1985

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

COMPANIES AND SECURITIES LEGISLATION (MISCELLANEOUS AMENDMENTS) 1985

EXPLANATORY MEMORANDUM

(Circulated by Authority of the
Deputy Prime Minister and
Attorney-General, the Honourable Lionel Bowen, M.P.)

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ABBREVIATIONS

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

ASRB	-	Accounting Standards Review Board
Board	-	Companies Auditors and Liquidators Disciplinary Board
CA	-	Companies Act 1981
CASA	-	Companies (Acquisition of Shares) Act 1980
C&S Interpretation Act	-	Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980
C(TP)A	-	Companies (Transitional Provisions) Act 1981
I CAC 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
NCSC	-	National Companies and Securities Commission
NCSC Act	-	National Companies and Securities Commission Act 1979
SIA	-	Securities Industry Act 1980

INTRODUCTION

1. The purpose of this explanatory memorandum is to explain the contents of the Companies and Securities Legislation (Miscellaneous Amendments) Bill 1985 (hereafter referred to as 'the Bill'), which makes various amendments to the Commonwealth Acts under the co-operative companies and securities scheme.

2. This Bill, which was approved by the Ministerial Council for Companies and Securities following its consideration of the public comments that were made on the two earlier drafts of the Bill, is submitted to the Commonwealth Parliament in accordance with the Commonwealth's obligations under the Formal Agreement.

3. If enacted, these amendments will, subject to the making of regulations for each State to effect any necessary local modifications (sometimes referred to as "translator regulations"), have automatic effect in each State without the need for further and separate substantive State legislation.

4. In the event of the Commonwealth Parliament not enacting these amendments within six months of their approval 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).

Explanatory memorandum

5. The remainder of this explanatory memorandum:

(a) contains a brief outline of the significant proposals contained in the Bill;

(b) deals sequentially with the content of each clause of the Bill; and

(c) contains a list of all changes made to the first exposure draft by the second exposure draft (Appendix A), and major changes made to the second exposure draft by the Bill (Appendix B).

Companies and Securities Legislation
(Miscellaneous Amendments) Bill 198S

Brief outline of changes

6. A brief outline of the significant new proposals is set out below:

(a) Companies (Acquisition of Shares) Act 1980

Conditions attached to offers under a take-over scheme

The Bill contains amendments to CASA dealing with the purchase of shares on-market outside a takeover offer, the withdrawal of offers and the power of the National Companies and Securities Commission to refuse to register proposed offers in certain cases.

(b) Companies Act 1981

(i) Abolition of Ultra Vires

The Bill includes new provisions which more clearly give effect to the intention of the 1983 amendments to abolish the doctrine of ultra vires insofar as it restricted the company's capacity to deal with outsiders.

At the same time, the company will continue to be permitted to specify objects or impose upon itself restrictions on its powers (albeit that it has now been clarified that such restrictions must be express). But, consistent with the purpose of the existing provisions, the amendments will ensure that the failure by the company or any of its officers to comply with the objects or such restrictions will only give rise to actions by the members against the company or the officers concerned and will not affect any legal rights which may have been

obtained by third parties in their dealings with the company.

(ii) Modification of Accounting Requirements

The Bill enlarges the capacity of the NCSC to grant exemptions to individual companies and classes of companies from any of the accounting requirements set out in either the Companies Act/Codes or in the Seventh Schedule to the Companies Regulation.

The NCSC will also be able to impose requirements which differ from the statutory requirements.

In either case, this power could only be exercised if compliance with the statutory requirements would render the accounts misleading, or inappropriate to the circumstances of the relevant company (or companies) or would impose unreasonable burdens on such companies.

(iii) Exclusion of Retirement Villages from Ambit of Companies and Securities Legislation

The Bill provides that as from 1 July 1987, rights to participate in retirement village schemes will not be subject to regulation under companies and securities legislation.

In the interim period pending commencement of the amendments, the NCSC has delegated all its powers concerning retirement villages to the State and Territory Corporate Affairs Commissions which will each administer the prescribed interests provisions in their application to retirement villages in the manner most appropriate to the needs of the particular State or Territory.

As from 1 July 1987 it will be a matter for each Government as to whether it introduces separate legislation concerning aged care issues arising in respect of retirement villages.

In taking this step, it has been accepted that the prescribed interests provisions of companies and securities legislation are not the most appropriate mechanism for dealing with such issues.

(iv) Disclosure of Beneficial Shareholdings

The Bill provides that all shareholders will be required to give a notice to the company whenever they commence to hold beneficially shares previously held non-beneficially, or vice versa.

(c) Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980

Use of extrinsic material in interpretation of scheme legislation:

It is proposed that the Companies and Securities (Interpretation and Miscellaneous Provisions) Act will be amended to enable extrinsic material to be used if this would assist in ascertaining the meaning of a provision in scheme legislation. This proposed amendment is based on s. 15AB of the Commonwealth Acts Interpretation Act 1901.

(d) Securities Industry Act 1980

(i) Screen trading and markets other than stock exchanges

* It is proposed to:

(a) amend the definition of stock market to ensure that all methods of trading are covered by the Securities Industry Act;

(b) introduce the concepts of securities exchanges and approved securities organisations to widen the scope of the Securities Industry Act to cater for all types of secondary securities markets; and

(c) empower the Ministerial Council to exempt stock markets from all or any of the requirements of the Securities Industry Act.

(ii) Licensees to have reasonable basis for recommendations as to investments:

* A licence holder will be required to have a reasonable basis for making a recommendation concerning securities to a person who may reasonably be expected to rely on the recommendation.

Financial Impact Statement

The proposals in the Bill have no cost implications for the Commonwealth's contribution to the co-operative companies and securities scheme.

Contents of the Bill

7. 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	-	Amendments of Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980
Part V	-	Amendment of Companies and Securities Legislation (Miscellaneous Amendments) Act 1983
Part VI	-	Amendments of National Companies and Securities Commission Act 1979
Part VII	-	Amendments of Securities Industry Act 1980.

BILL PART I - PRELIMINARY

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

Cl. 1: Short title

9. When enacted the Bill will be cited as the Companies and Securities Legislation (Miscellaneous Amendments) Act 1985 (Bill cl. 1).

Cl. 2: Commencement

10. At this stage it is anticipated that most of the provisions of the Bill will be proclaimed to come into operation on the same day.

11. However, the Bill does provide that certain provisions will come into operation on a specific day. Cls. 45 and 131 of the Bill will be deemed to have come into operation on 1 July 1982 (Bill s-cl. 2(8)). Cl. 65 and s-cl. 16S(2) of the Bill will come into operation on 1 July 1987 (Bill s-cl. 2(9)). Part V of the Bill will be deemed to have come into operation on 1 January 1984 (Bill s-cl. 2(12)).

12. The Bill ensures that all of the provisions which are consequential on the insertion of proposed s.562A (namely, clauses 30(2), 56 to 45, 65 and 123) will come into operation on the same day (Bill s-cl. 2(7)). The Bill also ensures that various other provisions will be proclaimed to come into operation on the same day (see Bill s-cls. 2(5), (4), (S), (6) and (10)).

13. The Bill also provides that s-cl. 80(2) will come into operation on the same day as s-cl. 80(1) except that, if on that day s.9 of the Companies Amendment Act 1985 has not come into operation, s-cl. 80(2) shall come into operation immediately after the commencement of that section (Bill s-cl. 2(11)).

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

Conditions attached to take-over offers

14. In brief, the Bill will make the following amendments to CASA in relation to conditional take-over offers:

(a) CASA s.18, dealing with the power of the NCSC to register Part A statements and offers made under take-over schemes, will be amended to enable the NCSC to refuse to register proposed offers relating to a conditional take-over scheme where the fulfilment or failure of the condition to which the offers are subject depends on:

(i) the opinion, belief or other state of mind of the offeror; or

(ii) the happening of an event which is within the sole control of the offeror;

(b) a take-over offer may not be withdrawn without NCSC consent and this consent may be subject to conditions;

(c) an offeror will not be able to purchase shares on-market during the bid if the offer is subject to any prescribed condition other than a condition that a prescribed occurrence does not occur, or a condition that is approved by the NCSC; and

(d) CASA s.28 dealing with the manner in which an offeror may declare offers to be free of conditions will be amended to ensure that where, at the end of the offer period, a prescribed condition has failed, all contracts formed by the acceptance of the offer will be void.

15. Background information on these proposals is contained in an NCSC commentary (Release 407 dated 2 July 1984) and an NCSC Discussion Paper ("Towards a Policy Statement relating to conditions in takeover offers" issued in June 1985).

Cl. 3: Principal Act

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

Cl. 4: Definitions

17. Background At present, CASA deals with securities that are listed for quotation on stock exchanges which are members of the Australian Associated Stock Exchanges. With the introduction of a regime that will cater for the development of a range of securities exchanges (in addition to existing stock exchanges) certain consequential amendments are proposed to CASA.

18. Proposed amendments The principal amendments are set out in Schedule 1 of the Bill and are accompanied by a series of new and amended definitions which are contained in cl. 4 of the Bill. The principal effect of these proposed amendments is to widen the CASA notification requirements in cases where securities are listed for quotation on securities exchanges other than existing stock exchanges.

19. At present, it is not proposed to extend the exemptions to CASA s.11 contained in provisions such as CASA s.13 and s.17 to securities exchanges that are not stock exchanges. If there are circumstances in which it would be appropriate for these provisions to apply, the NCSC has indicated that it would consider the matter under CASA s.57 or s.58.

Cl. 5: Acquisition and disposal of, and entitlement to, shares, and associated persons

20. Background To remove any doubt which may arise following the decision in Rendoel Pty. Limited v Campbell Investment Co (1985) 3 ACLR 335 on the interpretation of various provisions in co-operative scheme legislation the NCSC has proposed amendments to ensure that:

(a) a company can be an associate of another person in respect of a matter relating to shares in that company;

(b) a company can have an associate in respect of such a matter;

(c) a company is capable of having a relevant interest in, or being entitled to, its own shares; and

(d) the expression "either of those persons" is interpreted to mean "any of those two persons" rather than "each of those two persons".

21. Comparable amendments have been made to the CA, SIA and the C and S Interpretation Act.

22. CASA s-sec.7(3) provides that the shares to which a person is entitled include the shares in which that person or an associated person has a relevant interest. CASA s-sec. 7(4) sets out how a reference to an associate is to be construed. In Rendoel it was decided that the references to "the person", "the person concerned" and "the company" in CASA paras. 7(4)(b), (c), (d) and (f) were mutually exclusive and that therefore the company cannot be one of the persons referred to. Although not specifically decided, doubts were cast as to whether a company can have a relevant interest in its own shares. CASA paras. 7(4)(b) and 7(5)(b) refer to

arrangements etc. between a person and the person concerned by reason of which or under which either of those persons may take certain action.

25. Proposed amendment It is proposed that cl. S of the Bill will clarify the intended effect of CASA s.7 with regard to a company and its associates.

24. It is proposed to amend CASA s-paras. 7(4)(b)(i) and (iii) and para 7(5)(b) to remove the expression "either of those persons" and replace it with the words "the first mentioned person or the person concerned" (see para 20 above).

Cl. 6: Other interpretative and evidentiary provisions

25. Background It is a defence to a prosecution for a contravention of CASA s.11 if the defendant can establish that the contravention was due to inadvertence or mistake or to his not being aware of a relevant fact or occurrence (CASA s-sec.11(4)). The fact that a contravention of CASA s.11 has occurred because of inadvertence, etc., is also relevant to the Court's power under CASA s.45 to make certain orders where prohibited acquisitions have taken place (see CASA s-sec.45(3)).

26. Proposed amendment It is proposed that a new interpretative provision will provide that in determining whether a contravention has occurred because of a person's inadvertence or mistake, etc., that person's ignorance of the law, or a mistake on the person's part as to a matter of law should be disregarded (Bill cl. 6 - proposed s-sec.8(11)). Similar interpretative provisions will also be inserted in CA s.134 and CA s.261.

27. There is some doubt as to whether ignorance of the law, or mistake of law, can be a defence to contraventions under CASA on the grounds that such ignorance or mistake of law amounts to inadvertence. In Sungravure Pty. Ltd. v Meani (1963-64) 110 CLR

24 at 38, Windeyer J. commented that the law has no precise definition of inadvertence which would make it a distinct legal concept. Case law exists showing that ignorance of the law may constitute inadvertence: Ex parte Walker (1889) 22 QBD 584; Nichol v Fearbz; Nichol v Robinson (1923) 1 KB 480 at 496 et seq; NCSC v FAI Investments Pty. Ltd. (1982) 1 ACLC 358. However, there are also cases suggesting the contrary: The Walsall Case (1892) 4 O'M &H 123 at 129; The West Bromwich Case (1911) 6 O'M & H 256 at 289; Hamilton v Property Investments Ltd. (1985) 1 ACLC 124.

28. The purpose of the proposed amendment is to ensure that ignorance of the law or mistake of law cannot be used as a defence to prosecutions or actions brought under CASA.

29. It is also proposed that CASA s-sec.8(3) will be amended so that a reference to the period during which an offer remains open will not, if the contrary intention appears, be interpreted as meaning the period during which the offer would have remained open if it had not been accepted (Bill para 6(a)). This proposed amendment is consequential on the proposed amendment to CASA sub-para 16(2)(f)(vii) (see Bill para 11(c)).

Cl. 7: Approved manner of dispatch

30. Background At present several provisions in CASA require documents to be dispatched in a manner approved by the NCSC (e.g. CASA paras 16(2)(c), 17(10)(b)). An acceptable manner of dispatch, which is invariably approved, is dispatch by:

(a) pre-paid ordinary mail to shareholders within Australia; and

(b) pre-paid airmail to shareholders outside Australia.

Even where it is intended to dispatch certain documents in this manner those provisions in CASA providing for the dispatch of documents in a manner approved by the NCSC require the making of an application to the NCSC for approval of that manner of dispatch.

51. Proposed amendment It is proposed that those provisions in CASA which presently require documents to be dispatched in a manner approved by the NCSC will be amended to require instead that such documents be dispatched in "an approved manner" (e.g., see Bill para 11(a), Bill cl. 12, Bill paras 15(b), 15(d) and 21(c)).

32. It is also proposed that cl. 7 of the Bill will insert proposed s. 8A ("Approved manner of dispatch"). In most cases, a person will be taken to have dispatched a document in an "approved manner" if the document is dispatched in accordance with the manner prescribed in the regulations. It is intended that the manner of dispatch to be prescribed in the regulations will be:

(a) dispatch by pre-paid ordinary mail to shareholders within Australia; and

(b) dispatch by pre-paid airmail to shareholders outside Australia.

33. However, proposed s.8A will also provide that a document shall be taken to have been dispatched in an approved manner if it is dispatched in accordance with a direction or approval obtained from the NCSC (proposed s-sec.8A(2) and s-sec.8A(3)). These powers of the NCSC are considered necessary for the following reasons:

(a) The power of the NCSC to approve a manner of dispatch under proposed s-sec. 8A(3) would permit an application to be made where particular circumstances

warranted dispatch in a manner other than that prescribed by the regulations (e.g. by courier service during a postal strike).

(b) The power of the NCSC to direct that a document be dispatched in a certain manner would overcome the problems which might otherwise arise where, for example, a person who does not apply to have another manner of dispatch approved during a postal strike, chooses to post a document in the normal manner notwithstanding the disruption caused to postal services by the postal strike.

Cl. 8: Relevant interests in shares

34. Background CASA s-sec. 9(1) provides that a person has a relevant interest in a share in a corporation if he has the power to control the exercise of voting rights attached to that share, or if he has power to control the disposal of that share. If a body corporate has this power, and another person is in a position where he either directs or instructs the body corporate (CASA para 9(4)(c)), has a controlling interest in the body corporate (CASA para 9(4)(d)) or controls a prescribed percentage (20%) of the body corporate's voting shares (CASA para 9(4)(e)), then that person is deemed to have the same power as the body corporate has in relation to that share (CASA s-sec. 9(4)). CASA s-sec. 9(4) also has an extended operation, in that a person can be deemed to have power over the shares of a corporation by means of a chain of bodies corporate, each of which is deemed, by virtue of s-sec. 9(4), to have this power. CASA s-sec. 9(5) provides a further extension of the definition of a person's deemed power under CASA para 9(4)(e).

35. Proposed amendment It is proposed that cl. 8(a) of the Bill will make various amendments to CASA s.9. CASA para 9(4)(e) will be combined with CASA s-sec. 9(5) to form a new sub-section (proposed CASA s-sec. 9(5)). Unlike CASA

s-sec. 9(4), proposed s-sec. 9(5) will not have an extended operation, i.e. a person will not be deemed to have control of Company B if he controls 20% of Company A which controls 20% of Company B (even though Company A is deemed to have control of Company B).

36. It is also proposed that the reference to "power" in proposed s-secs. 9(4) and 9(5)will be expressed to include deemed power. The purpose of this proposed amendment is to resolve any ambiguity as to whether the term "power" in proposed s-secs. 9(4) and 9(5) includes "deemed power".

37. The following examples illustrate the operation of these proposed amendments:

Example A

38. Company A controls 20% of the voting shares in Company B. Company B has a controlling interest in Company C which has shares in Company D.

Present Position

39. Company A has a relevant interest in shares in Company D since Company A is deemed to have an interest in Company C by virtue of the extended operation of CASA s-sec. 9(4).

After Amendment

40. Company A will still have a relevant interest in the shares of Company D (or more precisely, in Company C's shares in Company D) since proposed s-sec. 9(5) will allow an interest to be deemed where Company B is deemed to have power by reason of CASA s.9 (other than proposed s-sec. 9(5)).

Example B

41. Company A controls 20% of the voting shares in Company B. Company B controls 20% of the voting shares in Company C which has shares in Company D.

Present Position

42. On the basis that the reference to "power" in CASA s-sec. 9(4) includes "deemed power" then, as in Example A, Company A is deemed to have a relevant interest in shares in Company D because of the extended operation of CASA s-sec. 9(4).

After Amendment

43. Company B will be deemed to have a relevant interest in Company D by virtue of the operation of proposed s-sec. 9(5). However, Company A will not be deemed to have an interest because proposed s-sec. 9(5) will not extend a deemed interest to the situation where Company B ("the body corporate" in proposed s-sec 9(5)) has been deemed to have power by virtue of proposed s-sec. 9(5).

44. The rationale for this proposed amendment is that it is considered an unreasonable attenuation of a relevant interest if the 'deemed power' arising by virtue of proposed s-sec. 9(5) is extended indefinitely along a chain of corporations. However, it will still be possible for persons to establish that a relevant interest exists by virtue of CASA s-secs. 9(1) to (3).

45. Similar amendments will also be made to CA s.8 and SIA s.5 (see paras 141 to 142 on Bill cl. 32 and para 6S2 on Bill cl. 166).

46. It is also proposed to introduce a new s-sec.9(9A) to clarify the intention that a company can have a relevant interest in its own shares (see discussion of Bill cl. 5 at paras 20 to 24).

Cl. 9: Acquisition of shares permitted in certain circumstances

47. Background CASA s.15 sets out some of the circumstances in which acquisitions of shares otherwise prohibited by s.11 are permitted. In particular, CASA s-sec.15(4) permits an offeror to acquire shares on-market during the course of a Part A take-over bid if:

(a) the take-over bid is not a partial bid (CASA para 13(4)(a)); and

(b) where the offers are subject to conditions, those conditions only:

(i) relate to minimum acceptances not exceeding 90% of the shares concerned;

(ii) relate to certain "prescribed occurrences" (defined in CASA s.6); or

(iii) are such as are approved by the NCSC

(CASA para 15(4)(b)).

48. Proposed amendment It is proposed to amend CASA para 13(4)(b) so that an offeror will no longer be permitted to acquire shares on-market during the course of a Part A take-over bid where offers under that bid are subject to a minimum acceptance condition (Bill cl. 9 - proposed para 13(4)(b)). An offeror will, however, still be entitled to purchase shares on-market where offers under the take-over bid are subject to prescribed occurrence conditions or conditions which have been approved by the NCSC.

Cl. 10: Acquisition of not more than 3% of voting shares permitted in each 6 months

49. Background Notwithstanding the prohibition in CASA s.11, a holder of between 20% and 90% of the voting shares in a company is permitted to increase his holding in any way he chooses by up to 3% every 6 months (CASA s.15).

50. In determining the percentage increase in a person's entitlement to voting shares in a company, the formula in CASA s-sec.15(1) requires that all acquisitions within the preceding 6 months which have increased that person's entitlement be taken into account (see item "b" of CASA s.15 formula).

51. Proposed amendment It is proposed that cl. 10 of the Bill will amend the formula in CASA s.15. Where a person's entitlement has been increased during the preceding 6 months because of an allotment of voting shares made in accordance with CASA s-secs. 14(1) and 14(2) (i.e. a parri passu allotment), that allotment of shares will not be taken into account for the purposes of determining the number of shares acquired during the preceding 6 months which has increased that person's entitlement.

S2. A parri passu allotment made in accordance with CASA s-sec.14(1) does not increase the percentage entitlement of shareholders and is specifically excluded from the prohibitions in CASA s.11 (see CASA s-sec. 14(1)). However, the effect of taking into account, for the purposes of CASA s.15, the shares acquired under a parri passu allotment, is that a person may be prohibited from acquiring 3% of the company's voting shares during that 6 month period. The purpose of the proposed amendment is to remove this anomaly and ensure that an allotment of shares under a parri passu allotment will not affect the right of a person under CASA s.15 to have his entitlement to the voting shares of a company increased by up to 3% during any 6 month period.

Cl. 11: Take-over offers

53. Background The prohibitions in CASA s.11 do not apply to the acquisition of voting shares pursuant to formal offers made under a take-over scheme that complies with CASA s. 16.

54. Proposed amendments It is proposed to amend CASA para 16(2)(c) so that an offeror will be required to dispatch offers in an "approved manner" rather than in a manner approved by the NCSC (Bill para 11(a)). A document will be taken to have been dispatched in an "approved manner" if it is dispatched in accordance with proposed s.8A (see paras 51 to 53 above).

55. It is also proposed that Bill para 11(b) will require an offeror to specify the total number of shares included in each class of shares in the target company. This information will be in addition to the existing requirement in CASA s-para 16(2)(f)(iv) that an offeror specify the number of shares included in each class of shares in the target company to which the offeror was entitled before the offer was dispatched. This proposed amendment will enable offerees to calculate the percentage of shares the offeror proposes to acquire.

56. It is also proposed that CASA para 16(2)(f)(vii) will be amended to ensure that the date for payment of the consideration relating to an offer is no later than 21 days after the close of the offer period (Bill para 11(c) -proposed s-para 16(2)(f)(vii)).

Cl. 12: Take-over announcements

57. Background Where an on-market offeror makes a take-over announcement in relation to shares in a company, the offeror is required, within 14 days of the announcement, to dispatch in a manner approved by the NCSC, a copy of the Part C statement to each of the target company shareholders (CASA para 17(10)(b)).

58. Proposed amendment It is proposed to amend CASA para 17(10)(b) so that the offeror will be required to dispatch a copy of the Part C statement in "an approved manner" rather than in a manner approved by the NCSC (Bill cl. 12). A document will be taken to have been dispatched in "an approved manner" if it is dispatched in accordance with proposed s. SA (see paras 31 to 33 on Bill cl. 7).

Cl. 13: Registration of Part A statements and offers

59. Background A Part A statement may not be served on a target company unless a copy of the Part A statement and a copy of a proposed offer under the take-over scheme have been registered by the NCSC (CASA s-sec. 18(1)).

60. The NCSC may not register a Part A statement and an offer unless the statement and offer appear to comply with the requirements of CASA, and the NCSC is of the opinion that the statement and offer do not contain any matter that is false or materially misleading (CASA para 18(2)(a)).

61. Proposed amendment It is proposed that CASA s.18 will be amended so that the NCSC may also refuse to register a proposed offer if the offer under the take-over scheme will be subject to a prescribed condition the fulfilment of which depends on:

(a) the opinion, belief or other state of mind of the offeror or a person associated with the offeror; or

(b) the happening of an event which is within the sole control of the offeror or a person associated with the offeror.

(Bill cl. 13 - proposed s-sec. 18(2A))

62. These amendments will enable the NCSC to refuse to register an offer in limited situations (cf. the amendments

proposed in the second exposure draft of the Bill which would have required NCSC consent of prescribed conditions). The onus will be on the NCSC to establish that a particular prescribed condition can be characterised as depending on the offeror's "subjective" belief etc, or that the happening of an event is within the sole control of the offeror.

Cl. 14: Withdrawal of offers

63. Background CASA s.21 sets out the circumstances and the manner in which take-over offers may be withdrawn. Essentially, an offeror is able to withdraw at any time after 14 days from the offers being dispatched.

64. Proposed amendment It is proposed that CASA s.21 will be repealed and replaced with a new provision (proposed s.21) which will provide that a take-over offer may only be withdrawn with the consent of the NCSC and upon such conditions as the NCSC imposes (Bill cl. 14). The NCSC stated in its paper "Towards a policy statement relating to conditions in take-over offers" that it considers "that withdrawal of a takeover scheme will be justified only in exceptional circumstances".

Cl. 15: Variation of take-over offers

65. Background CASA s.27 sets out the circumstances in which a take-over offer may be varied.

66. Proposed amendments An offeror who wishes to vary an offer under a take-over scheme by extending the period during which the offer remains open is required to do so in accordance with CASA s-sec. 27(8). It is proposed that where the NCSC has consented to the withdrawal of take-over offers under proposed s.21 (see paras 63 to 64 on Bill cl. 14), then the manner in which an offeror may extend the offer period under CASA s-sec. 27(8) will be subject to any condition specified by the NCSC in its consent to the withdrawal of take-over offers (Bill para 15(a) - proposed s-sec. 27(8A)). It is envisaged that the

circumstances in which a combination of withdrawal and variation of take-over offers may arise would be extremely rare.

67. An offeree who has accepted a conditional take-over offer may at present withdraw his acceptance of the offer where he receives a copy of a notice from the offeror under CASA s-sec. 27(11) notifying an extension of the offer period beyond 6 months (CASA s-sec. 27(12)). It is proposed that an offeree will be entitled to withdraw his acceptance of a conditional take-over offer where he receives a notice of variation from the offeror under CASA s-sec. 27(10) being a variation which would postpone for a period of more than one month the time when the offeror's obligations under the take-over scheme must be satisfied (Bill para 15(e) - proposed s-sec. 27(12)).

68. As a consequence of the proposed amendment to CASA s-sec. 27(12), it is also proposed that CASA s-sec. 27(10) be amended so that the notice of variation required to be served on the target company and offerees will also be required to set out the effect of proposed s-sec. 27(12) where the result of the proposed variation would be to postpone for a period of more than one month the time when the offeror's obligations under the scheme are to be satisfied (Bill para 15(b) - proposed s-sec. 27(10)).

69. It is also proposed that the notice under CASA s-sec. 27(11) will no longer be required to set out the terms of CASA s-sec. 27(12) (Bill para 15(c) - proposed s-sec. 27(11)). This proposed amendment is consequent upon the proposed amendment to CASA s-sec. 27(12).

70. CASA paras 27(10)(b) and 27(11)(b) will also be amended by requiring that the offeror dispatch notices required by those provisions in an "approved manner" rather than in a manner approved by the NCSC (Bill paras 15(b) and 15(d)). A document will be taken to have been dispatched in an "approved manner"

if it is dispatched in accordance with proposed s.8A (see paras 51 to 55 on Bill cl. 7).

Cl. 16: Declaration where take-over offers are conditional

71. Background An offeror may not treat a conditional take-over offer as being free from a condition unless he publishes a declaration to that effect not less than 7 days before the end of the offer period (CASA s.28). Where no such declaration is made, and at the end of the offer period the condition has either failed or has not been fulfilled, then the intent of CASA is that the take-over scheme should not proceed and acceptances received under the scheme should be returned to offerees. However, the interaction of CASA and the common law of contract has created a degree of uncertainty in this area. While CASA seeks to ensure that the only way an offeror may treat a conditional take-over offer as being free from a condition is by making a declaration under CASA s.28 prior to the end of the offer period, the common law still allows an offeror (who has not made a declaration under CASA s.28) to waive the condition after the close of the offer period (see Gerrard Company of Australia Ltd. v. Johns Perry Ltd. (1983) 1 ACLC 646).

72. Proposed amendment It is proposed that CASA s-sec. 28(9) will be amended so that where offers under a take-over scheme have at any time been subject to a prescribed condition, all contracts formed by the acceptance of offers under the scheme will be void if at the end of the offer period:

(a) the offeror has not declared the offers to be free from the condition;

(b) the offers have not become free from the condition under CASA s-sec. 50(1); and

(c) the condition has not been fulfilled.

(Bill cl. 16 -proposed s-sec. 28(9)).

73. The purpose of this proposed amendment is to overcome the decision in Gerrard Co. v. Johns Perry.

Cl. 17: Repeal of section 29

74. Background Where a take-over offer is conditional on the offeror obtaining acceptances that would give him more than 50% of the voting shares, the offeror may not declare the offer free from that condition before reaching the 50% entitlement level (CASA s.29).

75. Proposed amendment It is proposed that CASA s.29 will be repealed (Bill cl. 17). The rationale of CASA s.29 is that some offerees may not wish to sell if the offeror has not achieved his object of majority control. However, the utility of CASA s.29 is limited as offerors may avoid the effect of CASA s.29 by simply making their take-over offers subject to a minimum acceptance level of just under 50%.

Cl. 18: Notification of offeror's entitlement

76. Background At present there is no formal mechanism for obtaining information with respect to the level of acceptances received under a take-over scheme involving an unlisted target company.

77. However, in the case of a target company which is listed, an offeror or on-market offeror is required, during the course of the take-over bid, to notify the Home Exchange daily of any changes in his entitlement to shares in the target company (CASA s. 39).

78. Proposed amendment It is proposed that cl. 18 of the Bill will insert a new provision which will impose certain notification requirements on an offeror for an unlisted target company. An offeror for an unlisted target company will be required during the offer period to notify the target company when entitlement to shares in the target company reaches 25%, 50%, 75% and 90%. (Bill cl. 18 - proposed s.39A).

79. Where a target company receives such a notice from an offeror, it will be required to make the notice available for inspection by its members (proposed s-sec. 39A(3)).

80. The purpose of this proposed amendment is to enable shareholders of an unlisted target company to have access to up-to-date information about the offeror's entitlement. Such information would assist directors in making any recommendations and would assist shareholders in assessing the likelihood of the offer being successful.

Cl. 19: Provisions relating to dissenting shareholders

81. Background A person who proposes to acquire all the shares in a company, and who accordingly makes take-over offers or an on-market announcement, may compulsorily acquire the shares of the remaining minority shareholders if:

(a) during the bid, the offeror becomes entitled (by any means) to not less than 90% of the shares in the company; and

(b) where the shares subject to acquisition represent less than 90% of the shares in the company, 75% of the offerees have disposed of their shares to the offeror.

(CASA s-sec.42(2)).

82. For the purposes of CASA s.42, "shares subject to acquisition" means:

(a) where take-over offers have been made, shares in respect of which offers were made; and

(b) where a take-over announcement has been made, shares other than shares to which the offeror is entitled

(CASA paras 42(1)(a) and 42(1)(b)).

83. The anomaly at present is that whenever a Part C offeror is entitled to more than 10% of the target's shares, the 75% requirement will apply whereas it may not apply in the case of a Part A offeror.

84. Proposed amendment It is proposed that CASA para 42(1)(a) will be amended so that the expression "shares subject to acquisition" will mean, where an offeror has made offers under a take-over scheme, shares in respect of which offers have been made, but excluding those shares to which the offeror was already "entitled" at the time of making the offers (Bill cl. 19).

Cl. 20: Orders where prohibited acquisitions take place

85. Background Where a person has acquired shares in a company in breach of CASA s.11, the Court may make certain orders (CASA s.45).

86. Proposed amendment It is proposed that cl. 20 of the Bill will amend CASA s.45 so that the Court, in addition to being able to make the orders set out in CASA paras 4S(1)(a) to (g) will also be able to make the following orders:

(a) an order cancelling a contract, arrangement or offer for an acquisition of shares (proposed para 45(1)(fa)); and

(b) an order declaring such a contract, arrangement or offer to be voidable (proposed para 45(1)(fb)).

87. So far as is practicable this proposed amendment will make the types of orders which the Court can make under CASA s.45 the same as under CASA s.47.

Cl. 21: Orders where offers not dispatched pursuant to Part A statement

88. Background Where an offeror serves a Part A statement on a target company, he may subsequently acquire shares on-market (CASA para 15(3)(a)). If, however, the offeror does not, within 28 days of having served the Part A statement, dispatch offers to the target shareholders, then the NCSC may apply to the Supreme Court for an order of the kind specified in CASA s-sec.45(1), or for an order requiring the offeror to dispatch such offers in a manner approved by the NCSC (CASA s-sec.46(1)).

89. Proposed amendment It is proposed that CASA para 46(1)(f) will be amended so that the offeror will be required to dispatch offers in an "approved manner" rather than in a manner approved by the NCSC (Bill para 21(c)). A document will be taken to have been dispatched in an "approved manner" if it is dispatched in accordance with proposed s.8A (see paras 31 to 33 above). Drafting amendments will also be made to CASA paras 46(1)(a) and 46(1)(b) (Bill paras 21(a) and (b)).

Cl. 22: Orders to protect interests of certain persons

90. Background Where the Supreme Court is satisfied that a provision of CASA has been contravened, or has not been complied with, it may make a wide range of orders for the purpose of protecting the rights of persons affected by the take-over scheme or take-over announcement (CASA s.47).

91. Proposed amendments It is proposed that Bill para 22(a) will amend CASA s-sec. 47(1) by replacing the word "rights" (first occurring) with the word "interests".

92. The purpose of this proposed amendment is to negate any suggestion that the Court, in making an order under CASA s.47, may only make an order for the purpose of protecting the legal or equitable rights of a person affected by a take-over scheme or take-over announcement.

95. Where an offeror contravenes a condition specified in a consent given under proposed s.21, the Court will be able to make any orders necessary to protect persons affected by the contravention (Bill para 22(b) - proposed s-sec.47(1A)).

Cl. 23: Miscellaneous provisions relating to orders

94. Background CASA s.49 provides for a number of matters which are ancillary to the order making powers of the Court. In particular, CASA s-sec.49(4) gives the Court power to make an order directing the disposal of shares subject to any conditions which the Court thinks fit.

95. Proposed amendment It is proposed that CASA s.49 will be amended so that the Court will be expressly empowered, when making an order directing a person to dispose of certain shares, to include in that order a provision requiring that person to account to the target company for any profit made from the disposal of those shares (Bill cl. 25 - proposed para 49(4)(b)). The Court wilt also be expressly empowered to include in such a disposal order a provision deeming the person specified in the order to hold the shares as trustee for the beneficial owners (Bill cl. 25 - proposed para 49(4)(c)).

96. The purpose of these proposed amendments is to clarify the power of the Court to order a person to dispose of certain shares under CASA s.49.

Cl. 24: Announcements of proposed take-over bids

97. Background Bluffing notices or announcements of take-overs are prohibited (CASA s-sec.52(1)). Where a proposed bid is announced, but not proceeded with within 2 months, or such further period as the NCSC allows, the prohibition in CASA s-sec. 52(1) is deemed to have been breached unless the person who made the announcement can establish that changed circumstances made it unreasonable for him to proceed with the bid (CASA s-sec.52(2)). A person is also prohibited from making, or announcing an intention to make, an offer or take-over announcement, if he has no reasonable or probable grounds for believing that he will be able to meet the obligations which may arise under the take-over bid (CASA s-sec. 52(4)).

98. Proposed amendment It is proposed that cl. 24 of the Bill will repeal CASA s.52 and replace it with a new provision. The aim of the proposed amendment is to clarify the intent behind CASA s.52 and to address criticisms made by Wells J. in B.T. Australia v The Bell Group Limited (1981) ACLC 40-719 in relation to the operation of CASA s.52.

99. A person will be prohibited from making a public announcement proposing to make a take-over offer or announcement if he:

(a) knows the announcement is false, or is recklessly indifferent to whether it is true or false; or

(b) has no reasonable grounds for believing that he will be able to fulfil his obligations arising under the take-over bid or CASA if there are a substantial number of acceptances.

(Bill cl. 24 - proposed s-sec. 52(1)).

100. The maximum penalty for contravening proposed s-sec.52(1) will be $20,000 or imprisonment for up to S years, or both (proposed s-sec. S2(2)).

101. A person will also be prohibited from making an announcement proposing to make a take-over bid if he does not, within 2 months or such further period as the NCSC permits, make a take-over bid in terms which are the same as, or not substantially less favourable to the offerees than the terms of the original announcement (proposed s-secs. S2(3) and 52(10)). The maximum penalty for contravening proposed s-sec. S2(3) will be $10,000 or imprisonment for up to 2 years, or both (proposed s-sec. S2(4)).

102. A person who has contravened both proposed s-secs.52(1) and S2(3) will only be liable to be convicted in respect of one of those offences (proposed s-sec. 52(5)).

103. A person who has contravened either proposed s-sec. S2(1) or proposed s-sec. 52(3) (regardless of whether he has been convicted) will be liable to pay compensation to any person who has suffered loss as a result of that contravention (proposed s-sec. S2(7)).

104. A person will not be guilty of an offence under proposed s-sec. S2(4) and will not be liable to pay compensation under proposed s-sec. S2(7) if he can establish that he could not reasonably have been expected to make the take-over bid:

(a) because of circumstances existing at the time of the public announcement which he did not know about and could not reasonably have been expected to know about; or

(b) because of a change in circumstances after making the announcement, not being a change in circumstances caused, whether directly or indirectly, by him.

(proposed s-sec. S2(8)).

105. The right to apply to the Court for an injunction under CA s-sec.574(2) will not be available in respect of a failure to make a take-over bid in accordance with a public announcement. CA s.571 ("Continuing Offences") will also not apply in relation to a failure to make a take-over in accordance with a public announcement (proposed s-sec. 52(9)).

Cl. 25: Offences

106. Background CASA s.55 provides that the general penalty for an offence is a fine of up to $2,500, or imprisonment for a period not exceeding 6 months, or both. CASA s.44 and s.49 are excluded from this general penalty provision.

107. Proposed amendment It is proposed that CASA s.52 will also be excluded from the general penalty provisions set out in CASA s.55 (Bill s-cl. 25(1)). The reason for this proposed amendment is that different penalties have been proposed for the offences provided for in proposed s.52 (see paras 100 to 101 above).

108. It is also proposed that s-cl. 25(2) of the Bill will amend CASA s-sec.55(5). The effect of this proposed amendment will be that the continuing offence provisions in CA s.571 will apply to CASA in the same way that other CA provisions apply by virtue of CASA s.5.

Cl. 26: Repeal of sections 54, 63 and 64

109. Proposed amendment It is proposed that CASA ss.54, 65 and 64 will be repealed (Bill cl. 26).

110. CASA s.54 ("Continuing offences") sets out the consequences of failing to comply with a continuing obligation under CASA (i.e. the obligation to perform that obligation continues notwithstanding that the relevant time period has elapsed; a person who has been convicted of an offence of

failing to perform such an obligation may also be guilty of a further and separate offence for each day after the conviction that he fails to perform the obligation). It is proposed that this matter will be dealt with by CA s.571 (see para. 108 above on Bill s- cl.25(2)).

111. CASA s.63 is a transitional provision which was originally inserted into CASA to deal with the acquisition of shares within 6 months of the commencement of CASA.

112. CASA s.64 is another transitional provision which was intended to deal with take-overs that were pending at the commencement of CASA.

Cl. 27: Schedule

113. 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 which is the subject of a formal take-over bid. These 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 has been made.

114. Paragraph 2(e) of Part B and Part D requires that there be set out in the Part B or Part D statement:

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

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

115. Proposed amendment It is proposed that paragraph 2(e) of Part B and Part D of the Schedule to CASA will be amended (Bill cl. 27). These proposed amendments are consequent upon proposed amendments to CA s.233 (see paras 309 to 318 on Bill cl. 69 -"Benefits for loss of, or retirement from, office").

116. A brief outline of the amendments proposed by cl. 27 of the Bill is set out below:

(a) Where a prescribed benefit (i.e. a payment of other valuable consideration or any other benefit - defined in proposed CA s-sec. 233(7), applied by proposed clause 3 of Parts B and D) other than an excluded benefit (i.e. retirement payments referred to in proposed CA s-sec. 233(2A) or leave of absence payments referred to in para (f) of the definition of 'exempt benefit' in proposed CA s-sec.233(7) - see proposed clause 3 in Parts B and D) will or may be given to a person in connection with the retirement of a person from a prescribed office in relation to the target company, the Part B or Part D statement must set out the amount of any such payment or the money value of any such benefit.

(b) Where a prescribed benefit will or may be given to a prescribed person in relation to the target company in connection with the transfer of the whole or part of the undertaking or property of the target company, the Part B or Part D statement must set out the amount of any such payment or the money value of any such benefit.

Cl. 28: Further amendments relating to securities exchanges.

117. Proposed amendment Amendments to certain provisions of CASA (which are set out in Schedule 1 of the Bill) are proposed which are consequential on the introduction of the concept of securities exchanges (see paras 17-19 and para 659).

PART III - AMENDMENTS OF COMPANIES ACT 1981

Cl. 29: Principal Act

118. The Companies Act 1981 (referred to in this explanatory paper as "CA") is referred to in Part III of the Bill as the Principal Act (Bill cl. 29).

Cl. 30: Interpretation

(i) Directors of foreign companies

119. Background CA s-sec. 5(1) defines "director", in relation to a corporation, as including:

(a) any person occupying or acting in the position of director of the corporation, by whatever name called and whether or not validly appointed to occupy or duly authorised to act in the position; and

(b) any person in accordance with whose directions or instructions the directors of the corporation are accustomed to act.

120. Proposed amendment A new paragraph is proposed to be added at the end of the definition of "director" in CA s-sec. 5(1) (Bill paras 30(1)(a) and (1)(b)).

121. This new paragraph will provide that the word "director", when used in the case of a foreign company, will include:

(a) a member of the committee of management, council or other governing body of the foreign company;

(b) any person occupying or acting in the position of member of the committee of management, council or other governing body of the foreign company, by whatever name called and whether or not validly appointed to occupy or duly authorised to act in the position; and

(c) any person in accordance with whose instructions the members of the committee of management, council or other governing body of the foreign company are accustomed to act.

122. The purpose of this proposed amendment is to take account of the fact that the members of the governing body of a foreign company may not necessarily be known by the term "directors". Wherever reference is made within the CA or the Companies Regulations to a director of a foreign company, that reference will, by virtue of this proposed definition, include a reference to a member of the committee of management, council, or other governing body of the foreign company and to the persons specified in proposed s-paras 5(1) (c)(ii) and (iii) of the definition of "director".

123. A foreign company might possess both a governing body which would exercise the traditional functions of directors and a committee of management having some lesser status (e.g. in the Federal Republic of Germany, public companies have both a supervisory board which could be regarded as the governing body and a board of management). The proposed amendments will encompass members of both boards on the basis that members of each board would appear to have many responsibilities akin to those of a director of an Australian company.

(ii) Prescribed interests definition

124. Background The provisions of CA Part IV, Division 6 ("Prescribed Interests") regulate the public offering of

"prescribed interests". The term, "prescribed interest" is defined in CA s-sec. 5(1) and includes:

(a) any right to participate in a time-sharing scheme; and

(b) any other right to participate, or any interest, in certain schemes described in para (b) of the definition of "prescribed interest".

125. Proposed amendment It is proposed to amend the definition of prescribed interests so that all prescribed interests other than rights to participate in time-sharing schemes are labelled "participation interests" (Bill para 30(1)(e)). The definition of "participation interest," which is in similar terms to para (b) of the existing definition of "prescribed interest" in CA s-sec. 5(1), contains minor drafting amendments in order to remove some latent ambiguities (e.g. as to whether the words "whether enforceable or not" qualify the words "right to participate" or only "any interest".) The capacity to exempt particular interests by regulation will, by virtue of this proposed amendment, extend to time-sharing interests as well as participation interests.

126. The definition of prescribed interest will continue until 1 July 1987 to cover those retirement villages that are structured in such a way as to fall within the terms of the participation interest definition.

127. However, as from 1 July 1987 all interests in retirement village schemes will be excluded from the operation of companies and securities legislation (see Bill s-cl 2(9), cl. 63 and cl. 165).

128. Similar amendments will also be made to the definition of "prescribed interest" in SIA s-sec. 4(1) (see para 646 on Bill cl. 165).

(iii) Definition of "carrying on business"

129. Background There is some doubt surrounding the question of whether certain companies would be regarded as "carrying on business" in a participating jurisdiction and therefore whether such companies would be subject to the requirements of Divisions 5 and 4 of Part XIII of the CA (e.g. obligation to maintain a principal office, to notify the NCSC of the situation of such an office, etc.).

150. For example, a company which is licensed pursuant to CA s.66 may not distribute dividends to its members, and must apply any income or profits (if any) in promoting its objects. There is some doubt as to whether the activities of such a company would come within the concept of "carrying on business".

131. Proposed amendment A new s-sec. 5(1A) is proposed to be inserted in CA s.5 (Bill para 30(1)(k)).

132. Proposed s-sec. 5(1A) will provide that, unless the contrary intention appears, a reference in the CA to a person carrying on business includes a reference to the person carrying on business:

(a) in any case - otherwise than for profit; or

(b) in the case of a body corporate - otherwise than for the profit of the members or corporators of tile body corporate.

133. The object of this proposed amendment is to make it clear that the purpose of profit making is not essential to the concept of carrying on business, and that, in the case of a body corporate, it is not material to the concept of "carrying on business" that the body corporate may be carrying on business otherwise than for the profit of its members or corporators (e.g. as in the case of a company licensed under CA s.66).

134. The reasons for the amendment are, as explained in the previous paragraphs, to remove doubts about the operation of Divisions 3 and 4 of Part XIII on certain companies.

(iv) Disqualification of directors - consequential amendments

155. Background CA s-secs. S(8A), (8B) and (8C) are interpretation provisions which provide a short-hand expression for use elsewhere in the CA for the orders which can be obtained under CA sections 227, 227A and 562 prohibiting persons from being directors or being concerned in the management of companies.

136. Proposed amendment A new interpretation provision, which is proposed to be inserted into CA s.5, will set out, for the purposes of the CA, the circumstances in which a person shall be taken to be, or become subject to a CA s.562A notice (Bill s-cl 30(2) - proposed s-sec. 5(8D)).

137. This proposed amendment is consequential upon the proposed insertion in the CA of new s.562A. Proposed s.562A will enable the NCSC, in certain circumstances, to prohibit a person from being a director or promoter of, or from being concerned in the management of a corporation.

(v) Securities Exchanges

138. Consequential amendments are proposed to the CA to deal with the introduction of the concept of securities exchanges to co-operative scheme legislation (see para 639 below for an explanation). The principal amendments to the CA in relation to this matter deal with the prospectus and substantial shareholding provisions. Various amendments to the definitions in CA s.5 (e.g. proposed definition of "stock market") have also been proposed.

Cl. 31: Affairs of a corporation

139. CA s.6 defines the "affairs of a corporation" for tile purposes of certain provisions of the CA.

140. Proposed amendment A consequential amendment will be made to this section to also apply that definition for the purposes of the proposed new CA s.16A (see Bill cl. 55).

Cl. 32: Relevant interests in shares

141. Background CA s-sec. 8(1) provides that a person has a relevant interest in a share in a body corporate if he has the power to control the exercise of voting rights attached to that share, or if he has the power to control the disposal of that share. If a body corporate has this power, and another person is in a position where he either directs or instructs the body corporate (CA para 8(4)(c)), has a controlling interest in the body corporate (CA para 8(4)(d)) or controls a prescribed percentage (20%) of the body corporate's voting shares (CA para 8(4)(e)), then that person is deemed to have the same power as the body corporate has in relation to that share (CA s-sec. 8(4)). CA s-sec. 8(4) also has an extended operation in that a person can be deemed to have power over the shares of a body corporate by means of a chain of bodies corporate, each of which is deemed, by virtue of CA s-sec. 8(4), to have this power. CA s-sec. 8(5) provides a further extension of the definition of a person's deemed power under CA para 8(4)(e).

142. Proposed amendment CA s-secs. 8(4) and 8(5) will be omitted and replaced by new s-secs. 8(4) and 8(5) (Bill cl. 32). Similar amendments will also be made to CASA s.9 and SIA s.5. It is also proposed to insert a new s-sec. 8(9A) to ensure that a company can have a relevant interest in its own shares. (See paras 34 to 46 on Bill cl. 8 for an explanation of this proposed amendment).

Cl. 33: Associated Persons

143. Proposed amendment It is proposed to amend CA s.9 in line with the amendments proposed to CASA s.7 and SIA s.6 (see paras 20 to 24 on Bill cl. 5 for an explanation).

Cl. 34: Power of Commission to require production of books

144. Background The power of the NCSC to require the production of certain books relating to the affairs of a corporation may only be exercised in the circumstances specified in CA s-sec. 12(1). In particular, the NCSC is entitled to require the production of books relating to the affairs of a corporation for the purpose of the performance of a function or the exercise of a power under scheme legislation (CA para 12(1)(a)).

145. Proposed amendment It is proposed that CA para 12(1)(a) will be amended so that the NCSC will also be able to require the production of books relating to the affairs of a corporation for the purpose of ensuring compliance with such legislation.

146. The NCSC has sought this power to enable it, for the purpose of ensuring compliance with the provisions of a relevant Act, to conduct random inspections of books relating to the affairs of a corporation, whether the books are held by the corporation or by persons such as auditors and liquidators.

Cl. 35: Investigation of certain matters

147. Background S. 16A was inserted in the Principal Act following a decision of Sheahan J. in the Queensland Supreme Court in Gibbs & Ors. v NCSC (1982) 6 ACLR 22 to the effect that the NCSC's hearings powers in s.56 of the NCSC Act could not be used for investigative purposes in the absence of a clearly stated investigative power or function.

148. Subsequently, Ormiston J. of the Victorian Supreme Court in Wade v Guardian Investments Pty. Limited (1984) 2 ACLC 165 held that the NCSC could not rely on s.16A to exercise a power or function under the Companies Act unless that investigator reasonably suspected that a particular person had committed an offence under a specific provision of the Act.

149. Proposed amendment It is proposed that s.16A be amended in two ways as a result of the Guardian Investments case, namely, to ensure that the investigation power can be exercised

(a) not merely where the NCSC is satisfied that an offence has been committed but also where it is reasonably satisfied that an offence may have been committed; and

(b) not merely when the NCSC is reasonably satisfied as to the identity of the actual person involved, but also where it is satisfied that an offence may have been committed but it is not aware which of a number of persons may possibly have been involved.

150. In addition to the amendments prompted by the Guardian Investments case, s.16A will also be broadened so that the NCSC may rely not only on suspected offences under the Companies Act/Codes but also on offences under any scheme Act or "an offence relating to a company involving fraud or dishonesty or concerning the affairs of a company". This amendment is consistent with the application of the inspection powers (see CA s-para 12(1)(b)(iii)). See also cl. 170 of the Bill which amends SIA s.13 in a similar manner.

Clause 36: Registration of auditors

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

152. Proposed amendment It is proposed that CA s-sec. 18(3) will be amended so that the NCSC will also be precluded from registering as an auditor a person who is subject to a s.562A notice (Bill cl. 36).

153. This proposed amendment is consequential upon the insertion in the CA of proposed s.562A (see paras 505 to 510 on Bill cl. 123).

Cl. 37: Registration of liquidators

154. Background In certain circumstances (set out in CA s-sec. 20(4)) the NCSC is precluded from registering a person as a liquidator, or as a liquidator of a specified corporation.

155. Proposed amendment It is proposed that CA s-sec. 20(4) will be amended so that the NCSC will also be precluded from registering as a liquidator, or as a liquidator of a specified corporation a person who is subject to a s.562A notice (Bill cl. 37).

156. This proposed amendment is consequential upon the insertion in the CA of proposed s.562A (see paras 505 to 510 on Bill cl. 123).

Cl. 38: Notification of certain matters

157. Background CA s-sec. 25(4) requires a registered auditor or liquidator who becomes subject to a CA s.227 prohibition, or an order made under CA s.227A 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.

158. Proposed amendment It is proposed that CA s-sec. 25(4) will be amended to also require such a notice to be lodged with the NCSC where a registered auditor or liquidator becomes subject to a notice served under proposed s.562A (Bill cl. 58).

159. This proposed amendment is consequential upon the insertion in the CA of proposed s.562A (see paras 505 to 510 on Bill cl. 125).

Cl. 39: Powers of Board in relation to auditors and liquidators

160. Background The Companies Auditors and Liquidators Disciplinary Board (hereafter referred to as 'the Board') may hear applications by the NCSC regarding the conduct or capacity of an auditor, a liquidator or a liquidator of a specified corporation.

161. The Board may cancel or suspend the registration of an auditor, liquidator or liquidator of a specified corporation where it is satisfied, inter alia, that such a person is subject to a CA s.227 prohibition, a CA s.227A order or a CA s.562 order (CA s-paras 30D(1)(a)(i), 30D(2)(a)(i) and 30D(3)(a)(i)), or that such a person is incapable, by reason of mental infirmity, of managing his affairs (CA s-paras 30D(1)(a)(ii), 30D(2)(a)(ii) and 30D(3)(a)(ii)).

162. Proposed amendment It is proposed that the Board will be required to cancel or suspend the registration of an auditor, liquidator or liquidator of a specified corporation where it is satisfied that such a person is:

* subject to a CA s.227 prohibition;
* subject to an order made under CA s.227A or CA s.562;
* subject to a notice under proposed s.562A; or
* incapable, by reason of mental infirmity, of managing his affairs.

(Bill paras 39(a) and (b) - proposed s-secs. 30D(6A) and (6B)).

163. At present, a prohibition under CA s.227, or an order made under CA s.227A or CA s.562 constitutes an absolute bar to registration as an auditor or liquidator (see CA s-secs. 18(3)

and 20(4)). However, such a prohibition or order does not currently require the automatic cancellation of the registration of an auditor or liquidator who becomes subject to such a prohibition or order after his initial registration. The purpose of this proposed amendment (whereby the Board will be required to cancel or suspend the registration of such persons) is to remove this anomaly.

164. Proposed amendment It is also proposed that the circumstances in which the Board will be required to cancel or suspend the registration of an auditor or liquidator will be extended to the situation where an auditor or liquidator is, or becomes subject to a notice under proposed s.562A (proposed para 30D(6A)(a)). This proposed amendment is consequential upon the insertion in the CA of proposed s.562A (see paras 505 to 510 on Bill cl. 123).

165. Background CA s-sec. 30D(7) complements the Board's power under CA s-sec. 30D(1) to cancel or suspend the registration of an auditor, liquidator or liquidator of a specified corporation. In accordance with CA s-sec. 30D(7) the Board may (in addition to, or instead of cancelling the registration of an auditor, liquidator or liquidator of a specified corporation):

(a) impose a penalty on that person;

(b) admonish or reprimand the person; or

(c) require the person to give an undertaking in appropriate terms.

166. Proposed amendment It is proposed that CA s-sec. 30D(7) will be amended so that where the Board is required, by proposed s-sec. 30D(6A), to cancel or suspend the registration of an auditor, liquidator or liquidator of a specified corporation, the Board may impose the penalties set out in CA

s-sec. 30D(7) in addition to such cancellation or suspension, but not instead of such cancellation or suspension (Bill paras 59(c) and (d) - proposed s-sec. 50D(YA)).

167. This proposed amendment is consequential upon the proposed amendment to CA s.50D which will require the Board to cancel or suspend the registration of an auditor, liquidator or liquidator of a specified corporation in the circumstances set out in proposed s-sec. 30D(6A).

168. CA s.50D, as amended by cl. 53 of the Bill, will only apply to applications made by the NCSC after the commencement of cl. 39 of the Bill. CA s.30D, as presently in force, will continue to apply to applications made by the NCSC before the commencement of cl. 39 (Bill para 39(e) - proposed s-secs. 30D(11) and (12)).

Cl. 40: Proceedings at hearings

169. Background CA para 50G(3)(a) provides that, at a hearing, the Commission may be represented by an employee, or a member or acting member, of the Commission.

170. Proposed Amendment Cl. 40 of the Bill proposes that the Commission may also be represented at a hearing by a person authorised by the Commission for the purpose (proposed para 30G(3)(a)).

Cl. 41: Notice of Board's decision

171. Background The Board must, within 14 days of a decision to exercise any of its powers under CA s.30D, give notice in writing to the affected person, lodge a copy of the notice with the NCSC, and arrange to have a notice of the decision published in the Gazette (CA s-sec. 30M(1)). Where the Board refuses to exercise its powers under CA s.30D it is also

required, within 14 days of the decision, to give notice to the affected person, and to lodge a copy of the notice with the NCSC (CA s-sec. 30M(2)).

172. Proposed amendment It is proposed that CA s-secs. 30M(1) and (2) will be amended to provide for the situation where the Board must decide whether or not it is required to make an order under proposed s-sec. 30D(6A) (Bill cl. 41).

175. This proposed amendment is consequential upon the proposed amendment to CA s.30D which will require the Board to cancel or suspend the registration of an auditor, liquidator or liquidator of a specified corporation in the circumstances set out in proposed s-sec. 30D(6A). (See paras 160 to 168 on Bill cl. 39).

Cl. 42: Time when Board's decision comes into effect

174. Background A decision of the Board to cancel or suspend the registration of an auditor, liquidator or liquidator of a specified corporation comes into effect at the expiration of the day on which notice of the decision is given to the affected person (CA s-sec. 30N(1)). The Board may postpone the coming into effect of a decision to enable the NCSC or the affected person to appeal against the decision (CA s-sec. 30N(2)).

175. Proposed amendment The Board currently has a discretion under CA s.30D as to whether or not it should cancel or suspend the registration of an auditor, liquidator, or liquidator of a specified corporation. However, as a consequence of the proposed amendment to CA s.30D, the Board will, in the circumstances set out in proposed s-sec. 30D(6A), be required to make an order cancelling or suspending the registration of an auditor, liquidator or liquidator of a specified corporation. CA s.30N, which applies to a decision of the Board cancelling or suspending the registration of an auditor

or liquidator, would have no application to an order made by the Board under proposed s-sec. 30D(6A). Accordingly, it is proposed that CA s.30N will be amended so that it will apply to an order made by the Board cancelling or suspending the registration of an auditor or liquidator, rather than a decision of the Board cancelling or suspending the registration of an auditor or liquidator (Bill cl. 42).

Cl. 43: Appeal from decision of Board

176. Background A person affected by a decision of the Board may 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 (CA s-sec. 30R(1)). The NCSC may similarly appeal against a decision of the Board (CA s-sec. 30R(2)).

177. Proposed amendment It is proposed that CA s-secs. 30R(1) and (2) will be amended to ensure that the Court will also be able to confirm, reverse or modify any order made by the Board pursuant to a decision of the Board (Bill cl. 43).

178. This proposed amendment is consequential upon the proposed amendment to CA s.50D which will require the Board to cancel or suspend the registration of an auditor, liquidator or liquidator of a specified corporation in the circumstances set out in proposed s-sec. 30D(6A).

Cl. 44: Registers

179. Background In a recent matter, the Administrative Appeals Tribunal considered an application by a third party seeking access under the Victorian Freedom of Information Act 1982 to the liquidators report made, and furnished to the NCSC, pursuant to s.418 of the Companies (Victoria) Code (CA s.418). When granting the application the Tribunal indicated that the s.418 Report was, in effect, a public document as it was "lodged" with the NCSC pursuant to that section and s.31 of the Code (CA s.31) provides that, subject to certain exceptions, a person may inspect any document lodged with the NCSC. If this reasoning is correct a similar position would apply in respect of the receiver's report and the official manager's report made under CA ss. 324C and 351 respectively.

180. Until this decision it had not been the practice, nor has it ever been the intention that s.418 reports (or their equivalents) should be available for public inspection. The reports invariably detail, among other things, offences which in the opinion of the liquidator may have been committed by persons associated with the company. Accordingly they may be quite damaging to the reputations of those mentioned in them, and unfairly so if the allegations are later found to be untrue. Further, the disclosure of the liquidator's suspicions at the time of filing his report may prejudice a subsequent investigation by alerting suspects before an investigation is begun.

181. Proposed amendments For these reasons CA s.31 will be amended to ensure that reports of receivers, official managers and liquidators pursuant to CA ss.324C, 351 and 418 respectively, will not be available for public inspection by virtue of the operation of that provision. It should be noted that this amendment will only eliminate the right to obtain

such a report under the companies legislation. Whether such a report may be available, in whole or in part in a particular State or the Australian Capital Territory under whose companies law the report is lodged, will depend on the provisions of the freedom of information legislation or any other applicable law in that State or the A.C.T.

Cl. 45: Formation of companies

182. A clarifying amendment will be made to CA para 33(3)(a) to ensure that the exception to the prohibition on the formation of certain types of associations also applies to any such bodies formed under an Ordinance. This amendment will be deemed to have come into effect as from the commencement of the CA (see Bill s-cl. 2(8)).

Cl. 46 to Cl. 49: The Doctrine of Ultra Vires

183. Background Being a creature of statute, a company has only such capacity (i.e. the power to acquire and exercise rights) as is conferred on it by statute, including the capacity to have objects and powers and to restrict the powers that it would otherwise have.

184. Amendments were made to Division 3 of Part III (by Act No. 103 of 1983, which came into operation on 1 January 1984) which dealt with the interaction of a company's powers and objects and the consequences for third parties of dealing with a company with limited powers.

185. Proposed Amendment With two significant exceptions (as to which see paras 190 and 216 below), the Bill contains proposed amendments which are designed to ensure that the intention of the 1983 amendments is effected. Since the 1983 amendments were made, some doubts have been expressed as to whether or not they had the effect of abolishing the doctrine of ultra vires in its application to companies.

186. Prof. H.A.J. Ford indicates that "the term 'ultra vires' is sometimes used where a company fails to observe any type of statutory prohibition or where a person purporting to act for a company acts beyond his power. It assists avoidance of confusion to reserve the term for cases where a company acts beyond its permitted objects defining its capacity". (Ford, "Cumulative Supplement 1985 to the Third Edition of Principles of Company Law" p.15).

187. Using the term in its correct, more limited way, this means that the statutory provisions are abolishing the doctrine that a company only has the capacity to act in pursuance of its objects. This is done by distinguishing between, on the one hand a legal capacity which the statute declares to be in effect unlimited and, on the other hand, restrictions on its freedom of action imposed by the company itself.

188. Abolition of the doctrine of ultra vires is a necessary, but not sufficient, pre-condition to minimising the prospect of such breach affecting third parties. It means no more and no less than that a company's capacity to enter into arrangements with outsiders is not affected by limitations imposed by a company's internal rules. Hence, a company has the capacity to act in breach of its objects.

189. However, merely because a company has the capacity to enter into arrangements with outsiders which are in breach of its objects or other self-imposed restrictions does not, of itself, mean that the outsiders could not be denied the benefits of the arrangements. Such benefits could be denied if, for example, power were conferred on persons whose interests were affected to seek an order restraining the performance of the contract (see s.20 of the ICAC CA's which clearly conferred such a power; see also CA s-sec. 68(6)(f) which, arguably, also permits such an order).

190. Hence, additional provisions are required to ensure that the rules of a company relating to objects or powers of the company are given effect to by the company's officers and members, without unduly disrupting arrangements that the company may have entered into with outsiders. This balance is struck in the Bill by providing that although shareholders would not be able to restrain performance of an agreement once it has been executed, they (or any other person whose interests would be affected) will be able to seek an injunction restraining the company and the outsiders from entering into an agreement. (This amendment to CA para 68(6)(f) to cut down the ambit of the use of the s.574 injunction power is the first of the two significant changes referred to in para 185 above.)

Cl. 46: Amendment of Division Heading

191. To reflect the purpose of the amendments contained in cls. 47 to 50 of the Bill, the heading to Division 5 of Part III of the Principal Act will be amended by adding "Legal Capacity" to the existing heading "Powers".

Cl. 47: Insertion of new sections

192. Background Proposed ss. 66A and 66B are new provisions to be inserted in Division 3 of Part III before s 67.

195. Proposed Amendments The combined effect of proposed ss. 6A and 66B is that:

(a) the amendments will be deemed to have come into effect on 1 January 1984 (given that they are generally designed to clarify any doubts as to the effect of amendments that came into operation on that date); and

(b) those amendments apply to all companies whenever incorporated and in respect of restrictions or prohibitions Contained in the rules of companies regardless of whether those restrictions or prohibitions were included before or after the commencement of the 1985 amendments.

When coupled with proposed new s-sec.67(2) (see Bill cl. 48), this means, for example that even implied restrictions arising out of a company's powers and objects as stated in a company's rules prior to 1 January 1984, cannot, as from that date, have any effect on the company's "capacity" to enter into agreements with outsiders.

194. Proposed s. 66C is also an additional provision and clearly states that the object of proposed ss. 67 and 68 is to:

(a) abolish the doctrine of ultra vires in its application to companies; and

(b) without affecting the validity of the dealings of a company with outsiders, to ensure that provisions of the rules of a company relating to objects or powers of the company are given effect to by the company's officers and members.

195. These stated objects also make it clear that a company has the capacity to act in breach of its objects, but that if it does so, it commits a contravention which may have certain consequences.

Cl. 48: Legal Capacity

196. Background A company has:

(a) the rights, powers and privileges of a natural person.

(b) the power

(i) to do those things peculiar to companies (CA paras 67(1)(a) to (f) inclusive).

(ii) to do anything authorised by law (CA para 67(1)(g)).

(iii) to restrict or prohibit the exercise of any of its powers (CA s-sec.67(2)).

(iv) to exercise its powers outside Australia (CA s-sec.67(3)).

197. Proposed amendments CA s-sec. 67(1) will be amended so that a company will have the legal capacity of a natural person as distinct from the rights, powers and privileges of a natural person conferred by that sub-section at present. Paras 67(1)(a) to (g) inclusive will remain the same. This amendment in conjunction with the amendments detailed in the following paragraph, give effect to the objects stated in proposed s 66C.

198. CA s-secs. 67(2), (3) and (4) will be omitted and will be replaced by new provisions. (Proposed s-secs.67(2) and (3) - Bill para 48(b)). These provisions provide that the unlimited capacity of the company survives subject to the Act but notwithstanding

(a) any express or implied restriction on or prohibition of the exercise by the company of any of its powers,

(b) the fact that the company has stated objects,

(c) the fact that a company contravenes the Act if it acts contrary to an express restriction on or prohibition of the exercise of a power of a company; or

(d) the fact that an act of the company may not be in the best interests of the company (proposed s-sec.67(3)).

199. The proposed s-sec. 67(3) specifically excludes the application of the Rolled Steel case ([1982] 3 All ER 1057) and is designed to prevent any suggestion that any doctrine of "wider ultra vires" as expounded by the courts remains in existence. These proposed amendments further clarify the distinction between legal capacity and restrictions imposed by a company as a matter of internal management.

Cl. 49: Restrictions on companies

200. Background

(a) a company is prohibited from acting contrary to its memorandum or articles (CA s-sec. 68(1)).

(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 (CA s-sec. 68(2)).

(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 (CA s-sec. 68(3)).

(d) an act of a company will not be invalid by reason only that it is contrary to the company's memorandum or articles (CA s-sec.68(4)).

(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 (CA s-sec.68(5)).

(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 (CA s-sec.68(6)).

201. Proposed amendments CA s-secs. 68(1) to 68(5) inclusive will be omitted and proposed s-secs 68(1A) to 68(5) inclusive will be substituted (Bill cl. 49).

202. Proposed s-sec. 68(1A) will specify that the rules of a company may contain an express restriction on, or an express prohibition of, the exercise by the company of a power of the company. The purpose of this amendment is to enable a company to impose restrictions on itself while still retaining the legal capacity conferred by proposed s-sec. 67(1). It also does away with the notion of implied restrictions and therefore clears up any uncertainties which may have been created by the introduction of CA s-sec. 67(4) in the 1983 amendments.

203. Proposed s-sec.68(1) will specify that where:

(a) a company exercises a power contrary to an express restriction on, or an express prohibition of, the exercise of that power, being a restriction or prohibition contained in the rules of the company; or

(b) the memorandum of a company contains a provision stating the objects of the company and the company does an act otherwise than in pursuance of those objects,

the company contravenes this sub-section.

204. It has been suggested that existing CA s-sec.68(1) prohibits the doing of ultra vires acts. Proposed s-sec.68(1) is not expressed in terms of prohibitions of certain acts by

companies, but instead states that such acts as are contrary to express restrictions or prohibitions imposed by the company upon itself, or which are not in accordance with the stated objects of the company, shall result in a contravention of this section by the company.

205. Proposed s-sec. 68(2) will specify that where an officer of the company is in any way, by act or omission, directly or indirectly, knowingly concerned in or party to a contravention by the company of s-sec.68(1) he is in contravention of the sub-section. This amendment is similar to the existing s-sec.68(2) although stated more neutrally and not in the form of a prohibition on such action. Instead it states that such action will result in contravention of the section as does s-sec.68(1).

206. Proposed s-sec. 68(3) states that a company that contravenes s-sec.68(1) or an officer who contravenes s-sec.68(2), is not guilty of an offence by virtue of this section or s. 570. Basically this proposed sub-section is the same as the existing CA s-sec.68(3).

207. Proposed s-sec.68(4) states that where a contravention of s-sec.68(1) has occurred, the exercise of the power, or the act as the case may be, is not invalid by reason only of the contravention. This provision is similar to existing CA s-sec.68(4) but the reference to "prohibition by the memorandum or articles" has been removed indicating that implied prohibitions are not preserved.

208. Proposed s-sec.68(5) is in the same terms as existing CA s-sec.68(5).

209. Proposed paras 68(6)(a) and (b) are amendments which are consequential to the amendments to s-secs.68(1) and (2) and basically state that a contravention of those sub-sections can be asserted or relied on in the proceedings detailed in the following paragraphs of s-sec.68(6).

210. Proposed para.68(6)(f) is amended by adding to it the following phrase:

"to restrain the company from entering into an agreement".

211. The result of this amendment is that where there has been a contravention of either s-sec. 68(1) or s-sec. 68(2), it can no longer be suggested that injunctive relief provided by CA s.574 can be used in relation to executed contracts. This proposed amendment further supports the earlier amendments which abolish the doctrine of ultra vires in that an executed contract is valid notwithstanding any contravention of s-sec. 68(1) or s-sec. 68(2).

212. Proposed para 68(6)(g) is amended by inserting "(other than an application for an injunction)" after "proceedings". This amendment in conjunction with proposed para 68(6)(f) makes it clear that an injunction pursuant to s.574 is only available in cases where a contract has not been executed by a company. Proposed para 68(6)(g) will allow proceedings to be brought by either the company or by a member such as proceedings to recover damages from present or former officers of the company for losses sustained as a result of contraventions by those officers or s-sec 68(1) or s-sec. 68(2).

Cl. S0: Repeal of section 68B

213. Background It is provided in CA s.68B that, where a person deals with a single director of a company, he is not entitled to assume that the director has been appointed a committee of the board of directors merely because the director is acting in a matter which the memorandum or articles of the company provide may be delegated to a committee of directors.

214. The same applies to dealings with an officer or agent of the company who is acting in a matter which the memorandum or articles provide may be delegated to an officer or agent. (CA para 68B(b)).

215. This provision was inserted to counter the argument, arising out of the English case of Rama Corporation Limited v Proved Tin & General Investments Limited [1952] 2 QB 147, that notwithstanding that a company officer acts outside the usual authority attached to his position, the company will still be liable to a third party where under the articles the officer concerned could have been granted sufficient authority to cover his acts.

216. Proposed amendment It is proposed that s.68B be repealed. The provision has been criticised on the ground that it is an "unusual" exception to the general abolition of the rule that a person dealing with the company must make inquiry. It has been noted that a similar exception does not appear in the corresponding provisions of the Canadian Business Corporations Act 1975, which is argued to be of more certain application. (Baxt, Companies and Securities Law Journal, May 1983 at pp.215-6). It follows from this argument that the ability to make the assumption which CA s.68B denies is desirable because it would expedite dealings between companies and outsiders since the latter would not be required to inquire as to whether the relevant powers have in fact been delegated to the director, officer or agent.

Cl. 51: Alterations of memorandum

217. Background A company may, by special resolution, alter a provision of its memorandum, being a provision that could lawfully have been contained in the articles of the company, provided that the memorandum does not prohibit the alteration of such a provision (CA s-sec.73(2)).

218. In accordance with s.7 of the Companies (Transitional Provisions) Act 1981, unless the contrary intention appears, the CA does not disturb "the continuity of status, operation or effect" of any "memorandum" lodged under previous corresponding legislation. Under previous corresponding legislation some of the provisions of a memorandum could not have been altered, or

could not have been altered by the company alone. Accordingly, there is some doubt as to whether a company, incorporated before the commencement of the CA, may take advantage of CA s-sec.73(2) and alter, by special resolution, a provision of its memorandum which could not have been so altered under previous corresponding legislation.

219. Proposed amendment In order to ensure that CA s-sec.73(2) is also applicable to memoranda registered before the commencement of the CA, it is proposed that CA s.73 will be amended to provide that a reference in CA s.73 to a memorandum includes a reference to a memorandum registered under a corresponding previous law (Bill cl. 51 - proposed para 73(14)(a)).

220. A further amendment to CA s.73 will provide that a reference to a provision of the memorandum of a company that could lawfully have been contained in the articles is, where the memorandum was registered under a corresponding previous law, a reference to a provision of the memorandum that could have lawfully been contained in the articles had the memorandum and articles been registered under the CA (Bill cl. S1 -proposed para 73(14)(b)). The purpose of this proposed amendment is to ensure that CA s.73 is not interpreted as requiring an examination of the state of the law at the time when the memorandum was in fact registered.

Cl. 52: Operation of memorandum and articles

221. Background The memorandum and articles of a company bind the company and its members as if they had been signed and sealed by each member, and contained covenants on the part of each member to observe the provisions of the memorandum and articles (CA s-sec. 78(1)).

222. Proposed amendment It is proposed that the new s. 78 will deem the memorandum and articles of a company to be a statutory contract between:

(a) the company and each member;

(b) a member and each other member; and

(c) the company and each officer.

223. It is intended that the memorandum and articles will constitute a contract between the company and its members and as between the members themselves in their capacity as members, and also as between the company and its officers in their capacity as such, whether they are members or not.

224. The proposed para 78(5)(c) will prohibit the imposition of additional restrictions on issued shares, because in effect such restrictions deprive a shareholder of part of his property, except where the holder consents in writing to the alteration.

225. Proposed s-sec.78(4) of the Bill provides that the proposed para 78(3)(c) will not apply to a change from public to proprietary status, provided that it is procured by way of special resolution for the purposes of the CA.

Cl. 53: Contents of prospectuses

226. Background CA s. 98 sets out the particulars which must be included in a prospectus. Where a prospectus relates to shares, the prospectus must, inter alia, set out particulars as to any commission payable to a person in consideration of his agreeing to subscribe for, or to procure subscriptions for, shares in the corporation (CA s-s.para 98(1)(d)(i)(B)). The prospectus must also state whether or not application has been or is proposed to be made for permission for the shares or debentures

to be listed for quotation on the stock market of any stock exchange, and which stock exchange (CA para 98(1)(1)).

227. Proposed amendment. It is proposed that CA s-s. para 98(1)(d)(i)(B) will be amended to require a prospectus to also specify particulars as to any brokerage payable to a person in the circumstances set out in CA s-s. para 98(1) (d) (i) (B) (Bill para 53(a)).

228. The purpose of this proposed amendment is to bring the wording of CA s-s. para 98(1)(d)(i)(B) into line with the wording used in CA s. 117 (as amended by s. 49 of the Companies and Securities Legislation (Miscellaneous Amendments) Act 1983.)

229. It is proposed to substitute CA para 98(1)(1) with a new paragraph which incorporates the concept of a securities exchange (proposed CA para 98(1)(ka)(see para 680 on Bill cl. 185 for an explanation).

Cl. 54: Certain notices, etc. not to be published

250. Background CA s-sec.99(3) provides that certain notices shall not be published. Exceptions are set out in CA s-sec.99(4) and include a notice that refers to a registered prospectus and contains statements concerning, inter alia, the name of the stock exchange of which each broker or underwriter to the issue is a member.

231. Proposed amendment It is proposed to substitute CA sub-para 99(4)(a)(v) with a new sub-paragraph which refers to the name of each securities exchange of which the person is a member. (See para 639 for an explanation.)

Cl. 55: Application and interpretation

232. Background CA s.146 empowers the Court to make orders in respect to defaulting substantial shareholders. S-sec.146(9) allows a defence of 'inadvertence or mistake'.

233. Proposed amendment 'Inadvertence or mistake' will be defined to exclude from that defence the element of mistake or ignorance of law (see paras 25 to 28 above for a further explanation).

Cl. 56: Substantial shareholdings and substantial shareholders

234. Proposed amendment It is proposed to amend CA s-secs.136(2) and 136(3) in line with the proposed amendments to CASA s-secs.7(3) and (4) (see paras 20 to 24 on Bill cl. 5 for an explanation).

Cl. 57: Copy of notice to be served on a securities exchange

235. Background CA s.141 requires that a copy of a notice giving details of interests in or changes to substantial shareholdings must be served on the stock exchange that is the home exchange of the company.

236. Proposed amendment It is proposed to substitute CA s.141 with a new provision which requires that where a person gives a notice under CA s.137, 138 or 139 to a company that has been admitted to the official list of a securities exchange in Australia, that person must also serve a copy of the notice on the home stock exchange of the company and each securities exchange (not being a stock exchange) on which the company is listed. (See para 639 for an explanation.)

Cl. 58: Powers of Court with respect to the defaulting substantial shareholder

237. Background: Where a substantial shareholder has failed to comply with CA ss. 137 to 159, the Court may make certain orders (CA s. 146).

238. Proposed Amendment: The proposed amendment will expand the orders the Court may make under CA s. 146 to include the following:

(a) an order cancelling a contract, arrangement or offer relating to specified shares to which the substantial shareholder was entitled;

(b) an order declaring such a contract etc., to be voidable (Bill para S8(a)).

239. So far as is practicable, this will make the types of orders which the Court can make under CA s. 146 comparable with similar provisions in CASA (such as CASA ss. 45 and 47).

240. It is also proposed that the Court be expressly empowered, when it has made an order directing a person to dispose of shares, to make it a provision of that order that the person account to the company for any profit arising on the disposal of the shares. The Court is to be further empowered to make it a provision of the order that the person specified is deemed to be a trustee for the purposes of the disposal of the shares (Bill para SS(b)). A similar amendment is proposed to be made to CASA s. 49 (see Bill cl. 23).

241. The defence of 'inadvertence' in CA s.146 is retained and the Bill now contains a separate provision to define inadvertence so that mistake or ignorance of the law is excluded as an element of the defence. This provision is proposed s-sec.134(6) (Bill cl. 55).

242. The reasons for this amendment are discussed at paras 25 to 28 above.

Cl. 59: Approval of deeds

245. Background The provisions of CA Part IV, Division 6 ('Prescribed Interests') are designed to protect the public in relation to investment in company securities other than shares or debentures. This is done by regulating the public offering of "prescribed interests" (CA ss 164-177).

244. The public can only be issued prescribed interests or invited to purchase such interests if at the time of the issue there is in force, in relation to the interest, a deed that is an approved deed (CA s. 171).

245. The NCSC may grant its approval to such a deed if the deed makes a provision for the appointment of a person as trustee or representative for the holders of prescribed interests (CA s-sec. 166(1)), and if the deed complies with the requirements of CA Part IV, Division 6 and the requirements of the Companies Regulations (CA s-sec. 166(2)).

246. The deed, or a copy of the deed, must be lodged with the NCSC within seven days of approval (CA s-sec. 166(5)).

247. Proposed amendment It is proposed that where an approved deed has been amended by a subsequent instrument, the NCSC will be able to require the management company to lodge a printed copy of the deed as amended by the instrument, i.e. an up-to-date consolidation of the deed and any supplemental deeds (Bill cl. 59 - proposed s-sec. 166(4) - see also CA s-secs. 72(5) and 79(3) which make comparable provision for consolidations of the memorandum and articles of association).

248. This consolidated deed will be required to be verified in writing (proposed para 166(4)(a)) and will also be required to bear sufficient indication that the document is a consolidation in order to distinguish it from the principal deed and any supplemental deeds or consolidated deeds previously lodged (proposed para 166(4)(b)).

249. It is common for supplemental deeds to provide that different amendments will operate from different dates. Consequently, not all amendments effected by a supplemental deed may be operative at the date of lodgment of a consolidated deed. Such a consolidated deed will therefore be required to have marked on it a note that identifies each of the provisions

of the supplemental deed which are not yet operative and a statement to the effect that such provisions have not yet come into operation (proposed para 166(4)(c)).

250. A consolidated deed lodged under proposed s-sec. 166(4) is to be regarded, in the absence of proof to the contrary, as a true copy of the approved deed as amended (proposed s-sec. 166(4)).

251. Where a provision of an instrument affects the operation of a deed otherwise than by way of amendment to the text of the deed, a copy of such an instrument must be attached to the consolidated deed lodged under proposed s-sec. 166(4) (proposed s-sec. 166(5)).

252. The purpose of the proposed amendment is to assist investors or intending investors to discover the meaning of provisions of a deed by avoiding the necessity to read, where several supplemental deeds have been lodged amending one principal deed, the principal deed and a11 amending supplemental deeds.

Cl. 60: Remedy for refusal to register transfer or transmission

253. Background Where the directors of a company refuse, without just cause, to register a transfer or transmission of shares in, debentures of, or interests made available by the company, the Supreme Court may order the transfer or transmission to be registered, or may make such other orders as it considers proper (CA s. 186).

254. As presently drafted, CA s. 186 is expressed to apply "where the directors of a company refuse or fail to register a transfer or transmission of any shares in, debentures of, or interests made available by the company". Although it is more common for the directors of a company to be given authority to register transfers or transmissions, the memorandum or articles of a company may, for example:

(a) give the authority to register transfers or transmissions to the directors of the company subject to the consent or approval of some other body (e.g. the members in general meeting); or

(b) give the authority to register transfers or transmissions to some other organ of the company (e.g. the members in general meeting).

CA s. 186 would have no application to such situations.

255. Proposed amendment The proposed amendment is intended to extend the application of s. 186 to the situation where the memorandum or articles give the company in general meeting or some other organ of the company the power to register. CA s. 186 will be amended so that it is applicable "where a relevant authority in relation to company refuses or fails to register, or refuses or fails to give its consent or approval to the registration of a transfer or transmission "(Bill cl. 60 - proposed s-sec. 186(1)).

"Relevant authority" will be defined as:

(a) a person who has, persons who together have, or a body that has authority to register transfers or transmissions; or

(b) a person, or persons, or a body whose consent or approval is required before a transfer or transmission is registered.

(proposed s-sec. 186(3)).

Cl. 61: Interpretation

256. Background CA s-sec.189(1) defines expressions for the purposes of the provisions relating to transfer of marketable

securities (CA Part IV Division 8). "Prescribed stock exchange" is defined as a stock exchange that is a member of the Australian Associated Stock Exchanges.

257. Proposed amendment It is proposed to omit the definition of "prescribed stock exchange" from CA s-sec.189(1) as it is proposed to replace the words "stock exchange" in CA Part IV Division 8 with the words "securities exchange".

Cl. 62: Charges in favour of certain persons void in certain cases

258. Background In the winding up of an insolvent company the provisions of the Bankruptcy Act 1966 (Commonwealth) relating to fraudulent dispositions (s.121) and avoidance of preferences (s.122) are applicable (CA s-sec. 458(2)).

259. However, these provisions may not be adequate in coping with an apparent practice whereby insolvent companies, shortly before going into liquidation, grant a debenture or charge to principals associated with the company (usually directors) to secure loans or other indebtedness with the consequence that receivers appointed under those charges obtain control of the company's books. In many cases, the charge will be invalid pursuant to the above mentioned Bankruptcy Act provisions. However, the liquidator may have insufficient funds to apply to a court to set aside the invalid charge and require the return of the books.

260. Proposed amendment It is proposed to address this situation by:

(a) providing liquidators with a statutory right to inspect company books in the possession of a receiver (see paras 441 to 447 on Bill el. 102); and

(b) by reversing the onus of proving that a charge involves a fraudulent disposition or preference, where it has been given in favour of company officers and an attempt is made to enforce it within 6 months of its creation (Bill cl. 62).

261. The second of those proposed amendments will be achieved by the introduction of proposed new s.205A.

262. The main features of this proposed amendment are as follows:

(a) where a company creates a charge on its property in favour of a person who is a relevant person (see proposed s-sec. 205(7) for defn.) and the chargee (see proposed s-sec.205A(7) for defn.) purports to take a step in the enforcement of the charge within six months of its creation, the charge is void unless the leave of the court is obtained to enforce it. (proposed s-sec.205A(1)).

(b) either entry into possession or the appointment of a receiver shall be a step taken in the enforcement of the charge (proposed s-sec. 205A(2))

(c) leave of the court may be granted to enforce the charge if the company was solvent immediately after the creation of the charge and if it is just and equitable in the circumstances to do so (proposed s-sec.205A(3)).

(d) even if the charge is void, liability as an unsecured debt is retained (proposed s-sec.205A(4)).

(e) even if the charge is void, a bona fide purchaser for value who has no notice of the fact that the charge was created in favour of a relevant person, is

entitled to good title to property. However the third party has the onus of proving that his title is not affected. (proposed s-sec. 205A(5) and (6)).

263. The definition of "relevant person" in proposed s-sec. 205A(7) makes it clear for the purposes of CA paras 9(1)(c) and (d) that the matter to which the references to an associated person under proposed s.205A relates is the creation of the charge (proposed para 205A(7)(b)).

Cl. 65: Retirement Village Schemes

264. Depending on the manner in which rights are conferred on potential residents, the promotion of retirement villages may involve the offering to the public of "prescribed interests".

265. Proposed amendment. The Ministerial Council has decided to phase out the regulation of retirement villages under companies and securities legislation. To enable more appropriate authorities directly responsible for aged care services to determine whether or not to introduce alternative prudential controls, the Council has determined that it will not completely vacate the field until 1 July 1987. As from that date, proposed s.215D will operate so as to ensure that none of the prospectus, debenture or prescribed interests provisions will apply to rights to participate in a retirement village (provided that such rights are not simply part of a parcel of other rights that would otherwise attract the operation of the provisions). The licensing requirements of the SIA will be similarly inapplicable as from that date (see Bill s-cl. 2(9) and cl. 165).

266. In the period before the commencement of s.215D on 1 July 1987 (see Bill s-cl. 2(9)), the powers of the NCSC with respect to retirement villages will have been delegated to State and Territory Corporate Affairs Commissions for them to decide the manner in which the prescribed interests provisions will be

applied in their jurisdiction (see further discussion at paras 124 to 128 above).

Cl. 64: Publication of Name

267. Background The name of a company must be painted or affixed and remain painted or affixed in a conspicuous position and in letters easily legible on the outside of every office or place in which the business of the company is carried on. In the case of the registered office of the company, the words "Registered Office" must also be painted or affixed.

268. Proposed amendment CA s-sec. 218(4) will be amended so that the requirement to paint or affix its name, and keep painted or affixed its name in legible letters in a conspicuous position applies to the office or place that is its registered office and on the outside of every other place at which its business is carried on and that is open and accessible to the public. In the case of the office or place that is the registered office the words "Registered Office" must also be painted or affixed.

269. This amendment is to avoid any possible security risk which might result in some instances from identifying all places at which the business of a company was carried on. Consequential amendments will also be made to CA s-sec.509(4) and CA s-sec. 517(4), (Bill paras 113(da), (db) and (e), and 117(da), (db) and (e)).

Cl. 65: Vacation of Office

270. Background The office of director of a corporation is automatically vacated in the circumstances set out in CA s-sec. 222(1). For example, the office of director of a corporation is automatically vacated where the director becomes subject to a CA s.227A order or a CA s.562 order (CA paras 222(1)(e) and (f)).

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

272. Proposed Amendment It is proposed that the office of director of a corporation will also be automatically vacated where a director becomes subject to a s.562A notice (Bill paras 65(a) and (b) - proposed para 222(1)(g)).

273. A person whose office is vacated under CA s-sec. 222(1) by reason that he has become subject to a s.562A notice will be unable to be re-appointed as a director, without the leave of the Court, until the expiration of the period specified in the s.562A notice (Bill para 65(c) - proposed s-sec. 222(4B)).

274. These proposed amendments are consequential upon the insertion in the CA of proposed s.562A (see paras 505 to 510 on Bill cl. 125).

Cl. 66: Liability of directors for debts, etc incurred by company or foreign company acting as a trustee

275. Background Persons contracting with a trustee (corporate or individual) are entitled to be subrogated to the trustee's right of indemnity out of the trust assets to meet liabilities properly incurred. However, this right will be valueless if the trustee's right to indemnity is lost as a result of the trustee acting in breach of trust or in a manner which is not authorised by the terms of the trust.

276. Proposed amendment Proposed s. 229A will provide that where a company, that is a trustee and is acting or purporting to act in that capacity, incurs a debt in respect of which it is not entitled to be indemnified out of the assets of the trust then the directors of the company at the time when the

debt was incurred (except an "innocent" director) will be jointly and severally liable with the company for the payment of the debt.

277. The purpose of this proposed amendment is to ameliorate the consequences for creditors where there is no access to trust funds to meet liabilities incurred by a corporate trustee.

278. The reference to the entitlement to be indemnified in proposed s-sec. 229A(1) relates to the legal right of indemnity rather than the financial capacity of the trust to meet an indemnity obligation (Bill cl. 66 - proposed s-sec. 229A(5)). Consequently, directors will not be liable where the company is entitled to be indemnified but there are no or insufficient trust assets to satisfy the indemnity.

279. It should be noted, however, that notwithstanding the operation of proposed s. 299A, CA s. 556 might still operate to make directors personally liable where the right of indemnity has not been excluded but there are insufficient trust assets to indemnify the trustee.

280. In other respects the liability imposed under proposed s. 229A is stricter than that envisaged in CA s.556. The defence in s.556 revolves around the extent to which an individual director was involved and the reasonableness of his expectations about the company being able to repay the relevant debt at the time that the company incurs the debt. By contrast, if imposition of personal liability is to have the desired effect of discouraging the insertion in trust deeds of provisions relieving the company's right of indemnity from trust assets, and to encourage trust deeds to be drafted so as to minimise or even eliminate the possibility that the trustee company may be in breach of trust then the relevant time to consider the involvement of individual directors in acts which may deny creditors access to trust assets is the time when the trust deed is being prepared. The Bill proceeds on the basis

that it is reasonable to encourage all directors of companies acting as trustee to ensure that the company does not enter into trust deeds which are designed to or which by their operation may, deny creditors access to trust assets to meet liabilities incurred by the company.

281. Moreover, a fundamental corollary of the objective of overcoming the use of a corporate trustee with a nominal share capital to effectively render worthless the right of a creditor to hold the trustee liable for the debts incurred, is the lifting of the "corporate veil" and the treatment of the directors as if in fact they were the trustees. Under the law of trusts the trustee is, in the first event, personally liable to a creditor for the debts of the trust (Muir v City of Glasgow Bank (1897) 4 App Cas 377 : Octavo Investments Pty. Limited v Knight (1979) 54 ALJR 87 at p.89). Where there are a number of co-trustees, each is jointly and severally liable to creditors for the debts of the trust. It is this aspect of the trustees liability to the creditors which proposed s.299A seeks to impose on the directors of a corporate trustee.

282. However, it is not intended that the equitable rights of contribution which may arise as between the co-trustees themselves who are jointly and severally liable for a debt, where some are not responsible for the incurring of the debt in question (which principles have been applied to company directors : Ramskill v Edwards (1885) 31 ChD 100), will be affected by this provision.

283. On the other hand, where a director would, if he were a co-trustee of the trust, be entitled to be fully indemnified in respect of the liability by his co-trustee/directors, then he is completely exonerated from any liability to an outside party (proposed s-secs. 229(1) and (5) definition of "innocent director").

284. Proposed para 229A(1)(a) deals with the issue of jurisdiction and refers to three categories of corporation to which proposed s.299A applies, specifying the extent to which the provision applies to each category:

229A(1)(a) - (i) refers to a company which incurs a debt within or outside Australia;

(ii) refers to a registered overseas foreign company which incurs a debt within Australia;

(iii) refers to a foreign company that is neither a registered overseas foreign company nor a recognised foreign company which incurs a debt in the Territory (this reference will of course be modified by 'translator' regulation to refer to the appropriate State in each State Code).

Cl. 67: Loans to directors

(i) Indirect loans via trusts

285. Background Companies (other than exempt proprietary companies) are generally prohibited from making loans to their directors or to directors of related companies and to persons closely associated with them, such as spouses and relatives. Loans to such persons who are full-time employees are permitted if approved by the members. The prohibition extend to payments made to a trustee on behalf of the directors, and to payments made to other companies in which the directors, etc. have a substantial beneficial interest (CA s-secs 230(1) - 230(3)).

286. Proposed amendment It is proposed that the prohibition in CA s-sec. 230(1) be extended to expressly cover the situation

where another company, in which a director etc. has a substantial interest, is interposed between the director etc. and the trustee. (Bill paras 67(a) and 67(b) - proposed s-para 230(1)(a)(iiia)).

287. Consequential amendments will also be made to CA s-secs. 230(2) and 230(S) to take account of the proposed extended operation of CA s-sec 230(1) (Bill paras 67(d), (e) and if) - proposed s-sec. 230(2) and proposed para 230(5)(ba)).

288. Clause 67 of the Bill proposes to resolve the uncertainty as to the meaning of "directly or indirectly" in s-para CA 230(1)(a)(iv) by replacing the "direct or indirect beneficial interest" test with a "relevant interest" test (Bill para 67(c)).

289. Consequential amendments will be made to proposed sub-para 230(1)(a)(iiia), CA s-sec. 230(2), proposed para 230(5)(ba) and CA para 230(5)(c). (Bill paras 67(b), (d), (f) and (g)).

300. Several submissions pointed to the difficulty in defining "direct or indirect beneficial interest" in s-para CA 230(1)(a)(iv). The proposed conversion to a "relevant interest" test is designed to dispel the present uncertainty as that test is defined in CA by s. 8. Note that amendments are proposed in respect of CA s. 8 as well as CASA s. 9 and SIA s. 5 (see paras 34 to 46 on Bill cl. 8 for a detailed explanation of the proposed amendments in relation to "relevant interest").

(ii) Enforcement of guarantees

301. Background. Where a person ("the lender") has made a loan which has, in contravention of CA s. 230, been guaranteed or secured by a company, the lender may enforce the guarantee or security if:

(a) in the case of a proprietary company, the lender has, before making the loan, been furnished with a certificate that the company is an exempt proprietary company (the prohibition in CA s-sec 250(1) does not extend to exempt proprietary companies - CA para 230(5)(a)); or

(b) the lender has, before making the loan, been furnished with a certificate to the effect that the company is not prohibited by CA s. 230 from guaranteeing or securing the loan.

(CA s-sec. 230(8)).

302. Proposed amendment. CA paras 250(8)(a) and (b) will be amended to provide that the time before which the relevant certificate must be furnished to the lender is the time at which the company gives the guarantee or provides the security, rather than the time at which the lender makes the loan (Bill para 67(h)).

303. The purpose of this proposed amendment is to provide for the situation where, for example, additional security is required by a lender in respect of advances previously made. In such a case, since the security is required in respect of moneys previously advanced, it would not be possible for the lender to be furnished with a certificate under CA para 250(8)(a) or (b) before the loan was made. The proposed amendment will ensure that such a security is enforceable where a certificate under CA para 250(8)(a) or (b) is furnished to the lender before the security provided.

Cl. 68: General duty to make disclosure

304. Background A director of a public company or a director of a subsidiary of a public company is required, within 14 days of his becoming a director, to give written notice to the

company of the date of his birth (CA paras 232(1)(e) and 23Z(Z) (e)).

305. Proposed amendment It is proposed that CA para 232(1)(e) will be amended to require the directors of all companies (not merely public companies and their subsidiaries) to give written notice to the company of their date and place of birth (Bill para 68(a) - proposed para 232(1)(e)).

306. CA s. 232 will also be amended to require a person who is the principal executive officer or a secretary of a company to give written notice to the company of those matters and events relating to himself which are necessary to enable the company to compile the register of directors, principal executive officer and secretaries (namely, full name and address, other occupations (if any) and consent to appointment) - CA s-sec. 238(4); and his date and place of birth (Bill para 68(b) - proposed s-sec. 232(4A)).

307. Clause 68 of the Bill limits the application of proposed paras 46(a) and (b) to a director, principal executive officer or secretary of a company who is appointed or re-appointed after the commencement of the legislation (Bill para 68(b) - proposed s-sec. 232(4c)). Thus existing company officers will only be required to provide the new information on re-appointment to their position.

308. The purpose of this proposed amendment, which implements a recommendation of the 'Costigan Royal Commission', is to assist in the accurate identification of company officers. A related amendment will also be made to CA s. 238 (see paras 319 to 323 on Bill cl. 70).

Cl. 69 : Benefits for loss of, or retirement from, office

309. Background Companies are generally prohibited from making payments to their directors or principal executive officer (or

their spouses, relatives or associates) as compensation for loss of office, or in connection with their retirement, without disclosing the payments to the shareholders and obtaining their approval if the amount of the payment exceeds that determined in accordance with the statutory formula (CA s.233). The rationale for this provision is that shareholder approval should be obtained for those payments which could conceivably be regarded as exceeding normal or reasonable payments in the circumstances.

310. Proposed amendment It is proposed that CA s.233 be amended:

(a) to ensure that the primary prohibition extends to payments in connection with retirement made by a superannuation fund or by an associate of the relevant company (proposed paras 233(1)(a) and (b));

(b) (as a corollary), to ensure that contributions made by the relevant company to the trustees of a superannuation fund during the course of employment of a director or principal executive officer are excluded from the primary prohibition (proposed para 233(2)(b) and proposed s-sec. 233(6D)); and

(c) to substantially increase the level of payment which may be made to executive directors (i.e. full-time company officers) without the need for shareholder approval (proposed s-sec. 233(2A)).

311. The amendment includes a provision which enables shareholders to approve an upper limit on the payment of a prescribed benefit rather than to approve an exact figure where it is impractical to do so (Bill cl. 69 - proposed s-sec. 233(1A)).

312. The proposed amendment is a practical solution to situations where, although the basis for calculation of a retirement benefit may be known at the time of the relevant general meeting of the company, the exact figure is uncertain or likely to be subject to final variation where, for example, a director might undertake part-time work shortly before his retirement which would slightly alter his pay-out figure.

313. At present, principal executive officers may be paid a sum in the order of 7 years' salary without shareholder approval, whereas directors (or other directors, as the case may be) may only be paid a sum in the order of 3 years' salary without such approval. Furthermore, the existing provision does not differentiate between executive directors and non-executive directors (see para (e) of the definition of "exempt benefit" in CA s-sec. 253(7)).

314. It is proposed that the threshold will be the same for principal executive officers and executive directors. They will both be able to be paid a sum in the order of 7 years' salary (provided they have held such offices for at least 3 years) without shareholder approval (see CA s-sec. 233(6) and proposed s-para 233(2A) (b) (i)).

315. Cl. 69 of the Bill proposes to omit the definition of "executive officer" and substitute in CA s.233 "bona-fide full-time employee" wherever the words "executive officer" occur. The concept of bona-fide full-time employee will cover all eligible employees who are genuine full-time employees of the company and therefore eligible to receive the benefit of proposed s-para 233(2A)(b)(i) (Bill cl. 69 - proposed s-sec.233(2c)).

316. Note that non-executive directors will continue to be entitled to be paid an amount equalling merely the last 3 years' salary without shareholders approval (see CA s-sec. 235(6) and proposed s-para 233(2A)(b)(ii)).

317. Cl. 69 of the Bill contains a provision ensuring that the use of the word "retirement" throughout CA s.233 encompasses payment of prescribed benefits upon loss of office by resignation, retrenchment or death of the person at the time when the person holds the office. (Bill cl. 69 - proposed para 233(6)(e) and s-sec. 233(7)).

318. A number of subsidiary amendments are also proposed in order to fully achieve the above mentioned objectives. For example:

(a) the prohibition will extend to indirect payments made to directors or principal executive officers (or their spouses, relatives or associates) in connection with their retirement via some other person (proposed s-sec. 255(1)), unless the payments are required to be made under some other law (proposed s-sec. 233(2B)).

(b) the consequences of failure to have the payments approved by shareholders in accordance with the requirements will be borne by the relevant company officers in default rather than any independent superannuation fund (proposed s-secs. 255(2C) - (4)); and

(c) the prohibition will apply notwithstanding the involvement of more than one superannuation fund (proposed s-sec. 233(6C)).

It is intended that the lump sum payments described in proposed para 233(2A)(b) will include group tax payments.

Cl. 70: Register of directors principal executive officer and secretaries

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

secretaries (CA s-sec. 238(1)). With respect to each director the register is required to specify, inter alia, the director's present Christian name and surname, any former names, his usual residential address, and his business occupation (if any) (CA para 238(2)(a)). With respect to the principal executive officer and each secretary of the company the register is required to specify the officer's full name and address, and other occupation (if any) (CA s-sec. 238(4)). Details from the register are required to be notified to the NCSC upon incorporation and when the register is updated (CA s-sec. 238(7)).

520. Proposed amendment It is proposed that CA para 238(2)(a) will be amended to require the register to also specify the date and place of birth of each director (Bill para 70(a)).

321. A similar amendment is also proposed to be made to CA s-sec. 238(4) to require the register to specify the date and place of birth of the principal executive officer and each secretary of the company (Bill para 70(b)). Consequential amendments are also proposed concerning the notification of these details to the NCSC (Bill para 70(c) - CA para 238(7)(c)).

322. Cl. 70 of the Bill extends the application of proposed paras 70(a), lb) and (c) to a director, principal executive officer or secretary of a company who is re-appointed after the commencement of the legislation (Bill para 70(d)).

323. The purpose of these proposed amendments, is to assist in the accurate identification of company officers. A related amendment will also be made to CA s. 232 (see paras 304 to 308 on Bill cl. 68).

Cl. 71: Register of Disqualified Company Directors and Other Officers

324. Background. The NCSC is required, for the purposes of the CA, to keep a Register of Disqualified Company Directors and

Other Officers. The register must contain a copy of the orders made under CA s-secs. 227A(1) or 562(2) or under a corresponding provision of the law of a participating State or Territory (CA s-sec. 238A(1)).

325. Proposed amendment. It is proposed that CA s-sec. 238A(1) will be amended to require the Register of Disqualified Company Directors and Other Officers to also contain a copy of each notice served under proposed s-sec. 562A(3), or under a corresponding provision of the law of a participating State or Territory (Bill cl. 71).

326. This proposed amendment is consequential upon the insertion in the CA of proposed s. 562A (see paras 505 to 510 on Bill cl. 125).

Cl. 72: New section 255A

327. Background There does not exist at present under the CA any means of ascertaining whether shares in an unlisted company are beneficially owned by the person registered as the holder of the shares or whether those shares are held by the registered holder in a nominee or similar non-beneficial capacity. The register of substantial shareholdings kept under CA s.143 and the tracing provisions of CA s.261 provide details of interests in the shares of listed public companies and other declared bodies but, does not extend to unlisted companies e.g. proprietary companies or public unlisted companies. Although it is proposed to amend CA s.261 so that its information gathering powers will be available in respect of all companies, the Victorian Government considers that there is a need to provide the NCSC and the public with a facility which will give ready notice as to whether the holder of a share in a company is, or is not in fact the beneficial owner.

328. Proposed amendment It is proposed to insert a new CA s.255A to require that a shareholder of an unlisted company

disclose to that company the details of the shares he holds in a non-beneficial capacity.

329. A non-beneficial capacity will include the situation where a person holds the shares as trustee or nominee for, or otherwise on account of, another person (proposed CA s-sec.255A(9)). However it will not be necessary to provide full details of the particular nature of the non-beneficial capacity in which the shares are held. All that is required in this respect is a statement that at the relevant time the shares were held non-beneficially.

330. The proposed amendments will provide a starting point for the tracing of the beneficial ownership of shares in a company.

331. The information will be required to be stated in all new transfers lodged for registration (proposed s-sec.255A(1)). Failure to include an appropriate notice in the transfer will constitute an offence but will not affect the validity of the registration of the transfer (proposed s-sec. 255A(2)).

552. Special provision is made for further notice to be given within 14 days of the registration of the transfer, where a change in the non-beneficial shareholding notified in the transfer occurs after the transfer is lodged but before it is registered. This will occur where any share previously notified as being held in a non-beneficial capacity, becomes beneficially owned (proposed s-sec.255A(3)), or on the other hand where more of the shares being transferred become held non-beneficially (proposed s-sec.255A(4)).

333. Notice must also be given where, at any other time after the commencement of the new provision, a change occurs in the capacity in which particular shares are held, either from a beneficial to a non-beneficial capacity or vice versa (proposed s-secs.255A(S) and (6)). In such a case the notification of the change must be given to the company within 14 days of the change occurring.

334. It should be noted that proposed s-secs.255A(4) and (5) will be attracted whenever a person who holds shares beneficially becomes bound by a specifically performable contract for the sale of the shares. In such a case a notice under s-sec.255A(4) or (5), as the case may be, will need to precede the transfer of the shares.

335. It is recognised that, as a result of the structure of these provisions (whereby notice need only be given in transfers lodged, or of any change in capacity taking place, after the commencement of proposed s.255A), the entries in the register of members will be incomplete for some time after the provisions come into operation. Moreover, there will be a significant number of notices given under proposed s-sec. 255A(6) that may be of limited utility because the company will be unaware of the previous non-beneficial capacity. However, this is an unavoidable result unless a transitional requirement is imposed that all shareholders notify within a specified period after commencement the shares which they hold in a non-beneficial capacity.

336. In proceedings brought under proposed CA s.255A, the knowledge of an employee or agent acting in relation to the transfer or ownership of the shares will be imputed to the transferee or shareholder (proposed CA s-sec.255A(7)). This proposed provision is consistent with the approach taken in the substantial shareholdings provisions (see CA s.145).

Cl. 75: Register and index of members

537. Background CA s.256 requires a company to keep a register and index of members and enter in the register certain information relating to the shareholdings in the company. In order to give effect to the intention of proposed s.255A, namely notifying interested persons that certain shares in a company may be held non-beneficially, it seems desirable that the information provided under that proposed section should be

included in the register of members of unlisted companies so that it is conveniently available for inspection.

338. Proposed amendment Accordingly, it is proposed to amend s.256 to require the register of members of unlisted companies to state which shares are held in a non-beneficial capacity (Bill cl. 73: proposed para 256(1)(aa)). Proposed para 256(1)(a) and s-sec.256(1A) are to implement drafting changes and substantially repeat the relevant existing requirements in CA para 256(1)(a)). In the case of a listed company, the requirement to state only the shares held by each member remains the same (proposed para 256(1)(ab)).

339. A corresponding amendment is proposed to be made to CA s-sec.256(2) to require, where the register is altered by the unlisted company on the conversion of shares into stock, that a note be made of the stock which is held non-beneficially by a member (proposed para 256(2)(a), cf proposed para 256(2)(b) which retains the existing requirement in respect of listed companies). For the purposes of these provisions the joint ownership of shares by 2 or more persons will be deemed to constitute a single membership of the company (proposed s-sec.256(2A)).

340. The question of whether a member of an unlisted company holds shares beneficially or non-beneficially will be determined by having regard only to the information provided in respect of companies by the notification on transfer of shares or change of capacity required under proposed CA s.255A (see Bill cl. 72), or in a statement as to the beneficial ownership of shares furnished pursuant to a CA s-sec. 261(2) or (3) notice (proposed s-secs.256(2B), (2C), and (2D)).

Cl. 74: Trustee, &c may be registered as owner of shares

341. Background CA s-sec. 260(8) provides that no notice of any trust shall be entered on the register of members kept under CA

s.256 except as provided by that section and s.261. Since the 1985 amendments to s.261, the details of beneficial ownership received under that provision are not required to be entered in a part of the register of members but are kept in a separate register pursuant to CA s-sec. 261(9) and, accordingly, the reference to s.261 in s-sec.260(8) is no longer applicable. However this sub-section will require amendment in the light of proposed new s.255A and the corresponding amendments proposed to s.256.

542. Proposed amendment It is proposed, therefore, to amend CA s-sec.260(8) by omitting the reference to CA s.261, but to include a reference to CA s.256 because the latter provision now requires details relating to beneficial and non-beneficial shareholdings to be included in the company's register of members (Bill paras 74(a) and (b)). A transitional provision will be included to save the effect of CA s-sec 260(8) in force before the proposed amendment as it applies in relation to anything done before that amendment pursuant to CA s.261 (Bill para 74(c) - proposed CA s-sec. 260(8A)).

Cl. 75: Power of company to obtain information as to the beneficial ownership of its shares

343. Background CA s.261 provides the means whereby the NCSC, the company, or shareholders individually or together holding 5% of the voting rights in the company, may institute a series of notices questioning persons holding a relevant interest in the company's shares with a view to determining the ultimate owner of particular shares. The use of this provision is restricted in that, so far as companies incorporated under the CA are concerned, it only enables information to be obtained of the shares of companies listed on an Australian stock exchange (the definition of "company" in CA s-sec.261(1)).

344. Although s.261 also applies to corporations, bodies corporate and bodies (not being bodies corporate) declared as

"companies" by the Ministerial Council for the purposes of the substantial shareholding provisions (CA s.134), the section does not apply to unlisted companies.

345. Proposed amendment It is proposed to amend CA s.261 so that it will apply to all companies, in addition to the wider class of bodies (not being companies) to which the present provision applies (Bill para 75(1)(a)).

346. Background A company is not, by reason of any information it receives pursuant to the substantial shareholding provisions, to be taken to have notice of, or be put on inquiry as to, a right of a person in relation to a share in the company (CA s-sec.143(5)). A similar provision was not included in the Companies and Securities (Miscellaneous Amendments) Act 1983 in respect of those amendments which substantially revised and expanded CA s.261 and inserted CA s.261A.

347. Proposed amendment Therefore, proposed s-sec. 261(12A) will be inserted to confer similar protection on a company in relation to anything done pursuant to CA ss.261 or 261A as is provided by CA s-sec.143(5) in respect of the notification of substantial shareholdings (Bill para 75(1)(b)). The protection will be deemed to have applied as from the date the 1983 amendments came into operation (proposed s-sec.261(12B)).

348. Background A person who has failed to comply with CA s-secs.261(7) and 261(8) may be liable to pay damages under CA s-sec.261(17). CA s-sec.261(17) allows a defence of inadvertence or mistake.

349. Proposed amendment "Inadvertence or mistake" will be defined to exclude from that defence the element of mistake or ignorance of law (proposed s-sec. 261(17A) - see paras 25 to 28 above for a further explanation).

Cl. 76: Powers of Court

350. Background Where a person has failed to comply with CA s.261, the Court may make certain orders (CA s.261A). The Court, however, may not make an order (other than one restraining the exercise of voting rights) if it is satisfied that the failure to comply with CA s.261 was due to a person's inadvertence or mistake and that in all the circumstances the failure ought to be excused (CA s-sec. 261A(10)).

351. Proposed amendment It is proposed that the orders the Court may make under CA s.261A will be expanded to include the following:

(a) an order cancelling a contract, arrangement or offer relating to specified shares to which the substantial shareholder was entitled;

(b) an order declaring such a contract etc, to be voidable.

(Bill para 76(a)).

352. So far as practicable, this will make the types of orders which the Court can make under CA s.261A comparable with proposed similar provisions in CA s.146 (see Bill cl. 58).

353. It is also proposed that the Court be expressly empowered, when it has made an order directing a person to dispose of shares, to make it a provision of that order that the person account to the company for any profit arising on the disposal of the shares. The Court is to be further empowered to make it a provision of the order that the person specified is deemed to be a trustee for the purposes of the disposal of the shares (Bill para 76(b)). A similar amendment is proposed to be made to CASA s. 49 (see Bill cl. 25) and CA s.146 (see Bill cl. 58).

354. The defence of "inadvertence" in CA s-sec.261A(10) is retained and now contains a provision to define inadvertence so that mistake or ignorance of the law is excluded as an element of the defence (proposed s-sec. 261A(10A)). The reasons for the amendment are discussed at paras 25 to 28 above.

Cl. 77: Insertion of new Division - Division 6 - "Inspection of Records"

355. Background A director may apply to the Supreme Court for an order authorising a registered company auditor acting for the director to inspect the accounting records of the company (CA s-sec.267(8)). A company is also required to make its accounting records available for inspection at all reasonable times by any director of the company, or by any other person authorised by or under the CA to inspect the company's accounting records (CA s-sec. 267(9)).

356. A member of a company does not, however, have any general right under the CA to inspect the books of the company. This is a matter which has, to date, been regulated by the articles of association of a company. For example, Article 85 of Table A of CA Schedule 3 is as follows:

"The directors shall determine whether and to what extent, and at what time and place and under what conditions, the accounting records and other documents of the company or any of them will be open to the inspection of members other than directors, and a member other than a director does not have the right to inspect any document of the company except as provided by the law or authorised by the directors of the company in general meeting."

357. To the extent that members may have any additional common law right to inspect books in specific situations, the extent of that right is not clearly defined. For example, in Edman v Ross (1922) S.R. (N.S.W.) 351, Street C.J. said:

"His right as a shareholder is merely the common law right of a member of a corporation to inspect its documents, and the authorities establish that it must be shown that inspection is necessary with reference to some specific dispute or question in which the party applying is interested and that it is only then granted to such an extent as may be necessary for the particular occasion."

358. Proposed amendment It is proposed that a new Division will be inserted in CA Part V dealing with the right of a member of a company to inspect the company's books (Bill cl. 77 - proposed Division 6 - "Inspection of Records").

359. The main features of this proposed Division are set out below:

(a) A member of a company will be able to apply to the Supreme Court for an order authorising a registered company auditor or a legal practitioner to inspect the books of the company on the member's behalf (proposed para 265B(1)(a)).

(b) The Supreme Court will be required to be satisfied that the application is made in good faith and for a proper purpose (proposed para 265B(1)(b)).

(c) The Supreme Court will be able to make an order authorising a registered company auditor or a legal practitioner to inspect and make copies of such of the company's books as are specified in the order (proposed para 265B(1)(c)).

(d) The Supreme Court will also be able to make such other orders as it considers necessary (proposed para 264B(1)(d)).

(e) The member's right to apply for an order under proposed Part V, Division 6 will not limit any rights that the member may have under any other law (proposed s-sec. 265B(2)).

Where a registered company auditor or legal practitioner is authorised by court order to inspect the books of a company, he will be prohibited from disclosing any information acquired in the course of the inspection to any person other than the member on whose behalf he was authorised to make the inspection or an employee or member of the NCSC (proposed s.265C).

360. Whilst the proposed amendment leaves to the courts the question of what constitutes a "proper purpose" (proposed para 265B(1)(b)), two examples taken from decisions of American courts as to matters falling within this expression are:

(a) the ascertainment of whether allegations of mismanagement are sustained (i.e. in an Australian context, discovery as preliminary to proceedings under CA ss.229 or 520); and

(b) the ascertainment of a fair market value of shares in those companies whose articles provide for pre-emption rights to share sales.

Cl. 78: Interpretation

361. Proposed amendments It is proposed to amend CA s.266 to:

(a) include definitions of "cash statement", "prescribed company" and "relevant time"; and

(b) amend or replace the existing definitions of "accounts" and "group accounts".

362. "Cash statement" will be defined to mean a statement of cash movements. The purpose of this expression is to enable the future prescription in Schedule 7 of the regulations or in approved accounting standards of statements requiring information of cash receipts and payments as well as the sources and application of company funds.

365. "Prescribed company" has been defined as a company, or a company included in a class of companies, prescribed for the purposes of the definition. It is envisaged that the Regulations will prescribe the following companies for tile purposes of this definition:

(a) a listed company;

(b) a borrowing corporation;

(c) a company whose total assets exceed $10,000,000 or whose operating revenue exceeds $20,000,000; or

(d) a company which is the holding company of a group whose total group assets exceed $10,000,000 or whose group operating revenue exceeds $20,000,000.

364. "Relevant time", in relation to the financial year of a company, has been defined to mean:

(a) where the annual general meeting of the company is held not less than 14 days before the end of the period in which CA s.240 requires the company to hold its annual general meeting, either:

(i) the time when the notice of the meeting is given (if less than 14 days notice is given); or

(ii) if not less than 14 days notice of meeting is given, the end of the 14th day before the meeting, or

(b) in any other case, 14 days before the end of the period in which CA s.240 requires the company to hold its annual general meeting.

365. The introduction of the definition of "relevant time" into the CA will facilitate the redrafting of CA ss.269, 270 and 274 to permit a reduction in the period of 14 days referred to in those sections where, under CA para 242(3)(a), all shareholders agree to dispense with the usual requirement of 14 days notice for the calling of an annual general meeting.

366. The definitions of "accounts" and "group accounts" will be extended to include "cash statements". However, in the case of "group accounts", it will only be possible to prepare a consolidated cash statement, whereas the other group accounts may be prepared in a consolidated form, separately or a combination of the two. The rationale behind this requirement is that the preparation of group accounts containing separate cash statements for each company in a group of companies could be distorted by cash transfers within the group.

367. It is also proposed that where the directors of a company cause a statement prepared pursuant to CA s-secs.269(9) or (10) to be attached to the accounts, that statement will be deemed for the purposes of Part VI to form part of those accounts (proposed s-sec. 266(1A)). This proposed amendment is intended to clarify the status of the statements made under CA s-sec.269(9) and (10).

Cl. 79: Annual Report

368. Background The Accounting Standards Review Board ("the ASRB") is a body established by the Ministerial Council for

Companies and Securities to consider existing and proposed accounting standards and to approve such accounting standards as it sees fit. Within 60 days after an accounting standard has been approved by the ASRB the Ministerial Council for Companies and Securities may disallow the accounting standard (CA s.266B). Accounting standards which have been approved by the ASRB are given legislative force by the requirement that companies adopt such standards in preparing the accounts or group accounts required under the CA (CA s-sec. 269(SA)).

369. Proposed amendment It is proposed that the CA will be amended to require the ASRB to prepare, by no later than 31 October each year, an annual report describing the operations of the ASRB during the year ending on the previous 30 June. The ASRB will be required to furnish this report to the Ministerial Council (Bill cl. 79 - proposed CA s-sec.266G(1)). The Commonwealth Attorney-General (who is a member of the Ministerial council) will then be required to cause a copy of the report to be laid before each House of Parliament within 15 sitting days of his receiving the report (Bill cl. 79 - proposed CA s-sec. 266G(2)).

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

370. 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 not less than 14 days before the annual general meeting of the company (CA s-secs.269(1), (2) and (3)).

371. Such a requirement has the potential to frustrate the objectives of CA para 242(5)(a), which provides that if all shareholders agree, they may dispense with the usual requirement of 14 days notice for the calling of an annual general meeting.

372. There is no existing legislative requirement for the preparation of a cash statement.

373. Proposed amendment It is proposed that CA s.269 will be amended:

(a) to substitute "relevant time" for tile existing time limit ("not less than 14 days before the annual general meeting of the company") where it is used (Bill paras 80(1)(a), (b), (d), (f) and s-cl. 80(2));

(b) to introduce a requirement for the preparation of a cash statement (see paras 355 to 360) (Bill paras 80(1)(c), (g) and (j)); and

(c) to bring the reference to a holding company that is exempted from preparing group accounts into line with the terminology used elsewhere in CA Part VI, Division 2 (Bill paras 80(1)(e)).

374. Cash Statement It is proposed that the directors of a prescribed company will be required, before the relevant time, to have made out a cash statement relating to the last financial year of the company, being a cash statement that gives a true and fair view of the cash movements of the company during that financial year (Bill para 80(1)(c) - proposed CA para 269(3A)(a)).

375. If at the end of the last financial year of the company, the prescribed company was a holding company, the directors will be required to make out a consolidated cash statement relating to the respective last financial years of the company and its subsidiaries, being a cash statement that gives a true and fair view of the cash movements of the company and its subsidiaries during their respective last financial years (Bill para 80(1)(c) - proposed CA para 269(3A)(b)).

376. Definitions of "cash statement", "relevant time" and "prescribed company" will be included in CA s.266 (see paras 362 to 365 on Bill cl. 78).

377. It is proposed that CA s.269 will also be amended to provide that where the directors of a company are not required to prepare a cash statement, but do actually have a cash statement prepared for the purpose of laying before the annual general meeting, such a cash statement will also be required to give a true and fair view of the cash movements of the company during that financial year (Bill para 80(1)(c) - proposed CA s-sec.269(3B)). A similar amendment will also be made with respect to holding companies (Bill para 80(1)(c) - proposed CA s-sec. 269(3C)).

378. It is also proposed that CA s-sec. 269(9) will be amended to provide that where the accounts include a cash statement, the directors will be required to indicate in the directors' statement whether the cash statement is drawn up so as to give a true and fair view of the cash movements of the company during the financial year (Bill paras 80(1)(g) - proposed CA sub-para 269(9)(a)(iia)). A similar amendment will also be made to CA s-sec.269(10) relating to the statement made by the directors of a holding company (Bill para 80(1)(j) - proposed CA para 269(10)(aa)).

379. The main purpose of these proposed amendments and of the amendment to the definition of "accounts" in CA s.266 (see Bill cl. 78) is to ensure that if cash statements are prepared, whether or not pursuant to a statutory requirement, they are required to be audited (in cases where the accounts are required to be audited).

380. Consequential amendments will be made to CA s-secs.269(11) and (12) relating to the matters which directors are required to take into account when forming an opinion for the purposes of preparing a directors' statement (Bill paras 80(l)(k) and (m)).

Cl. 81: Directors' Reports

381. Background The existing CA s-secs.270(1) and (2) require a company and holding company, respectively, to prepare a directors' report "not less than 14 days and not more than 56 days before the annual general meeting of the company or, if no annual general meeting of the company is held within the period within which it is required by section 240 to be held, not less than 14 days and not more than 56 days before the end of that period".

382. This requirement has the potential to frustrate the objectives of CA para 242(3)(a), which provides that, if all shareholders agree, they may dispense with the usual requirement of 14 days notice for the calling of an annual general meeting.

383. Proposed amendment It is proposed that the existing references to time periods in CA s-secs.270(1) and (2) should be replaced by a reference to "within the period of 42 days ending at the relevant time in relation to a financial year of the company". It is also proposed that the reference to "prescribed day" in CA s-sec.270(9) should be replaced by a reference to "relevant time" and that the definition of "prescribed day" (CA s-sec.270(10)) should be omitted (Bill cl. 81).

584. An explanation of the "relevant time" concept appears at paras 364 to 365 of this memorandum.

Cl. 82: Relief from requirements as to accounts and reports

585. Background The directors of a company can apply to the NCSC for an order relieving them from compliance with any specified requirements of the Act relating to, or to the audit of, accounts or group accounts or to the directors' report required by CA s-secs.270(1) or (2) (CA s-sec.273(1)).

Provision also exists for the NCSC to grant such relief to a class or classes of companies (CA s-sec. 273(5)).

386. Before making an order relating to the form or content of the accounts, group accounts or directors' report, the NCSC must be satisfied that compliance with the requirements from which relief is sought would render the accounts, group accounts or directors' report misleading or inappropriate to the circumstances of the company or would impose unreasonable burdens on the company or an officer of the company (CA s-sec. 273(7)).

387. Proposed amendment It is proposed that CA s-sec. 273(1) and (5) be amended to allow the NCSC to also grant relief from requirements which are placed on the company (Bill paras 82(a), (b), (c), (d) and (e)).

388. It is also proposed to recast CA s-sec. 273(7) and to insert new CA s-secs.273 (6A), (6B) and (7A):

(a) to enable the NCSC - in conjunction with the proposed amendments to CA s-secs.273(1) and (5) - to grant relief in respect of a larger number of accounting, auditing and reporting requirements than is possible under the existing CA s. Z73 e.g. the capacity to exempt from accounting requirements will not be restricted to requirements as to the form and content of accounts (Bill para 82(f) - proposed CA s-secs.273(7) and (7A));

(b) to provide that the accounting requirements in respect of which the NCSC may grant relief include:

(i) a requirement to attach accounts, etc., to the annual return of a company; and

(ii) the items of financial information (commonly known as key financial data) which will be included in the new "short-form" of annual return which is being introduced in conjunction with the amendments to the CA that are contained in the Companies Amendment Bill 198S (Bill para 82(f) - proposed CA s-sec. 273(6B)); and

(c) to require the NCSC to be satisfied that the pre-requisite conditions (i.e. compliance with the normal requirements would be misleading, inappropriate or impose unreasonable burden) have been satisfied in relation to each requirement specified in orders to be made under CA s-secs.273(1) and (S) for companies and classes of companies except "non-profit" companies (Bill para 82(f) - proposed CA para 273(7) (a)).

389. The objective of these proposed amendments to CA s.273 is to give the NCSC the necessary power to make a class order relieving the directors of holding companies and their wholly owned subsidiaries from the requirement to prepare and lodge individual audited financial statements if the holding company has agreed to guarantee the debts of subsidiaries and comply with certain other conditions. (For further details of this proposal, see NCSC Media Release No. 84/27(a) dated 25 July 1984.)

Cl. 83: Members of company entitled to balance sheet, &c.

390. Background If all shareholders agree, they may dispense with the usual requirement of 14 days notice for the calling of an annual general meeting (CA para 242(3)(a)). However, this apparent power may prove to be illusory, as there is currently no corresponding power to abridge the minimum 14 day period between circulation of the accounts to shareholders and the holding of the annual general meeting (CA s.274).

391. Proposed amendment It is proposed that CA s-sec. 274(1) will be amended to ensure that where the period of notice of an annual general meeting is abridged pursuant to CA s.242, the period within which the accounts, etc must be sent out will be correspondingly reduced (Bill cl. 85).

Cl. 84: Accounts and reports to be laid before annual general meeting

392. Background The directors of a company are required to lay before each annual general meeting:

(a) a copy of the profit and loss account;

(b) a copy of the balance sheet;

(c) in the case of a holding company, a copy of the group accounts;

(d) a copy of the directors' report;

(e) a copy of the directors' statement; and

(f) a copy of any auditor's report which is required to be attached to the accounts or group accounts.

(CA s.275).

393. Proposed amendment It is proposed that CA paras 275(a) and (b) be combined and recast to require a copy of the accounts made out in accordance with CA s.269 to be laid before the annual general meeting of the company (Bill para 84(a)). It is also proposed that the reference to CA s-sec. 269(3) in CA para 275(d) should be changed to refer only to CA s.269 (Bill para 84(b)).

394. A consequence of these changes will be to require the directors of a company to lay before each annual general meeting of the company a copy of any cash statement made out in accordance with proposed CA s-sec. 269(3A) in relation to the last financial year of the company (see paras 370 to 580 on Bill cl. 80).

Cl. 85: Appointment of auditors

395. Background Where an auditor is removed from office and the company fails to appoint another auditor under CA s-sec.280(10), the company is required to notify the NCSC of the failure within 7 days thereof, whereupon the NCSC is required to appoint an auditor or auditors of the company unless:

(a) there is another auditor of the company whom the NCSC believes to be able to carry out the responsibilities of auditor alone and who agrees to continue as auditor; or

(b) where the company is an exempt proprietary company, all the members of the company have agreed that it is not necessary for another auditor to be appointed and the company notifies the NCSC of that agreement when it notifies the NCSC of its failure to appoint another auditor

(CA s-sec.280(11)).

396. However, if the company fails to notify the NCSC of its failure to appoint an auditor or fails to notify the NCSC within the required 7 days, the NCSC is not able to appoint a replacement.

397. Proposed amendment It is proposed that the NCSC be empowered to appoint a replacement auditor at any stage after the expiry of the 7 day period and required to do so at any stage after the NCSC receives the required notice from the company (Bill cl. 85).

Cl. 86: Powers and duties of auditors as to reports on accounts

398. 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 company's 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)).

399. In accordance with CA s-sec. 285(3), an auditor is required to make a number of statements in his report about the company's accounts, accounting records, registers, etc. For example, the auditor is required to state in his report:

(a) whether proper books and records have been kept by the company (CA para 285(3)(b));

(b) whether he has examined the accounts and auditors' reports of all the subsidiaries of which he has not acted as auditor (CA para 28S(3)(c)(ii));

(c) whether the accounts of the subsidiaries are appropriate for consolidation (CA para 285(3)(c)(iii)); and

(d) whether the auditor's report on the accounts of any subsidiary was made subject to any qualification or comment (CA para 28S(3)(c)(iv)).

400. In respect of the matters specified in CA s-sec.285(4), the auditor of a company is only required to include particulars of such matters in his report on an exception reporting basis, i.e. although the auditor is required to form an opinion as to each of the matters set out in CA s-sec. 28S(4), he is only required to include in his report particulars of any deficiencies in relation to such matters.

401. Proposed amendment It is proposed that CA s-sec. 285(3) will be amended to require the matters presently referred to in CA para 285(3)(b) and CA paras 285(3)(c)(ii), (iii) and (iv) to be reported on an exception reporting basis only (Bill cl. 86).

402. CA para 285(3)(b), which requires the auditor of a company to state in his report whether proper books and records have been kept by the company, will be deleted. CA para 285(4)(b) already requires such information to be included in the auditor's report on an exception reporting basis.

403. CA paras 285(3)(c)(ii) and (iv) will be amended so that, in respect of the matters currently specified in these provisions, the auditor will only be required to include such information in his report on an exception reporting basis (proposed paras 285(3)(b)(ii) and (iii)).

404. The requirement in CA para 285(3)(c)(iii) that the auditor of a company state in his report whether the accounts of the subsidiaries are in a form appropriate for consolidation will be removed from CA s-sec. 285(3) and will be relocated in CA s-sec. 285(4) (proposed para 285(4)(d)(i)). Accordingly, although the auditor will still be required to form an opinion on this matter, he will only be required to include in his report particulars of any deficiencies in relation to such a matter.

405. The purpose of these proposed amendments is to remove from the auditor's report a number of statements which are presently required to be included in the report but which could be more appropriately included in the report on an exception reporting basis. The present inclusion of such statements in the auditor's report (where the statement does not indicate any deficiency) serves no real purpose and tends to distract from the significance of the auditor's primary obligation to express an opinion as to the truth and fairness of the accounts.

Cl. 87: Interpretation and application
Cl. 88: Record of examination
Cl. 89: Admissibility of record of examination in evidence in proceedings against person examined
Cl. 90: Admissibility in other proceedings of statement at an examination

Cl. 91: Weight of evidence
Cl. 92: Credibility of person who made statements
Cl. 93: Determination of objection to admissibility of statement

406. Background CA ss.298 to 303 contain provisions relating to the questions asked and answers given at an examination under Part VII of the CA ("Special Investigations").

407. Proposed amendments References in CA ss.298 to 303 to questions asked and answers given at an examination will be replaced by references to statements made at an examination (Bill cls. 80 to 93). An interpretative provision will be inserted in CA s.289 which will provide that a reference in Part VII of the CA to a statement made at an examination includes a reference to a question asked, an answer given, or any other comment or remark made at an examination (Bill cl. 87).

408. The purpose of these proposed amendments is to make it clear that the application of CA ss.298 to 303 is not restricted to questions asked and answers given at an examination, but extends to any other comment or remark made at an examination. Similar amendments are also proposed to be made to SIA s.15 and ss.21 to 27 (see paras 667 to 669 for an explanation of these proposed amendments).

409. The justification for the amendments is that there can be no difference in principle between "questions asked and answers given" on the one hand and other comments made by an examiner to illuminate a question and statements volunteered by a witness. Rather than being an extension of the scope of the provisions, the amendments could be characterised as a return to the position which prevailed under the pre-1981 legislation when the relevant provisions referred to "notes of an examination".

410. In a decision on that earlier law in Re Mining Houses of Australia Ltd. and Ors and the Companies Act (1981) 6 ACLR 226 Needham J. at p.234 indicated that "it is proper to include in the notes (of an examination) any question and answer directed to and made by the examinee and any other thing said relating to the questions or answers. If one were to be limited, as suggested, only to the text of the questions and the answers, explanatory comment by the examiner, for example, would have to be excised. I do not think there is any such limitation."

411. His Honour also pointed out (at p.234) that if the respondent in that case was suggesting that the comments made by the delegates showed that they were frustrated by his conduct, and that if he relied upon that fact in order to show that the delegates were biased and acted unfairly, then it would be unjust for the notes to be edited by the removal of such comments.

412. The purpose of the proposed amendment is to ensure that, following the Mining Houses case, the change in terminology introduced in 1981 is not interpreted as having been inserted so as to import a limitation which did not exist in the phrase "notes of an examination" as to statements made during the examination. The 1981 amendment was in fact made so as to exclude matters occurring outside of the examination such as notes of the examiner's recollection of the examination.

413. Cl.89 of the Bill sets out the protections available in respect of the admissibility of statements made at an examination in other proceedings.

Clause 94: Power to compromise with creditors and members

414. Background Where a compromise or arrangement is proposed between a company and its creditors or members, the Court may, on the application of the company or any creditor or member or liquidator of the company, order a meeting of the creditors or

members (CA s-sec 315(1)). However, the Court may not make an order pursuant to CA s-sec. 315(1) unless 14 days notice of the hearing, or such lesser period as the Court or the NCSC permits, has been given to the NCSC (CA s-sec 315(2)).

415. Proposed amendment CA s-sec 315(2) will be omitted and new s-secs. 315(2) and (2A) will be substituted (Bill cl. 94).

416. New s-sec. 315(2) will provide that the Court may not make an order pursuant to CA s-sec. 315(1) unless:

(a) 14 days (or such lesser period as the Court or NCSC permits) notice of the hearing of the application has been given to the NCSC; and

(b) the Court is satisfied that the NCSC has had a reasonable opportunity to examine and make submissions to the Court on the proposed compromise or arrangement and the draft explanatory statement relating to it.

417. Proposed s-sec 315(2A) will set out the information which will be required to be contained in the draft explanatory statement. The draft explanatory statement will be required to:

(a) explain the effect of the proposed compromise or arrangement, stating in particular any material interests of the directors of the company and the effect that the proposed compromise or arrangement would have on those interests in so far as that effect is different from the effect on the like interest of others; and

(b) set out prescribed information and any other information material to the making of a decision by a creditor or member as to whether or not he should agree to the proposed compromise or arrangement,

being information that is within the knowledge of one or all of the directors of the company and which has not been previously disclosed to the creditors or members.

418. CA s.315 will be amended so that, for the purposes of CA s.315 and CA s.316, any reference to the directors of a company shall be read as a reference to the directors of the company or any one or more of them. (Bill cl. 94 - proposed s-sec.315(23)).

419. The purpose of these proposed amendments is to ensure that the NCSC is given a reasonable opportunity to examine and make submissions on a proposed compromise or arrangement before the Court orders a meeting of creditors or members under CA s-sec. 315(1). At the moment the NCSC only has power to examine the explanatory statement after it has been dispatched to creditors and/or members (CA para 316(1)(a) and s-sec. 316(7)).

420. Cl. 94 of the Bill also provides that a reference to the directors of the company is a reference to the directors of the company or any one or more of them. The proposed amendment ensures that knowledge which is only held by one director should also be disclosed. (Bill cl. 94 - proposed s-sec. 315(23)).

Cl. 95: Powers of receiver

421. Background CA para 324A(2)(q) provides that a receiver has power to appoint an agent.

422. By comparison a liquidator's power to appoint an agent is limited to any business which he is "unable to do himself". (CA para 577(2)(k)).

423. Proposed amendment So as to avoid any suggestion that the statutory powers of a receiver to appoint an agent differ from

the corresponding power of a liquidator which might otherwise arise because of the use of these different expressions, the CA will be amended so that the powers of both liquidators and receivers in this respect will be stated in similar terms. It is therefore proposed to delete the second limb of CA para 324A(2)(q), namely "or that can be more conveniently be done by an agent," and replace it with a further alternative that whereby an agent may also be appointed to do any business which "it is unreasonable to expect the receiver to do in person" (Bill para 9S(a)). Further background is set out in the discussion on the corresponding amendment to the liquidator's power to appoint an agent (see paras 441 to 444 on Bill cl. 102). So as to ensure that those receivers who have appointed agents under para 324A(2)(q) in its present form are protected, the amendment will only apply to receivers appointed on or after the commencement of the legislation (proposed CA s-sec. 324A(6) - Bill para 95(b)).

Cl. 96: Reports by receiver

424. Background CA s.324C requires a receiver to report to the NCSC any misfeasance he discovers that may have been committed by persons involved with the company.

425. Proposed amendment Drafting changes will be made to this section to make it clear that such reports are "lodged" with the NCSC (Bill cl. 96). Similar drafting amendments will be made to ss.351 and 418 (see Bill cls. 100 and 103 respectively). Note that notwithstanding that such reports will be lodged with the NCSC, they will not be available for public inspection under CA s.31 (see Bill cl. 44).

Cl. 97: Prosecution of delinquent officers and members

426. Background It is proposed to amend CA s.324C to make it clear that receiver's reports are lodged with the NCSC under that section, (see the above para of this memorandum).

427. Proposed amendment Consequential drafting changes will be made to CA s.324D to follow the amendments proposed to CA s.324C.

Cl. 98: Receiver to enjoy qualified privilege in certain circumstances

428. Background See paras 424 to 427 of this memorandum on cls. 96 and 97 of the Bill.

429. Proposed amendment Consequential drafting changes will be made to CA s.325A to follow the amendments proposed to s.324C (Bill cl. 98).

Cl. 99: Payments of certain debts out of property subject to floating charge in priority to claims under charge

430. Background CA s.331 provides for priority of certain unsecured debts over a floating charge where at the date of appointment of a receiver the company has not commenced to wind up voluntarily and the company has not been ordered to be wound up. Cl. 105 of the Bill proposes to amend CA s.441 so that retrenchment payments are given priority in the payment of debts in a winding up.

431. Proposed amendment It is proposed that CA s.331 be amended to give priority to retrenchment payments in a receivership (Bill cl. 99 - proposed paras 331(2)(c) and (2A)(b)).

432. The purpose of the proposed amendment is to afford equal treatment under the CA, in respect of priority given to retrenchment payments, to employees of a company in receivership and employees of a company being wound up.

Cl. 100: Certain provisions applicable to official management

433. Background CA s-sec. 351(4) applies to official managers the requirement of CA s.418 to report on misfeasance committed by persons involved with a company. A drafting amendment is to be made to CA s.418 to make it clear that such reports are to be "lodged" with NCSC (see Bill cl. 103).

434. Proposed amendment A corresponding drafting change is to be made to the relevant provision dealing with such reports in CA s-sec.351(4), namely para 351(4)(d) (Bill cl. 100).

Cl. 101: Avoidance of dispositions of property, attachments, etc

435. Background. Any disposition of property of a company made after the commencement of the winding up by the Court is void unless it is a disposition made by the liquidator pursuant to a power conferred on him by the CA or by an order of the Court, or unless the Court otherwise orders (CA s-sec.368(1)).

436. The case law on the precursors to CA s.368 is such that it is not clear precisely how this provision operates upon the involvement of the banker to the company being wound up in honouring cheques drawn by the company.

437. Proposed amendment. It is proposed that CA s.368 be amended to ensure that a banking corporation is not liable to repay to a liquidator the amount of any cheques of the company which it has honoured, whether the account is in credit or overdrawn.

438. The proposed amendment will enable a banking corporation to make a payment out of an account maintained by a company after the commencement of winding up of the company by the Court without being involved in any void disposition within the terms of CA s-sec. 368(1), so long as the banking corporation is

acting in good faith and in the normal course of its banking business. Banking corporations will not, however, be exempted from the consequences of statutory avoidance under CA s.368 where payments are made into an overdrawn account.

439. Further, it is proposed that the protection to be given to banks from certain transactions being regarded as void dispositions of property under CA s.368 will not extend past the date of the winding-up order. The precise time will be the end of the day of the winding-up order (Bill cl. 101 - proposed para 368(1A) (b) (i)).

440. The proposed amendment limiting the protection given to a bank to the date of the winding-up order has been included on the reasoning that there is no justification for extending the protection beyond that date as banks are able to discover from newspapers the date upon which winding-up provisions are heard and can then institute arrangements to ensure staff do not honour clients' cheques.

Clause 102: Powers of Liquidator

441. Background: Certain powers of a liquidator are set out in CA s.377. CA para 377(2)(k) gives a liquidator power "to appoint an agent to do any business that the liquidator is unable to do himself" whereas CA para 324A(2)(q) grants to a receiver what could be interpreted as a further and wider power i.e. "to appoint an agent to do any business that he is unable to do himself, or that can more conveniently be done by an agent".

442. Proposed amendment: It is proposed to realign the powers of liquidators and receivers to appoint agents by adding to para 377(2)(k) a further test enabling the liquidator to appoint an agent to do his business where it would be unreasonable to expect the liquidator to do the business in person (para 102(a) of the Bill).

443. The power "to appoint an agent to do any business that the liquidator is unable to do himself" is identical to para 236(2)(j) of the ICAC CA which was considered by Marks J. in CAC v. Harvey [1980] VR 669 at p.754. The decision of Marks J. makes it clear that statutory power to appoint "an agent to do any business which the liquidator is unable to do himself" does not allow the delegation of all discretions. The provision is impliedly to be read subject to the power to appoint an agent at common law. Thus the power is limited to appointments to perform administrative and ministerial acts, although the relevant case law is sparse and generally old (see McPherson, The Law of Company Liquidation 2nd Edn. at p.192; cf. Ford, Principles of Company Law 3rd Edn. p.575, where more emphasis is placed on the restrictive wording of the statutory provision itself). Notwithstanding the existence of a statutory power in relation to liquidators, the common law power of a receiver to appoint an agent seems to be regarded as substantially the same (O'Donovan Company Receivers and Managers pp.373, 374).

444. The proposed amendment to para 377(2)(k) widening the powers of a liquidator should not be seen as altering the principles relating to the functions which may be delegated to an agent which, as stated in CAC v. Harvey, is limited to the performance of administrative and ministerial and not discretionary acts.

445. A further proposed amendment to s.377 is to give additional power to the liquidator of a company to enable him to inspect, at any reasonable time, any books of the company. A person who refuses or fails to allow the liquidator to inspect the books of the company will be guilty of an offence (Bill cl. 102 - proposed s-sec.377(2A)).

446. This provision will enable the liquidator to have access to the books and records of the company which may, for example, be in the control of a receiver of the company without having

to apply to the Court. Note that under CA s-sec. 545(3) a permission to inspect books is extended to a right to make copies or take extracts. The effectiveness of CA ss.384 and 401, which create a summary procedure for obtaining delivery of books from a receiver of the company, is limited; it may not be appropriate for a validly appointed receiver to be required to hand over the documents to a liquidator - all that is required is a facility for both to use them (see Re High Crest Motors Pty. Ltd. ,1978 3 ACLR 564).

447. Where the books of a company are in the possession of a receiver, this proposed amendment will ensure that a liquidator of the company can gain access to the books of the company for the purpose of determining whether he should bring legal proceedings in the name of or on behalf of the company to challenge the validity of any charges granted by the company before the winding up. (See paras 258 to 263 on Bill cl. 62).

Cl. 103: Reports by liquidator

448. Background CA s.418 requires a liquidator to report to the NCSC any misfeasance that may have been committed by persons involved with the company.

449. Proposed amendment Drafting changes will be made to this section to make it clear that such reports are "lodged" with the NCSC (Bill cl. 103). Similar drafting amendments will be made to ss.324C and 551 (see Bill cls. 96 and 100 respectively). Note that notwithstanding that such reports will be lodged with the NCSC they will not be available for public inspection under CA s.51 (see Bill cl. 44).

Cl. 104: Expenses of winding up where property insufficient

450. Background CA s-sec. 429(3) makes reference to a s.418 report. As indicated in the above paragraph it is proposed that the section be amended to state that such reports are lodged with the NCSC.

451. Proposed amendment A consequential drafting change will be made to CA s-sec. 429(3) to take account of the amendment proposed to CA s.418 (Bill cl. 104).

Cl. 10S: Priority payments

452. Background In the winding up of a company, certain types of debts are to be paid out of the property of the company in priority to all other unsecured debts (CA s.441).

453. In relation to employees' entitlements in a winding up, priority is given to:

(a) wages to a maximum of $2,000 per employee in respect of services rendered to the company (CA para 441(e));

(b) all amounts due in respect of injury compensation (CA para 441(f)); and

(c) all amounts due to or in respect of an employee of the company (whether remunerated by salary, wages, commission or otherwise) in respect of leave of absence, being amounts due by virtue of an industrial instrument (CA para 441(g)).

Proposed amendments

Wages

454. It is proposed that the $2000 ceiling on employees' priority for payment of outstanding wages and salary entitlements be removed, except for directors. In the majority of instances involving unpaid wages upon winding-up, the amounts are understood to involve less than $2000 per employee; accordingly, the proposed amendment would not usually involve a significant reduction in funds available to unsecured creditors. However, it will assist those employees who have

foregone wages or salary for a considerable period in the (ultimately forlorn) hope of enabling a company's fortunes to revive. Removal of the ceiling in respect of the controllers of the company is not proposed so as to retain the disincentive to directors continuing trading when the company is hopelessly insolvent. A provision has been included to ensure that directors will not be able to avoid the limit of $2000 by resigning prior to the winding up (Bill para 10S(b) - proposed para 441(1)(e) and definition of "excluded employee" in proposed s-sec.441(2)). A $1500 limit would also be imposed on claims by directors in respect of annual leave (Bill para 105(c) - proposed para 441(1)(g)).

Retrenchment payments

455. It is proposed that the employees of a company which goes into liquidation will be given priority in a winding up for their entitlement to retrenchment payments. Such retrenchment payments will be listed eighth in the priority payments list set out in CA s.441 (Bill para 105(c) - proposed para 441(1)(ga)). However, no priority will be accorded to employee directors of a company, or an employee who is the spouse or relative of such an employee director, in respect of retrenchment payments due to them (Bill para 105(f) - see definition of "excluded employee" in proposed s-sec. 441(2)).

456. A corresponding priority will be given to retrenchment payments in a receivership (proposed amendment to CA paras 531(2)(c) and (2A)(b) - see Bill cl. 99).

Clause 106: Debts due to employees

457. Background Service by an employee after the relevant date is taken into account for the purpose of calculating any entitlement to payment for leave of absence (CA s-sec. 443(2)).

458. Proposed amendment It is proposed that service by an employee after the relevant date will also be taken into account for the purpose of calculation of any entitlement to retrenchment payment (Bill cl. 106 - proposed s-sec. 445(2)).

459. An amendment consequential upon proposed para 441(1)(ga) will be made to para 443(4)(5) (Bill cl. 106).

460. Consequential amendments will be made to CA ss. 444, 445, 446, 448 and 449 by the following clauses -

Cl. 107: Debts of a class to rank equally
Cl. 108: Advances in respect of wages, retrenchment payments and leave of absence
Cl. 109: Priority of employees' claims over floating charges
Cl. 110: Provisions relating to injury compensation
Cl. 111: Priority where security given for payment of taxes.

Cl. 112: Prosecution of delinquent officers and members

461. Background CA s-secs 457(1) and (2) refer to reports made to the NCSC under CA s.418. As indicated in para 449 of this memorandum drafting amendments are proposed to s.418 to make it clear that such reports are lodged with the NCSC (see Bill cl. 103).

462. Proposed amendment Corresponding drafting changes will be made to CA s-secs 457(1) and (2) to take account of the amendments proposed to CA s.418 (Bill cl. 112).

Cl. 113: Publication of name &c., of recognized company or recognized foreign company

463. Background The name of a company (including a banking company) is required:

(a) to appear in legible characters on certain documents and negotiable instruments (CA s-sec. 218(1));

(b) to be painted or affixed and remain painted or affixed in a conspicuous position and in letters easily legible on the outside of every office or place in which the business of the company is carried on (CA s-sec.218(4)).

464. However, a recognised company or a recognised foreign company that is a banking corporation is exempted from similar requirements (CA s-secs.509(1), (2) and (4)).

465. Proposed amendment CA s.509 will be amended so as to require the name of a banking corporation which is a recognised company or recognised foreign company to appear in legible characters on:

(a) every relevant document (as defined in CA s-sec.509(5)) of the recognised foreign company that is issued, signed or published in the Territory; and

(b) every relevant negotiable instrument (as defined in CA s-sec.509(5)) of the recognised company or recognised foreign company that is issued or signed in the Territory.

466. A recognised company or recognised foreign company that is a banking corporation will also be required to paint or affix its name, and keep painted or affixed its name in legible letters in a conspicuous position on the outside of every office or other place in the Territory in which its business is carried on and that is open and accessible to the public (Bill cl. 115). This amendment is designed to minimise any possible security risk as the requirement to affix the company name has been limited to places which are open and accessible to the public. Consequential amendments will also be made to CA s-sec. 218(4) and CA s-sec.509(4), (Bill cl. 64 and paras 113(da), (db) and (e)).

467. The purpose of this proposed amendment is to resolve any inconsistency in the requirements relating to publication of name as they apply to local banking companies and to banking corporations which are recognised companies or recognised foreign companies. This proposed amendment accords with previous Victorian law whereby a banking company formed or incorporated outside Victoria which established a place of business or carried on business within Victoria was required to display its name on every place where it carried on business in Victoria and to state its name on bill-heads, letter paper and in all notices, advertisements and other official publications of the company (see s.270 of the Companies Act 1928 (Vic) as inserted by s-sec.7(2) of the Companies Act 1931 (Vic)). Similar amendments are also proposed to be made to CA s.517 (Publication of name, &c., of foreign company) by Bill cl. 117 (see paras 478 to 484 for an explanation of Bill cl. 117).

Cl. 114: Unregistered foreign company not to establish place of business or carry on business in the Territory

468. Background Subject to Division 5 of Part XIII of the CA, if a foreign company lodges specified documents with the NCSC for registration under Division 5, the NCSC is required to register the company under Division 5 (CA s-sec.512(2)). CA paras 512(2)(c) and (d) specify, respectively, the following documents:

(a) a list of the directors or members of the committee of management, council or other governing body by whatever name called, containing particulars with respect to those directors or members that are equivalent to the particulars that are required by the CA to be contained in the register of the directors, principal executive officers and secretaries of a company incorporated under the CA; and

(b) where the list referred to above includes directors or members of a committee of management, council or other governing body who are:

(i) resident in the Territory; and

(ii) members of a local board of directors, committee of management, council or other governing body,

a memorandum duly executed by or on behalf of the foreign company stating the powers of those local directors or members.

469. Proposed amendments References to membership of a committee of management, council or other governing body in CA paras 512(2)(c) and (d) will be omitted (Bill cl. 114).

470. These proposed amendments are consequential upon the proposed insertion of a new paragraph (c) in the CA s-sec.5(1) definition of the term "director" whereby a member of the committee of management, council or other governing body will, in the case of a foreign company, be included in the definition of "director" (see paras 119 to 123 for an explanation of Bill cl. 30). A similar consequential amendment is also proposed to be made to CA para 515(2)(b) (see paras 471 to 473 for an explanation of Bill cl. 115).

Cl. 115: Notice to be lodged where documents, &c., altered

471. Background Where there is any change or alteration in the directors or the committee of management, council or other governing body of a registered foreign company, the foreign company is required to lodge notice in writing with the NCSC giving particulars of the change or alteration (CA para 515(2)(b)).

472. Proposed amendment The references to membership of the committee of management, council or other governing body of a registered foreign company are proposed to be removed (Bill cl. 115).

473. This proposed amendment is consequential upon the proposed insertion of a new paragraph (c) in the CA s-sec.5(1) definition of the term "director" whereby a member of the committee of management, council or other governing body will, in the case of a foreign company, be included in the definition of "director" (see paras 119 to 123 for an explanation of Bill cl. 30). Similar consequential amendments are also proposed to be made to CA paras 512(2)(c) and (d) (see paras 468 to 470 for an explanation of Bill cl. 114).

Cl. 116: Balance-sheets and other documents

474. Background A foreign company is required to register under CA Part XIII, Division 5 if the foreign company has a place of business in the Territory or is carrying on business within the Territory (CA s.512).

475. A registered foreign company is required, at least once in every calendar year and at intervals of no more than 15 months, to lodge with the NCSC a copy of its balance-sheet and a copy of its profit and loss account made up to the end of its last financial year. The copies of the balance-sheet and profit and loss account must be in such form as the company is required to prepared by the law for the time being applicable to that company in its place of incorporation or formation (CA s.516). Such a profit and loss account would normally only deal with the company's global profit or loss, and would not disclose any specific information relating to the amount of profit or loss derived by the company from its operations in Australia and how that amount was made up.

476. Proposed amendment It is proposed that a registered foreign company formed or incorporated outside Australia will also be required to lodge with the NCSC a separate report relating to the company's operations within Australia (Bill cl. 116 - proposed s-secs. S16(6A), (6B), (6C) and (6D)).

477. The main features of this proposed amendment are set out below:

(a) The additional requirement to lodge a report relating to the company's operations within Australia will only be imposed on a registered foreign company which:

(i) is formed or incorporated outside Australia;

(ii) conducted operations outside Australia at any time during the period to which the profit and loss account relates; and

(iii) is required under CA s.516 to lodge with the NCSC a profit and loss account or a copy of a profit and loss account.

(See proposed s-sec. S16(6A) and the definition of 'prescribed foreign company' in proposed s-sec. S16(6D)).

(b) This report, relating to the company's operations within Australia for the period covered by the profit and loss account, will be required to:

(i) state the amount of the profit or loss of the foreign company resulting from the foreign company's Australian operations (proposed para 516(6A)(c));

(ii) give such particulars as are prescribed relating to this profit or loss and as to the manner in which it was ascertained (proposed para 516(6A)(d));

(iii) set out a balance-sheet relating to the state of affairs of the foreign company's operations within Australia (proposed para 516(6A)(e));

(iv) contain a review of the company's operations within Australia and the results of those operations (proposed para 516(6A)(f));

(v) give particulars of any significant change in the state of affairs of the company (proposed para 516(6A) (g));

(vi) give particulars of any matter that has arisen since the end of the reporting period and that has significantly affected or may significantly affect the company's operations within Australia, the results of those operations or the state of affairs of the company (proposed para 516(6A) (h));

(vii) refer to likely developments in the company's Australian operations and the anticipated results of such operations (proposed para 516(6A)(j)); and

(viii) in the case of a company that is a subsidiary of another corporation, include the name of the corporation that the company believes to be its ultimate holding company (proposed para 516(6A) (k)).

(c) With respect to the requirement in proposed para 516(6A)(j) that the report include information as to any likely developments in the company's Australian operations, proposed s-sec. S16(6B) will provide that, where the agent of the foreign company believes that the inclusion in the report of such information would be prejudicial to the interests of the company, such information will not be required to be included in the report. However, the report will be required to state that such information has not been included in the report. This is consistent with the obligations imposed on local companies (CA para 270(2)(e) and CA s-sec.270(3)).

(d) A company, which would otherwise be required to lodge with the NCSC a report under proposed s-sec. S16(6A), will be able to apply to the NCSC for a declaration that the documents lodged by the company contain, in relation to the company's Australian operations, all the information that the company would be required to include in a separate report under proposed s-sec. S16(6A) (proposed s-sec.516(6C)).

Cl. 117: Publication of name, &c, of foreign company

478. Background The name of a company (including a banking company) is required:

(a) to appear in legible characters on certain documents and negotiable instruments (CA s-sec 218(1));

(b) to be painted or affixed and remain painted or affixed in a conspicuous position and in letters easily legible on the outside of every office or place in which the business of the company is carried on (CA s-sec.218(4)).

479. However, a foreign company that is a banking corporation is exempted from similar requirements (CA s-secs.517(1), (2) and (4)).

480. Proposed amendment CA s.517 will be amended so as to require the name of a banking corporation that is a foreign company to appear in legible characters on:

(a) every relevant document (as defined in CA s-sec.517(5)) of the foreign company that is issued, signed or published in the Territory; and

(b) every relevant negotiable instrument (as defined in CA s-sec.517(5)) of the foreign company that is issued or signed in the Territory.

481. A foreign company that is a banking corporation will also be required to paint or affix its name and keep painted or affixed its name in legible letters in a conspicuous position on the outside of every office or other place in the Territory in which its business is carried on and that is open and accessible to the public (Bill cl. 117).

482. The requirement to affix the company name has been limited to places which are open and accessible to the public so as to minimize any security risk. Consequential amendments will also be made to CA s-sec.218(4) and CA s-sec. 517(4), (Bill cl. 64 and paras 117(da), (db) and (e)).

483. The purpose of this proposed amendment is to resolve an inconsistency in the requirements relating to publication of name as they apply to local banking companies and to banking corporations which are foreign companies. This proposed amendment accords with previous Victorian law whereby a banking company formed or incorporated outside Victoria which established a place of business or carried on business within Victoria was required to display its name on every place where

it carried on business in Victoria and to state its name on bill-heads, letter paper and in all notices, advertisements and other official publications of the company (see s.270 of the Companies Act 1928 (Vic) as inserted by s-sec.7(2) of the Companies Act 1931 (Vic)).

484. Similar amendments are also proposed to be made to CA s.509 (Publication of name, &c., of recognised company or recognised foreign company) by cl. 113 of the Bill (see paras 463 to 467 for an explanation of Bill cl. 113).

Cl. 118: Service of documents on recognized company or recognized foreign company

485. Background CA s.529 provides for the service of documents on a recognised company or a recognised foreign company.

486. With the exception of CA s-sec. 529(6), all the sub-sections in CA s.529 are applicable to a recognised company or to a recognised foreign company. However, as presently drafted, CA s-sec.529(6) (which relates to the power Of the Supreme Court to authorise the service of documents in a manner not provided for by CA s.529) is only applicable to a recognised foreign company.

487. Proposed amendment It is proposed that CA s-sec. 529(6) will be amended so that it will also apply to recognised companies (Bill cl. 118).

488. This proposed amendment will ensure that the Supreme Court has the same power to authorise the service of documents on a recognised company, as the Court currently has with respect to companies (CA para 528(7)(c)), registered foreign companies (CA s-sec.530(5)) and recognised foreign companies (CA s-sec.529(6)).

Cl. 119: Offences by officers of certain companies

489. Background When property of a company is obtained in certain circumstances by a present or former officer of the company and the property is then pawned, pledged or otherwise disposed of, the person who receives or takes the property, regardless of the circumstances in which it was obtained and pledged, pawned or disposed of, holds the property as trustee for the company and is liable to account to the company for the property. (CA s-sec.554(6)).

490. Proposed amendment It is proposed that CA s.554 will be amended by the addition of s-sec.554(7). The effect of this sub-section is to make it clear that in proceedings pursuant to s-sec. S54(6) it is only necessary to establish on the balance of probabilities that the required knowledge existed.

491. This proposal has been included in the Bill consequential upon the amendment to the C&S Interpretation Act by proposed s.38B (see Bill cls. 120, 126 and 151).

Cl. 120: Offences relating to incurring of debts and fraudulent conduct

492. Background Proceedings may be brought for recovery of a debt incurred by a company in certain circumstances (CA s-sec.556(1)). Those proceedings may be brought notwithstanding the fact that the person against whom they have been brought has not been convicted of an offence under s-sec. 556(1).

493. Proposed amendment It is proposed that CA s.556 will be amended by the addition of s-sec. 556(3A). The effect of this new provision is to make it clear that the liability of a person under s-sec.556(1) need only be established on the balance of probabilities.

494. This proposed amendment has been included in the Bill consequential upon the amendment to the C&S Interpretation Act by proposed s.38B (see Bill cls. 119, 126 and 15I).

Cl. 121: Falsification of books

495. Background A committee chaired by Mr. T.S. Davidson, Q.C., was established by the NCSC to report on the nature of legislative amendments required to facilitate the prevention, detection and prosecution of computer related crime. The Committee's report contained proposals for amendment of companies and securities law and criminal law. The Bill contains proposed amendments to the companies and securities legislation to ensure that existing provisions operate satisfactorily when applied to computer input and to documents produced and stored by computers. (Bill cls. 121, 124 and 125 will amend CA ss.560, 565 and 564 and Bill cl. 196 will amend SIA s.126).

496. Where matter that is used or intended to be used in connection with the keeping of any books affecting or relating to the affairs of a company is recorded or stored in an illegible form by means of a device, a person who fails to record or store matter by means of that device with intent to falsify any entry made or intended to be compiled, wholly or in part from that matter is guilty of an offence (CA para 560(2) (c)).

497. Proposed amendment CA para 560(2)(c) will be omitted and a new para 560(2)(c) substituted. No amendments have been made to cl. 121 in Bill.

498. Proposed para 560(2)(c) will:

(a) only apply in the situation where a person has a duty to record or store matter by means of a device; and

(b) extend to the situation where a person, having a duty to record or store matter by means of a device, fails to record or store the matter by means of that device knowing that the failure to record or store the matter will render false or misleading in a material particular other matter so recorded or stored.

499. The purpose of these amendments is to make it clear that only persons with a duty to record or store matter will be guilty of an offence pursuant to proposed para 560(2)(c) if there is a failure to record or store. In addition, the operation of existing CA para 560(2)(c) is proposed to be extended so that under proposed para 560(2)(c)(ii), an offence may be committed in the absence of an express intention to falsify.

Cl. 122: Court may disqualify person from acting as director, &c, in certain circumstances

500. Background CA s.562 makes provision for the Supreme Court, on application by the NCSC, to prohibit a person from taking part in the management of a company where:

(a) that person was, up to 7 years before the application, a director, of or concerned in the management of, two or more companies that were wound up, placed in receivership, etc; and

(b) in the case of each of these companies, the manner in which each of the company's affairs had been managed was wholly or partly responsible for the winding up, receivership, etc.

501. For the purposes of CA s.562, "company" is defined in CA s-sec.562(5) as meaning a corporation or a body referred to in CA para 469(1)(b) (i.e. a partnership, association or other body that consists of more than 5 members).

502. This extended definition of "company", however, has the following unintended effect. Where the Court makes an order under CA s-sec.562(2) prohibiting a person from being a director or promoter of, or from taking part in the management of a "company", such a person is effectively prohibited from being concerned in the management of, for example, a partnership consisting of more than five members. A prohibition of this nature, whilst it may be desirable in itself, is not considered appropriate within legislation dealing with the management of corporations.

505. Proposed amendment In order to prevent an order made under CA s-sec.562(2) from having the effect of prohibiting a person from taking part in the management of bodies referred to in CA para 469(1)(b), it is proposed to amend CA s-sec 562(2) so that the Court may only make an order prohibiting a person from being a director of or taking part in the management of a "corporation" rather than a "company" as defined in CA s-sec.562(5) (Bill para 122(a)).

504. A new provision will also be inserted into CA s.562 which will provide that a person who was subject to a CA s.562 order prior to the commencement of the Bill cl. 122 will not be guilty of an offence under CA s-sec.562(4) where he takes part in the management of a body referred to in CA para 469(1)(b) (Bill para 122(b) - proposed s-sec.562(4A)).

Cl. 123: Commission may order persons not to manage corporations

505. Background CA ss.227, 227A and 562 provide that, in certain circumstances, a person is prohibited from being a

director or promoter of, or from taking part in the management of a corporation.

506. CA s.227 prohibits the following persons from taking part in the management of a corporation without the leave of the Supreme Court:

(a) a person who is insolvent under administration (CA s-sec. 227(1); and

(b) a person who has been convicted of certain offences (CA s-sec.227(2)).

507. Pursuant to CA s.227A, the NCSC or certain prescribed persons (e.g. a liquidator, official manager etc.) may apply to the Supreme Court for an order prohibiting a director, secretary or executive officer of a corporation from taking part in the management of a corporation where the person has acted dishonestly or carelessly or where that person has failed to take reasonable steps to prevent the corporation from breaching companies and securities legislation.

508. CA s.562 makes provision for the Supreme Court, on application by the NCSC, to prohibit a person from taking part in the management of a corporation where:

(a) that person was, up to 7 years before the application, a director of, or concerned in the management of, two or more corporations that were wound up, placed in receivership etc; and

(b) in the case of each of these corporations, the manner in which each of the corporation's affairs had been managed was wholly or partly responsible for the winding up, receivership etc.

509. Proposed amendment It is proposed that a new provision will be inserted into the CA which will enable the NCSC to prohibit certain persons from taking part in the management of a corporation without their having obtained the leave of the Supreme Court (Bill cl. 125 - proposed s.562A).

510. A brief outline of the proposed provision is set out below:

(a) Where the NCSC receives a notice from a liquidator, in respect of two or more companies (as defined in proposed para 562A(1)(a)) as to their inability to pay their unsecured creditors more than 50 cents in the dollar, and each company has a common director, being a person who was a director of each company at any time during the period of 12 months ending on the date of the commencement of each winding up, the NCSC will be able to give notice in writing to such a person requiring him to show cause why he should not be prohibited from taking part in the management of a corporation (proposed s-secs.562A(1) and (2)).

(b) Unless the NCSC is satisfied that such a person should not be prohibited from taking part in the management of a corporation, the NCSC will be able to serve on that person a notice in writing to the effect that he is prohibited, without the leave of the Supreme Court, from taking part in the management of a corporation for a period of up to S years (proposed s-sec.562A(5)). The person will have a right of appeal to the Supreme Court against the NCSC decision (CA s.557).

(c) Where the NCSC has served notice under proposed s-sec.562A(2) on a person who was a common director of two or more "relevant companies" (as defined in proposed para 562A(1)(b), and those companies have at

any time been related to each other, the NCSC will be required to have regard to that fact in deciding whether or not to serve a notice under proposed s-sec. S62A(3) prohibiting that person from taking part in the management of a corporation (proposed s-sec. S62A(4)). This provision will be relevant in the case of a failure of a group of companies which is in substance a single entity.

(d) The penalty for contravention of such a notice will be $5,000 or imprisonment for one year or both (proposed s-secs. 562A(5) and (6)).

Cl. 124: False or misleading statements

511. Background A person is guilty of an offence if, in a document required by or for the purposes of the CA or lodged with or submitted to the NCSC, he makes or authorises the making of a statement that to his knowledge is false or misleading, or omits or authorises the omission of any matter or thing without which the document is to his knowledge misleading (CA s-sec.563(2)).

512. Proposed amendment A new s-sec.563(2A) is proposed to be inserted in the CA.

513. Proposed s-sec.563(2A) will provide that, for the purposes of CA s-sec. S63(2), a person will be deemed to have made or authorised the making of a statement that to his knowledge is false or misleading in a material particular if he makes or authorises the making of a statement that is based on information that to his knowledge:

(a) is false or misleading in a material particular; or

(b) has omitted from it a matter or thing the omission of which renders the information misleading in a material respect.

514. The purpose of this proposed amendment is to make it clear that CA s-sec.563(2) covers the situation where a statement is made which is based on information (for example, computer output) which is known to be false or from which material matter is known to have been omitted.

515. Background A person is guilty of an offence if, in a document required by or for the purposes of the CA or lodged with or submitted to the NCSC, he makes or authorises the making of a statement that is false or misleading or omits or authorises the omission of any matter or thing without which the document is misleading, without having taken reasonable steps to ensure that the statement was not false or misleading or to ensure that the statement did not omit any matter or thing without which the document would be misleading (CA s-sec.563(3)).

516. Proposed amendment A new CA s-sec.563(3A) is proposed to be inserted in the CA (Bill para 124(b)).

517. Proposed s-sec. 563(3A) will provide that, for the purposes of CA s-sec.563(3), a person will be deemed to have made or authorised the making of a statement without having taken reasonable steps to ensure that the statement was not false or misleading if he makes or authorises the making of a statement without having taken reasonable steps to ensure that the information on which the statement was based:

(a) was not false or misleading in a material particular; and

(b) did not have omitted from it a matter or thing the omission of which would render the information misleading in a material respect.

518. The purpose of this proposed amendment is to make it clear that CA s-sec.565(5) covers the situation where a statement is made without reasonable steps having been taken to ensure that

the information on which the statement was based (for example, computer output) was not false or misleading and did not have omitted from it any matter or thing the omission of which would render the information misleading in a material respect.

Cl. 125: False information, &c

519. Background An officer of a corporation, who makes or furnishes, or authorises or permits the making or furnishing of, a false or misleading statement or report relating to affairs of the corporation to:

(a) a director, auditor, member, debenture holder or trustee for debenture holders of a corporation;

(b) in the case of a corporation that is a subsidiary, an auditor of the holding company; or

(c) a stock exchange in Australia or elsewhere or an officer of such a stock exchange,

knowing the statement or report to be false or misleading, or without having taken reasonable steps to ensure that the statement or report was not false or misleading is guilty of an offence (CA s-secs.564(1) and (2)).

520. Proposed amendment CA s.564 is proposed to be repealed and a new s.564 substituted.

521. Proposed s.564 will:

(a) replace references to a statement or report with references to information, whether documentary or other form (the purpose of this wider terminology is to ensure that the provision will also apply to computer discs and tapes etc. on which information may be stored); and

(b) apply to situations where an officer of a corporation makes available or furnishes information, or authorises or permits the making available or furnishing of information that has omitted from it a matter or thing the omission of which renders the information misleading in a material respect.

Cl. 126: Dividends from profits only

522. Background CA s-sec.565(2) imposes both criminal and civil liability on a director or an executive officer who wilfully pays or permits to be paid a dividend to shareholders otherwise than out of profits except pursuant to CA s.119.

523. Proposed amendment It is proposed to insert new CA s-secs.565(2A) and (2B) to provide, respectively:

(a) that proceedings for civil recovery under existing CA s-sec.565(2) may be brought notwithstanding that a director or executive officer has been convicted of an offence in respect of the matter. This brings CA s.565 into line with the similar recovery provisions in existing CA s.556 (see CA s-sec.556(3)); and

(b) to ensure that the civil standard of proof applies in respect of proceedings for the recovery of an amount under CA s-sec.565(2), which corresponds to the amendment proposed to be made to CA s.556 (see Bill cl. 120 - proposed new s-sec.556(3A)).

Cl. 127: General penalty provisions

524. Background CA s-sec.570(6) specifies the general penalty applicable to an offence except where a particular penalty is provided by the provision creating the offence.

525. Proposed amendment A consequential amendment is to be made to CA s-sec.570(6) to also exclude from the general penalty the calculation of daily penalty amounts to be imposed by proposed new s-sec.571(5) (see Bill cl. 128).

Cl. 128: Continuing offences

526. Background Where a person is convicted of an offence constituted by the failure to do an act within the time allowed for doing so by the CA provision creating the offence, and after the conviction for the original offence that person continues to fail to do the act required, CA s.571 provides that the person commits a separate and further offence for each day during which the act remains undone (CA s-sec.571(1)).

527. A similar situation prevails where the provision creating the original offence prescribes no time limit for the doing of the required act (CA s-sec.571(2)).

528. The formulation of the present provision by providing for continuing daily offences, rather than by creating the one continuing offence calculated by daily penalties (as did former ICAC CA s.380), requires the drawing of unnecessarily extensive informations where the continuing offences occur over a long period of time.

529. Proposed amendment It is proposed that a redrafted s.571 be inserted in the CA to remedy this technical difficulty.

530. At the same time, it is proposed to clarify the means by which continuing offences are committed by:

(a) the substantive offender - that is, the person whose commission of an offence by reason of the failure to do the required act arises directly (e.g. in CA s.113, the company); and

(b) the derivative offender - that is, the person who commits an offence by virtue of being an officer of a corporation, or a person who is knowingly concerned in, or party to, the commission of the substantive offence (e.g. in CA s.113, the officer in default - see CA s.572).

531. In the case of the substantive offender, if after conviction of the offence of failing to do the act required by the provision creating the offence (i.e. the "primary substantive offence" - e.g. CA s-sec.113 in respect of the company), the failure to do the act continues, that person will be guilty of a second substantive offence in respect of the conviction for the primary substantive offence and until the date specified in the subsequent information laid for the second substantive offence. If, after the substantive offender has been convicted of that second substantive offence, the required act remains undone, the substantive offender is guilty of a third substantive offence in respect of the next period (i.e. after the conviction for the second substantive offence and until the date specified in the information laid for the third substantive offence), and so on in respect of each further substantive offence until the act is done (proposed CA s-sec.571(3)).

532. In the case of the derivative offender the time for the commission of further derivative offences begins to run from, alternatively:

(a) the conviction of the derivative offender of an offence constituted by being knowingly concerned in or party to the primary substantive offence - that is, the "primary derivative offence"; or

(b) the conviction of a person for the primary substantive offence

(proposed CA para 571(4)(c)).

533. The second ground for the commission of a further offence by the derivative offender is to overcome the defect exposed in former ICAC CA s.380 by the judgment of Lush J in Welsh v Cornfoot (1973) V.R. 21. That case decided that where a company officer was not knowingly concerned in the company's failure to do the particular act within the time prescribed for doing so by the primary substantive offence, that officer could not be criminally liable for a continuing offence where he had acquired the relevant knowledge and failed to act upon it after that period had expired. The officer will now be guilty of an offence where the company has been convicted of the primary substantive offence and the act remains undone, notwithstanding that the officer himself has not been convicted of the primary derivative offence.

554. The commission of an offence by a derivative offender on either of the above grounds, or in respect of subsequent periods during which the failure continues after conviction, are to be referred to as "secondary derivative offences". The pattern for the further commission of secondary derivative offences is along the same lines as that for the commission of further substantive offences.

535. Proposed CA s-sec.571(5) specifies that the penalty is to be calculated by a daily rate in respect of the period during which each further offence continues. A transitional provision will be included to save the effect of CA s.571 as previously in force and to make it clear that the proposed new section does not apply to obligations which arise before this amendment comes into effect.

Cl. 129: Officers and other persons in default

556. Background CA s-sec.572(2) is stated to be for "the purposes of" s-sec.572(1).

537. Proposed amendment A drafting change is proposed to be made so that CA s-sec.572(2) will be expressed to be for "the purposes of this Act".

Cl. 130: Regulations

538. Background A person shall not make an offer in writing to any member of the public (not being a person whose ordinary business it is to purchase or sell shares, whether as principal or agent) of any shares for purchase unless the offer is accompanied by:

(a) a statement in writing (signed by the person making the offer and dated) containing such particulars as are required by s.552 to be included in the statement and otherwise complying with the requirements of this s.552 (CA para 552(3)(a); or

(b) in the case of shares in a corporation formed or incorporated outside the State, by such a statement or by a prospectus that complies with this Code. (CA s.sec 552(3)).

539. As it is considered that it would be inappropriate to regulate the contractual relationships between vendors and purchasers in secondary sales of prescribed interests such as timeshares it is proposed that the vendors of certain prescribed interests should not be required to comply with the provisions of CA s.552.

540. Proposed amendment Accordingly, it is proposed that CA s.577 be amended by inserting after s-sec.(6) proposed s-sec.(6A) which will allow the regulations to provide that, subject to any prescribed terms and conditions, the provisions of s. 552, or specified provisions of that section, do not have effect in relation to a specified person or a person included in a specified class of persons, to a specified transaction or class of transactions or in relation to a specified transaction or class of transactions entered into by a specified person or class of persons but may have effect in relation to a specified person or in relation to a person who

is a member of a specified class of persons, to the extent prescribed. (Bill cl. 130).

541. The purpose of this proposed amendment is to provide in certain situations for alternative methods of disclosure in relation to contracts for the secondary sale of prescribed interests.

Cl. 131: Operation of certain Ordinances

542. Background The CA applies as the law of the ACT. To that extent it should be capable of operating consistently with the general body of subordinate legislation applying as ACT law, namely the Ordinances of the Territory.

543. Proposed amendment It is considered desirable, for the removal of doubt, to indicate that the winding up provisions of certain ACT ordinances, namely the Associations Incorporation Ordinance 1953, the Co-operative Societies Ordinance 1939 and the Unit Titles Ordinance 1970, operate independently of the provisions of CA Division 6 Part XII "Winding Up of Bodies other than Companies" (Bill para 131(a) - proposed s-secs. 581(2A), (2B), (2C)and (2D)).

544. A further amendment will be made to preserve the operation of s.23 of the Trustee Companies Ordinance 1947 which imposes certain restrictions on the voluntary winding up of trustee companies (Bill para 131(b) - proposed amendment to s-sec. 581(3)).

545. To ensure that no problems with the operation of these Ordinances can arise from events taking place prior to the enactment of these amendments, the amendments will be deemed to have come into effect from the date of commencement of the CA (see Bill s-cl. 2(8)).

Cl. 132: Schedule 4

546. Proposed amendment It is proposed to omit the words "Stock Exchange" from Forms 3 and 7 in CA Schedule 4 and substitute the words "Securities Exchange".

Cl. 133: Further amendments relating to securities exchange

547. Proposed amendment Schedule 2 of the Bill amends CA by substituting "securities exchange" for "stock exchange", and for "prescribed stock exchange" where appropriate. (See para 639 for an explanation).

BILL PART IV - AMENDMENTS OF COMPANIES AND SECURITIES

(INTERPRETATION AND MISCELLANEOUS PROVISIONS) ACT 1980

548. The amendments which are proposed to be made to the C&S Interpretation Act by Part IV of the Bill include:

(a) a series of proposed amendments based upon amendments made to the Commonwealth Acts Interpretation Act 1901 by the Acts Interpretation Amendment Act 1984; and

(b) a proposed amendment relating to the standard of proof required in civil proceedings brought under scheme legislation.

Cl. 134: Principal Act

549. The C&S Interpretation Act is referred to in Part IV of the Bill as the Principal Act (Bill cl. 134).

Cl. 135: Regard to be had to purpose or object of relevant Act

550. Background When interpreting co-operative scheme legislation a construction consistent with the purpose and objects underlying the relevant Act is to be preferred (C&S Interpretation Act s-sec. SA(1)). However, s-sec. SA(1) does not authorise, for the purpose of interpreting scheme legislation, the consideration of any matter or document not forming part of the relevant Act (C&S Interpretation Act, s-sec. SA(2)).

551. Proposed amendment It is proposed that s-sec. SA(2) will be omitted (Bill cl. 135).

552. The proposed omission of s-sec. SA(2) is consequent upon the insertion in the C&S Interpretation Act of proposed s.5B (see paras 553 to 554 below) and is based on s.6 of the Acts Interpretation Amendment Act 1984.

Cl. 136: Use of extrinsic material in interpretation of relevant Act

553. Proposed amendment It is proposed that cl. 136 of the Bill will insert proposed s. SB into the C&S Interpretation Act. If material extrinsic to a scheme Act is capable of assisting in the ascertainment of the meaning of a provision of that Act, consideration may be given to that material in interpreting the provision (proposed s. SB). Proposed s-sec.5B(2) will set out, in a non-exhaustive way, the main categories of extrinsic materials that may be used to assist in the interpretation of scheme legislation. Proposed s-sec. SB(3) will provide that, in applying proposed s.5B, regard should be had to the matters set out in that sub-section. Proposed s.5B is not intended to be used for the purpose of overturning the ordinary meaning of a provision conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act, unless there is ambiguity or obscurity or the result would be manifestly absurd or unreasonable.

554. Proposed s.5B is based on s.15AB of the Acts Interpretation Act 1901 (inserted by s.7 of the Acts Interpretation Amendment Act 1984). Proposed s-sec. SB(2) will also include a specific reference to any relevant report of the Companies and Securities Law Review Committee being a report that has been furnished to the Ministerial Council for Companies and Securities prior to the enactment of the relevant provision (proposed para 5B(Z)(b)).

Cl. 137: Definitions

555. Background Various definitions of words and phrases used in scheme legislation are set out in s.9 of the C&S Interpretation Act. The definitions in s.9 are applicable unless a contrary intention appears.

556. Proposed amendment It is proposed that cl. 137 of the Bill will insert the following new definitions:

"calendar month": This new definition is based on the definition of "calendar month" which was inserted in the Acts Interpretation Act 1901 by para 10(b) of the Acts Interpretation Amendment Act 1984.

"Companies and Securities Law Review Committee": The definition of "Companies and Securities Law Review Committee" is consequent upon the proposed amendment which will enable reports of the Companies and Securities Law Review Committee to be considered in the interpretation of scheme legislation (see paras 553 to 554 on proposed s.5B).

"contravene": The definition of "contravene" is based on the definition of "contravene" which was inserted in the Acts Interpretation Act 1901 by para 10(b) of the Acts Interpretation Amendment Act 1984.

"daily newspaper": The definition of "daily newspaper" is intended to ensure that a newspaper which is published during the week but not on weekends or public holidays will be a "daily newspaper" for the purposes of those provisions of scheme Acts which require the publication of certain information in a daily newspaper.

"relevant Act": The definition of "relevant Act" is intended to ensure that where the term "relevant Act" is used in scheme legislation, it will be interpreted as meaning a relevant Act as specified in s.3 of the C&S Interpretation Act.

Cl. 138: References to persons, things and matters

557. Proposed amendment It is proposed that references in a scheme Act to companies, bodies corporate or corporations will not imply that references in the scheme Act to 'persons' will not also include references to companies, bodies corporate or corporations (Bill cl. 138 - proposed s-sec. 11A(1)).

558. Proposed s-sec.11A(1) is based on s-sec. 22(2) of the Acts Interpretation Act 1901 which was inserted by para 10(c) of the Acts Interpretation Amendment Act 1984.

559. Proposed s-sec.11A(2) will be inserted to remove any doubts following the decision in Rendoel Pty. Limited v Campbell Investment Co (1985) 3 ACLC 335 which in effect cast on the plaintiff an onus of establishing that respective references to a person and to a company were capable of having the same referent. The effect of proposed s-sec.11A(2) will be that references in a provision are capable of having the same or a common referent unless it is established that a contrary intention appears.

560. Proposed s-sec.11A(4) will be inserted in order to prevent the application of proposed s-sec.11A(2) being distorted by reference to the other amendments of provisions of relevant Acts made by cls. 5, 8, 32, 33, 56, 166 and 167 of the Bill and to make it clear that these amendments are being made for the avoidance of doubt. Proposed s-sec.11A(4) will provide for these other proposed amendments to be disregarded for the purposes of the application of proposed s-sec.11A(2).

Cl. 139: References to writing, printing and documents

561. Background For the purposes of scheme legislation, the term "document" is defined as including:

(a) any paper, etc., on which there is writing or printing, or on which there are marks, symbols or perforations that have a meaning for persons qualified to interpret them; and

(b) a disc, tape, etc., from which sounds, images or messages can be reproduced.

(para 13(c) of the C&S Interpretation Act).

562. Proposed amendment It is proposed that this definition of "document" will be amended so that any paper on which there are "figures" having a meaning for persons qualified to interpret them will also be included in the definition of "document" (Bill para 139(a)).

563. It is also proposed that sub-para 13(c)(ii) of the C&S Interpretation Act will be amended to make it clear that the term "document" includes a disk, tape, etc., from which sounds, images, etc., may be reproduced regardless of whether or not such sounds, etc., can be reproduced without the aid of any other article or device (Bill para 139(b)). This proposed amendment is intended to ensure, for example, that the term "document" will include a video cassette even though images from the video cassette cannot be reproduced without a video cassette recorder.

564. The amendments proposed to the definition of "document" in para 13(c) of the C&S Interpretation Act are based on similar amendments made to s.25 of the Acts Interpretation Act 1901, by s-sec. 13(1) of the Acts Interpretation Amendment Act 1984.

Cl. 140: Production of records kept by means of computers, &c.

565. Proposed amendment It is proposed that cl. 140 of the Bill will insert a new provision (proposed s.13A) which will provide that, where a person is required under a scheme Act to

produce certain information (being information which has, for example, been stored in a computer) that person will be required to reproduce the information in a form capable of being understood by the person requiring the information.

566. Proposed s.13A is based on s.25A of the Acts Interpretation Act 1901 which was inserted by s-sec. 13(1) of the Acts Interpretation Amendment Act 1984.

Cl. 141: Service of documents on certain persons

567. Proposed amendment It is proposed that cl. 141 of the Bill will insert a new provision (proposed s.14A) which will deal with the service of documents on a natural person and on a body corporate.

568. Proposed s-sec. 14A(1) will set out, for the purposes of scheme legislation, the manner in which documents may be served on either a natural person or a body corporate. This provision is based on s-sec.28A(1) of the Acts Interpretation Act 1901. However, whereas s-sec. 28A(1) specifies how service may be effected on any body corporate, proposed s-sec.14A(1) will only specify how service may be effected on a body corporate other than a company, a recognised company, a foreign company or a recognised foreign company. The manner in which service may be effected on these bodies corporate is already dealt with in CA ss.528, 529 and 530.

569. Proposed s-sec. 14A(2) will provide that the operation of proposed s-sec.14A(1) will not affect the operation of a provision in any other specific legislation which authorises the service of documents in a different manner. Nor will proposed s-sec.14A(1) affect the power of a court to authorise service of a document in a different manner.

Cl. 142: Mention of officer in general terms

570. Background Reference in a scheme Act to a person holding or occupying a particular office or position is, unless the contrary intention appears, deemed to include a reference to all persons who at any time occupy the office or position for the time being (s.20 of the C&S Interpretation Act).

571. Proposed amendment It is proposed that s.20 of the C&S Interpretation Act will be amended by extending the operation of that section to all persons who, at any time, perform the duties of a particular office or position for the time being (Bill cl. 142).

572. This proposed amendment is based on a similar amendment made to s.20 of the Acts Interpretation Act 1901 by s.9 of the Acts Interpretation Amendment Act 1984.

Cl. 145: Insertion of new sections

573. Proposed amendment It is proposed that cl. 143 of the Bill will insert four new sections dealing respectively with alterations of names and constitutions, compliance with forms, contents of statements of reasons for decisions, and attainment of age. A brief description of each of these proposed new provisions is set out below.

Proposed s.20A: Alterations of names and constitutions

574. Where a scheme Act changes the name of a body or the title of an office then, unless the contrary intention appears, references in any legislation, instrument, determination, order or contract, etc, to the former name or title will be construed, in respect of matters occurring after the change, as references to the new name or title (proposed s-sec. 20A(1)).

575. Where a scheme Act alters the constitution of a body then, unless the contrary intention appears:

(a) the body will continue in existence as newly constituted so that its identity will not be affected;

(b) the alteration will not affect any function, powers, rights or obligations, etc, of the body;

(c) the alteration will not affect any legal or other proceedings instituted by or against the body; and

(d) the alteration will not affect any investigation or inquiry into any action taken by the body prior to the alteration.

(proposed s-sec.20A(2)).

576. Proposed s.20A is based on s.25B of the Acts Interpretation Act 1901 which was inserted by s.13 of the Acts Interpretation Amendment Act 1984.

Proposed s.20B: Compliance with forms

577. Where a scheme Act prescribes a form, then unless the contrary intention appears, substantial compliance (rather than strict compliance with the form) will be sufficient (proposed s.20B). This proposed amendment, which is based on s.25C of the Acts Interpretation Act 1901 (inserted by s.13 of the Acts Interpretation Amendment Act 1984), will remove the need to include such a provision in particular scheme Acts and regulations.

Proposed s.20C: Contents of statements of reasons for decisions

578. Where a scheme Act requires the giving of written reasons for a decision, the instrument giving the reasons will also be

required to set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based (proposed s.20C - see also s.28 of the Administrative Appeals Tribunal Act 1975 and s.13 of the Administrative Decisions Judicial Review Act 1977).

579. Proposed s.20C is based on s.25C of the Acts Interpretation Act 1901, which was inserted by s.13 of the Acts Interpretation Amendment Act 1984.

Proposed s.20D: Attainment of particular age

580. Proposed s.20D will provide that, for the purposes of any scheme Act, the time at which a person attains a particular age, expressed in years, will be the commencement of the relevant anniversary of the date of the birth of that person.

581. Proposed s.20D, which is based on s.25E of the Acts Interpretation Act 1901 (inserted by s.13 of the Acts Interpretation Amendment Act 1984), is intended to abolish, for the purposes of scheme legislation, the little known legal rule that a person attains a particular age at the first moment of the day immediately before the anniversary of his birth.

Cl. 144: Conferral of power to make, grant or issue an instrument

582. Background Where a scheme Act confers the power to make, grant or issue an instrument, that power, unless the contrary intention appears, may be construed as including a power to repeal, rescind, revoke, amend or vary such an instrument (C&S Interpretation Act, s.22).

583. Proposed amendment It is proposed that cl. 144 of the Bill will make a number of amendments to s.22 of the C&S Interpretation Act dealing with the exercise of powers conferred by scheme legislation.

584. Proposed s-sec. 22(2), which is based on s-sec.35(3A) of the Acts Interpretation Act 1901, will provide that where a scheme Act confers a power to make an instrument (including rules, regulations or by-laws) in respect of particular matters, such a power will include a power to make, grant or issue such instruments in respect of classes of those matters, and to make different provisions in respect of different classes of matters.

585. Proposed s-sec. 22(3), which is based on s-sec. 53(3B) of the Acts Interpretation Act 1901, will provide that where a scheme Act confers a power to make, grant or issue an instrument, such a grant of power will not preclude, by implication, the power to make provision in respect of a particular aspect of a matter if the Act in question contains a reference to another aspect of that matter or to another matter.

586. Proposed s-sec. 22(4), which is based on s-sec.33(5) of the Acts Interpretation Act 1901, will provide that where a scheme Act empowers the prescribing of penalties, the limitation on the penalties that may be prescribed will not prevent the instrument from requiring the making of a statutory declaration.

Cl. 145: Power to Appoint

587. Background Where a scheme Act confers a power to make appointments to an office, that power includes, unless the contrary intention appears, a power to remove or suspend a person from that office. The power to appoint also includes a power to appoint another person temporarily in the place of a person so removed or suspended, or in the place of a sick or absent holder of the office (s-sec. 25(1) of the C&S Interpretation Act).

588. Proposed amendment It is proposed that s-sec. 23(1) will be amended so that where a scheme Act confers a power to make appointments, it will also be construed as including a power to

making acting appointments to that office for a period of up to 12 months (Bill cl. 145). A consequential amendment will also be made to s-sec.23(2) of the C&S Interpretation Act.

589. These proposed amendments are based on similar amendments made to s-sec.33(4) of the Acts Interpretation Act 1901 by s.16 of the Acts Interpretation Amendment Act 1984.

Cl. 146: Delegations

590. Proposed amendment It is proposed that cl. 146 of the Bill will insert a new section dealing with the power to delegate functions, duties and powers (proposed s.25A).

591. Where a scheme Act confers a power to delegate, then unless the contrary intention appears, that power will not be limited to delegating to a specified person, but will include a power to delegate to any person from time to time occupying or performing the duties of a specified office (proposed s.25A).

592. Proposed s.23A is based on s.34AA of the Acts Interpretation Act 1901 which was inserted by s.17 of the Acts Interpretation Amendment Act 1984.

Cl. 147: References to amended, re-enacted or remade laws

593. Background Where a scheme Act contains a reference to the short title of an Ordinance, then, unless the contrary intention appears:

(a) the reference is construed as a reference to that Ordinance as originally made and as amended from time to time; and

(b) if that Ordinance has been repealed and remade, the reference is construed as including a reference to the remade Ordinance (as originally made and as

amended from time to time), and where particular provisions of the repealed Ordinance are referred to, those references are construed as including a reference to the corresponding provisions (if any) of the remade Ordinance. (s-sec. 33(2) of the C&S Interpretation Act)

594. Proposed amendment It is proposed that s.33 of the C&S Interpretation Act will be amended so that s-sec. 33(2), instead of being merely applicable to references in a scheme Act to Ordinances, will be applicable to references in a scheme Act to the laws of a State or Territory (Bill cl. 147).

595. This proposed amendment is based on s.10A of the Acts Interpretation Act 1901 (inserted by s.5 of the Acts Interpretation Amendment Act 1984).

Cl. 148: Heading to Part III

596. Proposed amendment It is proposed that the heading to Part III of the C&S Interpretation Act (i.e. "Offences and Penalties") will be omitted and a new heading - "Part III - Legal Proceedings" - substituted (Bill cl. 148).

Cl. 149: Insertion of Division heading

597. Proposed amendment Part III of the C&S Interpretation Act will be divided into the following two Divisions:

(a) Division 1 - Offences and Penalties; and

(b) Division 2 - Civil Proceedings.

598. Cl. 149 of the Bill will insert the heading to Division 1. Division 2 will be inserted by Cl.151 of the Bill (see paras 603 to 605).

Cl. 150: Effect of alterations of penalties

599. Proposed amendment It is proposed that cl. 150 of the Bill will insert a new provision (proposed s.36A) dealing with the effect of any alteration in the penalty or maximum penalty for an offence under a scheme Act.

600. Where a scheme Act increases the penalty or maximum penalty for an offence, that increase will only apply to offences committed after the commencement of the provision increasing the penalty (proposed s-sec.36A(1)).

601. Proposed s-sec. 36A(2) will provide that where a scheme Act reduces a penalty or maximum penalty for an offence, that reduction will extend to offences committed before the commencement of the provision. The reduction in penalty will not, however, affect any penalty actually imposed before the commencement of the provision.

602. Proposed s.36A is based on s.45A of the Acts Interpretation Act 1901 (inserted by s.18 of the Acts Interpretation Amendment Act 1984).

Cl. 151: Insertion of new Division and new Section 38B - Standard of proof

603. Background Many provisions in companies and securities legislation make civil liability depend on "contravention" or "failure to comply". However, the legislation equates commission of an offence with contravention or failure to comply (CA para 570(1)(c), CASA s-sec. 53(1), SIA para 141(1)(c)).

604. The proposed amendment provides for the usual civil standard to apply in civil proceedings where it is necessary to establish, or for the Court to be satisfied, for any purpose relating to a matter arising under scheme legislation, that:

(a) a person has contravened such legislation;

(b) default has been made in complying with a provision of such legislation;

(c) an act or omission was unlawful by virtue of a provision of such legislation; or

(d) a person has been in any way knowingly concerned in or party to a contravention, or a default in complying with, a provision of such legislation.

605. Specific amendments have also been made to CA ss. 554, 556 and 565 to make it clear that where in civil proceedings under those sections it is necessary to establish certain matters, those matters may be established on the balance of probabilities (see Bill cls. 119, 120 and 126). A related amendment has also been made to SIA s.14 (see Bill cl. 171).

BILL PART V - AMENDMENT OF COMPANIES AND SECURITIES LEGISLATION (MISCELLANEOUS AMENDMENTS) ACT 1983

Cl. 152: Principal Act

606. The Companies and Securities Legislation (Miscellaneous Amendments) Act 1983 is referred to in Part V of the Bill as the Principal Act (Bill cl. 152).

Cl. 153: Schedule 1

607. Background Schedule 1 to the Principal Act made amendments to various provisions of the CA, including paragraph 238(7)(c).

608. Proposed amendment The proposed amendment corrects a typographical error in the amendment to CA para 238(7)(c).

BILL PART VI - AMENDMENTS OF

NATIONAL COMPANIES AND SECURITIES COMMISSION ACT 1979

Cl. 154: Principal Act

609. The NCSC Act is referred to in Part VI of the Bill as the Principal Act (Bill cl. 154).

Cl. 155: Interpretation

610. Proposed amendments It is proposed that the NCSC Act definition of "prescribed interest" will refer to the definition of that expression in the CA. The NCSC Act definition of "securities" will refer to the SIA definition of that term (as proposed to be amended). (Bill cl. 155.)

Cl. 156: Membership of Commission

611. Background The NCSC is presently required to consist of not less than three nor more than five members (NCSC Act s-sec. 11(1)). There are three full-time members and two part-time members.

612. Because of the substantial changes in the financial and commercial sectors resulting from de-regulation, advances in technology, increased competition, growing internationalisation of the markets and blurring of traditional institutional boundaries, the NCSC needs access to a wider range of expertise at member level. Accordingly, it is proposed to increase the number of part-time members from two to five.

613. Proposed amendment The maximum number of members will be increased to eight, of which three must be full-time (Bill cl. 156).

Cl. 157: Acting appointments

614. Background The Governor-General may appoint a person nominated by the Ministerial Council to act as a full-time or part-time NCSC member when there are less than five members (NCSC Act s-sec. 17(3)).

615. Proposed amendment The Governor-General will be empowered to appoint acting NCSC members when there are less than eight members (Bill cl. 157). This amendment is in consequence of the amendment made to NCSC Act s.11 (discussed at paras 611 to 613 above).

Cl. 158: Meetings of Commission

616. Background S.20 of the NCSC Act deals with various matters in relation to meetings of the NCSC. S.20 envisages meetings where NCSC members are physically present and does not provide for meetings to be held by telephone, closed-circuit television or some other mode of communication. By contrast, s-cl. 26(4) of the Formal Agreement allows the Ministerial Council to agree to hold meetings by such means.

617. The ability to conduct meetings by telephone or closed-circuit television would enable day-to-day decisions to be made quickly and efficiently.

618. Proposed amendment The whole or part of an NCSC meeting will be able to be held by telephone, closed-circuit television or any other method of communication or any combination of these methods if all members of the NCSC who are on duty in Australia so agree (Bill cl. 158 - proposed s-sec. 20(3A)). All NCSC members taking part in such a meeting will be deemed to have been present at the meeting, even though they were not all present at the same place when the meeting was held (Bill cl. 158 - proposed s-sec. 20(3B)).

619. A consequential amendment will be made to s-sec. 20(7) (Bill para 158(b)).

Cl. 159: Divisions of Commission

620. Background S.21 of the NCSC Act allows the NCSC to direct that its functions or powers in relation to a matter be performed or exercised by a Division of the NCSC comprised of at least two NCSC members.

621. Pursuant to this power the NCSC has established four standing Divisions (Companies, Takeovers, Executive and Securities Industry) and most of the day-to-day decision making by full-time NCSC members is performed by these Divisions. Several Divisions to deal with particular matters have also been constituted from time to time.

622. The requirement in s. 21 of the NCSC Act for at least two members to be present together at a meeting (see s-secs. 21(1) and (5)) sometimes inhibits the prompt and efficient dispatch of NCSC business. The position is exacerbated when one of the full-time members is on leave.

623. The problem could be overcome if particular decisions could be made when necessary and appropriate without the requirement for face-to-face contact.

624. Proposed amendment The whole or part of a Divisional meeting of the NCSC will be able to be held by telephone, closed-circuit television or any other method of communication or any combination of these methods if all full-time members of the NCSC who are members of a particular Division and are on duty in Australia so agree (Bill cl. 159 - proposed s-sec. 21(4A)).

625. All members of an NCSC Division taking part in such a meeting will be deemed to have been present at the meeting,

even though they were not all present at the same place when the meeting was held (Bill cl. 159 - proposed s-sec. 21(4B)).

Cl. 160: Engagement of consultants

626. Background The terms and conditions of consultants engaged by the NCSC must be approved by the Commonwealth Public Service Board (NCSC Act, s-sec. 25(2)).

627. Various Commonwealth Acts are proposed to be amended to remove the necessity for the Board to approve the terms and conditions of the engagement of consultants.

628. Proposed amendment It will no longer be necessary for the Public Service Board to approve the terms and conditions of consultants (Bill cl. 160 - new provision).

Cl. 161: Proceedings at hearings

629. Background At a hearing before the NCSC:

(a) proceedings are conducted with as little formality and technicality, and with as much expedition, as the requirements of any relevant Act or State Act and a proper consideration of the matters before the NCSC permit; and

(b) s. 20 of the NCSC Act applies, so far as it is capable of application, as if the hearing were an NCSC meeting.

(NCSC Act paras 58(1)(a) and (e)).

630. Proposed amendments To ensure that para 38(1)(a) of the NCSC Act retains its present meaning it will be necessary to omit the word "relevant" (Bill para 161(a) - cf Bill para 137(e)).

631. It is proposed that ss. 20 and 21 of the NCSC Act be amended to allow the NCSC to hold meetings by telephone or closed-circuit television (see Bill cls. 158 and 159 - proposed s-secs. 20(3A), 20(3B), 21(4A) and 21(4B)). To ensure that NCSC hearings cannot be held by such means, it will be necessary to amend para 38(1)(e) of the NCSC Act (Bill para 161(c)).

Cl. 162: Delegation by Commission

632. Background An NCSC hearing must be conducted by three NCSC members (NCSC Act s-sec. 20(4) and 38(1)(e)), although no decision is made by the NCSC at the hearing itself. The NCSC may delegate its hearing power to a State or Territory authority or an officer of such an authority (NCSC Act s-sec. 45(1)). A delegate can direct that one person preside at a hearing but the NCSC itself cannot do this. In many instances it is inappropriate and an inefficient use of resources to require more than one member to preside at a hearing.

633. Proposed amendment The NCSC will be able to delegate to a member or acting member all or any of its hearing powers under Part VI or under a State Act (Bill cl. 16Z - proposed s-sec. 4S(1A)).

634. Anything done by a NCSC member conducting a hearing will be deemed to have been done by the NCSC (Bill cl. 162 - proposed s-sec. 45(6A)).

635. There are a number of consequential amendments (Bill paras 162(c) and (d)).

Cl. 163: Repeal of section S0

636. Background S. 50 of the NCSC Act preserves the existing and accruing rights of a full-time member or an employee of the NCSC who, immediately before his appointment to the NCSC, was an officer of the Australian Public Service or a

person to whom the Officers' Rights Declaration Act 1928 applied.

637. The Officers' Rights Declaration Act 1928 and subsequent amendments to that Act were repealed by Act No. 170, 1978 and Act No. 61, 1981. The Officers' Rights Declaration Act 1928 preserved the existing and accruing rights of the officers of certain public authorities who, immediately prior to their employment, were officers of the Australian Public Service.

638. Proposed amendment It is proposed that s.50 of the NCSC Act be repealed so as to delete the redundant reference to the Officers' Rights Declaration Act 1928 (Bill cl. 163). The rights of the NCSC members and staff which the section seeks to preserve are now adequately preserved by s.87TA of the Public Service Act 1922.

BILL PART VII

AMENDMENTS OF SECURITIES INDUSTRY ACT 1980

Alternative forms of securities markets

639. In the light of structural changes taking place in the securities markets, the NCSC has proposed that the scope of the SIA be widened to cater for all types of secondary securities markets. To facilitate this, it is proposed to introduce two new concepts to co-operative scheme legislation: securities exchange and approved securities organization. A securities exchange can be either a stock exchange or an approved securities organization. A series of amendments is set out in Schedules to Bill. Schedule 1 deals with provisions relating to CASA, (see Bill cl. 28); Schedule 2 deals with provisions relating to the CA (see Bill cl. 133); and Schedule 5 deals with provisions relating to the SIA (see Bill cl. 200). Most provisions which apply to stock exchanges will apply to all securities exchanges. The Ministerial Council will be empowered to exempt certain stock markets from the SIA in appropriate cases.

Cl. 164: Principal Act

640. The SIA is referred to in Part V of the Bill as the Principal Act (Bill cl. 164).

Cl. 165: Interpretation

641. Background SIA s-sec. 4(1) contains a series of definitions for the purposes of the SIA.

642. The CA definition of "banking corporation" was amended by s.22 of the Companies and Securities Legislation (Miscellaneous Amendments) Act 1983 so as to omit any reference to the Primary Industry Bank of Australia.

643. "Director" is defined in relation to a body corporate formed within the Territory.

644. Proposed amendments The reference to the Primary Industry Bank of Australia will be deleted from the definitions of "banking corporation" and "investment adviser" in SIA s-sec. 4(1), so as to bring it into line with the CA (Bill paras 165(1)(b), (c) and (j)). For consistency, the reference to "bank" in the definition of "securities" in SIA s-sec. 4'(1) will also be amended to refer to "banking corporation" (Bill para 165(1)(q)).

645. The definition of "director" will be amended so as to define the term "director" in the case of a body corporate formed outside the Territory (Bill para 165(1)(e)). A similar amendment will be made to the definition of "director" in the CA (see Bill para.50(1)(b)).

646. The definition of "prescribed interest" will also be amended in a similar way to that proposed in the CA (Bill cl. 165). (See paras 124 to 128 on Bill cl. 30 for an explanation of this proposed amendment.) A consequential amendment is also being made to the definition of "securities" (Bill s-cl. 165(2)).

647. An amendment is proposed to the definition of "securities" to bring commodity and index options traded on the Sydney Stock Exchange (SSE) within the ambit of the SIA (Bill paras 165(1)(p) and (w)). The SSE is now a member of the International Options Market which trades gold, silver and currency options. The SSE also proposes to introduce options on the Australian Stock Exchanges' indices. Bringing gold, silver, currency and index options within the ambit of the SIA will ensure that provisions such as fidelity fund protection, licensing and various offence provisions will apply.

648. It is proposed to include a series of new definitions in SIA s-sec.4(1) including:

(a) "approved securities organization" (see para 680 on Bill cl. 185 for an explanation).

(b) "exempt stock market" (see para 677 on Bill cl. 183 for an explanation).

(c) "securities exchange" which means a stock exchange or an approved securities organisation (see para 680 on Bill cl. 185).

649. It is also proposed to include a definition of "quotation", "trading" and a new definition of "stock market". The purpose of these definitions is to clarify the effect of the SIA in relation to activities which lead to conduct typical of a market. This will include quotations which are indicative or which are invitations as well as those which are binding offers in the narrow contractual sense. The amendments are proposed to overcome problems which may arise when markets are established which are in effect stock exchanges with different trading methods and are not subject to the prudential requirements of the SIA.

650. "Exempt dealer" is presently defined in State Securities Industry Codes to include State Public Trustees. There is no equivalent in the SIA. It is proposed that the definition of "exempt dealer" be amended to include the Public Trustee for the ACT who carries on business of dealing in securities by virtue of his powers under the Public Trustee Ordinance 1985. (Bill para 165(1)(g)).

651. The purpose of proposed SIA s-sec. 4(7A) (Bill para 165(1)(v)) is to bring the SIA into line with CA s-sec. 5(8) as proposed to be amended by Bill paras 30(1)(m) and (1)(n).

Cl. 166: Relevant interests in securities

652. Proposed amendment SIA s-secs. 5(4) and 5(5) will be omitted and replaced by new s-secs. 5(4) and 5(5) (Bill cl. 166(1)). Similar amendments will also be made to CASA s.9 and CA s.8. (See paras 34 to 46 on Bill cl. 8 for an explanation of this proposed amendment.) SIA s-sec. S(7) and s-para 5(8)(c)(i) will be amended and s-sec. S(9A) will be inserted to bring s.5 into line with CASA s.7 and CA s.9 (see paras 20 to 24 on Bill cl. 5 for an explanation).

Cl. 167: Associated Persons

653. Proposed amendment: It is proposed to amend SIA s.6 in line with the amendments to CASA para 7(4)(b) and CA para 9(1)(b). (See paras 20 to 24 on Bill cl. 5 for an explanation).

Cl. 168: Power of Commission to require production of books

654. Background The NCSC has the power to require production of books relating to the affairs of stock exchanges and relating to dealings in securities, for the purpose of the performance or exercise of a power under the relevant Acts (SIA s.8). A similar power is contained in CA s.12.

655. Proposed amendment For the reasons given at paras 144 to 146 on cl. 34 of the Bill, relating to a similar amendment to CA s.12, it is proposed that this power should be extended to cover situations where the NCSC needs to have access to books in order to ensure that the provisions of the relevant Acts are complied with (Bill cl. 168).

656. It is proposed to omit the words "stock exchange" and "stock exchanges" in SIA s-sec.8(4) and substitute the words "securities exchange" and "securities exchanges".

Cl. 169: Disclosure to Commission

657. Background SIA paras 12(3A)(d) and (e) refer to CASA s-secs.60(7) and (7A). These references are references to the CASA provisions as they existed before CASA s.60 was amended by the Companies and Securities Legislation (Miscellaneous Amendments) Act 1983. That Act provided for new CASA s-secs.60(1) and (3), which are based on old s-secs.60(7) and (7A).

658. Proposed amendment SIA paras 12(SA)(d) and (e) will be amended so as to correct references to CASA s-secs.60(7) and (7A) (Bill cl.169).

Cl. 170: Investigation of certain matters

659. Background Where the NCSC has reason to suspect that a person has committed an offence under the SIA or has been guilty of fraud or of an offence against any other law relating to dealing in securities, the NCSC may make such investigation as it thinks expedient for the due administration of the SIA (SIA s.13). CA s.16A is in similar terms to SIA s.13.

660. CA s.16A was considered by Ormiston J. of the Victorian Supreme Court in Commissioner for Corporate Affairs (VIC) v. Guardian Investments Pty. Ltd. (1984) 9 ACLR 162. The effect of Ormiston J's decision was that the NCSC could not rely on s.16A unless the investigator suspected that a particular person had committed an offence under a specific provision of the CA. The decision significantly limits the NCSC's investigative powers.

661. Proposed amendment It is proposed that SIA s.13 be amended in two ways as a result of the Guardian Investments Case, namely, to ensure that the investigation power can be exercised:

(a) not merely where the NCSC is satisfied that an offence has been committed but also where it is reasonably satisfied that an offence may have been committed; and

(b) not merely when the NCSC is reasonably satisfied as to the identity of the actual person involved, but also where it is satisfied that an offence may have been committed but it is not aware which of a number of persons may possibly have been involved.

662. In addition to the amendments prompted by the Guardian Investments Case, s.13 will also be broadened so that the NCSC may rely not only on suspected offences under the SIA but also on offences under any other law relating to dealing in securities as an offence relating to securities that involves fraud or dishonesty. This amendment is consistent with the application of the inspection powers (see SIA s-sec. 8(1A)). See also Bill cl. 35 which amends CA s.16A in a similar manner.

Cl. 171: Power of Court to make certain orders

663. Background Where it appears to the Supreme Court that a person has committed an offence under the SIA, or has contravened the conditions or restrictions of a licence or the business or listing rules of a stock exchange or is about to do an act with respect to trading or dealing in securities that, if done, would be such an offence or contravention, the Court may make such orders as it thinks fit (SIA para 14(1)(a)).

664. This provision is of importance with respect to civil remedies to enforce the SIA e.g. the ability of the Court to declare a contract relating to securities to be void (NCSC v Monarch Petroleum N.L (1984) 2 ACLC 256). Enactment of proposed s.58B of the C&S Interpretation Act (see Bill cl. 151) may raise an inference that some standard of proof other than the balance of probabilities must be met before it could appear to

the Court that an offence or contravention referred to in s.14 had occurred.

665. Proposed amendment This provision is consequent upon proposed s.38B of the C&S Interpretation Act (see Bill cl. 151).

666. It will no longer be necessary for it to appear to the Supreme Court that a person has committed an offence under the SIA before the Court can make orders under SIA s.14. It will, however, need to appear to the Court that a person has contravened the SIA before it can make orders under s.14 (Bill cl. 171). Proposed s.58B of the C[S Interpretation Act (see Bill cl. 151) will make it clear that for the purposes of civil proceedings such as those under SIA s.14 a contravention of companies and securities legislation need only be established on the balance of probabilities.

Cl. 172: Interpretation

667. Background There are various special interpretation provisions for the purposes of SIA Part II, Div. 2 which deals with special investigations in matters relating to dealings in securities (SIA s.15).

668. Proposed amendments In a number of provisions in SIA Part II Division 2, (ss. 21-27) reference is made to "questions and answers" that may be asked or given during the course of an investigation. A similar reference to "questions and answers" also appears in the special investigation provisions of the CA (ss. 298-303). Doubts have been expressed that the use of such a phrase might mean that other statements made during the course of investigations might not be admissible as evidence as part of the record of an investigation. To put the matter beyond doubt it is proposed that a statement made at an examination carried out during an investigation should be defined to include any question asked or answer given or any other comment or remark made at an examination (Bill cl. 172).

669. See also paras 406 to 413 on Bill cl. 87 concerning a proposed amendment to CA s.298.

Cl. 173: Record of examination
Cl. 174: Record to accompany report
Cl. 175: Admissibility of record of examination in evidence in proceedings against person examined
Cl. 176: Admissibility in other proceedings of statements at an examination
Cl. 177: Weight of evidence
Cl. 178: Credibility of person who made statements
Cl. 179; Determination of objection to admissibility of statement

670. Background There are a number of provisions in the SIA which refer to questions asked and answers given in the course of an examination in regard to their admissibility (SIA ss.21 to 27).

671. Proposed amendment For the reasons outlined in paras 385 to 592, it is proposed that any reference to "questions" or "answers" in SIA ss. 21-27 should be replaced by a reference to "statements" (Bill cls. 173 to 179).

Cl. 180: Provisions relating to reports

672. Background The availability of an inspector's report and the initiation of proceedings as a result of a report are dealt with in SIA s.50.

673. Proposed amendment It is proposed to insert two new sub-sections in SIA s.50 which are based on comparable provisions in CA s-secs. 506(12) and (13). A copy of an inspector's report purporting to be certified as such by the NCSC will be admissible in civil proceedings as evidence of any matters stated in the report to have been found to exist (Bill cl. 180 - proposed SIA s-sec. 50(9A)). Similarly, a copy of an

NCSC report purporting to be certified as such by the NCSC will be admissible in civil proceedings as evidence of any matters stated in the report to have been found to exist (Bill cl. 180 - proposed SIA s-sec. 30(9B)).

Cl. 181: Power of Commission to make certain orders

674. Proposed amendment A drafting change is to be made to remove SIA s-sec. 35(6) as it duplicates a provision in SIA s.143.

Cl. 182: Heading to Part III

675. Proposed amendment: In line with amendments to Part III, it is proposed to change the heading of Part III from "Stock Exchanges" to "Securities Exchanges".

Cl. 185: Establishment &c of stock markets

676. Background SIA s-sec. 37(1) prohibits a person from establishing, maintaining or providing a stock market that is not the stock market of a stock exchange.

677. Proposed amendment: The new definitions of stock market, quotation and trading (see para 649 on Bill cl. 165) may cover a number of activities which do not need to be subject to some or al! of the requirements of the SIA. It is proposed to include s-sec.37(1A) and (1B) empowering the Ministerial Council to declare, that a specified stock market is an exempt stock market. Such a market will be exempt from the requirements of the SIA, subject to compliance with any conditions imposed by the Ministerial Council.

Cl. 184: Power of Ministerial Council to approve stock exchange

678. Proposed amendment An application for approval as a stock exchange is required to be in writing rather than as prescribed in the regulations.

Cl. 185: Power of Ministerial Council to approve body corporate as approved securities organisation

679. Background SIA s-sec.38(1) provides that a body corporate that proposes to establish, maintain or provide a stock market may lodge an application for approval by the Ministerial Council as a stock exchange.

680. Proposed amendment As defined in cl. 165 of the Bill, a "securities exchange" can be either a stock exchange or an ASO. A body corporate which proposes to establish, maintain or provide a stock market may lodge an application under proposed SIA s-sec.38A(1) for approval by the Ministerial Council as an approved securities organisation. The Ministerial Council must be satisfied that criteria similar to those in SIA s-sec. 38(2) are met before approval may be given.

Cl. 186: Securities exchange to provide assistance to NCSC

681. Background SIA s.41 requires a stock exchange to provide such assistance to the NCSC as the NCSC requires to perform its functions and duties. This includes permitting a representative of the NCSC full and free access to the trading floor of the exchange, which is defined as any place or facility maintained or provided by the stock exchange for the sale, purchase or exchange of securities by members of the stock exchange.

682. Proposed amendment It is proposed to omit from SIA s-sec.41(3) the words "of a stock market" and substitute the words "or trading floors of a securities exchange"; to omit from SIA s-sec.41(4) the words "the trading floor of stock market of a stock exchange" and substitute the words "a trading floor of a securities exchange"; and include a new sub-s. 5 defining "trading floor" in similar terms to the proposed definition of "stock market" and "trading" (see para 649 on Bill cl. 165). The purpose of this amendment is to enable the NCSC to have access to the trading floor of all securities exchanges.

Cl. 187: Power of Court to order observance or enforcement of business rules or listing rules of stock exchange

683. Background The Supreme Court is able to make orders and give directions, on the application of the NCSC, a stock exchange or a person aggrieved, where a person has failed to comply with, observe, enforce or give effect to business rules or listing rules (SIA s-sec. 42(1)). A body corporate that has been admitted to the official list of a stock exchange and has not been removed from that official list is deemed to be obliged to observe the listing rules of that stock exchange for the purposes of this provision (SIA s-sec. 42(2)).

684. It is proposed that SIA s.42 be amended to make it clear that a body corporate or a person associated with it admitted to the official list of a securities exchange with consent shall be deemed to be under an obligation to comply with the listing rules (but not with the business rules) of a securities exchange to the extent to which those rules purport to apply in relation to the body corporate or its associate (Bill cl. 187). It is possible that a securities exchange may facilitate trading in the securities of a company although the company may not be aware that its securities are being quoted on that exchange. The requirement that a body corporate consent to its admission to an official list is to ensure that the obligations associated with listing (reporting etc) are not imposed on a company without its acquiescence.

Cl. 188: Insertion of new section - 42A. Certain laws not applicable to option contracts to which this Act applies

685. Background The Sydney Stock Exchange (SSE) is now a member of the International Options Market which trades gold, silver and currency options. The SSE also proposes to introduce options on the Australian Stock Exchanges' indices. An amendment is proposed to the definition of "securities" to bring commodity and index options traded on the SSE within the ambit of the SIA (Bill paras 165(1)(p) and (w)).

686. Options over the All Ordinaries Index will call for settlement by way of differences, i.e., a cash adjustment between the parties. The gold, silver and currency options call for delivery. There is a possibility that settlement by way of differences options may amount to contracts by way of "gaming and wagering" within the meaning of s.16 of the New South Wales Gaming and Betting Act 1912 and under the corresponding legislation of the other participating States and the ACT. If so, such options would be null and void.

687. Proposed amendment It is proposed to remove any doubts as to the enforceability of the index option or any other option contract to which the SIA applies if made on a stock market of a securities exchange or on an exempt stock market (Bill cl. 188 - proposed SIA s.42A).

Cl. 189: Further provisions relating to revocation and suspension of licences

688. Background The NCSC has the power to revoke or suspend a licence of a dealer, investment adviser or representative in certain circumstances provided the licensee is given an opportunity for a hearing under SIA s.62 (SIA s.60). One of the grounds on which the NCSC may, subject to s.62, revoke a licence is where the NCSC has reason to believe that the licence holder has not performed the duties of a licence holder efficiently, honestly and fairly (SIA para 60(1)(b)).

689. Proposed amendment For the purposes of determining whether it has reason to believe that a licence holder has not performed duties efficiently, honestly and fairly, the NCSC may have regard to a contravention of proposed SIA s.65A(1) (see discussion on proposed SIA s.65A below).

Cl. 190: Issue of contract notes

690. Proposed amendment It is proposed to amend SIA s.64 by omitting "stock exchanges" from s-para (2)(h)(i) and substituting "securities exchanges" in accordance with the introduction of the concept of securities exchanges (see para 639 above).

Cl. 191: Insertion of new section - 65A Recommendations

691. Background Concern has been expressed at the practice of advising clients to place funds into particular investments irrespective of whether there is a reasonable basis for that advice and irrespective of whether the investments are suitable for the clients.

692. At present there is no specific provision in the SIA dealing with the basis for recommendations made by licensees in relation to securities.

693. Proposed amendments A dealer, investment adviser, dealer's representative or investment representative (referred to in proposed s.65A as an "adviser" - see Bill cl. 191 - proposed para 65A(7)(a)), who makes a recommendation whether expressly or by implication (Bill cl. 191 - proposed para 65A(7)(b)) relating to securities to a person who may reasonably be expected to rely on the recommendation will be required to have a reasonable basis for making the recommendation to the person (Bill cl. 191 - proposed s-sec.65A(1)).

694. An adviser will not have a reasonable basis for making a recommendation to a person unless the adviser has:

(a) reasonably considered and investigated the subject matter of the recommendation to ascertain that the recommendation is appropriate in view of the

investment objectives, financial situation and particular needs of the person; and

(b) the recommendation is based on that consideration and investigation.

(Bill cl. 191 - proposed s-sec. 65A(2)).

695. An adviser in breach of proposed s-sec. 65A(1) will not be guilty of an offence but may be liable in damages under proposed s-sec. 65A(4) discussed at para 697 below (Bill cl. 191 - proposed s-sec. 65A(3)).

696. The provisions in the second exposure draft, requiring an adviser to disclose commissions or other benefits, have been omitted. Further proposals will be developed so that these provisions can be integrated into SIA s.65.

697. An adviser will be liable to pay damages to a person to whom the adviser has made a recommendation in contravention of proposed s-sec. 65A(1) in certain circumstances (Bill cl. 191 - proposed s-sec. 65A(4)).

698. An adviser who, in the absence of malice:

(a) makes a recommendation relating to securities to a client who may reasonably be expected to rely on the recommendation; and

(b) without contravening proposed s-sec. 65A(1),

will not be liable to a defamation action in respect of a statement made to the client in the course of, or in connection with, the making of the recommendation to the client.

(Bill cl. 191 - proposed s-sec. 65A(5)).

699. Proposed s-sec. 65A(5) will not limit or affect any right, privilege or immunity that an adviser may otherwise have as defendant in a defamation action (Bill cl. 191 - proposed s-sec. 65A(6)).

Cl. 192: Short selling

700. Background The limitations on short selling of securities set out in SIA s.68 have, for all practical purposes, prevented short selling on Australian stock markets. Short selling refers to the practice of selling securities which the seller does not possess, at present prices, in the expectation that he can buy them in the future at lower prices.

701. The Campbell Committee recommended that the NCSC examine the feasibility of allowing short selling, subject to the imposition of appropriate requirements to discourage the development of a false market and to prevent the development of unfunded speculation.

702. In April 1985 the NCSC and AASE jointly released for public comment proposed amendments to stock exchange business rules and SIA s.68 to permit short selling.

703. Some key features of the proposal, which will appear in stock exchange business rules yet to be approved by the Ministerial Council, will be:

(a) only Approved Securities (of companies and trusts) and Public Securities (issued by Government, Semi-Government and Local Authorities) may be short sold by members of an AASE exchange;

(b) in the case of Approved Securities there must be S0 million shares/units on issue (after deducting shares held by related companies) with a minimum market capitalisation of $100 million;

(c) not more than 10 per cent of any Approved Security may be short sold at any time;

(d) short sales at Official Meetings may be made at a "price not lower than the price of which the last reported sale" took place.

704. Proposed amendment In addition to the manner in which short selling of securities may presently be undertaken, short selling will be permitted where:

(a) the securities are of a class prescribed by a securities exchange committee in accordance with business rules;

(b) the sale is effected in accordance with exchange business rules; and

(c) the principal or agent in the sale is not an associate of the body corporate that issued the securities

(Bill cl. 192 - proposed SIA para 68(3)(e)).

A consequential amendment is proposed to be made to SIA s-sec. 68(4) (Bill para 192(c)).

Cl. 193: Insertion of new section - 68A. Power of Commission to prohibit certain kinds of short selling

705. Background The NCSC has the power to prohibit trading in particular securities for up to 21 days in order to protect investors or the public (SIA s.40).

706. Proposed amendment A provision along the lines of SIA s.40 is proposed so as to empower the NCSC to prohibit short selling of securities prescribed under securities exchange

business rules (Bill cl. 193 - proposed SIA s.68A).

707. A brief outline of proposed s.68A is as follows:

(a) The NCSC must first notify the securities exchange that it has formed the opinion that it is necessary to prohibit short selling in approved securities or public securities (proposed s-sec. 68A(1)).

(b) If the securities exchange takes no action to prevent short selling, the NCSC will be able to prohibit short selling in relevant securities for up to 21 days (proposed s-sec. 68A(2)).

(c) The NCSC must report to the Ministerial Council as soon as practicable (proposed s-sec. 68A(3)) which may revoke the NCSC's prohibition (proposed s-sec. 68A(4)).

(d) Contravention of an NCSC prohibition will be an offence (proposed s-sec. 68A(5)).

Cl. 194: Dealers' trust accounts

708. Background A dealer must open and maintain a trust account into which he must pay all moneys held by him on trust for a client, and any amount paid back to him by the stock exchange under SIA s-sec. 97(4) (SIA s.73). However some dealers are expressly prohibited by their licence conditions from holding clients' money on trust.

709. Proposed amendment A dealer will not be required to comply with SIA s-sec.73(1) where a licence condition or restriction prevents him from holding moneys in trust for his clients (Bill cl. 194).

Cl. 195: Certain matters to be reported to the NCSC

710. Background SIA s-sec.80(1) requires that a stock exchange must report to the NCSC as soon as it becomes aware of any of the matters in SIA s-sec. 80(2). These matters include a breach of any of the provisions of Part VIII which relates to deposits.

711. Proposed amendment It is proposed to exempt from the requirement to report any breach of Part VIII any securities exchange which is not a stock exchange. This exception is proposed as such regulation would be inappropriate for an approved securities organisation.

Cl 19.6 : Fraudulent inducing persons to deal in securities

712. Background A person is prohibited from inducing another person to deal in securities by making a statement, promise or forecast he knows to be misleading, by dishonestly concealing material facts or by recklessly making a misleading statement, promise or forecast (SIA s.126).

713. Proposed amendment The means of inducing a person to deal in securities will be extended to include recording or storing false or misleading information. It will be a defence to a prosecution for an offence under SIA s. 126 if, at the time of recording or storing the defendant had no reasonable grounds for expecting that the information would be available to any other person (Bill cl. 196).

714. The purpose of this proposed amendment is to make it clear that SIA s.126 will apply to information stored in a computer. The proposed amendment will remove any doubt that a person is responsible for false or misleading input into a computer if that input induces another person (i.e. a person with access to the input through a computer terminal) to deal in securities.

Cl. 197: Restrictions on use of titles "stockbroker"

"sharebroker" and "stock exchange"

715. Background SIA s.133 restricts the use of the name or title "stockbroker" or "sharebroker" to a member of a stock exchange or a person who is a partner of a member firm of a stock exchange.

716. Proposed amendment It is proposed to extend SIA s.133 to restrict the use of the name or title of stock exchange to use by a body corporate approved by the Ministerial Council as such.

Cl. 198: Continuing offences

717. Background It is an offence in certain circumstances to continue to fail to do an act or thing that is required to be done under the SIA (SIA s.142).

718. Proposed amendment SIA s.142 will be repealed and substituted with a new section (Bill cl. 198). A similar amendment will be made to CA s.571 (Bill cl. 128). The reasons for this proposed amendment are explained at paras 526 to 535 on cl. 128 of the Bill.

Cl. 199: Offences by bodies corporate

719. Background An officer of a body corporate who was in any way knowingly concerned in the commission of an offence by the body corporate is also guilty of that offence (SIA s.143).

720. Proposed amendment Amendments are also proposed to SIA s-sec.143(1) as a consequence to the amendments to SIA s.142. SIA s-sec.143(1) will be amended to make it clear that:

(a) the provision does not apply where a body corporate or officer is guilty of a continuing offence under proposed s-secs 142(3) or (4);

(b) the provision will apply to a former officer of a body corporate (cf CA s-sec. 572(1)); and

(c) the penalty which an officer or former officer will incur will be the penalty applicable to the offence of which the body corporate is guilty.

(Bill cl. 199)

Cl. 200: Further amendments relating to securities exchanges

721. Proposed amendment Schedule 3 of the Bill amends the SIA by substituting "securities exchange" for "stock exchange" in specified provisions.

Appendix A

Changes made to the first exposure draft by the second exposure draft are as follows:

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
	New interpretation provision Cl.3A.
Cl.4	Omitted and replaced with new cl. 4 which will insert a new provision dealing with associated persons.
-	New interpretation provision at cl. 4A.
Cl.5	Omitted and replaced with new cl.5 which will amend CASA s-sec.8(3) and insert a new interpretative provision (see proposed s-sec.8(11)).
Cl.6	Minor drafting changes
Cl.7	Minor drafting changes made to para 7(a). New paras 7(b), (c) and (d) inserted dealing with a company having a relevant interest in its own shares.
Cl.8	Omitted - see new cl.5
Cl.11	Paras 11(a), (d) and (e) have been omitted. Drafting changes made to para 11(c) (see new para 11(c)). New para 11(a) will require conditions attached

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
	to take-over offers to be approved by the NCSC. New para 11(d) will ensure that the consideration for take-over offers is to be paid by not later than 21 days after closed offer period.
-	New provision - cl. 11A (proposed s.16A): provides for the approval by the NCSC of conditions attached to take-over offers. New provision -cl. 12A: consequential amendments to CASA s.20.
Cl.13	Para 13(b) has been omitted. New cl. 13 will prohibit the withdrawal of take-over offers without the consent of the NCSC.
Cl.14	Para 14(c) has been omitted. New paras 14(a), (c) and (e) will amend CASA s-secs.27(8), 27(11) and 27(12).
Cl.15	Cl. 15 has been substantially redrafted. New cl. 15 will repeal CASA ss. 28, 29 and 30. Proposed s.28 will provide that an offeror may only declare offers to be free of a condition with the consent of the NCSC.
Cl.16	Omitted - see new cl. 15.

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
Cl.17	Minor drafting changes to proposed s-sec.59A(1). Proposed s-sec. 39A(2) has been redrafted - offeror will not be required to publish notice in newspaper; target company will be required to make offeror's notice available to members of the company.
Cl.18	Amended so that a reference to the shares subject to acquisition in s.42 will exclude the shares to which the offeror was entitled when the first offer was made.
Cl.19	Para 19(b) omitted - see new cl.5.
Cl. 21	New para 21(b) will insert proposed s-sec. 47(1A) which will give the Court power to make such orders as it considers necessary where an offer has contravened a condition specified in an approval or consent obtained from the NCSC in relation to conditional take-overs.
Cl.23	Drafting changes to penalty provisions for offences under proposed s-secs.52(1) and (2).

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
	* Minor drafting changes to proposed s-secs.52(3) and (6).
	* Proposed s-sec. 52(7) amended so that CA s.570 will also be inapplicable in relation to a failure to make a take-over bid in accordance with a public announcement.
	* Proposed para 52(8)(b) amended in relation to meaning of the expression "making a take-over bid in accordance with a public announcement".
Cl.24	Amended. Proposed para 24(b) of this draft will substitute new s-sec. 53(5).
-	New provision - cl.24A: will repeal CASA ss.54, 63 and 64.
	New provision cl. 25A provides for amendments as set out in Schedule 1. New paras 27(1)(ba), (bb), (ea), (eb) and (ec) - interpretative.
Cl. 27	Amendment of the definition of "prescribed interests" in CA

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
	sub-section 5(1) to enable time sharing schemes to be exempted by regulation. The specific inclusion of retirement village schemes has been removed; see cl. 43B below.
-	New provisions paras 28(b), (c) and (d) inserted dealing with a body corporate having a relevant interest in its own shares.
-	New provision cl. 28A amends CA s.9 dealing with associated persons.
-	New provision cl.29A repeals s.16A of the CA and substitutes a new s.16A. New s.16A widens the investigations power of the NCSC to include cases where there is a reasonable suspicion that an offence may have been committed by unspecified persons either under a provision of the scheme legislation or relating to a company involving fraud or dishonesty or concerning the affairs of the company.
-	New provision cl. 33A amends CA s.309 by omitting para (3)(a)

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
	and substituting a new para (3)(a) which provides that in addition to being represented at hearings by an employee, or a member or acting member of the Commission, the NCSC may also be represented by a person authorised by the Commission for the purpose.
-	New provision cl. 36A amends the heading of Division 3 of Part III by omitting "Powers" and substituting "Legal Capacity".
-	New provision cl. 36B inserts new interpretation provisions before s.67 of the CA. Section 66A defines words and phrases used in ss.66B, 67 and 68. Section 66B is a clear statement of the objects of ss.67 and 68.
-	New provision cl. 36C amends s.67 of the CA and confers on a company the capacity of a natural person while permitting the company the right to impose restrictions on its powers and to specify objects without affecting its legal capacity.

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
-	New provision cl. 36D amends s.68 of the CA, consequential upon the amendments to s.67. Sub-section 68(1A) will dispose of the notion of implied restrictions or prohibitions on the exercise by a company of its powers. Sub-sections 68(1)-(6) of the CA are all amended consequential to the amendment to s.67.
-	New provision cl. 36E repeals s.68B.
Cl.38	Proposed paras 78(1)(d) and (1)(e) have been omitted. Proposed s-sec.78(4) will be inserted after proposed para 78(3)(c) to provide that a company may alter its status from that of a public company to a proprietary company, notwithstanding the provisions of proposed para 78(3)(c).
Cl.39	Omitted and replaced with new provision cl. 39 concerning contents of prospectuses with regard to securities exchanges.

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
	New provision cl. 39A will amend CA s.99 with regard to securities exchanges.
-	New provision cl. 39B will amend CA s.134 by adding proposed s-sec.(6) which removes a person's ignorance of, or mistake as to, a matter of law as an element of the defence of inadvertence.
-	New provision cl. 39C amends CA s.136 dealing with entitlement to voting shares and associates with regard to substantial shareholdings.
-	New provision cl. 39D will include new CA s.141 concerning copies of notices to be served on securities exchanges.
Cl.40	Defence of "inadvertence" to be retained but defined so that mistake or ignorance of the law is excluded as an element of the defence (see new provision cl.59B).
-	New provision cl. 42A will amend CA s-sec. 189(1) by omitting the definition of "prescribed stock exchange".

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
Cl.43	Omitted
-	New provision cl.43A provides that where an officer of the company or an associated person seeks to enforce a charge within six months of its creation, the charge is void against everyone except a bona fide purchaser for value without notice, unless court approval is obtained.
-	New provision 43B ensures that prospectus debenture and prescribed interest provisions do not apply to retirement village schemes.
-	New provision cl.43C amends s.218(4) of the CA regarding the places where a company can be required to paint or affix its name.
-	New provision cl.44A imposes liability on directors of a company, acting as a trustee, which has incurred a debt and is not entitled to be indemnified out of the assets of the trust [see ED1 cl.72 - proposed s.504C].
Cl.45	Amended by changing the "direct or indirect beneficial interest"

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
	test in CA sub-para 230(1)(a)(iv) to a "relevant interest" test.
Cl.47	Amended by:
	* enabling shareholders to approve an upper limit on the payment of a prescribed benefit rather than an exact amount
	* omitting the definition of 'executive officer' and replacing all references to 'executive officer' with 'bona fide full-time employee'
	* replacing the reference to 'a related corporation' in proposed para 233(2A)(a) with 'a corporation that is a related corporation or that was, at the time when the past services were rendered, a related corporation'
	* ensuring that 'retirement' be read as encompassing 'resignation, retrenchment or death'

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
	* imposing a $1500 limit on claims by directors in respect of annual leave. * inserting a definition of 'associate'.
Cl.48	Amended by extending the application of proposed paras 48(a), (b) and (c) to a director, principal executive officer or secretary of a company who is re-appointed after the commencement of the Companies and Securities Legislation (Miscellaneous Amendments) Act 1985
-	New provision cl. 49A will insert proposed s.255A to require a shareholder in an unlisted company to disclose to that company the details of the shares he holds in a non-beneficial capacity.
-	New provision 49B will amend CA s.256 so that the information as to non-beneficial shareholding to be provided under proposed s.255A will be included in the register of members of unlisted companies.

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
-	New provision 49C will make a consequential amendment to CA s-sec. 260(8) in the light of the 1983 amendments to CA s.261 and of the amendments proposed to CA s.256.
-	New provision 49D will amend CA s.261 so that it will apply to all companies, not merely listed companies. A new s-sec.(12A), along the lines of CA s-sec.143(S), will be inserted to provide that a company is not to be affected with notice of any right relating to a share and is not deemed to have been so affected since the commencement of s.261 in its present form (as inserted by the 1983 amendments).
-	Proposed s-sec (17A) will be inserted to remove a person's ignorance of, or mistake as to, a matter of law as an element of the defence of inadvertence contained in CA s-sec. 261(17).
Cl.50	Amended to retain the defence of 'inadvertence' in CA s-sec. 261A(10) but new s-sec.261A(10A) defines inadvertence to exclude mistake or ignorance of the law as an element of the defence.

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
Cl.51	"Books" substituted for "records"
Cl.52	Amends CA s.266 by: * omitting definition of "funds statement" and inserting definition of "cash statement"; * inserting definition of "relevant time"; and * inserting a proposed s-sec.266(1A) which provides that the statements under 269(9) and (10) form part of the accounts.
Cl.53	Amended to include in proposed s.266G a time limit within which the ASRB must prepare its annual report.
Cl.54	Amends CA s.269 by: * substituting a requirement for the preparation of a "cash statement" in lieu of "funds statement"; * use of "relevant time" to specify latest date by which accounts, etc, must be made up; and

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
	* omitting CA s-sec. 269(6) and incorporating requirement in s-sec. 269(3).
-	New provision cl.54A, which makes the following amendments to CA s.270: * use of 'relevant time' to specify latest date by which reports must be made up; and * omission of s-sec.270(10).
-	New provision cl.54B, which makes the following amendments to CA s.275: * company can be relieved of requirements imposed on it; and * s-sec. 273(7) repealed and replaced by new s-secs. 275(7) and (7A). * inserts new s-sec.273(11) which allows relief to be granted in respect of financial information required to be disclosed in annual return.

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
Cl.56	BD1 cl.56, specifying additional items to be laid before an annual general meeting pursuant to CA s.275, replaced by new cl.56 which achieves same effect by using less specific references to requirements of CA s.269.
Cl.57	Minor drafting change
Cl.66	Amended by adding proposed s-sec. 515(23) which provides that in CA ss.51S and 316 any reference to 'the directors of a company' is a reference to 'the directors of a company or any one or more of them'.
Cl.67	Omitted, but see new provision Bill cl. 43A.
Cl.68	Omitted, but see Bill cl. 70.
-	New provision cl. 68A grants priority to retrenchment payments in receivership -consistent with Bill cl. 71 which grants priority to retrenchment payments in a winding up.
Cl.69	Amended so that the protection to be given to banks from certain transactions being

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
	regarded as void dispositions of property under CA s.368 will not extend past the date of the winding up order.
Cl.70	Amended by the addition of a provision designed to realign the powers of liquidators and receivers in respect of the appointment of agents.
Cl.71	Amended to ensure that directors will not be able to avoid the limit of $2000 by resigning prior to the winding up. Also, priority given to retrenchment payments in a winding up has been extended to receiverships (see Bill cl. 68A).
-	New provision cl. 71A provides that service by an employee after the relevant date will also be taken into account for the purpose of calculation of any entitlement to retrenchment payment (proposed s-sec.443(2)).
-	New provisions cls. 71B, 71C, 71D, 71F and 71G are amendments consequential upon proposed para 441(1)(ga) (see Bill cl. 71).

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
-	New provision cl. 71E provides that re-insurance proceeds paid to an insolvent company will be distributed amongst all policy holders with loss based claims.
Cl.72	Omitted (see Bill cl. 44A).
Cl.73	Cl. 75 - Amended to limit the places where the company name should be displayed to the principal office and every other place at which its business is carried on and which is open and accessible to the public.
Cl.76	Amends proposed CA s-sec. S16(6A) to require: * amount of profit or loss of foreign company's operations within Australia; and * balance sheet relating to state of affairs of foreign company's operations within Australia.
Cl.77	Cl. 77 - Amended in the same way as cl. 73.
-	New provision cl. 78A has been included in Bill consequential upon proposed s.38B of the C&S Interpretation Act (see Bill

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
	cl.87). The effect of this new provision will be to make it clear that in civil proceedings under CA s-sec.554(6) where it is necessary to establish certain matters, civil standard of proof shall apply.
Cl. 83	New provision cl.78B proposes an amendment similar to cl. 78A but in respect of CA s-sec.556(1). New paragraphs CA 564(1)(c) and (2)(c) amended to substitute "securities exchange" for "stock exchange".
-	New provision cl. 83A inserts s-secs. S65(ZA) and (2B) which: (a) provide that proceedings for civil recovery under CA s-sec. 565(2) may be brought notwithstanding that a director or executive officer has been convicted of an offence in respect of the matter; and (b) ensure that the civil standard of proof applies in respect of proceedings for the recovery of the civil liability under CA s-sec.565(2).

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
-	New provision cl. 85B is a consequential amendment to CA s-sec.570(6) to also exclude from the general penalty the calculation of daily penalty amounts to be imposed by proposed new s-sec. 571(S) (Bill cl. 85C).
-	New provision cl. 83C substitutes a redrafted CA s.571 to overcome the difficulty caused by s.571 providing for continuing daily offences rather than by creating the one continuing offence calculated by daily penalties. The redrafted s.571 also clarifies the means by which continuing offences are committed by both substantive and derivative offenders.
-	New provision cl. 83D is a drafting amendment to CA s-sec. 572(2) so that it will be expressed to be for the "purposes of this Act" rather than as presently expressed for "the purposes of s-sec. 572(1)".
-	New provision cl. 85E will insert new s-sec. 577(6A) to provide that the provisions of

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
	CA 552 will not apply to the secondary sale of a prescribed interest except as prescribed.
-	New provisions cl. 83F and 83G contain amendments to CA concerning securities exchanges including amendments in Schedule 2.
-	New provisions cls. 84A, 84B, 84C, 84D, 84E, 84F, 84G, 84H, 84J, 84K, 84L, 84M, 84P - these clauses are based on recent amendments made to the Commonwealth Acts Interpretation Act 1901 by the Acts Interpretation Amendment Act 1984.
-	New provision cl. 84D inserts new s-secs.11A(2), (3) and (4).
-	New provision cl. 86A is based on a recent amendment made to the Commonwealth Acts Interpretation Act 1901 by the Acts Interpretation Amendment Act 1984.
Cl.87	The proposed amendment is based on ED1 cl. 87 but goes further by providing for the usual civil standard to apply in civil

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
	proceedings where it is necessary to establish, or for the Court to be satisfied, for any purpose relating to a matter arising under companies and securities legislation, that: (a) an act or omission was unlawful by virtue of a provision of such legislation; or (b) a person has been in any way knowingly concerned in or party to a contravention, or a default in complying with, a provision of such legislation.
-	New provision cl.87A provides that the NCSC Act is referred to in Part IVA of the Bill as the Principal Act.
-	New provision cl. 87B brings the NCSC Act definition of "prescribed interest" into line with the CA definition of that term.
-	New provision cl.87C will enable an NCSC meeting to be held by telephone, closed-circuit television or any other method of communication if all full-time members of the NCSC on duty in Australia so agree.

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
-	New provision cl.87D will enable a Divisional meeting of the NCSC to be held by telephone, closed-circuit television or any other method of communication if all full-time NCSC members who are members of a relevant Division and are on duty in Australia so agree.
-	The effect of new provision cl.87E is: (a) to amend para 38(1)(a) of the NCSC Act so that the words "relevant Act" will retain their present meaning after the proposed amendment to s.9 of the C&S Interpretation Act (see Bill cl. 84C); and (b) to ensure that NCSC hearings cannot be held by telephone or closed-circuit television.
-	New para 89(1)(aa), (da), (eaa), (eab), (ha) and (hb) are interpretative provisions relating to securities exchanges and approved securities organisations.

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
Para 89(f)	The proposed definition of "participation interest" has been amended by the addition of a new paragraph (d). A similar amendment is proposed to the corresponding proposed CA definition (see Bill para 27(c)).
Para 89(g)	The proposed definition of "retirement village scheme" has been amended by the substitution of paragraph (b) of that proposed definition. A similar amendment is proposed to the corresponding proposed CA definition (see Bill para 27(e)).
-	New provision para 89(k) brings SIA into line with CA s-sec. 5(8).
Cl.90	Minor drafting changes made to para 90(a) new paras 90(b), (c) and (d) inserted dealing with a person being deemed or taken to have a relevant interest in securities issued by the person. New provision cl. 90A inserted which clarifies the meaning of associated persons.
Cl.91	Minor drafting changes made.

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
-	Cl.91A amends SIA paras 12(3A)(d) and (e) so as to correct erroneous references to CASA s-sets.60(7) and (7A).
-	New provision cl.91B enables the NCSC to make investigations where it has reason to suspect that: (a) an offence under companies and securities legislation or against any other law relating to dealing in securities; or (b) an offence relating to securities that involves fraud or dishonesty, may have been committed.
-	New provision cl.91C is consequent upon proposed s.38B of the C&S Interpretation Act.
-	New provision cl. 100A amends SIA s.35 by omitting sub-section 6.
-	New provision cl. 100B amends the heading to SIA Part III by substituting "securities" for "stock".

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
-	New provision cl. 100C which empowers Ministerial Council to exempt stock markets.
-	New provision cl. 100D removes the requirement for a prescribed form.
-	New provision cl. 100E introduces SIA s.38A which allows approval of an ASO. New provision cl. 100F amends SIA s.41 with regard to securities exchanges.
Cl.101	Cl.101 of the first exposure draft is amended to make it clear that a listed body corporate or a person associated with it is deemed to be under an obligation to comply with stock exchange listing rules only to the extent to which those rules purport to apply in relation to the body corporate or its associate.
Cl.102	Omitted
Cl. 102A	New provision cl. 102A empowers the NCSC to revoke a licence where there is a breach of proposed SIA s.65A.

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
-	New provision cl. 102B amends SIA s.64 by substituting "securities exchanges" for "stock exchange".
Cl. 103	ED1 cl.103 has been substantially redrafted. Bill cl. 103: (a) requires a licensee to have a reasonable basis for making a recommendation relating to securities; (b) requires a licensee to disclose what commission or benefit will accrue to the licensee for making the recommendation and any other interest which might influence the advice; (c) confers a right to damages on a person who suffers loss in reliance on a recommendation made in contravention of the above requirements; and (d) protects a licensee from a defamation action in respect of a recommendation, provided the above requirements were adhered to.

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
-	New provision cl. 104A amends SIA s.80 to ensure that Part VIII does not affect an ASO.
-	New provision cl. 105A amends SIA s.133 to restrict the use of the name "stock exchange".
-	New provision cl. 106 repeals SIA s.142 and substitutes a new section. A similar amendment is proposed to CA s.571.
-	New provision cl. 107 amends SIA s.143 to make it clear that: (a) the section does not apply where a body corporate is guilty of a continuing offence; (b) the section will apply to a former officer of a body corporate; and (c) the penalty which an officer or former officer will incur will be the penalty applicable to the offence of which the body corporate is guilty.

FIRST EXPOSURE DRAFT	SECOND EXPOSURE DRAFT
-	New provision cl. 108 provides for amendments to the SIA as set out in Schedule 3.
-	New Schedule 1 contains amendments to CASA relating to securities exchanges.
-	New Schedule 2 contains amendments to the CA relating to securities exchanges.
-	New Schedule 3 contains amendments to the SIA relating to securities exchanges.
-	New Note 6 will amend the headings to SIA s.82, 109, 118, and 121 when Bill comes into operation as an Act.

APPENDIX B

The major changes between the second exposure draft and this Bill are as follows:

SECOND EXPOSURE DRAFT	NATURE OF CHANGE
Cl.9	Omitted and replaced with new cl.9 the effect of which will be to prohibit an offeror from acquiring shares on-market during the course of a take-over bid which is subject to a minimum acceptance condition.
Cl.11	Para 11(a) (which would have required conditions attached to take-over offers to be approved by the NCSC) has been omitted from this Bill.
Cl.11A	Cl.11A relating to the power of the NCSC to approve conditions attached to take-over offers has been omitted from this Bill.
-	New provision - cl.13: will enable the NCSC to refuse to register a proposed offer where certain conditions are attached to the offer.
Cl.14	CASA s-sec. 27(12) will be amended so that an offeree will be entitled to withdraw his acceptance of a conditional

SECOND EXPOSURE DRAFT	NATURE OF CHANGE
	take-over offer where the effect of a proposed variation to the take-over offer would be to extend by more than one month the time when the offeror's obligations under the take-over scheme are to be satisfied (see para 15(e) of the Bill).
Cl.15	CASA ss.28 and 30 will not be repealed by the Bill (see cl.17 of the Bill which will however repeal CASA s.29).
-	New provision - cl.16: will amend CASA s-sec 28(9) in order to overcome the effect of the decision in Gerrard Co of Australia Ltd. v Johns Perry Ltd.
-	New clause - amends CA s.31 to make it clear that reports by receivers, official managers and liquidators under CA ss.324C, 351 and 418 respectively are not available for public inspection (Cl.44).
-	Amendment to make it clear that benefit of charge cannot be obtained by director from assignment to a third party (Cl.62).
-	Amended to include a defence for an 'innocent director' (Cl.66).

SECOND EXPOSURE DRAFT	NATURE OF CHANGE
-	Proposed CA s.265C amended to allow information to be disclosed also to the NCSC (Cl.77).
-	Proposed definition of "cash statements" amended to allow prescription for cash as well as funds type financial information relating to a company to be disclosed pursuant to regulation or an approved accounting standard (Cl.78).
-	Proposed priority for retrenchment payments amended to remove limit imposed by formula. Cl. 105 now proposed a priority for the full amount - except for directors, their spouses and relatives who will have no priority in respect of any amounts owing by way of retrenchment payments.
Cl.71E	This clause has been omitted.
-	Cl.156 increases the maximum NCSC membership from 5 to 8. 5 of the 8 will be part-time.
-	Cl.157 enables the appointment of acting NCSC members when there are less than 8 members.

SECOND EXPOSURE DRAFT	NATURE OF CHANGE
-	The Public Service Board will no longer be required to approve the terms and conditions of consultants engaged by the NCSC (cl.160).
-	NCSC hearings will be able to be conducted by only one NCSC member (cl.162).
-	Section 50 of the NCSC Act will be repealed. The rights of NCSC members and staff which the section seeks to preserve are now adequately preserved by s.87TA of the Public Service Act 1922 (cl.163).
-	The Public Trustee for the ACT will be an exempt dealer (para 165(1)(g)).
-	The SIA will apply to trading in commodity and share index options on a securities exchange or an exempt stock market (paras 165(1)(p) and (w)).
-	Commodity and share index options entered into on a stock market of a securities exchange or on an exempt stock market will not be null and void under gaming and betting legislation (cl.188).

SECOND EXPOSURE DRAFT	NATURE OF CHANGE
Cl.103	Proposed sub-ss.65A(4)-(6), which imposed an obligation on investment advisers to disclose commissions and other benefits, have been omitted. Further proposals will be developed so that these provisions can be integrated into SIA s.65 (cl.191).
-	Short selling in accordance with the business rules of a securities exchange will be permitted (cl.192).
-	The NCSC will be empowered to prohibit short selling in the public interest (cl.193).

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