issued. The commission may be satisfied by the payment of cash or by the allotment of fully or partly paid shares or partly by the payment of cash and partly by the allotment of fully or partly paid shares. The company may, on any issue of shares, also pay such brokerage as is lawful.

662. Proposed amendment These regulations will be replaced by new regulations (Bill paras 126(a) and (c)). The new regulations:-

- (a) will omit the reference to the payment of "such brokerage as is lawful";
- (b) will replace the references to commission with references to brokerage or commission;
- (c) will refer to the power of the company to make payments by way of brokerage or commission "conferred by the Act in the manner provided by the Act", rather than specifically referring to disclosure requirements and to the maximum payment which may be made.

663. The purpose of these amendments is to bring the wording of the regulations into line with the proposed amendments to CA s. 117 (see paras 267 to 269 of this ex memo for an explanation of these proposed amendments).

664. Background Paras. 65(a) and (b) of Table A and regs 49(a) and (b) of Table B of the Third Schedule to the CA provide that, in addition to the circumstances in which the office of a director becomes vacant by virtue of the CA, the office of a director becomes vacant if the director:

- becomes an insolvent under administration; or
- becomes prohibited from being a director by reason of an order made under the CA.

0. Proposed amendment Paras 65(a) and (b) of Table A and paras 49(a) and (b) of Table B will be omitted (Bill paras 126(b) and (d)). These paras are being omitted because, in both these circumstances, the office of a director becomes vacant by virtue of the CA. Where a director becomes an insolvent under administration, his office is vacated pursuant to CA para. 222(1)(c), and where a director is prohibited from being a director by reason of an order made under the CA, his office also becomes vacant by virtue of the CA.

Cl. 127 : Amendment of Schedule 5

1. Background The CA contains (in Schedule 5) a statement as to the order of priority of registrable charges.

2. Proposed amendment A new provision will be inserted in the schedule of priorities (Bill cl. 127 - proposed cl. 3A). This new provision will provide that, where, due to the definition of "priority time" in clause 6, a registered charge has 2 or more priority times each relating to a particular

663. The purpose of these amendments is to bring the wording of the regulations into line with the proposed amendments to CA s. 117 (see paras 267 to 269 of this ex memo for an explanation of these proposed amendments).

664. Background Paras. 65(a) and (b) of Table A and regs 49(a) and (b) of Table B of the Third Schedule to the CA provide that, in addition to the circumstances in which the office of a director becomes vacant by virtue of the CA, the office of a director becomes vacant if the director:

- becomes an insolvent under administration; or
- becomes prohibited from being a director by reason of an order made under the CA.

0. Proposed amendment Paras 65(a) and (b) of Table A and paras 49(a) and (b) of Table B will be omitted (Bill paras 126(b) and (d)). These paras are being omitted because, in both these circumstances, the office of a director becomes vacant by virtue of the CA. Where a director becomes an insolvent under administration, his office is vacated pursuant to CA para. 222(1)(c), and where a director is prohibited from being a director by reason of an order made under the CA, his office also becomes vacant by virtue of the CA.

Cl. 127 : Amendment of Schedule 5

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2. Proposed amendment A new provision will be inserted in the schedule of priorities (Bill cl. 127 - proposed cl. 3A). This new provision will provide that, where, due to the definition of "priority time" in clause 6, a registered charge has 2 or more priority times each relating to a particular

liability secured by the charge, each of those liabilities shall, for the purposes of Schedule 5, be deemed to be secured by a separate registered charge, the priority time of which is the priority time of the first-mentioned registered charge that relates to the liability concerned.

668. The CA ensures that a charge, to the extent that it secures each extra amount, has a priority time related to the date of lodgment of the notice of variation. The purpose of this proposed amendment is to make it clear that the provisions of Schedule 5 that allocate priorities apply to such a charge separately in respect of each extra amount secured by the charge.

Cl. 128 : Further amendments

669. Proposed amendments Certain amendments will be made to the CA by Schedule 1 of the Bill (Bill cl. 128).

670. The principal amendments proposed to be made in Schedule 1 are:

references in the CA to master and servant will be replaced by references to employer and employee (see paras 34 to 37 above) ;

references to principal executive officers or a principal executive officer will be amended to make it clear that there is only one principal executive officer;

references to "situation" and to "address" will be amended in line with previous amendments to the CA; and

amendments which reflect a change in drafting style adopted throughout the CA when referring to the property of a company in respect of which a receiver, has been appointed (see paras 491 to 492 of this ex-memo on Bill cl. 91 for an explanation of these amendments).

BILL PART IV - AMENDMENT OF COMPANIES
(TRANSITIONAL PROVISIONS) ACT 1981

Cl. 129 : Principal Act

671. The C(TP)A is referred to in Part IV of the Bill as the Principal Act (Bill cl. 129).

Cl. 130 : Registered auditors and liquidators

672. Background Where a person is deemed by C(TP)A s-sec. 26(1) to be registered under the CA as an auditor or liquidator for a period of 6 months and has applied to be registered under the CA as an auditor or liquidator within that period, but, at the expiration of that period, has not been notified of the results of his application, that person is, subject to CA s. 27, deemed to be registered as an auditor or liquidator for a further period (C(TP)A s-sec. 26(2)).

673. Proposed amendment C(TP)A s-sec. 26(2) will be amended so as to refer to Subdivision B of Division 2 of Part II of the CA (which deals with cancellation or suspension of registration) as well as to CA s. 27. (see paras 126 to 128 of this ex-memo for an explanation of Subdivision B of Division 2 of Part II of the CA).

BILL PART V - AMENDMENTS OF COMPANIES AND SECURITIES
(INTERPRETATION AND MISCELLANEOUS PROVISIONS) ACT 1980

Bill Part V : Introduction

674. Part V of the Bill (cls. 131 to 134) contains amendments to the Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 (hereinafter referred to as "C & S (I & MP) A"). This Act contains the substantive provisions of the interpretation code for the companies and securities scheme.

Cl. 131 : Principal Act

675. The C & S (I & MP) A is referred to in Part V of the Bill as the Principal Act (Bill cl. 131).

Cl. 132 : Regard to be had to purpose or object of relevant Act

676. Proposed amendment It is proposed to require the Courts, when interpreting scheme legislation, to have regard to the purpose or object of the relevant legislation (Bill cl. 132, proposed s.5A). This proposed amendment is based on s. 15AA of the Acts Interpretation Act 1901.

Cl. 133 : Definitions

677. Background Various terms that are used in "relevant Acts" to which the C & S (I & MP) A applies are defined in s. 9.

678. The "relevant Acts" include the major Commonwealth scheme acts.

679. Unless the contrary intention appears, the words "the Territory" or "the Australian Capital Territory" are defined to mean the Territory accepted by the Commonwealth pursuant to the Seat of Government Act 1909.

680. Proposed amendment It is proposed to replace the reference to the "Seat of Government Act 1909" by the correct reference to the "Seat of Government Acceptance Act 1909" (Bill cl. 133).

Cl. 134 : Insertion of new section -
38A. Evidence

681. Background It is proposed to include a new evidentiary provision in the C & S (I & MP) A to assist in proving that a person was convicted of an offence under relevant companies and securities legislation or that a person contravened, or failed to comply with a provision of such legislation.

682. Proposed amendment For the purposes of a relevant Act, a certificate purporting to be signed by the Registrar or other proper officer of a court and stating:

- that a person was convicted by the court on a specified date of a specified offence; or
- that a person charged with a specified offence was, on a specified date, found to have committed the offence but was not convicted,

is, in the absence of proof to the contrary, conclusive evidence that the person was convicted or that the person contravened, or failed to comply with, a particular provision (Bill cl. 134).

BILL PART VI - AMENDMENTS OF NATIONAL
COMPANIES AND SECURITIES COMMISSION ACT 1979

BILL PART VI : Introduction

683. Part VI of the Bill (cls. 135 to 139) contains amendments to the National Companies and Securities Commission Act 1979 (hereafter referred to as 'NCSC Act').

Cl. 135 : Principal Act

684. The NCSC Act is referred to in Part VI of the Bill as the Principal Act (Bill cl. 135).

Cl. 136 : Interpretation

685. Background NCSC Act s. 3 contains a series of definitions for the purposes of the NCSC Act.

686. Proposed amendment A definition of "Accounting Standards Review Board" will be inserted in NCSC Act s-sec. 3(1).

687. The "Accounting Standards Review Board" (hereafter referred to as 'ASRB') will be defined as the body, known as the ASRB, established by the Ministerial Council (Bill cl. 136).

Cl. 137 : Application of moneys

688. Background In order to provide for:

- (i) the establishment and operating costs of the ASRB; and

(ii) payment of remuneration and travelling allowances to the members of the ASRB,

it is proposed that the Ministerial Council will make a specific allocation of funds for the operation of the ASRB within the annual budget allocation for the NCSC. It is intended that the NCSC will then make any necessary payments in connection with the operation of the ASRB, and to the members of the ASRB.

689. NCSC Act s. 29 provides that the moneys of the NCSC may be applied only in accordance with paras (a), (aa), (b) and (c) of s-sec. 29(1). At present however, there is no paragraph in NCSC Act s-sec. 29(1) which would authorise the NCSC to apply any moneys in payment of any remuneration or allowances payable to members of the ASRB, or in payment of any expenses incurred in relation to the operation of the ASRB.

690. Proposed amendment NCSC Act para. 29(1)(a) will be amended to provide that the moneys of the NCSC may also be applied in payment or discharge of any obligations undertaken by the NCSC or by the ASRB in connection with the performance of the functions or exercise of the powers of the ASRB (Bill paras 137(a) and 137(b)).

691. With respect to the payment of remuneration and allowances to members of the ASRB, NCSC Act para. 29(1)(b) will be amended to provide that the moneys of the NCSC may also be applied in payment of any remuneration or allowances payable to members of the ASRB (Bill para. 137(c)).

Cl. 138 : Power to summon witnesses and take evidence

692. Background A member or acting member of the NCSC may, summon a person to attend at a hearing to give evidence, - r produce any documents referred to in the (NCSC'':': A. t

s-sec. 37(1)). A member or acting member may require the person either to take an oath or make an affirmation that the answers given to the questions asked will be true (NCSC Act s-secs 37(2) and (3)).

693. Proposed amendment It is proposed to simplify the oath or affirmation to be taken or made by a person who proposes to give evidence at an NCSC hearing. In future, the oath or affirmation to be taken or made is an oath or affirmation that the evidence to be given will be true (Bill cl. 138).

Cl. 139 : Insertion of new section -

43A - Accounting Standards Review Board

694. Background It is proposed that the ASRB should be provided with full-time administrative and secretarial staff.

695. Such staff of the ASRB would be employees of the NSW Corporate Affairs Commission. However, it is intended that the NCSC would enter into an arrangement with the NSW Public Service Board pursuant to NCSC Act s-sec. 24(2), whereby the services of these employees would be made available to the NCSC for the purpose of staffing the ASRB.

696. At present however, there is no provision in the NCSC Act which would enable the NCSC to provide staff and facilities to the ASRB (cf. NCSC Act ss. 44 and 44A which enable the NCSC to provide staff and facilities to the Companies and Securities Law Review Committee, and to the Ministerial Council Secretariat).

697. The employees seconded pursuant to NCSC Act s-sec. 24(2) would come within the NCSC Act s-sec. 3(4) definition of "member of staff of the Commission". Accordingly, it would appear that the NCSC would not at present be entitled to provide such "staff" to the ASRB.

698. Proposed amendment A new section will be inserted in the NCSC Act entitling the NCSC to provide to the ASRB such staff and facilities as are approved by the Ministerial Council for the purposes of the performance of the functions and the exercise of the powers of the ASRB (proposed NCSC Act s. 43A - Bill cl. 139).

BILL PART VII - AMENDMENTS OF SECURITIES INDUSTRY ACT

1980 Bill Part VII : Introduction

699. Part VII of the Bill (cls. 140 to 151) contains various amendments to the Securities Industry Act 1980 (hereafter referred to as the 'SIA'). This Act contains the substantive provisions for the new Australian securities industry code.

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

Cl. 140 : Principal Act

701. The SIA is referred to in Part VII of the Bill as the Principal Act (Bill cl. 140).

Cl. 141 : Interpretation

702. Background SIA s-sec. 4(1) of the SIA contains a series of definitions for the purposes of the SIA. In particular "officer", in relation to a body corporate, is defined to include a receiver and manager of the property or any part of the property of the body corporate (SIA s-sec. 4(1), para (b) of definition of "officer").

703. "Director", in relation to a body corporate, is defined to include any person occupying or acting in the position of director and any person in accordance with whose directions or instructions the directors are accustomed to act

(SIA s-sec. 4(1)). There is a corresponding definition of "director", in relation to a corporation, in CA s-sec. 5(1). However, CA s-sec. 5(2) makes it clear that a director does not include certain professional advisers in accordance with whose directions or instructions the directors are accustomed to act. There is no corresponding provision in the SIA.

704. Proposed amendment - Definition of "officer" It is proposed to remove certain words from para (b) of the definition of "officer" so that "officer", in relation to a body corporate, will be defined to include a receiver and manager of property of the body corporate (Bill para. 141(a)).

705. Similar amendments are proposed to:

- (a) SIA paras 8 (8) (b) , 128(11)(b) and 143(2)(b), and s-paras 48(b) (ii) and 59(1) (b) (ii) (see Bill cis. 146, 151 and Sch. 2); and
- (b) CA ss. 323, 559, s-sec. 560(4), paras. 12(10) (b), 84(3) (b), 85(2) (b), 237(4) (b), 535(5)(b), 538(b) and 562(1)(f), and s-paras. 6(d) (i) , 315(11) (a) (i) and (ii), and 562(1)(f) (See Bill cis. 91, 128 and Sch. 1).

706. Proposed amendment - Professional advisers not directors It is proposed to include a provision like CA s-sec. 5(2) to make it clear that a professional adviser or a person who gives advice to directors in the course of business: with the directors or the body corporate is not to be regarded as a director (Bill para. 141(b), proposed SIA s-sec. 4(114)).

Cl. 142 : Power of Court to make certain orders

707. Background Where it appears to the Supreme Court that a person has committed (or is about to commit) an offence relating to trading in securities or has contravened a condition of a licence or the stock exchange business or listing rules, the Court may make various orders (SIA s. 14).

708. Proposed amendments The Court will now be able to make such orders as it thinks fit and will not be limited to the orders specified in SIA s-sec. 14(1) (Bill para. 142(a)). A minor drafting change is also proposed to SIA s-sec. 14(2) (Bill para. 142(b)).

709. Similar amendments are proposed to CASA ss. 45 and 46 (see Bill cis. 11 and 12), to CA s. 146 and by proposed CA s. 261A (see Bill cls 55 and 76).

Cl. 143 : Conditions to which licence is subject

710. Background The securities industry code empowers the NCSC to impose various conditions and restrictions when granting a licence to:

a dealer;

a dealer's

representative; an

investment adviser; or

(SIA s.51)

711. These conditions may include requiring the holder of a dealer's or investment adviser's licence to lodge and maintain with the corporate affairs office in the jurisdiction under whose law the licence is granted a bond not exceeding \$20,000 (SIA para 51(2)(d)). It has been argued that fixing in the Act itself the maximum amount for such a bond reduces the flexibility to set the level of the bond.

712. Proposed amendment It is proposed to amend this provision by enabling the maximum amount of the bond to be prescribed in the Securities Industry Regulations (Bill cl. 143).

Cl. 144 : Further provisions relating to revocation and suspension of licences

713. Background The NCSC has the power (provided that the licensee is given an opportunity for hearing under SIA s. 62) to revoke a licence it has granted to a dealer, a dealer's representative, an investment adviser or an investment representative if, among other things, it has reason to believe that the licensee has not performed his duties efficiently, honestly and fairly (SIA para. 60(1) (b)).

714. The terms of this power (in SIA para 60(1)(b)) create problems where it is desired to revoke a licence because an applicant has made materially false or misleading statements in his application for a licence under the SIA.

715. Proposed amendment It is proposed to give the NCSC an additional power to revoke a licence where the application for the licence contained false or materially misleading matter or omitted material matter (Bill cl. 144).

Cl. 145 : Deposits to be invested by stock exchange

716. Background A dealer is required to open and maintain a trust account (SIA s. 73). The penalty for contravention or failure to comply with this requirement is \$5,000 or imprisonment for one year, or both (SIA s-sec. 73(6)). However, the penalty for failure to pay certain moneys received from a stock exchange into the trust account (as required by SIA s. 97) is either \$5,000 or imprisonment for one year (SIA s-sec.97(7)).

717. This difference in penalty is anomalous as the penalty incurred under SIA s-sec. 97(7) relates to a failure to pay money into a s. 73 trust account.

718. Proposed amendment It is proposed to bring the two penalty provisions into line so that they both are \$5,000 or one year's imprisonment or both (Bill cl. 145).

Cl. 146 : Prohibition of dealings in securities by
insiders

719. Background A person who is, or has been in the past 6 months, connected with a body corporate and as a result of his connection has price sensitive information in relation to a second body corporate, must not deal in securities of the second body corporate. (SIA s-sec 128(2)). For example, an officer of a body corporate would be prohibited from dealing in securities of a second body corporate if he was aware that the body corporate with which he was connected was proposing a take-over of the second body corporate.

720. A body corporate is also prohibited from dealing in securities if one of its officers is so prohibited because of inside information (SIA s-sec 128(6))
unless:-

- (a) the decision to deal in securities was taken by a person other than the officer with inside information;
- (b) the body corporate had arrangements to ensure that the inside information was not communicated to that person and that no advice with respect to the transaction was given to him by a person in possession of the information; and
- (c) the inside information was not communicated and such advice was not given

(SIA s-sec 128(7)).

721. Proposed amendment It is proposed to make a further exception to the prohibition in SIA s-sec. 128(6) so as to allow a body corporate to deal in securities of another where one of its officers possesses information obtained in the course of his duties and relating only to its proposed dealings in securities of that other body corporate. This exception will protect a body corporate proposing to make a take-over of a target company or otherwise proposing to acquire or dispose of securities of another body corporate. A minor drafting change is also proposed to remove superfluous words from SIA para. 128(11) (b) (Bill cl. 146 - see also paras. 704 to 705 above).

Cl. 147 : Penalty notices

722. Background Amendments to the CA and the SIA are proposed to enable minor breaches of the companies and securities legislation to be dealt with by means of a penalty notice system rather than having the matter taken to court. It is anticipated that this will lead to a reduction in the

number of cases proceeding to a court hearing, thereby resulting in a saving of time and cost for both the enforcing authority and the alleged offender.

723. Proposed amendment A new provision, dealing with penalty notices, will be inserted after the general offence provision in SIA s. 141 (Bill cl. 147, proposed SIA s. 141A).

724. This proposed new provision is in similar terms to the proposed new provision to be inserted after CA s. 570 (see paras. 633 to 642 of this ex memo for an explanation of proposed CA s. 570A).

Cl. 148 : Continuing offences

725. Background Where the SIA requires an act or thing to be done within a particular period or before a particular time, but that act or thing is not done within the period or before the time and that failure constitutes an offence, the obligation to do that act or thing continues until the act or thing is done (SIA para 142(1)(d)).

726. Where a person is convicted of an offence that (by virtue of SIA para 142(1)(d)) is constituted by failure to do that act or thing after the expiration of that period or after that time, that person is guilty of a separate and further offence for each day after the day of conviction that the failure to do the act or thing continues (SIA para 142(1)(e)).

727. Proposed amendment SIA para. 142(1)(e) will be omitted and a new para. 142(1)(e) will be substituted (Bill cl. 148).

728. The new para. 142(1)(e) is in similar terms to proposed CA para. 571(1)(e), inserted by cl. 122 of the Bill (see paras. 643 to 646 of this ex memo for an explanation of proposed CA para. 571(1)(e)).

Cl. 149 : Injunctions

729. Background The Supreme Court is currently able, on the application of the NCSC or of any person whose interests have been, are, or would be affected by certain conduct to grant an injunction restraining a person from committing an offence or requiring a person to something which is either considered desirable by the Court or which would prevent the occurrence of an offence. Alternatively, or in addition, the Court is able to award damages to, any person. The Court is also able to grant an interim injunction and rescind or vary any injunction granted (SIA s. 149).

730. Proposed amendment SIA s. 149 will be amended along the lines of amendments made to CA s. 574 by cl. 123 of the Bill (Bill cl. 149). (See paras. 647 to 649 of this ex memo for a discussion of these proposed amendments).

Cl. 150 : Regulations

731. Proposed amendments The regulation making power will be extended to deal with the penalty notice system (Bill cl. 150). These proposed sub-sections are in similar terms to the proposed CA s-secs 577(7) and (8) to be inserted by Bill cl. 124 (see paras. 650 to 657 of this ex memo for an explanation of these proposed amendments).

Cl. 151 : Further amendments

732. Proposed amendments The references in the SIA to master and servant will be changed to employer and employee respectively. (Bill cl. 151 - Schedule 2 - see paras. 34 to 37 of this ex memo for a discussion of this proposed amendment). Some other minor drafting changes are proposed (see paras 704 to 705 of this ex-memo for a discussion of this proposed amendment).

APPENDIX 'A'

733. The major changes between the exposure draft and this present Bill are as follows:-

<u>Exposure Draft</u>	<u>Nature of Change</u>
ED cl. 14 (definition of "director")	Deleted from Bill
ED cl. 29 (Certain persons to have duties and liabilities of directors; persons not to be held out as directors)	Deleted from Bill
ED cl. 36 (Power of company to obtain information as to beneficial ownership of its shares)	Strengthening of provisions enabling a company to obtain information as to beneficial ownership of its shares (Bill cl. 76).
ED cl. 38 (Interpretation)	Definition of "current assets" and related definitions deleted.
ED cl. 41 (Directors' reports)	Amended to require more informative reports, but not so as to require the disclosure of information which would be prejudicial to the interests of the company (Bill cl. 81).

Exposure Draft

Nature of Change

ED cis. 76-85
(objects and powers of
companies)

Alternative 2 (ie. companies
not required to have objects)
implemented in the Bill (Bill cl.
33).

Proposal that exempt
proprietary companies should
be required to lodge accounts with
the NCSC whether or not those
accounts are audited

Not implemented in the Bill.

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New provisions included in the Bill
which set out the procedures which
must be followed by the Companies
Auditors and Liquidators
Disciplinary Boards in cancelling or
suspending the registration of an
auditor or liquidator (Bill cl. 31).

Rationalization of NCSC powers of
exemption and modification in
relation to CA Part IV, Divisions 1,
2, 5 and 6 (Bill cl. 68).

New provisions included in the Bill
which will require accounts and group
accounts to be prepared in accordance
with accounting standards approved by
the Accounting Standards Review
Board (Bill cl. 80).