

1988

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CORPORATIONS BILL 1988

CORPORATIONS (FEES) BILL 1988

SECURITIES EXCHANGES (APPLICATION FOR MEMBERSHIP)
FIDELITY FUNDS CONTRIBUTION BILL 1988

SECURITIES EXCHANGES (MEMBERSHIP) FIDELITY FUNDS
CONTRIBUTION BILL 1988

SECURITIES EXCHANGES FIDELITY FUNDS BILL 1988

NATIONAL GUARANTEE FUND (REPORTABLE TRANSACTIONS)
LEVY BILL 1988

NATIONAL GUARANTEE FUND (PARTICIPATING EXCHANGES)
LEVY BILL 1988

NATIONAL GUARANTEE FUND (MEMBERS OF PARTICIPATING
EXCHANGES) LEVY BILL 1988

FUTURES ORGANISATIONS (APPLICATION FOR MEMBERSHIP)
FIDELITY FUNDS CONTRIBUTION BILL 1988

FUTURES ORGANISATIONS (MEMBERSHIP) FIDELITY FUNDS
CONTRIBUTION BILL 1988

FUTURES ORGANISATIONS FIDELITY FUNDS LEVY BILL 1988

EXPLANATORY MEMORANDUM

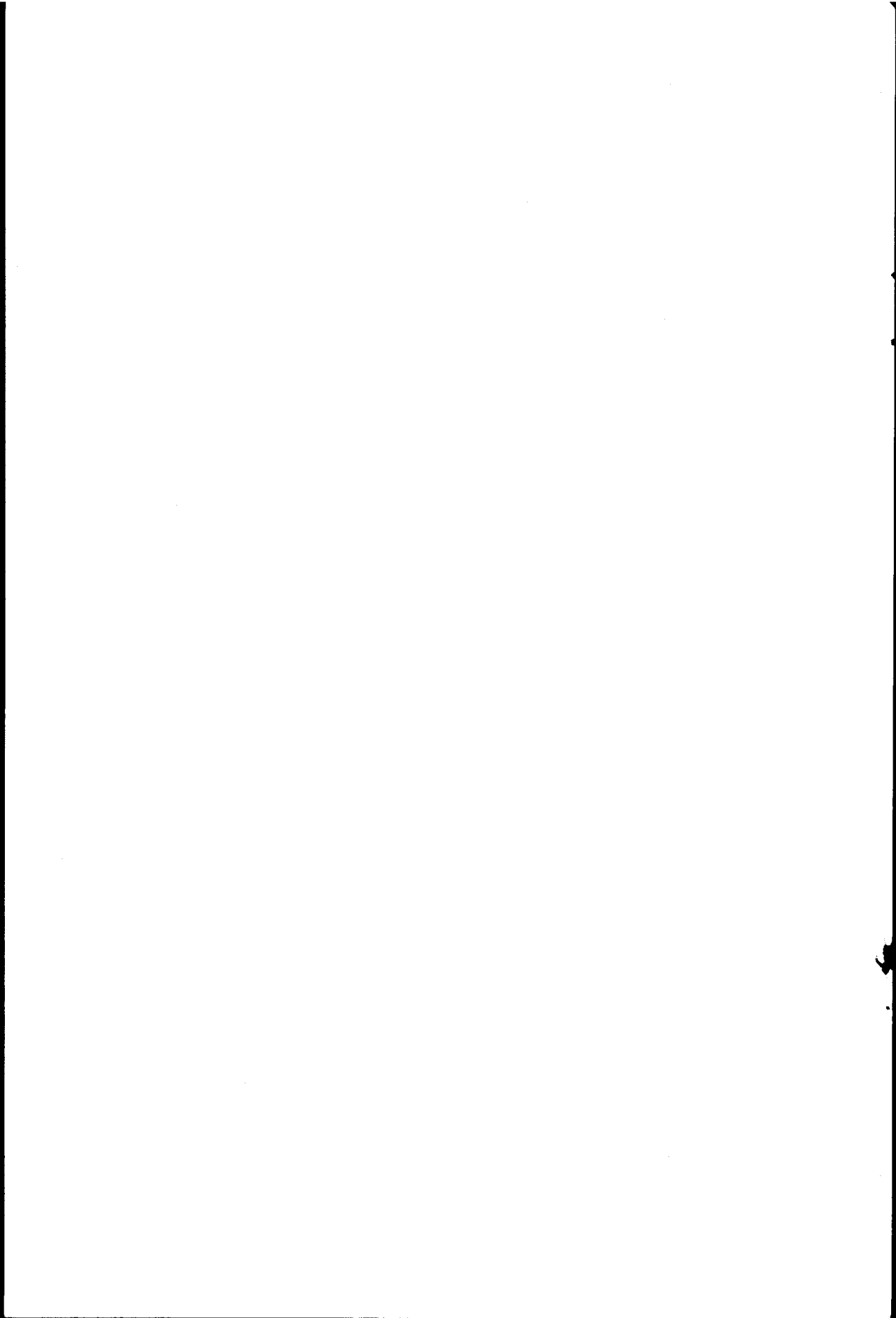
VOLUME 3

(Circulated by authority of the Honourable Lionel Bowen, MP,
Deputy Prime Minister and Attorney-General)

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CHAPTER 7 - SECURITIESIntroduction

2328. Chapter 7 is based on the SIA. The opportunity has been taken to relocate the prospectus, debenture, prescribed interest and share hawking provisions (formerly Divisions 1, 5 and 6 of Part IV of the CA) and the transfer of securities and transfer of marketable securities provisions (formerly Divisions 7 and 8 of Part IV of the CA) as Parts 7.12 and 7.13 respectively of Chapter 7. It is appropriate that these provisions be included in Chapter 7 as they deal with matters relating to securities.

2329. One of the major reforms in Chapter 7 is the discontinuation of licensing of representatives and related amendments designed to ensure that investor protection levels are maintained and that licensees accept a greater responsibility for the supervision and conduct of their representatives (see Part 7.3). A number of other licensing reforms have been included in Part 7.3. Reforms have also been introduced in the area of transfer of marketable securities. These are designed to assist in remedying delays in the transfer and registration of securities (see Division 3 of Part 7.13).

2330. The major reforms in the area of prospectuses affect first the contents and registration requirements for prospectuses and secondly, emphasise the need to maintain prospectus integrity. Amendments include:

- . the application of the prospectus provisions to all offers, invitations and issues of securities except excluded offers, invitations and issues. The concepts of 'offer to the public' and 'section of the public' are no longer used;

- . the relaxing of the detailed prospectus contents requirements in favour of market determination;
- . prospectuses will be lodged but no longer pre-vetted and registered by the ASC; and
- . advertising of issues by certain listed persons will be permissible.

2331. Prospectus integrity will be maintained by:

- . the ASC being given the power to order that the issue of securities under a defective prospectus cease;
- . extending liability for misrepresentation in a prospectus to underwriters, stockbrokers etc. who have been involved in the preparation of the prospectus; and
- . a general prohibition on engaging in misleading and deceptive conduct in connection with dealing in securities. This provision applies to all dealings in securities and as such has a wider ambit than merely to the prospectus provisions.

2332. Abbreviations which are used in this Chapter's explanatory paragraphs are:

- ASX : The Australian Stock Exchange Ltd
- NGF : The National Guarantee Fund under Division 3 of Part 7.10 of the Bill
- SEGC : The Securities Exchanges Guarantee Corporation nominated by the Minister to administer the National Guarantee Fund

PART 7.1 - INTERPRETATION

2333. This Part contains definitions and interpretative provisions.

Cl.760 : Effect of this Part

2334. This provision has no equivalent in SIA.

2335. This is a general interpretation provision that ensures that the provisions in Part 7.1 have effect in the Securities Chapter, unless the contrary intention appears.

Cl.761 : Definitions

2336. Clause 761 contains a number of definitions exclusive to the Securities Chapter and based on SIA s.4. However, the overwhelming majority of definitional and interpretation provisions previously in SIA s.4 are now contained in Chapter 1 of the Bill.

2337. The major changes are as follows:

- (a) a number of definitions have been omitted . These include:
 - (i) those that were necessary mechanisms under the Co-operative Scheme e.g. recognised dealer;
 - (ii) those no longer needed because the licensing provisions have been amended
 - "dealer's representative"
 - "dealer's representative licence"
 - "representative's licence"
 - "investment representative's licence";

(iii) those moved to cl.9 of the Interpretation Chapter are:

- "accounting records"
- "approved securities organisation"
- "arbitrage transaction"
- "articles"
- "banker's books"
- "banking corporation"
- "books"
- "dealer"
- "dealers licence"
- "dealing"
- "director"
- "Exchange"
- "Exchange subsidiary"
- "executive officer"
- "exempt dealer"
- "exempt public authority"
- "exempt stock market"
- "function"
- "Fund"
- "insolvent under administration"
- "investment adviser"
- "investment advisers licence"
- "investment contract"
- "licence"
- "member"
- "member firm"
- "member organisation"
- "memorandum"
- "officer"
- "on"
- "participation interest"
- "prescribed interest"

- "quarter day"
- "quotation"
- "registered company auditor"
- "retirement village scheme"
- "securities"
- "securities exchange"
- "share"
- "sole trader"
- "stock exchange"
- "stock market"
- "time sharing scheme"
- "trading"
- "underwrite"
- "voting share"

(b) the following definitions have been added:

"comply" in relation to business or listing rules includes give effect to those rules

"eligible exchange" is the Australian Stock Exchange Limited (ASX) or a securities exchange which is not the ASX or one of its subsidiaries; such are alone eligible to be members of the SEGC (see cl.920). When they become members, they are referred to as "participating exchanges".

"participating exchange" - see "eligible exchange" above

"shares" includes units in shares of a body corporate

"trading day" - this is the same as the definition previously included in SIA sub-s.96(5)

(c) a number of the "new definitions" refer to a definition contained in another provision:

- odd lot refers to cl.763
 - trust account refers to cl.866
- (d) the following definition has been amended:
- "business rules" and "listing rules" - minor changes in wording have been made
- (e) the following definition has been retained in the same form as in the SIA.
- "marketable parcel" means marketable parcel of securities within the meaning of the business or listing rules of the relevant exchange.

Cl.762 : Conduct

2338. This provision is new.

2339. It outlines actions that will be relevant in determining whether conduct was engaged in for the purposes of this Chapter. The clause is particularly relevant to the new misleading and deceptive conduct provision, clause 995.

2340. Paragraph 762(1)(a) states that a reference to engaging in conduct refers to doing or refusing to do any act including the making of, or the giving effect to a provision of an agreement. Paragraphs 762(2) indicates a particular meaning of conduct. Sub-clauses 762(1) and (2) find a parallel in TPA sub-s.4(2).

2341. Sub-clauses 762(3) - (7) provide the link between the state of mind of the relevant body corporate or other person and the individuals who perform the relevant actions. These provisions find parallels in TPA s.84.

Cl.763 : Odd lot

2342. Clause 763 is to the same effect as SIA sub-s.4(8). A parcel of securities will constitute an odd lot if the number of securities in that parcel is less than one marketable parcel. If, after excluding a marketable parcel from a parcel of securities, a number remain that remaining number constitutes an odd lot.

Cl.764 : References to doing acts

2343. This is a new provision.

2344. A reference to doing an act or thing includes causing, permitting or authorising the act or thing to be done.

Cl.765 : Misleading Representation

2345. This is a new provision. It finds a parallel in TPA s.51A.

2346. Representations or predictions about future matters are dealt with in this clause. A representation made by a person in relation to the matters specified therein will be deemed to be misleading for the purposes of the Chapter unless the person making the representation has reasonable grounds for making it. The onus is on the person to establish on the balance of probabilities that he or she had reasonable grounds for the belief.

Cl.766 : Trading in securities

2347. Clause 766 is to the same effect as SIA sub-s.4(6). A reference to a stock exchange permitting trading will include a reference to it:

- (i) listing the securities for quotation; or
- (ii) otherwise permitting the securities to be quoted.

PART 7.2 - SECURITIES EXCHANGES

2348. Part 7.2 (cls.767 to 779) deals with the approval and regulation of securities exchanges.

Cl.767 : Conducting unauthorised stock markets

2349. Subject to the significant changes identified below, this clause is based on SIA sub-s.37(1).

2350. This clause contains a number of prohibitions relating to the establishment and conduct of an unauthorised stock market (defined in cl.9 as a stock market other than either an exempt stock market - cl.771 or one conducted by a securities exchange (see cl.9)).

2351. A corporation is prohibited from establishing or conducting such an unauthorised stock market (sub-cl.767(1)). It is also prohibited from holding itself out as conducting, and from assisting in the establishment or conduct of such a market. A similar prohibition applies to all persons where the market is one on which eligible securities (see definition in cl.9) or securities including eligible securities are regularly traded or on which certain information in relation to those securities is provided (sub-cl.767(2)). It is also a contravention for a person to conduct an unauthorised stock market if, on that market

- (a) a corporation trades, or certain information is provided about such trading; or
- (b) eligible securities are traded, or certain information about eligible securities is provided (sub-cl.767(3) and (4)).

Cl.768 : Trading on unauthorised stock markets

2352. This provision does not have an equivalent in SIA.

2353. A corporation and a person acting on behalf of a corporation, is prohibited from trading in securities on an unauthorised stock market (sub-cl.768(1) and (2)). A person is also prohibited from trading in eligible securities (defined in cl.9) on such a market.

Cl.769 : Approval of stock exchange

2354. Subject to the additional prerequisites for approval in paras.769(2)(a), (b)(i) and (iv), and (e) mentioned below, this clause is to the same affect as SIA s.38.

2355. A body corporate that proposes to establish or maintain a stock market will be able to apply to the Minister for approval (sub-cl.769(1)).

2356. The Minister will only be able to approve a body corporate as a stock exchange if he or she satisfied that:

- (a) the applicant is an eligible corporation (defined in cl.9) (para.769(2)(a));
- (b) its business rules make satisfactory provision for certain matters including membership qualifications, discipline of members and conditions of trading. Sub-para.769(2)(b)(i) relating to standards of training and experience of members and sub-para.769(2)(b)(iv) relating to monitoring of compliance with and enforcement of business rules are additional to the criteria in SIA s.38 (para.769(2)(b));
- (c) it has made or adopted listing rules (para.769(2)(c)) which make satisfactory provision for the trading of securities and the protection of the public (para.769(2)(d));

- (d) the body is either a participating exchange (and hence covered by the NGF) or the body has a sufficient fidelity fund (para.769(2)(e)); and
- (e) the interests of the public will be served by the approval (para.769(2)(f)).

2357. Bodies approved by the Ministerial Council under the corresponding legislation will be deemed to have been approved by the Minister under this clause (sub-cl.769(3)).

Cl.770 : Approval of approved securities organisation

2358. Subject to the addition of the criterion in paras.770(2)(a) and (2)(e), this clause is to the same effect as SIA s.38A.

2359. A body corporate which proposes to establish or conduct a stock market may apply to the Minister for approval as an approved securities organisation (sub-cl.770(1)). The criteria for approval are similar to those mentioned in respect of approval as a stock exchange (see cl.769) and include the requirement that the applicant be an eligible corporation (para.770(2)(a)) and that the body be either a participating exchange or have a sufficient fidelity fund (para.770(2)(e)). Bodies approved by the Ministerial Council under the corresponding legislation will be deemed to have been approved by the Minister under this clause (sub-cl.770(3)).

Cl.771 : Exempt stock market

2360. This clause is to the same effect as SIA sub-ss.37(1A) and (1B).

2361. The Minister may declare that a specified stock market or class of stock markets are exempt for the purposes of this Chapter, subject to compliance with any conditions he or she imposes (sub-cl.771(1)). The Minister may vary or revoke such a declaration on grounds including breach of a condition (sub-cl.771(2)).

2362. A declaration by the Ministerial Council under the corresponding legislation, of a stock market as an exempt stock market will be deemed to be a declaration by the Minister under this clause (sub-cl.771(3)).

Cl.772 : Publication of instruments executed under section 769, 770, 771

2363. This clause is to the same affect as Part of SIA s.38B.

2364. Copies of instruments signed by the Minister under the above clauses are to be published in the Gazette.

2365. The provision in SIA s.38B that failure to publish the instrument in the Gazette will not effect its validity is now found in para.103(2)(b).

Cl.773 : Auction, by licensed auctioneer, of forfeited shares

2366. This clause is to the same affect as SIA sub-s.37(2).

2367. The conduct of an auction of forfeited shares at a stock exchange by a person holding an auctioneer's licence will not amount to conducting a stock market.

Cl.774 : Commission to be notified of amendments to rules

2368. This clause is to the same effect as SIA s.39 except that the Minister now holds the power previously held by the Ministerial Council and transitional provisions have been inserted.

2369. The ASC must be notified of any amendments to a securities exchange's business rules or listing rules (sub-cl.774(1)). The text, the purpose of the amendment and its date are to be included in the notice (sub-cl.774(2)).

2370. A brief outline of these provisions is as follows:

- (a) An amendment will cease to have effect if it is not notified within 21 days (sub-cl.774(3)).
- (b) A copy of the notification must be sent by the ASC to the Minister (sub-cl.774(4)) who may disallow all or part of an amendment within 28 days (sub-cl.774(5)).
- (c) The ASC must notify the securities exchange of any disallowance and the amendment ceases to have effect on receipt of that notice (sub-cl.774(6)).
- (d) Certain notices which are given but not disallowed before the commencement will be treated as if the amendment was made at the commencement of the Part (sub-cl.774(7)).

Cl.775 : Power of Commission to prohibit trading in particular securities

2371. This clause is to the same effect as SIA s.40 except that the Minister now has the power previously held by the Ministerial Council and transitional provisions have been inserted (sub-cl.775(7)).

2372. Where it is necessary to protect investors or the public the ASC will be able to prohibit trading in particular securities for up to 21 days. (sub-cl.775(1) and (2)).

2373. A brief outline of these provisions is as follows:

- (a) The ASC must firstly notify the securities exchange that it has formed the relevant opinion and its reasons (sub-cl.775(1)).

- (b) If the securities exchange takes no action to prevent trading, the ASC will be able to suspend trading for up to 21 days (sub-cl.775(2)).
- (c) The ASC must notify the relevant body corporate of the suspension, giving reasons, and must also report to the Minister (sub-cl.775(3)).
- (d) The relevant body corporate will be able to request the ASC to refer the matter to the Minister (sub-cl.775(4)), who may direct the Commission to revoke the notice (sub-cl.775(5)).
- (e) Contravention of a notice by the stock exchange is prohibited (sub-cl.775(6)).
- (f) Where a notice given by the NCSC under the corresponding SIA provision is in force before commencement, then trading in the relevant securities will continue to be suspended for the unexpired portion of the period set out in the notice. Both the giving of the notice and other specified actions taken in relation to the notice will be deemed to have been done under this Bill (sub-cl.775(7)).

Cl.776 : Securities exchanges to provide assistance to Commission

2374. This clause is to the same effect as SIA s.41 .

2375. A securities exchange must assist the ASC or a person authorised by the ASC in the performance of ASC functions (sub-cl.776(1)). Details and reasons for any disciplinary action taken by a securities exchange against a member must be notified to the ASC (sub-cl. 776(2)). A person authorised by the ASC is entitled to access to the trading floor of a securities exchange (sub-cl.776(3)). It will be an offence to refuse to allow a person authorised by the ASC to have access to the trading floor of a securities exchange (sub-cl.776(4)).

Cl.777 : Power of Court to order compliance with or enforcement of business rules or listing rules of securities exchange

2376. This clause is to the same effect as SIA s.42.

2377. The Court will be able to give directions, on the application of the ASC, the securities exchange or a person aggrieved, where a person has failed to comply with, observe, enforce or give effect to business rules or listing rules of the securities exchange (sub-cl.777(1)). A corporation whose securities are listed on the securities exchange (or an associate of such a corporation) is deemed to be obliged to observe the exchange's listing rules to the extent to which those rules purport to apply in relation to the corporation or its associate. (sub-cl.777(2)).

Cl.778 : Gaming and wagering laws not applicable to certain option contracts

2378. This clause is based on SIA s.42A.

2379. It applies to option contracts (defined in cl.9) that are entered into on a stock market conducted by a securities exchange or entered into on an exempt stock market conducted by a corporation (para.778(a)). It also applies to option contracts that are eligible securities and are entered into on an exempt stock market (para.778(b)).

2380. Options over the All Ordinaries Index call for settlement by way of differences, i.e. a cash adjustment between the parties. 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 States and the ACT. If so, such options would be null and void.

2381. This clause removes any doubts as to the enforceability of any option.

Cl.779 : Qualified privilege in respect of disciplinary proceedings

2382. This clause is to the same effect as SIA s.42B.

2383. Qualified privilege (see cl.89) is provided to securities exchanges, their members, officers or employees (including subsidiaries of ASX Ltd and their officers and employees acting on behalf of ASX) in respect of statements made by them arising out of disciplinary proceedings of the exchange (sub-cl.779(2) and (3)).

2384. Publication of such statements is similarly protected (sub-cl.779(4)).

2385. This protection recognises the importance of the possibility of publication of the results of disciplinary proceedings as a deterrent, in addition to, or instead of, a fine or other penalty.

PART 7.3 : PARTICIPANTS IN THE SECURITIES INDUSTRY

2386. Part 7.3 of the Bill (cls.780 to 840) deals with the regulation of participants in the securities industry. It is divided into 5 Divisions:

- (a) Division 1: Dealers and Investment Advisers (which deals with the licensing of securities dealers and investment advisers).
- (b) Division 2: Agreements with Unlicensed Persons (which deals with rights of persons dealing with unlicensed securities dealers or investment advisers).
- (c) Division 3: Representatives (which deals with representatives of dealers and investment advisers).
- (d) Division 4: Liability of Principals for Representatives' Conduct (which deals with the liability imposed on principals for the conduct of a person who is a representative of the principal).
- (c) Division 5: Excluding Persons from the Securities Industry (which deals with the disciplining of participants in the securities industry).

2387. Part 7.3 of the Bill is based on Part 4 of the SIA, with the inclusion of some substantial reforms.

2388. The major reform is the removal of the requirement that representatives of dealers and investment advisers should obtain a licence. Representatives, however, will be required to hold a proper authority from a dealer or investment adviser and disclose the proper authority to the client before they can act as a representative of a dealer or investment adviser (see Division 3). Dealers and investment advisers will be required, through the imposition of conditions on their

licences, to properly supervise representatives and to give them adequate training and education. The protection that licensing of representatives affords the investor will be replaced with a system where the dealers and investment advisers will be made fully liable for the conduct of a person who is their representative (see Division 4).

2389. Another major initiative included in Part 7.3 is the inclusion of Division 2, which gives investors a right to rescind agreements made with persons who should be licensed but who are not. Appropriate safeguards are included to ensure that the rights of third parties are properly protected.

2390. There are a number of other changes included in this Part of the Bill. These relate principally to modifying the qualification requirements for obtaining a licence and introducing some related grounds for revocation and suspension of a licence. The ASC has also been given greater flexibility in disciplining participants in the securities industry with the conferral of a power to ban a person from acting as a representative.

Division 1: Dealers and Investment Advisers

2391. Division 1 deals with the different licences that are required to be held by dealers and investment advisers. It also deals with the different requirements that must be satisfied by natural persons and bodies corporate who apply for licences. It also outlines obligations of licensees to report information to the ASC.

Cl.780 : Dealers

2392. This clause is based on SIA s.43, although the clause is structured differently to take account of the need to give the clause a proper constitutional basis.

2393. Because of constitutional considerations the prohibition on carrying on a securities business without a dealers licence has been redrafted so that a number of separate, though often overlapping prohibitions have been created. The combined effect of these prohibitions produces a result that is substantially the same as SIA s.43.

2394. A corporation will be prohibited from carrying on a securities business unless it has a dealers licence (sub-cl.780(1)). A person will be prohibited, in the course of carrying on a securities business, from dealing in eligible securities (see definition in cl.9), and also from dealing in securities in specified circumstances unless that person has a dealers licence (sub-cl.780(2)).

2395. A corporation will be prohibited from holding itself out as carrying on a securities business unless it holds a dealers licence (sub-cl.780(1)). A person will be prohibited from holding himself out as carrying on a business of dealing in eligible securities or a business of dealing in securities in specified circumstances unless that person holds a dealers licence (sub-cl.780(3)).

2396. A person will be prohibited from using an eligible communications service (see definition in cl.9) as part of a securities business or in connection with holding himself out as carrying on a securities business unless the person holds a dealers licence (sub-cl.780(4)).

2397. The prohibitions in cl.780 do not apply to an exempt dealer (see definition in cl.68).

Cl.781 : Investment advisers

2398. This clause is based on SIA s.45, although the clause is structured differently to take account of the need to give the clause a proper constitutional basis.

2399. Because of constitutional considerations the prohibition on carrying on an investment advice business without a licence has been redrafted so that a number of separate, though often overlapping prohibitions have been created. The combined effect of these prohibitions produces a result that is substantially the same as SIA s.45.

2400. A corporation will be prohibited from carrying on an investment advice business or holding itself out to be an investment adviser unless it has a dealers licence or an investment advisers licence (sub-cl.781(1)). A person will be prohibited, in the course of carrying on an investment advice business, from advising about eligible securities or giving a securities report about eligible securities and in some circumstances from advising about securities and giving a securities report unless that person has a dealers licence or an investment advisers licence (sub-cl.781(2)).

2401. A person will also be prohibited from holding himself out as an investment adviser who advises or gives securities reports about eligible securities unless that person has a dealer's licence or an investment adviser's licence. A person will also be prohibited in some circumstances from holding himself out as a person who advises on securities or gives securities reports unless that person has a dealer's licence or an investment adviser's licence (sub-cl.781(3)).

2402. A person will be prohibited from using an eligible communications service as part of an investment advice business or in connection with holding himself out as an investment adviser unless the person holds a dealers licence or an investment advisers licence (sub-cl.781(4)).

2403. The prohibitions in cl.781 will not apply to an exempt investment adviser (see definition in cl.68).

Cl.782 : Application for a licence

2404. This clause is based on SIA s.47.

2405. An application for a licence must be made to the ASC (sub-cl.782(1)). The ASC can require further information from an applicant (sub-cl.782(2)). Applications for dealers' licences and investment advisers' licences lodged with the NCSC but not dealt with by the NCSC will be dealt with by the ASC (sub-cl.782(3)).

Cl.783 : Grant of licence to natural person

2406. This clause is based on SIA s.48 although there are a few changes to the criteria for grant of a licence.

2407. The ASC is required to grant a licence to the applicant if:

- (a) the application is in the proper form;
- (b) the person is not an "insolvent under administration" (see cl.9);
- (c) the ASC is satisfied about the educational qualifications and experience of the applicant;
- (d) the ASC has no reason to believe that the applicant is not of good fame and character or that the applicant will not perform the duties of a licensee efficiently, honestly and fairly.

(sub-cl.783(2)).

2408. The ASC is required to take into account any convictions for serious fraud (see cl.9) in the preceding 10 years when determining the good fame and character criterion and the efficiently, honestly and fairly criterion (sub-cl.783(4)).

2409. The differences with SIA s.48 are:

- (a) Convictions within the preceding ten years of serious fraud will not automatically disqualify the applicant but will be a factor that must be taken into account by the ASC (sub-cl.783(4)).
- (b) The applicant must satisfy the ASC that his or her educational qualifications and experience are adequate. Previously the applicant only had to show that his or her educational qualifications or experience were adequate (para.783(2)(c)).

2410. Licences granted to natural persons under previous legislation will be treated as if they were granted under this clause (sub-cl.783(5)).

Cl.784 : Grant of licence to body corporate

2411. This clause is based on SIA s.48 although there are a few changes to the criteria for grant of a licence.

2412. The ASC is required to grant a licence to the applicant if:

- (a) the application is in the proper form;
- (b) the applicant is not an externally administered body corporate (see definition in cl.9);
- (c) the ASC is satisfied about the educational qualifications and experience of responsible officers (see definition in cl.9) of the applicant; and
- (d) the ASC has no reason to believe that the applicant will not perform the duties of the holder of a licence, efficiently, honestly and fairly

(sub-cl.784(2)).

2413. In determining this last criterion the licensing criteria pertaining to natural persons is also applied to the responsible officers of the body corporate (sub-cl.784(4)).

2414. The differences with SIA s.48 are:

(a) the ASC must be satisfied about both the educational qualifications and experience of the responsible officers of the applicant (para.784(2)(c)). Previously each such officer need only satisfy one of the requirements.

(b) the licensing criteria pertaining to natural persons is also applied to the responsible officers of the body corporate (sub-cl.784(4)).

2415. Licences granted to bodies corporate under previous legislation will be treated as if they were granted under this clause (sub-cl.784(5)).

Cl.785 : Effect of certain provisions

2416. This clause is based on the introductory words to SIA s.48.

2417. The granting of a licence will be subject to any requirements imposed by the regulations as well as the requirement, imposed by cl.837, to give the applicant a hearing before refusing to grant a licence. The ASC is also unable to grant a licence if there is a relevant disqualification order in force under cl.838 (sub-cl.785(1)). Sub-clause 785(2) is a new provision designed to ensure that the specific mention of matters in sub-cl.783(4) and 784(4) does not restrict the matters the ASC can have regard to in connection with performing any function, including deciding on licence applications.

Cl.786 : Conditions of licence

2418. This clause is based on SIA s.51 although it includes specific reference to a few more types of conditions that may be imposed on a licence.

2419. A licence granted by the ASC will be subject to two types of conditions and restrictions (sub-cl.786(1)). These are:

- (a) such conditions or restrictions as are prescribed (para.786(1)(a)) - the regulations will make it clear that these prescribed conditions or restrictions may be imposed on individual licensees; and
- (b) such conditions or restrictions as the ASC imposes (para.786(1)(b)).

2420. The conditions or restrictions that may be prescribed by regulation or imposed by the ASC may relate to:

- (a) the limitation of liability incurred by the holder of a dealer's licence, either in the business of dealing in securities or not, and on the incurring or disclosure of liabilities arising otherwise than in connection with a business of dealing in securities (paras.786(2)(a) and (b));
- (b) the financial position of the holder of a dealer's licence whether relating to the business of dealing in securities or not (para.786(2)(c));
- (c) the lodging and maintaining with the ASC of a bond by the holder of the licence (para.786(2)(d)).
- (d) the supervision requirements of a licensee in relation to representatives of that licensee (para.786(2)(e)). This is a new provision designed

to ensure that the ASC is able to make licensees take reasonable steps to supervise the conduct of their representatives.

- (e) what the licensee must do to ensure his representatives have adequate qualifications and experience (para.786(2)(f)). This is a new provision designed to ensure that the ASC can, for example, require licensees to give training and on-going education to representatives.

2421. The conditions relating to the financial position of a dealer (see para.786(2)(c)) may include:

- (a) a condition that his assets include or do not include a particular kind of asset (para.786(3)(a)); and
- (b) a condition that the sum value of particular assets be not less than or greater than an amount ascertained in accordance with that condition (para.786(3)(b)). This latter condition may specify how the assets are to be valued (sub-cl.786(4)). It may also specify asset ratios (sub-cl.786(5)).

2422. Other provisions relating to conditions and restrictions are as follows:

- (a) The reference to assets is to all assets, not merely those used in dealing in securities (sub-cl.786(6)).
- (b) The ASC will be able, subject to giving the licensee an opportunity for a hearing, to vary conditions or restrictions imposed by the ASC (sub-cl.786(7)).
- (c) The ASC must notify the stock exchange, and the member firm if the member is a partner, in relation to the imposition and variation of conditions in licences (sub-cl.786(8)).

- (d) Any security lodged with the ASC (under para.786(2)(d)) must be dealt with as prescribed (sub-cl.786(9)).

Cl.787 : Licensee to notify breach of licence condition

2423. This clause is based on SIA s.52 although the requirement is now made a condition of the licence.

2424. It is a condition of the licence that a licensee notify the ASC within one day of a breach of a condition or restriction (sub-cl.787(1)). A defence of ignorance is included (sub-cl.787(2)).

Cl.788 : Giving information and statements to Commission

2425. This clause is based on SIA s.53 although the requirement is now made a condition of the licence.

2426. It is a condition of a dealer's licence that the holder give to the ASC written statements in respect of the licensee's business if required (para.788(1)(a)). The ASC will be able to require such a statement to be audited (para.788(1)(b)). The period for giving a statement if a deadline has been set can be extended (sub-cl.788(2)).

Cl.789 : Register of Licence Holders

2427. This clause is based on SIA s.54.

2428. The ASC will be required to keep a Register of Licence Holders (sub-cl.789(1)). The register must include a copy of each licence and a copy of each instrument that imposes or varies conditions on the licence (sub-cl.789(2)). This is a new requirement.

2429. The information to be entered in the Register is set out in sub-cl.789(3). The Register will include the name and business addresses of the licensee, the names of the directors and secretaries of the licensee if the licensee is a body corporate, the date the licence was granted, and particulars of any suspension of the licence. The name of a person who ceases to hold a particular licence must be removed from the Register (sub-cl.789(4)). The Register will be open for public inspection (sub-cl.789(5)).

Cl.790 : Notifying change in particulars

2430. This clause is based on SIA s.55 although the requirement is now made a condition of the licence.

2431. It is a condition of the licence that the holder notify the ASC within 21 days when the holder ceases to carry on the business to which the licence relates or a change occurs in particulars that are required to be entered in the Register.

Cl.791 : Annual statement of licensee

2432. This clause is based on SIA s.56 although the requirement is now made a condition of the licence.

2433. It is a condition of the licence that the holder lodge with the ASC each year a statement that sets out the number of persons who hold proper authorities (see cl.88) from the licensee as well as containing any other prescribed information (sub-cl.791(1)). A similar obligation is imposed on former licensees (sub-cl.791(2)).

Cl.792 : Time for lodging annual statement

2434. This clause is based on SIA s.57 although the requirement is now made a condition of the licence.

2435. It is a condition of the licence that the annual statement by a licensee must be lodged:

- (a) in the case of the holder of a dealer's licence, when the profit and loss account and balance sheet referred to in cl.860 are required to be lodged (para.792(a)); and
- (b) in the case of the holder of an investment adviser's licence within one month before the anniversary of the date on which the licence was granted (para.792(b)).

Cl.793 : Commission may extend period for lodging statement

2436. This clause is based on SIA s.58.

2437. The ASC will be able to extend, or further extend the period for lodging a statement under cl.791 (sub-cl.793(1)). As a transitional measure, where an extension was granted under a corresponding provision of SIA and the period as extended ends after the commencement of this Bill, the extension continues to have effect (sub-cl.793(2)).

Division 2 - Agreements With Unlicensed Persons

2438. Division 2 is a new Division. Under SIA there is no provision to prevent the enforcement of a contract by a person who either advises or deals in securities contracts and does not have a licence but who should be licensed. This person is called a non-licensee. Division 2 introduces a series of provisions to bring about this result, with appropriate safeguards to ensure that the rights of third parties are properly protected.

2439. Division 2 is divided into 2 subdivisions. Subdivision A identifies the classes of agreements to which Subdivision B

applies and Subdivision B deals with the extent to which agreements are enforceable by non-licensees and the circumstances in which the client has a right to rescind those agreements.

Subdivision A : Agreements affected

2440. This subdivision identifies the agreements to which Subdivision B applies.

Cl.794 : Certain persons not clients

2441. This is a new provision.

2442. This is a definitional provision and ensures that a person who is a dealer or investment adviser is not regarded as a client for the purposes of this Division. Dealers or investment advisers should rely on their own expertise in dealings with other persons and hence they do not need the protection afforded by Division 2.

Cl.795 : Agreements with unlicensed corporations

2443. This is a new provision.

2444. When a corporation is in breach of cl.780 or cl.781 and enters into an agreement (with a client) that relates to a dealing in, or advising the client about, securities, Subdivision B applies to the agreement.

Cl.796 : Agreements with other unlicensed dealers and investment advisers

2445. This is a new provision.

2446. When a person enters into an agreement with a client and that agreement relates to a dealing in securities that involves a contravention of sub-cl.780(2) or relates to

advising the client about securities in circumstances involving a contravention of sub-cl.781(2), then Subdivision B applies to the agreement.

Cl.797 : Agreements with other unlicensed persons

2447. This is a new provision.

2448. This provision applies where a person in contravention of sub-cl.780(3) holds himself out as carrying on a securities business or, in contravention of sub-cl.781(3) holds himself out as an investment adviser. If, in these circumstances the person enters into an agreement (with a client which is a corporation) that relates to a dealing in, or advising the client about, securities, then Subdivision B applies to the agreement. On the other hand, if, in the above circumstances, the person enters into an agreement (with a client which is not a corporation) that relates to a dealing in, or advising the client about, eligible securities (defined in cl.9) or a dealing in or advising about securities in eligible circumstances (defined in cl.63), then Subdivision B applies to the agreement.

Subdivision B : Effect on agreements

2449. This subdivision deals with the enforceability or otherwise of agreements between non-licensed persons and their clients.

Cl.798 : Client may give notice of rescission

2450. This is a new provision.

2451. The client of a non-licensee may give written notice to the non-licensee stating that the client wishes to rescind the agreement (sub-cl.798(1)). The client must, however, do so within a reasonable time (sub-cl.798(2)). The client will

also lose the right to give a notice under this clause if the client engages in conduct that amounts to an affirmation of the agreement (sub-cl.798(3)). The client has a right to give a notice under this clause whether or not the effect of the notice will be to rescind the agreement and whether or not the Court will be empowered to make any order under cl.800 (sub-cl.798(5)).

Cl.799 : Effect of notice under section 798

2452. This is a new provision.

2453. A valid notice given by a client under cl.798 stating that the client wishes to rescind the agreement will rescind the agreement unless rescission of the agreement would prejudice the rights of a third party. For this exception to apply the third party must have acquired those rights in good faith for valuable consideration and without notice of the facts that have entitled the client to give notice under cl.798.

Cl.800 : Court may make consequential orders

2454. This is a new provision.

2455. If the client exercises his right to rescind, the Court is given the power to make such orders as it would have power to make if the client had rescinded on the grounds of misrepresentation by the non-licensee (sub-cl.800(1)). But the Court cannot make an order if the order would prejudice the rights of a third party and the third party acquired those rights in good faith, for valuable consideration and without notice of the facts that have given the client a right to give notice under cl.798 (sub-cl.800(2)).

Cl.801 : Agreement unenforceable against client

2456. This is a new provision.

2457. This clause only applies if the agreement has been rescinded or if the client is entitled to give a notice under cl.798 and giving of the notice will result in rescission of the agreement. That is, this clause does not apply if it is not possible to rescind the agreement (sub-cl.801(1)). Where this clause applies, the non-licensee cannot, whether directly or indirectly, enforce or rely on the agreement between the client and the non-licensee (Bill sub-cl.801(2)).

Cl.802 : Non-licensee not entitled to recover commission

2458. This a new provision.

2459. This clause only applies while a client is entitled to give a notice under cl.798 that he wishes to rescind the agreement or after he has given such a notice. It does not matter that the agreement may not be rescinded (i.e. because rescission would prejudice the rights of third parties (sub-cl.802(1))). Where this clause applies, the non-licensee is not entitled, by any means, to recover from the client any commission or other fee owed by the client under the agreement.

Cl.803 : Onus of establishing non-application of section 801 or 802

2460. This is a new provision.

2461. In any proceedings where a non-licensee is seeking to enforce an agreement against a client or seeking to recover a commission or other fee from a client then it will be presumed that cl.801 or cl.802 applies, as the case may be, and unless the non-licensee can bring evidence to rebut the presumption, the non-licensee will be unsuccessful. Thus the onus is on the licensee to show that the client has lost the protection granted by cls.801 and 802.

Cl.804 : Client may recover commission paid to non-licensee

2462. This is a new provision.

2463. The client is given a right to recover from the non-licensee any commission or other fee the client has paid to the non-licensee under the agreement. The client can only recover that money if he has given a notice under cl.798 that he wishes to rescind the agreement.

Cl.805 : Remedies under this Division additional to other remedies

2464. This is a new provision.

2465. The rights and remedies conferred under this Division are additional to any other rights or remedies the client may have against a non-licensee.

Division 3 : Representatives

2466. Division 3 is a new Division. It deals with representatives of dealers and investment advisers. Representatives will no longer be licensed. However, representatives will be required to hold an appropriate document (a proper authority - see definition in cl.88) from their principal and disclose it to persons with whom they deal. Licensees will be required to keep a register of persons who hold a proper authority from them.

Cl.806 : Representatives of dealers

2467. This is a new provision.

2468. A person cannot act as a representative (see definition in cl.94) of a dealer unless the dealer holds a dealers licence and the person holds a proper authority (see definition in cl.88) from the dealer. This clause does not apply to representatives of exempt dealers (defined in cl.68).

Cl.807 : Representatives of investment advisers

2469. This is a new provision.

2470. A person cannot act as a representative (see definition in cl.94) of an investment adviser unless the investment adviser holds either a dealer's licence or an investment adviser's licence and the person holds a proper authority (see definition in cl.88) from the investment adviser. This clause does not apply to representatives of exempt investment advisers (defined in cl.68).

Cl.808 : Defence

2471. This is a new provision.

2472. Where a person is prosecuted for acting as a representative of a dealer or an investment adviser in contravention of cl. 806 or cl.807 it will be a defence if the person can prove that:

- (a) the act was only a contravention because the licence of the dealer or investment adviser had been revoked or suspended;
- (b) the person believed that the other person held a licence and was unaware of the revocation or suspension; and
- (c) it was reasonable for the person to so believe and to be unaware of the revocation or suspension.

Cl. 809 : Body corporate not to act as representative

2473. This is a new provision that makes explicit what is already implicit in SIA s.47.

2474. A body corporate cannot do an act as a representative of either a dealer or an investment adviser.

Cl.810 : Licensee to keep register of holders of proper authorities

2475. This is a new provision.

2476. It will be a condition of the licence that each licensee establish a register of the persons who hold proper authorities from the licensee (sub-cl.810(1)). The information to be entered in the register is set out in sub-cl.810(3). The register will include a copy of the proper authority held by each person from the licensee, the person's name and residential and business addresses (sub-cl.810(3)). A copy of the proper authority should be placed in the register within 2 business days of the person beginning to hold the proper authority (sub-cl.810(4)). Other information required to be included in the register must be included within 2 business days after the person begins to hold a proper authority from the licensee or after the licensee receives the information, whichever happens later (sub-cl.810(5)). After a person ceases to hold a proper authority from the licensee, the licensee must transfer the information in the register to a separate part of the register (sub-cl.810(6)).

Cl.811 : Licensee to notify Commission of location and contents of register

2477. This is a new provision.

2478. It will be a condition of a licence that:

- (a) a licensee give notice in writing to the ASC of the place where the register is kept (sub-cl.811(2));
- (b) a notice be given of any change in the place at which the register is kept (sub-cl.811(3));
- (c) the licensee notify the ASC of the information that the register is required to contain and provide a copy of all proper authorities (sub-cl.811(4) and (5))
- (d) the licensee notify the ASC within 2 days after a person ceases to hold a proper authority from the licensee (sub-cl.811(6)).

Cl.812 : Inspection and copying of register

2479. This is a new provision.

2480. It will be a condition of a licence that:

- (a) licensees keep the register (kept pursuant to the licence condition imposed by cl.810) open for inspection without charge (sub-cl.812(2)).
- (b) a person may request a copy of all or part of the register (sub-cl.812(3)).
- (c) the licensee comply with such a request within 2 business days of receipt unless the licensee requires the person to pay an amount not exceeding the prescribed amount. In the latter case the licensee must comply with the request within 2 business days of receiving the amount requested. (sub-cl.812(3)).

Cl.813 : Disclosure to client by representative

2481. This is a new provision.

2482. A person cannot do, as a representative of another person, (the principal), any of the acts specified at paras.813(1)(a)-(d) unless:

- (a) the representative informs the third party that he is doing the act as a representative of the other person;
- (b) if the representative is acting for a licensee, the representative has at some previous time shown the third party his proper authority (defined in cl.88); and
- (c) the representative has at some previous time informed the third party in writing of the current business address of the other person.

(sub-cl.813(1)(e)-(g)).

2483. A person is prohibited from doing an act as a representative of a principal that will result in the principal dealing in securities with a non-dealer on the principal's own account, unless the representative has informed the non-dealer that the principal is acting in the transaction on the principal's own account (sub-cl.813(2) : see also cl.843).

Cl.814 : Commission may require production of authority

2484. This is a new provision.

2485. The ASC will have the power to require a person to produce any proper authority or invalid securities authority (see definition in cl.88) held by that person. The ASC will only be able to exercise this power where it has reason to believe that a person holds a proper authority from a licensee or has done an act as a representative of another person (see definition in cl.94) (sub-cl.814(1)).

Cl.815 : Commission may give licensee information about representative

2486. This is a new provision.

2487. If the ASC has information about a person, the ASC may give that information to a licensee if it believes on reasonable grounds that:

- (a) the person holds or will hold a proper authority from the licensee;
- (b) the ASC should give the information to licensee; and
- (c) the information is true

(sub-cl.815(1)).

2488. Where the ASC gives such information to a licensee, the licensee or an officer of the licensee may only give that information to another person or make use of or record that information for purposes related to taking certain action (see sub-cl.815(7)), if any, against the holder of the proper authority (sub-cl.815(2)). Similarly a person who receives information under sub-cl.815(2) can only give that information to another person or make use of or record that information for purposes related to taking certain action (see sub-cl.815(7)), if any, against the holder of the proper authority (sub-cl.815(3)). Qualified privilege (defined in cl.89) is conferred on persons who do things permitted by sub-cl.815(2) and (3) (sub-cl.815(5)). A person who is given information in accordance with this clause is prohibited from disclosing that information in court except in the following cases:

- (a) for purposes connected with the licensee taking action, if any, against the holder of the proper authority;

- (b) in proceedings relating to an alleged contravention of cl.815 or an ancillary offence; or
- (c) in proceedings relating to the giving to a court of false information.

(sub-cl.815(6)).

Cl.816 : Holder of authority may be required to return it

2489. This is a new provision.

2490. Where a person holds a proper authority (see definition in cl.88) from the licensee, the licensee will be able to require the person to return the proper authority to the licensee (sub-cl.816(1)). Similarly, where a person holds an invalid securities authority (see definition in cl.88) from another person, that other person will be able to require the return of the invalid securities authority (sub-cl.816(2)).

Division 4: Liability of Principals for Representatives' Conduct

2491. This is a new Division.

2492. As representatives of dealers and investment advisers are no longer required to be licensed, dealers and investment advisers will be required to accept greater responsibility for the acts of their representatives. In general, all the principals of a representative will be jointly and severally liable for the conduct of that person when that person is acting as a representative (defined in sub-cl.94(3) and (4)) unless it can be established that the person was acting as a representative of a particular identified principal. If the principal is identified then that principal will be fully liable for the acts of the representative whether those acts are done within or outside the scope of the representative's authority.

Cl.817: Conduct engaged in as a representative

2493. This is a new provision.

2494. Where a person engages in conduct as a representative of another person (see definition in sub-cl.94(3)), then as between that other person and a third party with whom the representative is dealing, the principal is liable as if the principal had done the act himself. Under this clause the principal is liable even if the person acting as a representative acts beyond the express limits of the instructions from the principal.

Cl.818 : Liability where identity of principal unknown

2495. This is a new provision.

2496. This clause applies where a person engages in "eligible securities conduct" (see definition in cl.9) while that person is a representative (defined in sub-cl.94(1) and (2)) of 2 or more principals and that person engages in the conduct as a representative of a principal (see definition in sub-cl.94(3)) but the identity of the principal is not established (sub-cl.818(1)). Where this clause applies and only one of the principals is a party to a proceeding, that principal is liable in respect of the conduct of the representative as if he were the principal involved (sub-cl.818(2)). Where this clause applies and 2 or more of the principals are a party to a proceeding then each of those principals is liable in respect of the conduct of the representative as if each of them were the unidentified principal (sub-cl.818(3)).

Cl.819 : Liability of principals where act done in reliance on representative's conduct

2497. This is a new provision.

2498. This clause applies where the following 3 elements are satisfied:

- (a) a person is a representative (defined in sub-cl.94(1) and (2)) of one or more principals and engages or proposes to engage in particular "eligible securities conduct" (see definition in cl.9);
- (b) the client does or omits to do an act because the client believes in good faith that the representative engaged in or proposes to engage in that conduct on behalf of a principal and in connection with a securities business or investment advice business carried on by the principal; and
- (c) it is reasonable for the client to have that belief and to do or omit to do the act in question because of that belief

(sub-cl.819(1)).

2499. It does not matter that the conduct of the representative may be outside the scope of the representative's employment by, or authority from, the principal.

2500. Where this clause applies, and the representative has engaged in the particular conduct then the principals of the representative are liable in respect of the conduct of the representative as if they had engaged in the conduct themselves (sub-cl.819(2)).

2501. The liability of principals under this clause includes a liability to pay damages to the client in respect of any loss or damage that the client suffers as a result of doing or omitting to do an act in reliance on the conduct of the representative (sub-cl.819(3)).

2502. If during proceedings the identity of the principal on whose behalf the representative acted can be established, and the identified principal is a party to the proceedings, then only the identified principal will be liable in respect of the conduct of the representative (sub-cl.819(4)).

Cl.820 : Presumptions about certain matters

2503. This is a new provision.

2504. Where a person is a representative (see definition in sub-cl.94(1) and (2)) of one or more principals, and engaged in particular conduct, it will be presumed until the contrary is proved, that the person engaged in that conduct as a representative (see definition in sub-cl.94(3)) of one of those principals (sub-cl.820(1)).

2505. Where the application of cl.819 is at issue in a proceeding, and it is proved that a client did or omitted to do an act because the client believed in good faith that the representative had or would engage in particular conduct then it will be presumed unless the contrary is proved that it was reasonable for the client to so act and believe (sub-cl.820(2)).

Cl.821: No contracting out of liability for representative's conduct.

2506. This is a new provision.

2507. Sub-clause 821(1) is definitional and identifies the nature of the liability of a principal that is dealt with in the clause. Any agreement that purports to exclude, restrict or otherwise affect a liability of a principal in respect of conduct engaged in by a person as a representative of the principal is void (sub-cl.821(2)). An agreement that provides for a person to indemnify the principal in respect of such a

liability is similarly void (sub-cl.821(2)). However, some types of agreements are not made void. They are as follows:

- (a) a contract of insurance;
- (b) an agreement between a representative and a principal for the representative to indemnify the principal in respect of the liability of the principal arising from acts of that representative; and
- (c) an agreement between licensees who have both given a person a proper authority, providing for one licensee to indemnify the other licensee in respect of the other licensee's liability arising from acts of the person holding the proper authority

(sub-cl.821(3)).

2508. A person is prohibited from making, offering to make, or inviting another person to offer to make an agreement that would be void under sub-cl.821(2) (sub-cl.821(4)).

Cl.822 : Effect of Division

2509. This is a new provision.

2510. Where two or more people are liable under Division 4 of Part 7.3 in respect of the same conduct or the same loss, they are jointly and severally liable (sub-cl.822(1)). The liability created by this Division does not affect a liability arising otherwise than under this Division. However, this Division does not give a person an entitlement to be compensated twice in respect of the same loss or damage (sub-cl.822(2)).

Cl.823 : Additional operation of Division

2511. This is a new provision.

2512. This clause extends the operation of Division 4 of Part 7.3. Where a representative has a corporation as a principal, then the liability imposed by Division 4 on that principal with respect to the conduct of the representative will extend to any conduct, not just eligible securities conduct (sub-cl.823(1)). Where a representative deals with a third party which is a corporation the liability imposed by Division 4 on that principal with respect to the conduct of the representative will extend to any conduct, not just eligible securities conduct (sub-cl.823(2)).

Division 5: Excluding Persons from the Securities Industry

2513. This Division deals with the various means by which participants in the securities industry may be disciplined. Under the SIA, disciplining took the form of suspension or revocation of a person's licence or disqualification by the Court. Under this Division, in addition to these forms (which are expanded in scope) the ASC is given a power to make a banning order against a person. Also the provisions dealing with revocation and suspension of licences have been restructured to provide an easier format to follow.

Cl.824 : Power to revoke, without a hearing, licence held by natural person

2514. This clause is based on SIA s.59, although this clause only deals with licences held by natural persons.

2515. The ASC will be able to revoke a licence held by a natural person without giving the licensee an opportunity to be heard (para.837(1)(d)) in the following circumstances:

- (a) if the person becomes an "insolvent under administration" (see definition in cl.9)

- (b) if the person is convicted of serious fraud (see definition in cl.9)
- (c) if the person becomes incapable, through mental or physical incapacity, of managing their affairs
- (d) if the person contravenes the licence conditions imposed by cls.791, 792 or 860; or
- (e) if the person asks the ASC to revoke the licence.

Cl.825: Power to revoke, without a hearing, licence held by body corporate

2516. This clause is based on SIA s.59, although this clause only deals with licences held by bodies corporate.

2517. The ASC will be able to revoke a licence held by a body corporate without giving the licensee an opportunity to be heard (para.837(1)(d)) in the following circumstances:

- (a) if the body ceases to carry on business
- (b) if the body becomes externally administered (see definition in cl.9)
- (c) if the body contravenes the licence conditions imposed by cls.791, 792 or 860
- (d) if the body asks the ASC to revoke the licence
- (e) if a director, secretary or executive officer of the body contravenes this Chapter because he does not hold a licence or a licence held by him is suspended.

Cl.826 : Power to revoke licence after a hearing

2518. This clause is based on s.60 of the SIA, although a number of additional grounds for revocation have been inserted.

2519. The ASC will be able to revoke a licence, provided that the licensee is given an opportunity for a hearing under cl.837, in the following circumstances:

- (a) if the application for the licence contained false or misleading information, or omitted material information (paras.826(1)(a) and (b))
- (b) if the licensee contravenes a securities law (see definition in cl.9) or contravenes a condition of the licence (paras.826(1)(c) and (d))
- (c) if the licensee is a natural person and the ASC believes that person is not of good fame and character (para.826(1)(e))
- (d) if the licensee is a body corporate and the ASC is satisfied that the educational qualifications or experience of an officer of the body corporate is inadequate having regard to the duties that that officer performs in connection with holding the licence. This power is only exerciseable in relation to persons who become officers after the grant of the licence or in relation to duties that an officer performs that are different to those performed at the time of granting the licence (paras.826(1)(f) and (g))

- (e) if the licensee is a body corporate and if a licence held by a director, secretary or executive officer of the body is suspended or revoked or a banning order under cl.830 is issued against such a director, secretary or executive officer (para.826(1)(h)).
- (f) if the ASC believes that the licensee has not performed, or will not perform, the duties of a licensee efficiently, honestly and fairly (paras.826(1)(j) and(k))

2520. In determining the good fame and character criterion or the efficiently, honestly and fairly criterion, the ASC can have regard to matters that arose before the licence was granted (sub-cl.826(2)).

Cl.827 : Power to suspend licence instead of revoking it

2521. This clause is based on SIA sub-ss.59(3), 60(2) and s.61 although a number of additional grounds of suspension have been inserted.

2522. The ASC will be able to suspend a licence rather than revoke it, provided the licensee is given an opportunity for a hearing under cl.837 in the following circumstances:

- (a) on any of the grounds specified in cls.824 and 825, except where the licensee has requested that the licence be revoked (para.827(1)(a))
- (b) on any of the grounds specified in cls.826 except
 - (i) if the application for the licence contained false or misleading information or omitted material information; or
 - (ii) if the ASC believes the licensee, being a natural person, is not of good fame and character

(para.827(1)(b)).

2523. The ASC can also, in the same circumstances, prohibit the licensee from doing specified acts which would be prohibited by cls.780 or 781 if the licensee did not hold a licence (para.827(1)(d)).

2524. The holder of a licence will be deemed not be the holder for any period during which the licence is suspended. This will mean that a person cannot act as a representative of a licensee while the licensee's licence is suspended (sub-cl.827(3)). Similarly, a person cannot, as a representative of a licensee, do an act which a licensee is prohibited from doing pursuant to an order under para.827(1)(d) (sub-cl.827(4)).

Cl.828 : Power to make banning order where licence revoked or suspended

2525. This a a new provision.

2526. The ASC will be able to issue a banning order against a natural person prohibiting that person from doing an act as a representative of a dealer or an investment adviser (see cl.830).

2527. The ASC can make such an order, provided that the person is given an opportunity for a hearing under cl.837, in the following circumstances:-

- (a) where the ASC revokes a licence under any of the grounds specified in cl.824 (para.828(a))
- (b) where the ASC revokes a licence under cl.826 on any of the following grounds:-
 - (i) because the application for the licence contained false or misleading information or omitted material information

- (ii) because the licensee contravened a securities law or a condition of the licence
- (iii) because the ASC believes the licensee is not of good fame and character
- (iv) because the ASC believes the licensee has not or will not perform his duties efficiently honestly and fairly.

(paras.828(b) and (c)).

- (c) where the ASC suspends a licence under cl.827 (paras.828(d) and (e)).

Cl.829 : Power to make banning order against unlicensed person

2528. This a new provision.

2529. The ASC will be able to issue a banning order against a natural person (who is not a licensee), prohibiting that person from doing an act as a representative of a dealer or an investment adviser (see cl.830).

2530. The ASC can make such a banning order, provided that the person is given an opportunity for a hearing under cl.837, in the following circumstances:

- (a) if the person becomes an "insolvent under administration"; see definition in cl.9 (para.829(a))
- (b) if the person is convicted of "serious fraud"; see definition in cl.9 (para.829(b))
- (c) if the person becomes incapable, through mental or physical incapacity, of managing his or her affairs (para.829(c))

- (d) if the person contravenes a "securities law"; see definition in cl.9 (para.829(d))
- (e) if the ASC believes the person is not of good fame and character (para.829(e))
- (f) if the ASC believes the person has not or will not perform their duties as a representative of a dealer or investment adviser efficiently, honestly and fairly (paras.829(f) and (g))

Cl.830 : Nature of banning order

2531. This is a new provision.

2532. This clause specifies the nature of the banning orders that the ASC is empowered by other clauses to make. The ASC may permanently prohibit a person from doing an act as a representative of a dealer or investment adviser or both (paras.830(1)(a), (c), (d) and (e)).

2533. The ASC may also prohibit for a specified period a person from doing an act as a representative of a dealer, an investment adviser or both. This power is, however, not available where the ground for making the banning order is that the person is not of good fame and character (para.830(1)(b)).

Cl.831 : Exceptions to banning order

2534. This is a new provision.

2535. A banning order made by the ASC may include a provision that permits the person, to do things that the order would otherwise prohibit. This provision may be subject to conditions (sub-cl.831(1)). The ASC may vary a banning order by inserting or removing such a provision or by varying the conditions to which the provision is subject (sub-cl.831(2)). Such variations can only be done if the person is given an opportunity for a hearing under cl.837.

Cl.832 : Variation or revocation of banning order on application

2536. This is a new provision.

2537. A person may apply to the ASC for a variation or revocation of a banning order relating to them (sub-cl.832(1)). The ASC is required to revoke the banning order if the person is not an "insolvent under administration" (see definition in cl.9), if the ASC has no reason to believe that the person is not of good fame and character and if the ASC has no reason to believe that the person will not perform efficiently, honestly and fairly the duties of a representative of a dealer or of an investment adviser (paras.832(2)(a), (b), (c) and (e)). If the ASC has no reason to believe that the person will not perform efficiently, honestly and fairly the duties of a representative of either a dealer or an investment adviser but not both, the ASC is required to vary the banning order accordingly (paras.832(2)(a), (b), (c) and (d)). In determining the good fame and character criterion and efficiently, honestly and fairly criterion, the ASC is required to have regard to any convictions of the person for "serious fraud" (see definition in cl.9) in the preceding 10 years (sub-cl.832(4)).

Cl.833 : Revocation of banning order in certain cases

2538. This a new provision.

2539. Where the ASC is required to vary a banning order so that it no longer has a particular operation and the banning order has no other operation, the ASC is required to revoke the banning order instead.

Cl.834 : Effect and publication of orders under this Division

2540. This a new provision.

2541. An order suspending or revoking a licence, or a banning order or variation of a banning order takes effect when it is served on the person to whom the order relates (sub-cl.834(1)). After the order is served the ASC must publish a copy of the banning order or the banning order as varied in the Gazette, together with a statement that the order or variation of the order took effect on that day (sub-cl.834(2)). If the banning order includes a provision that permits, subject to conditions, the person to do things that are otherwise prohibited, and inclusion of those conditions in the Gazette would make the notice unreasonably long, the notice published in the Gazette may instead contain a summary of the effect of those conditions (sub-cl.834(3)).

Cl.835 : Contravention of a banning order

2542. This is a new provision.

2543. It will be an offence for a person to contravene a banning order.

Cl.836 : Banned person ineligible for licence

2544. This is a new provision.

2545. Where a banning order prohibits a person from acting as a representative of a dealer or an investment adviser the ASC cannot grant a dealers licence, or an investment advisers licence as the case may be, to that person.

Cl.837 : Opportunity for hearing

2546. This clause is based on SIA s.62 although, as a consequence of other amendments, a number of additional circumstances where a person is entitled to a hearing have been inserted.

2547. The ASC is required to give a person an opportunity to appear in private before the ASC and to make submissions and give evidence to the ASC before the ASC takes action in respect of any of the following matters:

- (a) refusing to grant a licence, unless there is in force a banning order against that person or Court order disqualifying that person from holding a licence
- (b) imposing or varying conditions of a licence
- (c) revoking or suspending a licence otherwise than as empowered by cls.824, 825 or para.827(1)(a)
- (d) making a banning order against a person, otherwise than by virtue of paras.828(a) or (d), or S.829(a), (b) or (c)
- (e) varying a banning order under sub-cl.831(2)
- (f) refusing an application for a variation or revocation of a banning order

(sub-cl.837(1)).

Cl.838 : Disqualification by the Court

2548. This clause is based on SIA sub-ss.60(3) and (4), although some minor changes have been made in order to give the Court more flexibility in the types of orders it can make.

2549. The ASC may apply to the Court for a disqualification order against a person if it has revoked the licence of that person or if it has made a permanent banning order against that person (sub-cl.838(1)). The Court may make an order

disqualifying the person permanently or for a specified period from holding either a dealer's licence, an investment adviser's licence or both (para.838(2)(a)) or disqualifying the person permanently or for a specified period from doing an act as a representative of either a dealer or investment adviser or both (para.838(2)(b)).

Cl.839 : Effect of orders under section 838

2550. This clause is based on SIA sub-s.62(2).

2551. A licence cannot be granted to a person while there is in force an order from the Court disqualifying that person from holding a licence (sub-cl.839(1)). It will be an offence for a person to contravene a disqualifying order that prohibits that person from doing an act as a representative of a dealer, investment adviser or both (sub-cl.839(2)).

Cl.840 : Effect of previous orders under laws corresponding to section 838

2552. This is a new provision.

2553. This is a transitional provision to ensure that disqualification orders made under the SIA will continue to have effect as if they had been made under sub-cl.838(2).

PART 7.4 - CONDUCT OF SECURITIES BUSINESS

2554. Part 7.4 of this Chapter (cls.841 to 853) deals with the conduct of a securities business.

Division 1 - Regulation of Certain Activities

Cl.841 : Certain representations prohibited

2555. This clause is to the same effect as SIA s.63.

2556. A licence holder will be prohibited from representing that his abilities or qualifications have been approved by the ASC (sub-cl.841(1)). A statement that a person holds a licence will not contravene the prohibition (sub-cl.841(2)).

Cl.842 : Issue of contract notes

2557. This clause is based on SIA s.64 but applies now also to exempt dealers in so far as they carry on eligible securities business (defined in cl.93) of a deceased dealer, in a capacity of personal representative of that dealer. In addition the clause now applies to a dealer that is a corporation, and a person who is a dealer carrying on an eligible securities business, in relation to a transaction in securities (sub-cl.842(1)).

2558. A contract note must be issued by a dealer in respect of a transaction of sale and purchase of securities to the following persons:

- (a) his client, where the transaction took place in the ordinary course of business on a stock market and the dealer was not a principal;
- (b) his client and the person with whom he entered the transaction, where the transaction did not take place

in the ordinary course of business at a stock market and the dealer was not a principal; and

- (c) the person with whom he entered the transaction, where he was a principal and the transaction did not take place in the ordinary course of business at a stock exchange

(sub-cl.842(2)).

2559. The contract note must include the particulars set out in sub-cl.842(3). The requirement contained in SIA para.64(2)(h) that the rate of commission be included in the contract note has not been retained. A dealer must not include in a contract note a name that he knows or could reasonably be expected to know is not the name of the person with or for whom he has entered the transaction (sub-cl.842(4)). Sub-clauses (5), (6) and (7) contain provisions relevant to whether a dealer is dealing as principal.

Cl.843 : Dealings and transactions on a dealer's own account

2560. This clause is based on SIA s.66 except that the clause now applies to a dealer that is a corporation or to other dealers which carry on an eligible securities business (see definition in cl.93) in respect of their dealings (sub-cl.843(1)).

2561. A dealer will be prohibited from dealing with another person (who is not a dealer) on the dealers own account (see cl.84) (i.e. as a principal), without first informing the other person of that fact (sub-cl.843(2)) except where the transaction involves an odd lot of securities (defined in cl.763) entered into by a dealer specialising in odd lots.

2562. A brief outline of cl. 843 is as follows:

- (a) The statement must be made on the contract note (sub-cl.843(3)).

- (b) A dealer who deals as principal with a person who is not a dealer must not charge that person brokerage or any fee (sub-cl.843(4)). This does not apply to an odd lot dealer (sub-cl.843(5)) or to a dealer who as principal enters into a transaction under an approved deed within the meaning of Division 4 of Part 7.12 (relating to prescribed interests) if the dealer charges brokerage in accordance with that deed (sub-cl.843(6)).
- (c) Where a dealer contravenes sub-cl.843(2), (3) or (4), the purchaser or vendor is entitled to rescind the contract by giving written notice to the dealer within 14 days after receipt of the contract note (sub-cl.843(7)). Common law rights to rescind a contract will also be preserved (sub-cl.843(8)).

Cl.844 : Dealer to give priority to clients' orders

2563. This clause is to the same effect as SIA s.131 except that it now applies to a dealer that is a corporation or other dealers insofar as the transaction relates to an eligible securities business (see cl.93) carried on by them (sub-cl.844(1)).

2564. A dealer must give priority to his client's orders (sub-cl.844(2)). This requirement will not apply where the client has specified conditions that the dealer is unable to comply with, or the transaction is entered into in prescribed circumstances (sub-cl.844(3)).

Cl.845 : Dealings by employees of holders of licences

2565. This clause is to the same effect as SIA s.132 except that it now applies to purchase of, or subscription for, eligible securities (see cl.9).

2566. The clause regulates dealings by employees of dealers or investment advisers.

2567. A brief outline of this clause is as follows:

- (a) A dealer or an investment adviser, and an employee of either will be prohibited from jointly purchasing eligible securities as principals (sub-cl.845(1)). A similar prohibition will apply in respect of a partner in a partnership which carries on securities or investment adviser business in relation to joint purchases with employees (sub-cl.845(2)).
- (b) A dealer or an investment adviser or a partner in a securities or investment advice partnership will be prohibited from giving credit to an employee or a person he knows is associated with the employee if the purpose is to assist the employee to purchase eligible securities (sub-cl.845(3)).
- (c) Employees of stockbrokers will be prohibited from purchasing securities as principal unless the stock broker acts as agent in the transaction (sub-cl.845(4)).

Division 2 - Short Selling of Securities

Cl.846 : Short Selling

2568. This clause is to the same effect as SIA s.68 except that this clause applies to eligible securities (see cl.9).

2569. Subject to the Bill and to the regulations, short selling will be prohibited.

2570. A brief outline of these provisions is as follows:

- (a) A person will be prohibited from selling eligible securities unless he or his principal has, or believes on reasonable grounds that he has, a presently exercisable and unconditional right to vest the securities in the purchaser (sub-cl.846(1)).

- (b) A person who has a presently exercisable and unconditional right to have securities vested in him or in accordance with his directions will be deemed to have at that time a presently exercisable and unconditional right to vest the securities in another person (para.846(2)(a)). A right to vest securities in another person is not unconditional merely because the securities are charged or pledged in favour of another person (para.846(2)(b)).
- (c) The prohibition does not apply to:
- (i) a sale of securities relating to odd lots (defined in cl.763) by a dealer who is a member of a securities exchange specialising in odd lots and who is acting as principal;
 - (ii) a sale as part of an arbitrage transaction;
 - (iii) a sale by a purchaser whose right to have the securities vested in him is conditional only upon payment by him of the consideration or receipt of the necessary transfer or document of title;
 - (iv) a sale of securities where:
 - . the seller is not associated with the issuer of the securities;
 - . arrangements are made before the sale that will enable delivery of the securities to be made to the purchaser within 3 business days of the sale; and

- . if the sale is effected on a stock market, the price per unit is not lower than the price (and, in certain circumstances, is higher than the price) at which the immediately preceding ordinary sale was effected, and the stock exchange is immediately informed that the sale has been made short.

- (v) a sale of securities, which were in a class specified in a securities exchange declaration made for this purpose, is made according to the exchange's business rules and the vendor was not associated with the issuer of securities.

(sub-cl.846(3)).

- (d) A person who effects a sale or requests a dealer to effect a sale referred to in paras.846(3)(b), (d) or (e) must inform the dealer that the sale is a short-sale (sub-cl.846(4)). A person who effects a sale referred to in para.846(3)(d) must include an endorsement that the sale was short on any document evidencing the sale (sub-cl.846(5)).

- (e) A person who purports to sell, offers to sell, holds himself out as entitled to sell or instructs a dealer to sell is deemed to sell the securities for the purposes of the provision (sub-cl.846(6)).

Cl.847 : Power of Commission to prohibit short selling in certain cases

2571. This clause is to the same effect as SIA s.68A except that the Minister now holds the power previously exercisable by the Ministerial Council, transitional powers have been included (sub-cl.847(6)) and the prohibition applies only in respect of eligible securities (see cl.9).

2572. The clause is comparable to the power to prohibit trading in particular securities for up to 21 days in order to protect investors or the public (cl.775).

2573. Clause 847 empowers the ASC to prohibit short selling of securities prescribed under securities exchange business rules in order to protect investors or the public interest.

2574. A brief outline of these provisions is as follows:

- (a) The ASC must first notify the securities exchange that it has formed the opinion that it is necessary to prohibit short selling in eligible securities or a particular class of eligible securities (sub-cl.847(1)).
- (b) If the securities exchange takes no action to prevent short selling after receiving the notice, the ASC will be able to prohibit short selling in relevant securities for up to 21 days (sub-cl.847(2)).
- (c) The ASC must report as soon as practicable to the Minister (sub-cl.847(3)) who may revoke the ASC's prohibition (sub-cl.847(4)).
- (d) Contravention of an ASC prohibition will be an offence (sub-cl.847(5)).
- (e) Where a notice given by the NCSC, under the corresponding SIA provision, has resulted in suspension of short selling of particular securities and at the commencement of this Act there still remains an unexpired portion of the suspension period then that suspension will continue for that portion of the period. Both the giving of the notice and other actions in relation to it will be deemed to have been done under this Act (sub-cl.847(6)).

Division 3 - Recommendations about Securities

2575. This Division is based on SIA ss.65 and 65A but the requirements in these sections have been extensively restructured and amended.

Cl.848 : Recommendation made by partner or officer

2576. This clause is to the same effect as SIA sub-s.65(11).

2577. A recommendation made by a partner will be deemed to have been made by each of the partners. A recommendation made by a director, executive officer or secretary of a body corporate will be deemed to have also been made by the body corporate.

Cl.849 : Client to be told if adviser's interests may influence recommendation

2578. This clause, although still containing some of the elements of SIA sub-ss.65(1) and (3), represents a major reform of those sub-sections (see below).

2579. Briefly, this clause provides:

- (a) A securities adviser (defined in cl.9 as a dealer, investment adviser, or one of their representatives), when making a recommendation orally or in writing to a client who may reasonably be expected to rely on it (sub-cl.849(1)), must disclose any commission, fee or benefit which he or an associate has, will or may receive or any other interest which could reasonably be expected to influence the adviser (sub-cl.849(2)).

- (b) The above sub-clause does not however require disclosure of a commission or fee from the client (sub-cl.849(3)).
- (c) If the advice was oral, the disclosure must also be confirmed in writing to the client within 2 business days (sub-cl.849(4)).
- (d) In general the definition of associate in Chapter 1 (cls.10-17) applies for the purpose of ascertaining the adviser's associates. However, a partner or co-director of the adviser is only an associate of the adviser if they act jointly in relation to making securities recommendations (sub-cl.849(7)). The principal of a representative which makes the recommendation is an associate of that representative but the representative is not required to disclose a commission or fee payable by the client to the principal (sub-cl.849(5)).

2580. The main differences between this clause and SIA sub-ss.65(1) and (3) are:

- this clause also applies to exempt dealers (as to which see cl.68)
- this clause also applies to oral recommendations (SIA sub-s.65(1) only applied to recommendations in written circulars)
- the meaning of associate in this clause is wider than that in SIA para.65(3)(c); the clause includes principals of adviser representatives and applies to partners and directors of advisers if they act together with the partner in relation to making recommendations generally (cf. SIA para.65(3)(c) which only applies to such persons if they act with the adviser in relation to the particular recommendation)

- the clause lays down a more relevant test for wider pecuniary or other interests (para.849(1)(d) cf. SIA paras.65(3)(a) and (b)).

2581. The defence provided in SIA sub-s.65(2) is now contained in a simplified version in cl.850. In addition, the requirements in SIA sub-ss.65(4)-(10) have not been repeated in the Bill.

Cl.850 : Defence to alleged breach of sub-section 849(2)

2582. This clause is a simplified version of the defence in SIA sub-s.65(2). (It also extends that defence to oral recommendations.)

2583. A person who fails to disclose a matter required to be disclosed by sub-cl.849(2), will not contravene that sub-clause if the person was not and could not reasonably have been aware of the matter at the time of making the recommendation.

Cl.851 : Adviser must have reasonable basis for recommendation

2584. This clause is to the same effect as SIA sub-ss.65A(1) and (2).

2585. A securities adviser who makes securities recommendation 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 (sub-cl.851(1)).

2586. 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 (sub-cl.851(2)).

Cl.852 : Adviser who breaches this Division liable to compensate client.

2587. This clause is based on SIA sub-s.65A(4) but now also applies where the adviser fails to disclose (as required under cl.849) an interest which could influence a recommendation.

2588. An adviser who breaches cl.849 or cl.851 will in certain circumstances be liable to pay damages to a person who, as a result of reasonable reliance on the recommendation, suffered loss or damage.

Cl.853 : Qualified privilege for adviser when complying with this Division

2589. This clause is based on SIA sub-s.65A(5) but now extends to a dealer who has not contravened sub-cl.849(2).

2590. An adviser has qualified privilege (defined in cl.89) where the adviser:

- (a) makes a recommendation in relation to eligible securities (see cl.9) to a person who may reasonably be expected to rely on it; and
- (b) in so making the recommendation, contravenes neither sub-cl.849(2) or 851(1).

PART 7.5 - DEALERS' ACCOUNTS AND AUDIT

2591. This Part is based on SIA Part 6 except that the requirements in SIA Part 6 have been recast in this Part as conditions of the licence. In addition, the matters covered by SIA ss.67, 72, 73, 74 and 83-86 in respect of money and scrip of dealers' clients are dealt with in Part 7.6.

2592. Part 7.5 of the Chapter (cls.854 to 864) deals with conditions of licences stipulating requirements in respect of the accounts to be kept by the holder of a dealer's licence and with the auditing and supervision of those accounts. The application of this Part is dealt with in cl.855.

Cl.854 : Interpretation

2593. This clause is based on SIA s.69 subject to the extra interpretation provision in para.854(a).

2594. A reference in the Part to a licence is a reference to a dealers licence (para.854(a)).

2595. A reference in the Part to a book etc of a dealer who carries on business in partnership is to be read as a reference to a book etc of the partnership (para.854(b)).

Cl.855 : Application of Part

2596. This clause is based on SIA s.70.

2597. Part 7.5 of this Chapter applies to holders of a dealer's licence and to the securities business carried on by them but any condition existing by virtue of the Part will not affect the operation of Parts 3.6 and 3.7 in relation to a company which holds a dealers licence or carries on a securities business.

Cl.856 : Dealers' accounting records

2598. Subject to the requirements being recast as licence conditions, and to new requirements in relation to records kept outside Australia (sub-cl.856(14)), this clause is based on SIA s.71.

2599. It sets out conditions attached to securities licences relating to the accounting records to be kept by the holder of such a licence (referred to as a dealer).

2600. A brief outline of these conditions and related matters is as follows:

- (a) A dealer must keep accounting records that correctly record and explain the transactions and financial position of his securities business. He must keep accounting records that enable true and fair profit and loss accounts and balance sheets to be made up and conveniently audited (sub-cl.856(2), (3) and (4)).
- (b) Particular matters that must be recorded are set out in sub-cl.856(6)-(9).
- (c) A dealer must keep records in sufficient detail to show separately particulars of all his transactions with or on account of his clients, himself or the partners (if appropriate), other dealers and his employees (sub-cl.856(10)).
- (d) An entry in the records will be deemed to have been made by or with the authority of the dealer (sub-cl.856(11)).

- (e) A dealer must keep his records in English or, if not, in a form readily convertible to English (sub-cl.856(5)). If required, the dealer must convert a record not kept in English to English within a reasonable time (sub-cl.856(12)).

- (f) If records are kept outside Australia the dealer must send to and keep in Australia such particulars as will enable true and fair profit and loss accounts and balance sheets to be prepared and, if required by the ASC, produce the documents within 28 days (sub-cl.856(14)).

Cl.857 : Appointment of auditor by dealer

2601. Except to the extent that the obligations on the licensee are recast as licence conditions, this clause is to the same effect as SIA s.75.

2602. A person who holds a dealer's licence will be required, as a condition of the licence, to have an auditor.

2603. A brief outline of cl. 857 is as follows:

- (a) It is a condition of a dealer's licence that the licence holder must appoint an auditor (other than an "ineligible" auditor) within one month of becoming a licence holder (sub-cl.857(1)).

- (b) A person or firm is ineligible for the purposes of sub-cl.857(1) to act as an auditor unless certain conditions set out in sub-cl.857(2) and (3) are satisfied. These requirements relate, among other things, to registration as a company auditor, to indebtedness to the dealer (explained in sub-cl.857(4)) and to not being an officer of the dealer (explained in sub-cl.857(5), (6) and (7)). An auditor is not allowed to act as an auditor of the licence holder (or to consent to so act) while ineligible (sub-cl.857(8)).

- (c) The appointment of a firm as auditor is taken as the appointment of all members of the firm (sub-cl.857(9)). The new partner of a newly reconstituted firm (due to death or retirement etc. of a partner deemed under sub-cl.857(9) to be an auditor of the licence holder) who is a registered auditor is deemed to be appointed as auditor if not disqualified by sub-cl.857(3) (sub-cl.857(10)).
- (d) A person will be prohibited from knowingly disqualifying himself or a firm (of which the person is a member) from acting as auditor of the dealer (sub-cl.857(14)). An auditor will hold office till death, removal, resignation or incapacity (sub-cl.857(15)).
- (e) It is a condition of a dealers licence that the dealer appoint an (eligible) auditor within 14 days of a vacancy if there is no surviving or continuing auditor (sub-cl.857(16)).
- (f) It is also a licence condition that the holder must notify the ASC of any initial appointment of an auditor and any appointment following a vacancy (sub-cl.857(13)). It is also a condition that the licence holder not appoint an auditor who has not agreed in writing to so act (sub-cl.857(18)).

Cl.858 : Removal and resignation of auditors

2604. Except to the extent that the obligation on the licensee is recast as a licence condition, this clause is based on SIA s.76.

2605. This clause deals with the removal and resignation of a dealer's auditor.

2606. A brief outline of cl. 858 is as follows:

- (a) It is a licence condition that the holder of a dealer's licence remove an auditor if the auditor becomes ineligible (see cl.857). Such a licence holder will also be able to remove an auditor if he has the consent of the ASC (sub-cl.858(1)). An auditor will be able to resign if he has the consent of the ASC (sub-cl.858(2)).
- (b) A statement made in a resignation application by an auditor or an answer to an inquiry by the ASC is not admissible evidence in civil or criminal proceedings against the auditor (except in relation to cl.1308) and may not be the ground of a prosecution or other action (other than in relation to cl.1308) against the auditor (sub-cl.858(4)).
- (c) Sub-clause 858(5) deals with the date the resignation takes effect.
- (d) Where a firm is no longer capable of being auditor (by reasons of para.857(3)(a)) on the retirement or withdrawal from a firm of a member, the member (if not disqualified) is deemed to be auditor until the ASC consents to his retirement or withdrawal (sub-cl.858(6)).
- (e) A person aggrieved where the ASC does not consent to the removal or resignation of an auditor, will be able to appeal to the Court which may confirm or reverse the decision or make such further order as it thinks just and reasonable (sub-cl.858(7)).

- (f) This clause does not apply in relation to a body corporate (other than an exempt proprietary company) to which cl.329 applies.

Cl.859 : Fees and expenses of auditors

2607. This clause is based on SIA s.77.

2608. It is a condition of a dealer's licence that the dealer pay the reasonable fees and expenses of his auditor.

Cl.860 : Dealer's accounts

2609. Subject to the obligations being recast as licence conditions this clause is based on SIA s.78.

2610. It is a condition of a dealer's licence that the dealer must prepare a yearly profit and loss account and balance sheet containing prescribed information and lodge these with the ASC. (See also cl.792 which requires a dealer's annual statement to the ASC to be lodged during the same period as is required for the lodgment of the accounts).

2611. A brief outline of some other aspects of cl.860 is as follows:

- (a) The term 'financial year' and 'prescribed day' are defined for the purposes of the provision (sub-cl.860(1)).
- (b) An auditor's report containing prescribed information must also be lodged (sub-cl.860(2)).
- (c) The ASC will be able to extend and further extend the time for lodgments (sub-cl.860(3)). It is a condition of a dealer's licence that where any conditions are attached to such an extension they must be complied with (sub-cl.860(5)).

Cl.861 : Auditor to report to Commission on certain matters

2612. This clause is based on SIA s.79.

2613. Where an auditor becomes aware of one of the matters set out in sub-cl.861(2) e.g. a matter adversely affecting a licence holder's ability to meet its obligations, the auditor must, within 7 days, lodge a report on the matter with the ASC. A copy must be sent to the licence holder and to each securities exchange of which the holder is a member (sub-cl.861(1)).

Cl.862 : Securities exchange to report to Commission on certain matters

2614. This clause is based on SIA s.80.

2615. A securities exchange must notify the ASC of any of the matters set out in sub-cl.862(2) in relation to a dealer of that exchange (sub-cl.862(1)). These matters are the same as those set out in sub-cl.861(2) and include breach of a licence condition or a matter that may adversely affect the ability of a licence holder to meet its obligations (sub-cl.862(2)).

Cl.863 : Qualified privilege for auditor

2616. This clause is based on SIA s.81.

2617. An auditor will have qualified privilege (see cl.89) in actions in respect of an oral or written statement made or issued by him in the course of his duties as an auditor (sub-cl.863(1)). Such protection will also be given to the publisher of a document prepared by an auditor and required to be lodged under this Bill and in respect of the publishing of any statement made by an auditor as mentioned in sub-cl.863(1). (sub-cl.863(2)).

Cl.864 : Securities exchange may impose additional obligations on members

2618. This clause is to the same effect as SIA s.82.

2619. Nothing in Part 7.5 or Part 7.6 of the Bill will prevent a securities exchange from imposing on members any obligations dealing with auditing of accounts, furnishing information in auditors' reports or the keeping of books provided they are not inconsistent with this Chapter or a licence condition.

PART 7.6 - MONEY AND SCRIP OF DEALERS' CLIENTSDivision 1 - Trust Money

2620. This Part (cls.865 - 878) regulates, primarily by the imposition of licence conditions, the conduct of holders of dealers licences in relation to money and scrip received from or on account of, or by way of loan from, clients. The Part also provides certain powers to the Court in respect of breach of conditions and other matters giving rise to concern about the security of clients' money or scrip held by the licence holder (these are based on SIA ss.83-86). The conditions and their obligations imposed are largely based on the requirements under SIA ss.67, 72, 73 and 74.

Cl.865 : Interpretation and application

2621. The Part, except cl.872 which relates to money lent to a dealer, applies to the holder of a dealer's licence and in relation to a securities business carried on by the licensee.

Cl.866 : Dealer to keep trust account

2622. Subject to the obligations being recast as a licence condition, this clause is based on SIA sub-ss.73(1) and (8).

2623. It is a condition of a dealer's licence that the holder open and maintain at least one trust account with an Australian bank (sub-cl.866(1)).

2624. A dealer will not be required to comply with the condition imposed by sub-cl.867(1) where (another) licence condition prevents him from holding moneys in trust for his clients (sub-cl.866(2)).

Cl.867 : What is to be paid into dealer's trust account

2625. Subject to the obligation being recast as a licence condition, sub-cl.867(1) is based on part of SIA sub-s.73(2) and on SIA sub-s.73(4). Sub-cl.867(2) is based on SIA sub-s.73(5) and has been simplified with the new definition of "payment order" (see cl.9).

2626. It is a condition of a dealer's licence that the dealer pay the following moneys into a trust account:

- (a) money held by the dealer in trust for a client (para.867(1)(a)); and
- (b) money received by a dealer from a client other than brokerage fees etc, payment for securities delivered to the dealer before money is received or money to which para.872 applies (para.867(1)(b)).

2627. A payment order that is payable to, or to the order of, a specified person or bearer (not being a cheque etc. in which the payee is the dealer, a partner of the dealer or the dealer's firm) received from a client with instructions to deliver it to the person to whom it is payable, will not have to be paid into a trust account (sub-cl.867(2)).

Cl.868 : When money to be paid into trust account

2628. Subject to the obligation being recast as a licence condition, this clause is based on SIA sub-s.73(2).

2629. It is a condition of a dealer's licence that the dealer pay into the trust account any money held by him in trust for a client no later than the next business day after receipt.

Cl.869 : Withdrawals from trust account

2630. Subject to the restrictions being recast as licence conditions this clause is based on SIA sub-s.74(1) and (4).

2631. This clause sets out the purposes for which the dealer can use moneys from the trust account. It is a condition of a dealer's licence that the dealer not withdraw money from a trust account except to:

- (a) make a payment to or in accordance with the written directions of a person entitled to the money;
- (b) make a payment to a stock exchange in accordance with cl.889;
- (c) defray brokerage and proper charges;
- (d) pay to the dealer moneys to which he is entitled (being moneys that were paid, but were not required to be paid, into the trust account); and
- (e) make a payment that is otherwise authorised by law.

(sub-cl.869(1)).

2632. Lawful claims or liens will not be affected (sub-cl.869(2)).

Cl.870 : Withdrawal against uncleared cheque

2633. Subject to the obligation being recast as a licence condition, this clause is based on SIA sub-ss.74(5) and (6).

2634. A dealer may withdraw from a trust account an amount which is the whole or part of a cheque that has not been cleared if it has not been refused payment (sub-cl.870(1) and (2)). However, it is a condition of a dealer's licence that the dealer must pay this back if clearance of the cheque is subsequently refused within 1 business day of notification of the refusal (sub-cl.870(3)).

Cl.871 : Trust money not available in respect of dealer's own debts

2635. This clause is based on SIA sub-s.74(3).

2636. Money in a dealer's trust account is not available to satisfy a liability of the dealer.

Cl.872 : Money lent to dealer

2637. Except to the extent that this clause is slightly more limited in coverage, it is based on SIA s.67.

2638. This section applies where a person lends money to a dealer in connection with either the dealer's securities business, if the dealer or the person is a corporation, or the dealer's "eligible securities business" (see cl.93) where neither is a corporation (sub-cl.872(1)).

2639. Where a client lends money to a dealer in such circumstances, the dealer must:

- (a) pay that money into an Australian bank account which contains only money lent to the dealer (sub-cl.872(2));
- (b) give the client a document in the prescribed form setting out terms and conditions on which the loan is made and accepted and its purpose (sub-cl.872(3));
- (c) keep the moneys in the account until the client has given written acknowledgement that the disclosure document has been received (sub-cl.872(4)); and

- (d) use the moneys only for the purpose set out in the disclosure document or for another purpose agreed to by the client subsequently and in writing (sub-cl.872(5)).

Cl.873 : Scrip in dealer's custody

2640. Subject to the obligations being recast as licence conditions, this clause is based on SIA s.72.

2641. This section applies where a licenced dealer receives, for safe custody, scrip which is the property of the client (sub-cl.873(1)).

2642. A brief outline of cl.873 is as follows:

- (a) Where the client requests that the documents be registered in the name of a nominee or that they be deposited with a bank it is a condition of the licence that the dealer do so (sub-cl.873(2) and (3)). If no such request is made, it is a condition of the licence that the dealer register the documents in the name of the client if this has not been done (sub-cl.873(4)).
- (b) It is a condition of a licence that the dealer not deposit documents as security with his creditors unless an amount is owed by the client and the dealer gives a written notice to the client identifying the documents and stating that he or she intends to deposit them as a security (sub-cl.873(5)). Where the money owed to the dealer is paid it is a licence condition that the dealer withdraw the documents from deposit within 1 business day (para.873(6)(a)).

- (c) If the documents are maintained as security for more than 3 months it is a licence condition that the dealer give the client written notice of this fact, and at 3 monthly intervals thereafter (para.873(6)(b)).

Cl.874 : Court may freeze certain bank accounts of dealers and former dealers

2643. This clause is based on SIA sub-s.83(1).

2644. The Court will be able to make an order restraining dealing in relation to any of the dealer's bank accounts (sub-cl.874(3)) where the ASC shows, to the satisfaction of the Court, that:

- (a) there are reasonable grounds for believing there is a deficiency in a trust account or loan account (see sub-cl.872(2));
- (b) there has been undue delay or unreasonable refusal by a dealer in paying or accounting for trust moneys as required by a licence condition or the securities exchange's business rules;
- (c) a licence condition imposed by cl.868 has been contravened or sub-cl.872(2) has been contravened;

(sub-cl.874(1))

or

- (d) where a person, pursuant to an existing or past dealers licence, is or last carried on a securities business otherwise than in partnership - that the licence of that person has been revoked or suspended, that he is mentally or physically incapable of managing his affairs, that he has ceased to carry on a securities business or that he has died. (sub-cl.874(2)).

Cl.875 : Interim order freezing bank accounts

2645. This clause is based on SIA sub-ss.83(2) and (3).

2646. The Court may grant an interim order (e.g. restraining dealing in bank accounts) pending the determination of an application under cl.874 (sub-cl.875(1)). The Court will not require any undertaking as to damages as a condition of granting an order (sub-cl.875(2)).

Cl.876 : Duty of banker to make full disclosure

2647. This clause is to the same effect as SIA s.84.

2648. Where an order made under cl.874 is directed to a banker, the banker must make full disclosure to the ASC in respect of any accounts kept or reasonably suspected of being kept by the dealer the subject of the order. The banker must also permit the ASC to take copies of and extracts of such accounts.

Cl.877 : Further orders and directions

2649. This clause is based on SIA s.85.

2650. The ASC or a person affected by a restraining order may apply to the Court which will be able to make further orders dealing with ancillary matters, directing payment from a bank account affected by an order to the ASC or its nominee or varying or discharging an order.

Cl.878 : Power of Court to make order relating to payment of money

2651. This clause is based on SIA s.86.

2652. The Court, in making an order under cl.877 which provides for payment to the ASC or a nominee, will be able to direct the person to whom the money is to be paid:

- (a) to pay the moneys into a separate trust account;
- (b) to prepare a scheme for distributing the moneys; or
- (c) to apportion the moneys among the claimants in proportion to their proved claims where the moneys received are insufficient (this is despite any rule of law or equity to the contrary e.g. the rule in Claytons case).

(sub-cl.878(1)).

2653. A scheme prepared pursuant to sub-cl.878(1) must be approved by the Court (sub-cl.878(2)). The Court will be able to give such directions as it thinks fit in relation to moneys held in a separate trust account under sub-cl.878(1) (sub-cl.878(3)).

PART 7.7 - REGISTERS OF INTERESTS IN SECURITIES

2654. Part 7.7 of this Chapter (cls.879 to 887) deals with the establishment and maintenance of a register of interests in securities by licence holders and by financial journalists.

Cl.879 : Interpretation

2655. Subject to the extended definition of "financial journalist" outlined below, this clause is based on SIA s.87.

2656. Cl. 879 of the Bill contains a number of interpretative provisions:

- (a) 'Financial journalist' is defined for the purposes of the Part (sub-cl.879(1)). In contrast to the corresponding definition in SIA sub-s.87(1), this definition extends to persons preparing analysis or reports for the electronic media.
- (b) A member of a securities exchange certified by the exchange as specialising in odd lots is exempted from the operation of this Part in relation to any relevant interest he acquires as a result of an odd lot transaction (sub-cl.879(2)).

Cl.880 : Application of Part

2657. This clause is based on SIA s.88 and sub-s.87(2).

2658. Part 7.7 applies to the holders of licences, representatives of licence holders holding proper authorities and financial journalists (sub-cl.880(1)).

2659. The Part only applies to eligible securities (see cl.9) of a public company or a securities exchange listed company (sub-cl.880(2)).

Cl.881 : Register to be maintained

2660. This clause is based on SIA s.89 with no differences of substance.

2661. A financial journalist and a licence holder (and representatives holding proper authorities from him) must maintain a Register in the prescribed form and manner and must keep it in Australia (sub-cl.881(1)).

2662. Particulars of securities and the nature of the relevant interest (see Division 5 of Part 1.2 cls.30-45) must be entered in the Register within 7 days by a person who is or who becomes a person with a relevant interest (sub-cl.881(2) and (3)). Particulars of any change must also be entered within 7 days (sub-cl.881(4)). The particulars to be entered include:

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

(sub-cl.881(6)).

2663. The register may now also include particulars of matters relating to other securities to which the Part does not relate (sub-cl.881(7)).

Cl.882 : Commission to be notified of certain matters on establishment of Register

2664. This clause is based on SIA sub-ss.90(1) and (2).

2665. An applicant for a licence must give notice in writing to the ASC of the place at which he intends to keep the Register (sub-cl.882(1)). Within 14 days of commencing to keep the Register, a person who holds a proper authority from a licensee must give written notice to the ASC stating where the Register is kept and the name and business address of the licence holder (sub-cl.882(2)). Within 14 days after beginning to keep a Register, a financial journalist must give a similar notice which includes the name and business address of his employer and the publications to which he or she contributes (sub-cl.882(3)).

Cl.883 : Commission to be notified of changes in certain matters

2666. This clause is more extensive than SIA sub-s.90(3) which referred only to a change in the place at which the Register was kept. (This requirement is now included in sub-cl.883(1)).

2667. Notification to the ASC is also required when a person to whom the Part applies:

- (a) begins or ceases to hold a proper authority from a particular licensee (sub-cl.883(2)); or
- (b) begins or ceases to be employed as a financial journalist by a particular employer (para.883(3)(a)); or to contribute as a financial journalist to a particular publication (para. 883(3)(b)).

2668. Notification is also required of the new name or business address when the name or business address of the licensee or employer or the name of the publication which has been notified ceases to be correct (sub-cl.883(4)).

Cl.884 : Defences

2669. This clause is based on SIA s.91.

2670. In a prosecution under cls.881, 882 or 883, there will be a defence based on ignorance of relevant facts or occurrences and on timely rectification of the failure to comply with the relevant section (sub-cl.884(1)). The awareness of an employee or agent will be imputed to his employer or principal unless proved to the contrary (sub-cl.884(2)).

Cl.885 : Power of Commission to require production of Register

2671. This clause is based on SIA s.92.

2672. The ASC will be able to require a person to whom this Part applies to produce the Register at a specified place and within a specified time for inspection by a person authorised by the ASC (who may make further requirements).

Cl.886 : Power of Commission to require certain information

2673. This clause is based on SIA s.93.

2674. The ASC will be able, by written notice, to require the proprietor or publisher of a newspaper or periodical and the owner or provider of an electronic media service to supply the name and address of a person who contributed to or prepared any article, analysis or report (or contributed during a specified period to any article etc) concerning eligible securities - see cl.9 (sub-cl.886(1)).

Cl.887 : Power of Commission to supply copy of Register

2675. This clause is the same as SIA s.94.

2676. The ASC will be able to supply a copy of an extract from a Register to any person who in its opinion should in the public interest be informed of the matters disclosed.

PART 7.8 - DEPOSITS WITH STOCK EXCHANGES

2677. Part 7.8 of this Chapter (Cls.888 to 893) deals with the deposits that each member and member organisation are required to lodge with the stock exchanges. (See para.869(1)(b) which permits a dealer to withdraw money from a trust account to lodge and maintain the deposit required by this Part).

Cl.888 : Interpretation

2678. This clause is based on SIA para.94A(a).

2679. In effect it exempts ASX Ltd subsidiaries from the requirements of Part 7.8. This is done because those subsidiaries do not have broker members - by amendments to the SIA in 1987 all members of the capital city exchanges were transferred to ASX Ltd. Accordingly, deposits are lodged with ASX Ltd.

Cl.889 : Deposits to be lodged by member organisations

2680. Except to the extent that the obligations are recast as licence conditions, this clause is based on SIA s.95.

2681. It is a condition of a dealer's licence held by, or held by a partner of, a member organisation (see cl.9) of a stock exchange that the member organisation lodge and maintain a deposit with a nominated stock exchange (sub-cl.889(1) and (2)). It is also a licence condition that a licensee member organisation or partnership comprising a licensed partner that becomes a member of more than one exchange, or ceases to be a member of a particular exchange (but remains a member of 2 or more exchanges), must inform each relevant stock exchange where the deposit is to be lodged (sub-cl.889(3)).

2682. This deposit is payable out of moneys in a trust account (sub-cl.889(5)). Money lodged as a deposit from a trust account continues to be money in that trust account even though it is lodged (sub-cl.889(6)).

2683. A contravention of a condition under sub-cl.889(2) is to be disregarded if it was attributable to the making of a payment out of the trust account authorised by paras. 869(1)(a), (c), (d) or (e) that would not have been able to be made if the obligation under sub-cl.889(2) had been met.

Cl.890 : Deposit to be proportion of trust account balance

2684. Except to the extent that the obligations are recast as licence conditions, this clause is based on SIA s.96.

2685. It is a licence condition that the deposit required to be lodged under cl.889 be two-thirds of the lowest balance in the trust account during the three months period ending on the previous quarter day (defined in cl.9) or such lesser proportion as is prescribed (sub-cl.889(1)). Where there are two or more trust accounts, the amount of deposit will be determined on the basis of the total of the balances (sub-cl.889(1)). No deposit will have to be lodged where the amount is less than \$3,000 (sub-cl.889(2)).

2686. It is also a licence condition that where a licensee member organisation, or partnership (a partner of which is licensed) is required to increase the amount lodged with an exchange, it must lodge the additional amount within 5 trading days of that stock exchange after the relevant quarter day (sub-cl.890(3)).

Cl.891 : Deposits to be invested by stock exchange

2687. This clause is based on SIA s.97.

2688. It sets out what a stock exchange is to do when it receives a deposit under cl.889. A brief outline is as follows:

- (a) Deposits received by a stock exchange must be held on trust for the person lodging it and must be invested:
- (i) on interest-bearing term deposit with an Australian bank; or
 - (ii) on deposit with an eligible money market dealer (defined in cl.9).
- (sub-cl.891(1)).
- (b) Interest received from deposits must be paid into the National Guarantee Fund in the case of participating exchanges (defined in cl.761) and into the exchange's fidelity fund in the case of other exchanges (sub-cl.891(2) and (3)).
- (c) The amount deposited with the stock exchange under cl.889 will be repayable by it on demand (sub-cl.891(4)) but this will not affect a condition existing under cl.889 (sub-cl.891(5)). It is a licence condition that the amount repaid by a stock exchange (under sub-cl.891(4)) must be paid into a trust account maintained under cl. 866 (sub-cl.891(6)).
- (d) The National Guarantee Fund and the fidelity fund of a stock exchange will guarantee repayment of a deposit (sub-cl.891(7) and (8)).

Cl.892 : Accounts in respect of deposits

2689. This clause is based on SIA s.98.

2690. A stock exchange must establish and keep proper accounts of all deposits received under this Part and is required, within 1 month after each quarter day, to cause a balance-sheet to be made out as at that day (sub-cl.892(1)).

2691. Accounts must be audited by a registered company auditor (sub-cl.892(2)) who must give a report on the accounts and balance sheet to the board of the stock exchange within one month after the balance sheet is made out (sub-cl.892(3)). A stock exchange must give the ASC a copy of each report and of the balance sheet to which it relates within 14 days after the report has been given to the board (sub-cl.892(4)).

Cl.893 : Claims not affected by this Part

2692. This clause is based on SIA s.99.

2693. No claims or liens of a member of a stock exchange or rights of other persons are affected by anything done under this Part.

PART 7.9 - FIDELITY FUNDS

2694. Part 7.9 of this Chapter (cls.894-919) deals with conduct of the fidelity funds required to be kept by exchanges which are not participating in the Securities Exchange Guarantee Corporation (see Part 7.10).

Cl.894 : Interpretation

2695. This clause is based on SIA s.99A.

2696. This defines "participating exchange" as either a participating exchange under Part 7.10 i.e. an eligible exchange which is a member of the Securities Exchange Guarantee Corporation (see sub-cl.925(1)) or an Exchange subsidiary (a subsidiary of ASX Ltd).

Cl.895 : Fidelity funds

2697. This clause is to the same effect as SIA s.100 with the addition of a transition provision (sub-cl.895(3)).

2698. A securities exchange, other than a "participating exchange", must keep a fidelity fund which is administered by its board (sub-cl.895(1)). The assets of the fund will be the property of the securities exchange, but must be kept separately from other property and must be held in trust for the purposes of this Part (sub-cl.895(2)).

Cl.896 : Money constituting fidelity fund

2699. This clause is based on SIA s.101.

2700. The fidelity fund will consist of:

- (a) any amount paid to the credit of the fund by the securities exchange on its establishment;

- (b) moneys paid to the exchange under sub-cl.902(5) and 904(5));
- (c) the interest on moneys invested by the exchange under Part 7.8;
- (d) the interest and profits accruing from the investment of the fidelity fund;
- (e) moneys paid into the fund by the exchange;
- (f) moneys recovered by or on behalf of the exchange in the exercise of a right of action conferred by the Part;
- (g) moneys paid by an insurer pursuant to an insurance or indemnity contract entered into by the securities exchange under cl.917; and
- (h) all other moneys lawfully paid into the fund.

Cl.897 : Fund to be kept in separate bank account

2701. This clause is based on SIA s.102 but now requires that fidelity fund money be kept in a separate bank account in an Australian bank (until invested or applied).

Cl.898 : Payments out of fund

2702. This clause is based on SIA s.103.

2703. The following payments will be payable out of the fidelity fund in such order as the board determines:

- (a) claims allowed by the board or established against the securities exchange under this Part;

- (b) legal and other expenses incurred in investigating or defending claims or in the exercise by the securities exchange or board of rights, powers and authorities under this Part;
- (c) premiums payable in respect of insurance or indemnity contracts entered into under cl. 917;
- (d) expenses incurred in administering the fund, including wages and salaries; and
- (e) all other money payable out of the fund in accordance with the Part.

Cl.899 : Payment to the credit of the fidelity fund of a futures exchange or futures association

2704. This clause is based on SIA s.103A except that the Minister has the power previously held by the Ministerial Council, and a transitional provision has been inserted (sub-cl.899(2)).

2705. The Minister may approve a payment from a fidelity fund kept under this Part to the fidelity fund of a securities exchange or related body corporate that becomes a futures exchange or futures association (sub-cl.899(1)).

2706. Any approval given by the Ministerial Council under the corresponding SIA s.103 is deemed to be an approval given by the Minister under this Part (sub-cl.899(2)).

Cl.900 : Accounts of Fund

2707. This clause is to the same effect as SIA s.104.

2708. A securities exchange must establish and keep proper accounts of its fidelity fund and prepare a balance sheet (sub-cl.900(1)).

2709. It must appoint a registered company auditor (sub-cl.900(2)) who is to audit the accounts and give a report and balance sheet to the board of the securities exchange not later than one month after the balance sheet is made out (sub-cl.900(3)). The securities exchange must give the ASC a copy of the report and balance sheet within 14 days of receipt (sub-cl.900(4)).

Cl.901 : Management sub-committee

2710. This clause is based on SIA s.105 to which has been added transitional provisions (sub-cl.901(6) and (7)).

2711. The board of a securities exchange may, by resolution, appoint a management sub-committee of not more than 5 nor less than 3 members one of whom is a member of the board (sub-cl.901(1)).

2712. Other provisions relating to this management sub-committee are as follows:

- (a) The securities exchange board will be able to delegate its powers etc under Part 7.9 other than:
- this power of delegation;
 - cl.904 (imposition of a levy)';
 - sub-cl.907(8), (10) or (11) (payment out of fund of amounts in excess of those authorised by cl. 907); or
 - cl.909 (recompense of an innocent partner).
- (sub-cl.901(2)).
- (b) A delegation by the board of a securities exchange will be able to be varied or revoked at any time by resolution of the board (sub-cl.901(4)).

- (c) The board may, by resolution, remove a member or fill a vacancy in a sub-committee appointed by it (sub-cl.901(5)).
- (d) Any existing management sub-committees remain in existence and their delegated powers continue (sub-cl.901(6) and (7)).

Cl.902 : Contributions to fund

2713. With the exception of sub-cl.902(3)-(6), this clause is based on SIA s.106.

2714. A person must not be admitted to membership of a securities exchange (or to partnership in a member firm) unless he has paid a contribution to the fidelity fund (sub-cl.902(1)). An annual fidelity fund contribution must also be made on or before 31 March each year (sub-cl.902(2)).

2715. Such fidelity fund contributions are payable to the Secretary of the Department on behalf of the Commonwealth (sub-cl.902(3)) who pays it into the Consolidated Revenue Fund and an equivalent amount is then appropriated out of the Consolidated Revenue Fund to the securities exchange (sub-cl.902(4)). On receipt of this amount the exchange must pay it into the fidelity fund (sub-cl.902(5)). A person is not liable to pay any contribution under this Part unless the obligation is imposed by an Act other than this Bill (cl.902(6) and see cl.919). In this regard see the explanatory memoranda below relating to the Securities Exchanges (Membership) Fidelity Funds Contribution Bill 1988 and the Securities Exchanges (Application for Membership) Fidelity Funds Contribution Bill 1988.

Cl.903 : Provisions where fund exceeds \$2,000,000

2716. This clause is to the same effect as SIA s.107.

2717. This clause deals with the situation where the amount in a fidelity fund exceeds \$2,000,000 or such lesser amount as is prescribed.

2718. A brief outline of the provisions is as follows:

- (a) Where the amount in a fidelity fund exceeds \$2,000,000 (or a prescribed lesser amount):
 - (i) a natural member who, or a corporate member which, has made 20 or more annual contributions and in respect of whom a payment from the fund has not been made (or if made has been repaid) will not be required to make further contributions (sub-cl.903(1) and (2));
 - (ii) if a body corporate or natural person ceases to be a securities exchange member, the board may pay it or him (or his personal representative or his dependents) all or part of its total annual contributions, either with or without interest (sub-cl.903(3)-(5)).
- (b) The securities exchange will be able to suspend the operation of paras. 903(3)(a) or (b) (but not both) by notice in the Gazette, or revoke the suspension (sub-cl.903(7)).
- (c) The board will be able to require a member referred to in sub-cl.903(2) to recommence annual contributions if the fund is less than \$1,000,000 or a prescribed lesser amount and such a member will be liable to contribute accordingly (sub-cl.903(8)).

Cl.904 : Levy in addition to annual contributions

2719. With the exception of sub-cl.904(3) to (6) this clause is based on SIA s.108.

2720. A securities exchange will be able to determine that a levy be paid by each contributor if the fidelity fund is insufficient to pay all amounts required to be paid under cl.898. Such a levy is payable by each member (sub-cl.904(1)). A person will not be required to pay more than \$5,000 in total or more than \$1,000 in any 12 month period (sub-cl.904(2)).

2721. Such a levy is payable to the Secretary of the Department on behalf of the Commonwealth in the prescribed period and manner (sub-cl.904(3)) who pays it into the Consolidated Revenue Fund and an equivalent amount is then appropriated out of that fund to the exchange (sub-cl.904(4)). On receipt of this amount the exchange must pay it into the fidelity fund. A person is not liable to pay such a levy unless the obligation is imposed by another Act (cl.904(6) and see cl.919). In this regard, see the explanatory memorandum below relating to the Securities Exchanges Fidelity Funds Levy Bill 1988.

Cl.905 : Power of securities exchange to make advances to fund

2722. This clause is to the same effect as SIA s.109.

2723. A securities exchange will be able to give or advance money to its fidelity fund (sub-cl.905(1)) which may be repaid at any time (sub-cl.905(2)).

Cl.906 : Investment of fund

2724. This clause is to the same effect SIA s.110.

2725. Money in a fidelity fund not immediately required may be invested in any manner in which trust funds may lawfully be invested or on deposit with an eligible money market dealer (see cl.9).

Cl.907 : Application of fund

2726. This clause is to the same effect as SIA s.111 with the insertion of a transitional provision (sub-cl.907(9)).

2727. This clause deals with the payment of moneys out of the fidelity fund where a person has suffered pecuniary loss because of defalcation or fraudulent misuse of securities etc.

2728. A brief outline of cl.907 is as follows:

- (a) The fund will be applied to compensate persons who suffer loss, whether before or after the commencement of this Part, because of defalcation or fraudulent misuse of money, securities or documents of title to securities by a member of the securities exchange who, when the loss is suffered, is a sole trader or partner in a member firm who is liable to contribute to the fidelity fund, or an employee of that sole trader or firm, again whether before or after the commencement of this Part (sub-cl.907(1)).
- (b) If there is no right to compensation under sub-cl.907(1) a payment from the fund will be able to be made to an official receiver or trustee in bankruptcy. The amount of such a payment will be limited to the amount the official receiver or trustee certifies is required to make up or reduce the deficiency in the bankrupt member's estate to satisfy debts arising from dealing in securities (sub-cl.907(2)).
- (c) This provision for payment where the defaulter is bankrupt will also apply where a member or a partner in a member firm of a stock exchange has made a composition with his creditors or has executed a deed of assignment or deed of arrangement under Part X of the Bankruptcy Act (sub-cl.907(3) and (4)).

- (d) The fidelity fund will be able to be applied to pay a liquidator of a corporate member that is being wound up. The amount of such a payment will be limited to the amount that the liquidator certifies is required to make up or reduce the deficiency arising by reason of the available assets being insufficient to satisfy proved debts arising from dealings in securities (sub-cl.907(5)).
- (e) The total liability of a stock exchange in relation to the defalcations etc of one member or one firm is \$500,000 (sub-cl.907(6)).
- (f) The stock exchange will be able to increase the amount of this total liability by notice in the Gazette (sub-cl.907(8)). Existing notices will continue in force (sub-cl.907(9)). This notice may be revoked or varied (sub-cl.907(10)).
- (g) The exchange will also be able to apply out of the fidelity fund such sums in excess of the amount limited by this clause as it thinks fit in the compensation of persons who have suffered loss, or in payment to a trustee or official receiver (sub-cl.907(11)).
- (h) Where money, securities, documents of title to securities or other property have been entrusted to or received by a former member of a securities exchange or his employee who defalcated or fraudulently misused them and the person who entrusted them had reasonable grounds for believing (and did believe) that the former member was a member of the securities exchange and subsequently

suffered loss, then the reference in this clause to a member of a stock exchange includes a reference to that former member (sub-cl.907(12)).

Cl.908 : Claims against the fund

2729. This clause is to the same effect as SIA s.112 with the addition of a transitional provision.

2730. A person who suffers pecuniary loss whether before or after commencement of the Part will be entitled to claim compensation from the fidelity fund and to take Court proceedings to establish his claim (sub-cl.908(1)).

2731. Other provisions of cl.908 are as follows:

(a) A person will not have a claim against the fund if:

(i) the pecuniary loss was suffered before 1 July 1981 or when the securities exchange was a participating exchange i.e. a member of the Securities Exchanges Guarantee Corporation (see cl.9); or

(ii) the pecuniary loss was suffered after the money or property had, in due course of administration of a trust, ceased to be under the sole control of a member or partner in a member firm.

(sub-cl.908(2)).

(b) The claimant will be able to claim the actual pecuniary loss suffered by him including the reasonable costs in making and proving his claim less any benefit received by him from any other source in reduction of the loss (sub-cl.908(3)).

- (c) Interest will be payable on the amount of the compensation at the rate of 5% per annum or such rate as is prescribed (sub-cl.908(4)).
- (d) Claims outstanding at the commencement of this Part will be deemed to have been made under this section (sub-cl.908(5)).

Cl.909 : Rights of innocent partner in relation to fund

2732. This clause is to the same effect as SIA s.113.

2733. An innocent partner who has made payments to persons who have suffered loss will be able to make a claim against the fidelity fund in certain circumstances.

2734. A brief outline of cl.909 is as follows:

- (a) Where all claimants have been fully compensated for loss suffered in relation to money or other property entrusted to or received by a partner in a member firm, any other partner in that firm who has made a payment to a person in relation to that compensation will be subrogated to the rights and remedies of that person against the fund. This will occur only if the board determines that the partner was in no way a party to the loss and acted honestly and reasonably in the matter (sub-cl.909(1)).
- (b) A partner aggrieved by the board's decision may appeal to the Court within 28 days. The partner must also lodge a copy of the appeal notice with the securities exchange (sub-cl.909(2) and (3)).
- (c) The Court is not limited in its powers of inquiry and will be able, if it is of the relevant opinion, to direct that the partner be subrogated to the rights and remedies against the fund of the person to whom he made the payment (sub-cl.909(4) and (5)).

Cl.910 : Notice calling for claims against fund

2735. This clause is to the same effect as SIA s.114 with the insertion of a transitional provision.

2736. A brief outline of cl.910 is as follows:

- (a) A securities exchange will be able to publish in a daily newspaper a notice specifying a date (not earlier than 3 months after the date of the notice) by which compensation claims must be made (sub-cl.910(1)).
- (b) A claim must be made in writing before the specified date or, where there is no notice, within 6 months of the claimant becoming aware of the loss; other claims are barred unless the securities exchange determines otherwise (sub-cl.910(2)).
- (c) The exchange, a member or employee has qualified privilege (see cl.9) in respect of a notice published under sub-cl.910(1) (sub-cl.910(3)).
- (d) Notices already published will be deemed to have been made under this clause (sub-cl.910(4)).

Cl.911 : Power of board to settle claims

2737. This clause is to the same effect as SIA s.115.

2738. This clause sets out the procedure for the settlement of claims for compensation by the board of the securities exchange.

2739. A brief outline is as follows:

- (a) The exchange board will be able to allow and settle a compensation claim against the fund (sub-cl.911(1)).
- (b) A claimant is barred from commencing proceedings against a securities exchange without leave of the board unless his claim has been disallowed and he has exhausted other remedies (sub-cl.911(2)). A person refused leave may apply to the Court for leave to commence proceedings (sub-cl.911(3)).
- (c) Notice of disallowance of a claim must be served on the claimant (sub-cl.911(4)), and proceedings against the securities exchange must be commenced within 3 months of this notice (sub-cl.911(5)).
- (d) The admissibility of certain evidence is dealt with in sub-cl.911(6).
- (e) The board or the Court will be able to allow a claim if satisfied there was defalcation or fraudulent misuse even though the person against whom the allegation is made was not convicted or prosecuted or the evidence would not be sufficient to establish the guilt of that person on a criminal trial (sub-cl.911(7)).

Cl.912 : Form of order of Court establishing claim

2740. This clause is to the same effect as SIA s.116.

2741. Where the Court is satisfied that there was a defalcation or fraudulent misuse of property and the claimant has a valid claim it will be able, by order, to declare this and the date it occurred and to direct the board to allow that claim (sub-cl.912(1)). Costs are at the Court's discretion (sub-cl.912(2)).

Cl.913 : Power of securities exchange to require production of securities

2742. This clause is to the same effect as SIA s.117.

2743. The securities exchange will be able to require any person to produce any securities, documents or statements of evidence necessary to support a claim, to enable criminal proceedings to be taken or to enable the exchange to exercise its rights against a member or partner in a member firm. In default of delivery, the board may disallow the claim.

Cl.914 : Subrogation of securities exchange to rights etc. of claimant on payment from fund

2744. This clause is to the same effect as SIA s.118.

2745. The securities exchange will be deemed to be subrogated to the rights and remedies of a claimant on payment being made out of the fund.

Cl.915 : Payment of claims only from fund

2746. This clause is to the same effect as SIA s.119.

2747. Money or other property of the securities exchange, other than the fidelity fund, will not be available for the payment of a claim under this Part.

Cl.916 : Provision where fund insufficient to meet claims or where claims exceed total amount payable

2748. This clause is to the same effect as SIA s.120.

2749. Where the amount of the fund is insufficient to satisfy all claims allowed, the amount of the fund will be apportioned among the claimants in such manner as the board thinks

equitable and the remaining unpaid amount will be a charge against future receipts to be paid when available (sub-cl.916(1)). Where, however, the total of claims in respect of a sole trader or member firm's defalcation or fraud exceeds \$500,000 (the maximum amount under sub-cl.907(6)), the total amount will be apportioned among the claimants and after this apportionment all such claims are discharged (sub-cl.916(2)).

Cl.917 : Power of securities exchange to enter into contracts of insurance or indemnity

2750. This clause is to the same effect as SIA s.121.

2751. A securities exchange will be able to insure itself against liability in respect of claims under this Part (sub-cl.917(1)).

2752. Premiums payable in respect of contracts of insurance or indemnity entered into by the securities exchange under cl.917 may be paid out of the fidelity fund (see para.898(c)).

2753. The exchange, its members and employees and the board and its members have qualified privilege (see cl.89) for publication of a statement that the insurance contract doesn't apply to a particular member (sub-cl.917(3)).

Cl.918 : Application of insurance money

2754. This clause is to the same effect as SIA s.122.

2755. A claimant against a fidelity fund has no right of action against a person with whom a contract of insurance is taken out in respect of the contract or any money paid by the insurer under such a contract.

Cl.919 : Contributions and levies not payable unless imposed
by another Act

2756. A contribution under cl.902 or levy under cl.904 does not impose a liability on a person unless they are imposed by a separate Act. In this regard, see the explanatory memoranda below dealing with those separate Acts.

PART 7.10 - THE NATIONAL GUARANTEE FUND

2757. Part 7.10 has provisions giving protection to clients of members of participating exchanges when dealings are conducted with or through those members or money or other property is entrusted to them. The Part is based on SIA Part IXA with the following modifications;

- . access to the National Guarantee Fund is to be extended to cover unauthorised executions of security transfers (See Division 7). Dealers are to be permitted to execute transfers on behalf of transferors as a result of proposed changes to provisions relating to the transfer of marketable securities and marketable rights (see cl.1105) and this measure is considered necessary to properly protect the interest of transferors and transferees who may suffer loss in the possible event of transfers occurring without the owner's authority.
- . the Board of the Securities Exchanges Guarantee Corporation (SEGC) is to be able to appoint, and delegate certain functions (including the power to determine and allow a claim) to, a management sub-committee (see cl.927).
- . the SEGC may appoint a fund manager to exercise its power of investment provided the manager meets certain eligibility requirements (see sub-cl.934(3)-(5)).
- . the Board will be able to open a separate bank account for administrative expenses (see cl.931).
- . an Exchange subsidiary will be entitled to make a claim on behalf of a claimant dealer if its business rules authorise such a claim (see sub-cl.949(4)).

- . a dealer will be entitled to make one claim in relation to all sales transactions with a defaulting dealer for the net amount outstanding (see sub-cl.949(2)) and an Exchange subsidiary will be entitled to make a single claim on behalf of several selling dealers for the aggregate net amount outstanding (see sub-cl.949(4)).

- . each client will be able to make one claim against the NGF in respect of all unfulfilled obligations of a defaulting selling dealer (see sub-cl.951(2)) and one claim in respect of all unfulfilled obligations of a defaulting buying dealer (see sub-cl.952(2)).

- . a client will be able to make a claim in certain circumstances where his dealer who has entered into a transaction on his behalf has been suspended by the exchange (see cl.951).

- . the only limit on compensation for dealer insolvency will be an overall limit of 14% of the minimum amount of the Fund for the total amount paid out in respect of one dealer insolvency. The individual claim limit of \$50,000 in SIA sub-s.122W(1) has been removed (see cl.968).

Division 1 - Interpretation

2758. This Division is based on SIA Division 1 Part IXA.

Cl.920 : Interpretation

2759. This clause is based on SIA s.122AA.

2760. It inserts a number of interpretation provisions for the purposes of this Part.

2761. Some of the more important provisions are as follows:

- 'eligible exchange' means ASX Ltd, or a securities exchange other than an ASX Ltd subsidiary (see also definition of "participating exchange").
- 'minimum amount' refers to the amount which the SEGC determines, with Ministerial approval, to be the minimum amount maintained in the Fund. This will continue to be \$15 million but provision is made for this to be increased or decreased.
- 'participating exchange' is an eligible exchange that is a member of the corporation (SEGC) running the NGF.
- 'property' is defined to include money and scrip.
- 'reportable transaction' means a sale or purchase of securities quoted on an exchange that according to the exchange's business rules is to be reported to the exchange by a member organisation.
- 'settlement documents' means documents (i.e. appropriate transfer forms and certificates) sufficient to discharge the obligations of the seller under a particular transaction.

Cl.921 : Excluded persons

2762. This clause is to the same effect as SIA s.122AB.

2763. This clause identifies the categories of person who may not make a claim under cl.963 in respect of property entrusted to, or received by, a dealer which subsequently becomes insolvent or under cl.958 in respect of unauthorised transfers of securities. Sub-clause 921(2) provides that the term "relative of a person" in sub-cl.921(1) includes a relative of

the spouse of the person. Ordinary employees of body corporates do not fall within the excluded person definition (sub-cl.921(3)).

Cl.922 : Becoming insolvent

2764. This clause is to the same effect as SIA s.122AC and sets out the circumstances in which a corporation (sub-cl.922(1)), a body corporate other than a corporation (sub-cl.922(2)) and a natural person (sub-cl.922(3)) will be taken to be insolvent for the purposes of Part 7.10. The situation where a dealer becomes insolvent triggers the right to a claim under cl.963.

Cl.923 : Permitted investments

2765. This clause is to the same effect as SIA s.122AD.

2766. Money in the NGF or in a development account (under Division 5) not immediately required for the purposes set out will be able to be invested in a 'permitted manner'. Clause 923 defines these as investments in authorised trustee investments or deposits with an eligible money market dealer (defined in cl.9).

Cl.924 : Additional operation of certain provisions

2767. Provisions of Part 7.10 requiring the SEGC, the Board or a management sub-committee to do something or prohibiting an act require each corporation that is a member of the SEGC to ensure that this is done.

Division 2 - Securities Exchanges Guarantee Corporation (SEGC)

2768. This Division is based on SIA Division 2 Part IXA.

Cl.925 : Minister to nominate

2769. Subject to the addition of a transitional provision (sub-cl.925(4)), this clause is based on SIA 122BA.

2770. The Minister is empowered to nominate a company limited by guarantee as the Securities Exchanges Guarantee Corporation (SEGC). SEGC is responsible for the operation of the NGF. Included in the criteria for nomination are the ability of the body corporate to perform its functions under the Fund provisions having regard to the interests of the public, the sufficiency of indemnity insurance and the suitability of the business rules in respect of ensuring safety of property and protection of the interests of the public. Membership of the corporation is to be limited to the ASX Ltd and any other eligible exchanges (sub-cl.925(3)).

2771. The National Securities Exchanges Guarantee Corporation Ltd, which had been nominated as the SEGC by the Ministerial Council under the corresponding section of the co-operative scheme, will be deemed to have been nominated as the SEGC by the Minister under this clause (sub-cl.925(4)).

Cl.926 : Functions and powers under Fund provisions

2772. This clause is based on SIA 122BB.

2773. The SEGC has, in addition to general corporate powers and capacities, functions and powers conferred on it by Part 7.10 (sub-cl.926(1)).

2774. The provision in cl.162 which provides that a company can restrict or prohibit certain exercises of power by the company will not apply to the above mentioned functions and powers (sub-cl.926(2)).

Cl.927 : Management sub-committee

2775. This provision represents a reform to the SIA Part IXA provisions that will enable the Board which is to administer the National Guarantee Fund on behalf of SEGC (see cl.927) to appoint, and to delegate the majority of its functions under Part 7.10 (including the power to determine and allow a claim) to, a management sub-committee in much the same way as can a committee of a securities exchange (other than the ASX) under cl.901. The sub-committee must consist of between 3 and 5 persons, one of whom is a member of the Board (sub-cl.927(1)). The only powers, authorities and discretions not allowed to be delegated are:

- . the power of sub-delegation under the section.
- . determinations as to payments into a participating exchange's securities industry development account under cl.s.944.
- . determinations that claims are not time-barred under sub-cl.s.s.954(5) and s.969(3)

(sub-cl.927(2)).

2776. A delegation by the Board under this clause can be varied or revoked by it (sub-cl.927(4)) and a member appointed by it can be replaced by it (sub-cl.927(5)).

Cl.928 : Commission to be notified of amendments to business rules

2777. Subject to the addition of a transitional provision, this clause is based on SIA s.122BC.

2778. Where an amendment is made to the business rules of SEGC, it must, as soon as practicable, give notice of it

including its text, date and purpose to the ASC (sub-cl.928(1) and (2)). If that notice is not given within 21 days after the amendment is made, the amendment ceases to have effect (sub-cl.928(3)). The ASC will then be required to notify the Minister who may, within 28 days, disallow the amendment. Where the Minister disallows an amendment, the ASC is required to notify the SEGC and the disallowance takes effect upon that notification (sub-cl.928(6)). Where an amendment notified to the NCSC under SIA sub-s.122BC(1) has not been disallowed and the 28 days under SIA sub-s.122BC(5) has not elapsed as at the commencement of this Act, the amendment will be treated as if it had been made on commencement day (sub-cl.928(7)).

Division 3 - The National Guarantee Fund

2779. This Division is based on SIA Division 3 Part IXA.

Cl.929 : Establishment

2780. Subject to the addition of a transitional provision, this clause is based on SIA s.122CA.

2781. SEGC will establish and maintain the NGF which will be administered by the Board on behalf of SEGC (sub-cl.929(1)). Although the assets of the NGF will be the property of SEGC, it will only be able to use the NGF for the purposes set out in this legislation and not mingle it with its own property or operating funds (sub-cl.929(2)). Assets will include assets of the previous Fund under SIA, Part IXA (sub-cl.929(3)).

Cl.930 : Property constituting Fund

2782. This clause is based on SIA s.122CB.

2783. The NGF will consist of money from a number of sources referred to in cl.930 including the money and property before commencement that formed part of the previous Fund under Part IXA SIA (para.930(a)).

Cl.931 : Fund to be kept in separate bank account

2784. This clause is partly based on SIA s.122CC.

2785. Money in the existing NGF is currently required to be kept in one separate Australian bank account. As a means of improving the efficiency in administering the NGF the the Board will be given the discretion of establishing a second account that could be used, for example, for the payment of day to day administrative expenses associated with the NGF's operation.

Cl.932 : Payments out of Fund

2786. This clause is to the same effect as SIA s.122CD.

2787. SEGC will only be permitted to use the NGF for the purposes set out in Part 7.10. Sub-clause 932(1) specifies the types of payments that may be made out of the Fund.

2788. Payments in respect of contract guarantees and unauthorised security transfers will have priority over payments in respect of a member's insolvency regardless of the order in which claims are made (sub-cl.932(3)).

Cl.s.933 : Accounts of Fund

2789. Subject to the insertion of an appropriate transitional provision, this clause is based on SIA s.122DA.

2790. As the body responsible for the NGF, SEGC will be required to keep proper accounts of the NGF and make out an annual balance sheet of those accounts, to appoint an auditor to audit those accounts and to give to the ASC and participating exchanges a copy of the auditor's report.

2791. A person appointed as an auditor under the corresponding provision of SIA Part IXA whose appointment is current at

commencement of this Act is deemed to have been appointed under this clause (sub-cl.933(6)).

Cl.934 : Investment of Fund

2792. This clause is partly based on SIA s.122DB.

2793. SEGC is able to invest money in the NGF which, in the Board's opinion, is not immediately required for its purposes, in a "permitted manner" (see cl.923 above). A new provision will enable the Board, with ASC's approval, to appoint a professional fund manager to exercise its power of investment (sub-cl.934(3)). Before granting approval, the ASC must be satisfied that a proposed appointee has appropriate qualifications and adequate indemnity insurance (sub-cl.934(4)). An appointed fund manager will be required to act in accordance with the Board's directions and subject to any conditions imposed by the Board (sub-cl.934(5)).

Cl.935 : Interest and profits from investment of Fund

2794. This clause is to the same effect as SIA s.122DC.

2795. Moneys earned from investment of the NGF must be applied by SEGC to pay administration expenses of the NGF and premiums payable in respect of contracts of insurance or indemnity. Any excess must be paid into the NGF.

Cl.936 : Minimum amount of Fund

2796. This clause is based on SIA s.122DD.

2797. SEGC will be empowered, subject to ministerial approval, to determine the minimum amount of the Fund (sub-cl.936(1)). This gives SEGC the flexibility to maintain the NGF at a viable level while the Minister will retain overall responsibility for the level of the NGF.

2798. Any approval given by the Ministerial Council under the corresponding SIA provision is deemed to be an approval under this clause (sub-cl.936(2)).

Division 4 - Levies Where Fund Less Than Minimum Amount

2799. Division 4 is based on SIA Division 4 Part IXA except in relation to the procedures in respect of payment of levies imposed by SEGC where the NGF falls below the minimum. The various levies provided for in this Division will actually be imposed by separate Acts. These are identified in the relevant clauses below. Explanatory memoranda for these Bills are included at the end of this explanatory memorandum.

Cl.937 : Definition

2800. This clause is the same as SIA s.122EA and defines "dealer" as a member organisation of a participating exchange for the purposes of Division 4.

Cl.938 : Levy on reportable transactions

2801. This clause is to the same effect as SIA ss.122EB and 122EC.

2802. The NGF may fall below the minimum amount if there are large sums paid out or the minimum amount is increased under cl.936. To maintain the minimum amount, the SEGC may impose a levy on sale or purchase of securities i.e. "reportable transactions" (sub-cl.938(2)). This transaction levy is imposed at a rate and on a class or classes of transactions determined by the SEGC (sub-cl.938(3)).

2803. Where such a levy is made or varied, the SEGC must give notice to each participating exchange - defined in sub-cl.938(1) (sub-cl.938(4)). Levies can also be imposed by the SEGC on a participating exchange (see cl.940).

2804. Where a transaction levy is imposed by SEGC in respect of a reportable transaction, payment of the levy will be required to be made to a participating exchange as agent for the Commonwealth (para.938(5)(a)) which must also be supplied with transaction particulars sufficient to ascertain the amount of the levy (para.938(5)(b)). The exchange will in turn be required to pay that amount to the Secretary to the Department on behalf of the Commonwealth (sub-cl.(7)). That amount or the amount of the levy payable by member organisations of participating exchanges which is allocated to payment of the levy under this clause (see cl.940) is then paid into the Consolidated Revenue Fund. An equivalent amount is then appropriated out of that fund and paid to the SEGC which must then pay it into the Fund (sub-cl.(8), (9)). By virtue of cl.942 a person is not liable to pay such a levy unless it is imposed by a separate Act (sub-cl.(10) and see explanatory memorandum below relating to the National Guarantee Fund (Reportable Transactions) Levy Bill 1988).

Cl.939 : Revocation of levy on reportable transactions

2805. This clause is based on SIA s.122FA.

2806. Revocation of a levy imposed under cl.938(2) does not affect a liability to pay an amount of levy that became payable before the revocation.

Cl.940 : Levy on participating exchanges

2807. This clause is partly based on SIA s.122FB.

2808. SEGC may, in addition to, or instead of, a levy on reportable transactions under cl.938(2), impose a levy on a securities exchange in order to rectify a deficiency in the Fund (sub-cl.940(1)). The exchange levied must pay the levy to the Secretary to the Department on behalf of the Commonwealth (sub-cl.940(2)) and notify each participating

exchange levied the amount of the levy (sub-cl.940(3)). An exchange may borrow money to pay the levy (sub-cl.940(4)). The levy is payable into the Consolidated Revenue Fund and an equivalent amount is then appropriated to SEGC. The amount is then to be paid into the Fund (sub-cl.940(6)).

2809. By virtue of cl.942 an exchange is not liable to pay such a levy unless it is imposed by a separate Act (sub-cl.940(7)) and see explanatory memorandum below relating to the National Guarantee Fund (Participating Exchanges) Levy Bill 1988).

Cl.941 : Levy by participating exchange on members or member organisations

2810. This clause is partly based on SIA s.122FC.

2811. Where a levy is imposed on a participating exchange under cl.940, it will be able to raise the levy by imposing a levy on members or member organisations (sub-cl.941(1)). Such a levy is payable by a member who, at the time of the levy, is a dealer in securities and within a particular class of members subject to the levy (sub-cl.941(2)). Different rates may apply to different classes of members and payment is to be made to the Secretary of the Department on behalf of the Commonwealth within the period and in the manner specified by the participating exchange (sub-cl.941(3)). The amount is payable into the Consolidated Revenue Fund and the Secretary will apply that amount towards payment of the levy under cl.940. If there is an excess after that application that excess is paid to SEGC (sub-cl.941(4)). The SEGC must then pay it into the Fund (sub-cl.941(5)). Again by virtue of cl.942, a member is not liable to pay such a levy unless it is imposed by a separate Act (sub-cl.941(6) and see explanatory memorandum below relating to the National Guarantee Fund (Members of Participating Exchanges) Levy Bill 1988).

Cl.942 : Levies not payable unless imposed by another Act

2812. Clauses 938, 940 and 941 do not impose a liability on any person to pay a levy unless the levy is imposed by a separate Act. In this regard see explanatory memoranda below dealing with those separate Acts.

Division 5 - Securities Industry Development Accounts

2813. This Division is based on SIA Division 5 Part IXA.

Cl.943 : Interpretation

2814. This clause is based on SIA s.122GA and defines "development account" as an account kept for the purposes of sub-cl.945(1).

Cl.944 : Payments where Fund exceeds minimum amount

2815. This clause is based on SIA s.122GB.

2816. If at any time the amount in the NGF exceeds the minimum amount, the Board will have the discretion to distribute the excess in part or in full to the participating exchanges for industry development purposes. Where an apportionment of the excess is made between participating exchanges or where the Board decides to pay it to only one exchange, it must be fair and equitable having regard to contributions made by, and amounts paid out in respect of, particular exchanges. This, however, is not intended to require payments to be strictly in proportion to contributions or pay-outs made i.e. flexibility is necessary to allow the SEGC to operate efficiently.

Cl.945 : Payments into and out of development account

2817. This clause is based on SIA s.122GC.

2818. The funds distributed to the exchanges under cl.944 are to be kept in a separate account and shall only be applied towards Australian securities industry development purposes approved by the Minister. Such approval may be subject to conditions (sub-cl.945(4)). Where a participating exchange pays out for other than approved purposes or fails to comply with a condition of the approval, it is required to reimburse the development account from its own funds (sub-cl.945(5) and (6)).

Cl.946 : Investment

2819. This clause is the same as SIA s.122GD.

2820. Money in development accounts not immediately required for development purposes can be invested in a 'permitted manner' (defined in cl.923). Interests and profits from such investments must be paid into the development account.

Cl.947 : Accounts

2821. This clause is based on SIA s.122GE.

2822. A participating exchange will be required to lodge with the ASC an annual statement in respect of expenditure from its development account.

Division 6 - Contract Guarantees

2823. This Division is based on SIA Division 6 Part IXA.

Cl.948 : Definitions

2824. This clause is based on SIA s.122H.

2825. The more important definitions are:

- 'completion period' is the period contained in the business rules of a participating exchange, or, if there is no period specified in the business rules, a reasonable period, within which a transaction between dealers should be completed. The expiration of this period is used in cls.949 and 950 to designate the time at which claims may be made.
- 'dealer' means a person who, or partnership that, is or has been a member organisation of a participating exchange.
- 'prescribed period' is the period contained in the business rules of a participating exchange, or, if there is no period specified in the business rules, a reasonable period, within which a dealer must fully settle with its client in respect of a transaction. The expiration of this period is used in cls.951 and 952 to designate the time at which claims by a client may be made.
- 'purchase price' means the cost of purchasing securities and any other fees, charges and taxes payable by the purchaser.
- 'reportable transaction' means a transaction defined in sub-cl.920(1) which relates to "eligible securities" (see cl.9).

Cl.949 : Claim by selling dealer in respect of default by buying dealer

2826. Subject to the modifications outlined below, this clause is to the same effect as SIA s.122J.

2827. Where, at the end of the 'completion period', a buying dealer has not fulfilled his obligations in respect of settlement of the transaction in securities (i.e. supplied the consideration) and the selling dealer has fulfilled his obligations (i.e. supplied settlement documents) or is in an immediate position to do so in relation to that transaction, the selling dealer is able to make a claim against SEGC (sub-cl.s.949(1)).

2828. Provisions additional to those contained in SIA s.122J will enable a dealer to make a single claim in respect of a number of sales (sub-cl.949(2)). In addition, an Exchange subsidiary will be able to make a claim on behalf of a claimant dealer and a single claim will be sufficient where the Exchange subsidiary is entitled to make claims in respect of a number of dealers (sub-cl.s.949(3) and (4)).

2829. Where the SEGC is satisfied that sub-cl.s.949(1) and (3) found a claim, that the claim is in respect of "eligible securities" and that the claimant has supplied settlement documents to it (or has already supplied them to the buying dealer), it will be required to pay the claimant, out of the Fund, the amount of the consideration due (sub-cl.949(5)).

2830. In this way cl.949 provides a contract guarantee to a selling dealer (as does cl.950 to a buying dealer) that SEGC will complete the defaulting dealer's obligations in the transactions.

Cl.950 : Claim by buying dealer in respect of default by selling dealer

2831. Subject to it only applying in respect of "eligible securities", this clause is to the same effect as SIA s.122K.

2832. In the same way that cl.949 provides a contract guarantee to selling dealers, cl.950 provides a contract guarantee to buying dealers in respect of a selling dealer's

failure to meet his settlement obligations (i.e. to provide settlement documents) in respect of "eligible securities" (see cl.9) within the completion period.

2833. Where a successful claim is made by the buying dealer, SEGC will be able to either supply settlement documents to the dealer or supply a cash equivalent if settlement documents are unobtainable (see cl.953).

Cl.951 : Claim by selling client in respect of default by selling dealer

2834. Subject to the modifications outlined below, this clause is to the same effect as SIA s.122L.

2835. This clause and cl.952 represent the other category of contract guarantees provided by Division 6. Where the client of the selling dealer has completed (or is willing to complete) his obligations in respect of a transaction in relation to "eligible securities" (see cl.9) entered into on his behalf by the selling dealer and the selling dealer has not, within the 'prescribed period' supplied to the client the consideration received for the sale or has not dealt with that consideration in accordance with the client's instructions, the client may claim against the SEGC.

2836. A provision (sub-para.951(1)(a)(ii)) additional to that contained in SIA s.122L has been inserted to allow a claim by a client of a suspended selling dealer where the dealer (before suspension) entered into a reportable transaction on behalf of the client and the client has supplied, or is ready willing and able to supply, the scrip to the dealer.

2837. In addition, a person will be able to make a single claim in respect of multiple sales by the selling dealer but each sale will be treated separately by the Board when deciding whether to allow or disallow payment to the claimant

(sub-cl.951(2)). Where SEGC is satisfied that the claimant is entitled to claim and the claimant has supplied the scrip to the dealer or to SEGC, it will be required to pay the claimant the consideration less any unpaid brokerage or other charges (sub-cl.951(3)).

Cl.952 : Claim by buying client in respect of default by buying dealer

2838. Subject to the modifications outlined below, this clause is to the same effect as SIA s.122M.

2839. In the same way that cl.951 provides a guarantee to selling clients in respect of failure by the selling dealer to meet his obligations, cl.952 provides a guarantee to a buying client where the buying dealer fails, within the 'prescribed period' (cl.948) to meet his obligations to the client in respect of a purchase on the client's behalf of "eligible securities" (see cl.9) i.e. where the dealer has not obtained the settlement documents or has obtained them but dealt with them otherwise than in accordance with instructions.

2840. A provision (sub-para.952(1)(a)(ii)) additional to that contained in SIA s.122M has been inserted to allow a claim by a client of a suspended buying dealer in respect of a purchase transaction entered into on the client's behalf (before suspension) where the client is ready willing and able to supply the consideration to the dealer. Another provision, (sub-cl.952(2)) additional to that contained in SIA s.122M, has been inserted to allow a person to make a single claim in respect of multiple purchases by the dealer on the client's behalf.

2841. Where SEGC is satisfied that the client is entitled to make the claim and the client has supplied the consideration to the dealer or, in the case of a suspended dealer, has supplied the consideration to the SEGC, it is required to

supply settlement documents to the client or, if those settlement documents are unobtainable, to pay cash compensation under cl.953 (sub-cl.952(3)).

Cl.953 : Cash settlement of claim where settlement documents unobtainable

2842. This clause is based on SIA s.122N.

2843. Where SEGC allows a claim made by a buying dealer or a buying client under sub-cl.950(2) or 952(3) respectively, the Board will be able to pay an amount equal to the pecuniary loss suffered by that claimant where it is not reasonably practicable for the the Board to provide settlement documents.

2844. Such a situation may arise where:

- (a) an orderly market does not exist in the relevant securities; or
- (b) a "market corner" exists in the securities (i.e. there is insufficient scrip for whatever reason to satisfy demand).

Cl.954 : Making of claims

2845. This clause is based on SIA s.122P.

2846. Claims under the contract guarantee provisions will only be available, in the case of cls.949 and 950, where both persons in the eligible securities transaction are dealers and the claimant dealer carried on a securities business (sub-cl.954(1)). In the case of cls.951 and 952, the person making the sale or purchase of eligible securities on the client's behalf must be a dealer carrying on a securities business (sub-cl.954(2)).

2847. Claims against the NGF must be in writing and, unless served on the SEGC within 6 months after the day on which the claim arises, will be barred (unless the Board determines otherwise) (sub-cl.954(4) and (5)).

Division 7 - Unauthorised Transfer

2848. This Division is additional to those contained in SIA Part IXA and deals with claims on the NGF by owners of securities or by transferees who have suffered loss arising from unauthorised execution of transfers of those securities by transferor dealers. Under changes to the transfer of marketable securities provisions of the Bill (see Division 3 Part 7.13), transferor dealers will be able to execute security transfer forms on behalf of the transferor. Access to the NGF will be available where unauthorised transfers occur.

Cl.955 : Interpretation

2849. This provision has no equivalent in SIA.

2850. Meanings are given for the terms "claim", "dealer" and "securities" for the purpose of the Division (sub-cl.955(1)). A dealer will be deemed to have executed a transfer document on behalf of a person as transferor if the transfer states that the person is transferor and the transfer is purportedly stamped by the dealer as transferor broker.

Cl.956 : Unauthorised execution of transfer of securities

2851. This provision has no equivalent in SIA.

2852. The Division will apply where a dealer executes a transfer of securities on behalf of the owner without the owner's authority i.e. without having received selling instructions from the owner.

Cl.957 : Claim by transferor

2853. This provision has no equivalent in SIA.

2854. An owner of securities who suffers loss as a result of an unauthorised execution of a transfer of those securities by a dealer will be able to make a claim against the NGF.

Cl.958 : Claim by transferee or sub-transferee

2855. The original transferee in a transfer of securities not authorised by the owner, and subsequent transferees, will be able to claim against the NGF in respect to any loss suffered as a result of the unauthorised transfer (sub-cl.958(1)). For example, because an unauthorised transfer will not be sufficient to pass title to the securities, the transferee may suffer loss as a result of rectification of the register to re-instate the true owner.

2856. Transferees will not be able to claim against the Fund where they knew the transfer was unauthorised or where they are "excluded persons" under cl.921 in relation to the dealer executing the unauthorised transfer (sub-cl.958(2)).

Cl.959 : How and when claim may be made

2857. This provision has no equivalent in SIA.

2858. Claims must be in writing and claims not served on SEGC within 6 months of the claimant first becoming aware that he suffered loss as a result of the unauthorised execution will be barred unless the Board otherwise determines.

Cl.960 : How claim is to be satisfied

2859. This provision has no equivalent in SIA.

2860. Where the Board is satisfied that the owner or a transferee is entitled to make a claim under cls.957 or 958 respectively the SEGC must allow the claim (sub-cl.960(1)). If replacement securities of the kind and number the owner originally held (or transferee subsequently held) are available and can be obtained within a reasonable time, then the SEGC will supply those securities to the claimant (para.960(2)(a)).

2861. If the SEGC is satisfied that equivalent securities cannot be purchased, then the claimant will receive an amount from SEGC representing the value of the securities as at the time the SEGC is so satisfied together with any loss as a result of failure to receive (or retain in the case of a transferee claimant) the entitlements described above (para.960(2)(b)).

2862. In addition, the SEGC will pay the claimant the amount of any pecuniary loss suffered up to the date of allowance of the claim as a result of the claimant not receiving, or being deprived of, any entitlements e.g. dividends, which would have otherwise accrued to him as registered owner (sub-cl.960(3)).

Cl.961 : Discretionary further compensation to transferor

2863. This clause provides the SEGC with a discretion to provide additional compensation to an owner of securities which have been the subject of an unauthorised "transfer", in respect of any gains (e.g. rights issues or other opportunities) the owner may have made had he remained on the register.

Division 8 - Claims In Respect Of Insolvent Members

2864. This Division is based on SIA Division 7 Part IXA.

2865. The third way in which the NGF is to be used to provide investor protection is in the event of a dealer's insolvency. Division 8 will provide for the use of the NGF to pay compensation or to purchase replacement property, including securities, to clients of a dealer (except "excluded persons" - see cl.921) who suffer loss in the event of the dealer's insolvency.

Cl.962 : Interpretation

2866. This clause is based on SIA s.122Q.

2867. Definitions of "claim", "dealer" and "member organisation" appearing in Division 8 are provided (sub-cl.962(1)). Property entrusted to a person both inside and outside Australia will be subject to the provisions (sub-cl.962(2)).

Cl.963 : Claim in respect of property entrusted to, or received by, dealer before dealer became insolvent

2868. This clause is to the same effect as SIA s.122R.

2869. A person who entrusts property to a dealer (or the specified persons connected with the dealer) in connection with the dealer's securities business may make a claim if the dealer subsequently becomes insolvent and at that time has not discharged his obligations to the person. Property is defined in sub-cl.920(1) to include money and scrip. A person who is an "excluded person" in relation to the dealer (see cl.921) is not entitled to claim (sub-cl.963(1)).

2870. Where the SEGC is satisfied that the above criteria are met the SEGC must allow the claim and pay to the claimant the money entrusted and any property involved (sub-cl.963(2)). If the property includes scrip and that particular scrip is not recoverable from the dealer, the SEGC will provide replacement scrip (sub-cl.963(3)).

Cl.964 : Cash settlement of claims where property unobtainable

2871. This clause is to the same effect as SIA s.122S.

2872. SEGC may compensate claimants by way of cash settlement where it is not reasonably practical for it to obtain the property in question (whether it be scrip or other property). Such a situation may arise in relation to scrip where an orderly market for the securities does not exist or a 'market corner' exists. The amount of the pecuniary loss in respect of which the client will receive cash compensation is assessed as at the time of the SEGC's determination to make the cash settlement.

Cl.965 : Ordering of alternative claims and prevention of double recovery

2873. This clause is based on SIA s.122T.

2874. Sub-clauses 965(1) and (2) provide that, in general, where a client is entitled to make a claim under cl.951 or cl.952 for settlement documents or the sale consideration in the event of dealer default, then no claim can be made under the insolvency provision for those documents or the consideration. This is the case unless, before the insolvency, the dealer satisfied his obligations to the client and the property was re-entrusted to the dealer.

2875. Sub-clause 965(3) addresses the potential problem of a number of partners in a member firm to which the client has entrusted property becoming insolvent at different times. In such a case the client may attempt to choose to his own advantage which insolvency he bases his claim on (e.g. if there are likely to be fewer claimants in respect of a later insolvency then there may be more money available per claimant for satisfaction of claims). Sub-clause 965(3) in effect prevents a client choosing the insolvency on which a claim is

based. It does this by providing that the SEGC will not allow a claim for property where a claim could have been made for that property on the occasion of the first insolvency i.e. if the client knew of this insolvency and it was reasonably practicable for the client to make the first claim. If, however, the first claim was disallowed or, would if made, have been disallowed, then the client is entitled to claim in respect of the later insolvency.

2876. Sub-clause 965(4) will prevent a client making more than one successful claim in respect of particular property.

Cl.966 : No claim in respect of money lent to dealer

2877. This clause is to the same effect as SIA s.122U.

2878. The loss must be suffered in respect of money, securities, documents of title to securities or other property entrusted to or received by a dealer in the course of, or in connection with, the dealer's securities business. No claim will be allowed in respect of money lent to a dealer.

Cl.967 : No claim in certain other cases

2879. This clause is to the same effect as SIA sub-s.122V(2).

2880. Claims will not be allowed if:

- (i) before the dealer's insolvency trust property had ceased to be under the dealer's sole control; or
- (ii) the claimant, in the view of the Board or the Court, materially contributed to the dealer becoming insolvent.

Cl.968 : Limits of compensation

2881. This clause is based on SIA s.122W except that the limit of \$50,000 on an individual claim has been deleted.

2882. The only limit will be that the aggregate compensation payable out of the Fund in respect of a dealer's insolvency or the insolvency on the same day of partners in a member organisation is not to exceed 14% of the prescribed minimum level of the NGF at the date that the dealer or partners become insolvent (sub-cl.968(1)).

2883. For the purpose of calculating the aggregate compensation, an amount that is paid by the SEGC shall, to the extent to which that amount is repaid to it or is recovered pursuant to the SEGC's subrogation rights under cl.980, be disregarded (sub-cl.968(2)).

2884. By imposing a statutory limitation on payments from the NGF, the possibility arises that claims may exceed the statutory maximum. This will mean that the SEGC must consider and either validate or reject all claims for compensation due to insolvency before distribution is made to the claimants. If the claim total exceeds the statutory maximum, a pro-rata distribution will be made to the claimants.

2885. In determining the pro-rata distribution, the Board will be required to take into account the fact that some claimants have received partial satisfaction of their claims from other sources (sub-cl.968(3)). The Board will be permitted to use whatever calculations are appropriate to achieve the objective of all claimants receiving similar payments of their total claim.

Cl.969 : Making of Claims

2886. This clause is to the same effect as SIA s.122X.

2887. As there is to be a maximum limit on payments from the NGF in respect of any one insolvent dealer, all claims will have to be made within a specified period to allow finalisation of a pro-rata distribution to occur within a determinable period.

2888. Claims must be made within either:

- (a) the three month limit specified by SEGC in a notice published in a daily newspaper in each State or Territory; or
- (b) if no such notice is published, six months after a person becomes aware of the dealer becoming insolvent.

2889. Claims not made within this time will be barred unless the Board determines otherwise.

2890. SEGC, its Board members and employees are to have qualified privilege (see cl.89) in respect of a notice published under this clause.

Division 9 - Claims under Divisions 6, 7 and 8

2891. This Division is based on SIA Division 7 and it deals with matters ancillary to Divisions 6, 7 and 8.

Cl.970 : Power of SEGC to allow and settle claim

2892. This clause is to the same effect as SIA s.122YA.

2893. SEGC will be entitled to allow and settle claims at any time after a person becomes entitled to make a claim.

Cl.971 : Successful claimant entitled to costs and disbursements

2894. This clause is to the same effect as SIA s.122YB.

2895. A successful claimant will be entitled to reasonable costs and disbursements incidental to the making of a claim.

Cl.972 : Interest

2896. This clause is to the same effect as SIA s.122YC.

2897. Interest at 5% per annum, or such other rate as is prescribed, is payable on the value of the claim from the day it arose until the claim is paid. Interest is not payable on costs and disbursements incidental to the claim (sub-cl.972(1)). It is also payable, at the prescribed rate, in respect of any entitlement to a claim plus interest which is not paid on the day which the entitlement accrues (sub-cl.972(2)).

Cl.973 : Application of Fund in respect of certain claims

2898. This clause is to the same effect as SIA s.122YD.

2899. SEGC will be able to purchase securities from Fund monies under those provisions where it is required to compensate claimants by the supply of securities (sub-cl.973(1)). Such securities purchased form part of the NGF until supplied to the claimant (sub-cl.973(2)). If SEGC decides to purchase securities but for some reason, such as being unable to purchase sufficient to meet the claim, a cash settlement is later made to the client, SEGC will be required to sell the securities purchased and pay the proceeds into the Fund (sub-cl.973(3)).

Cl.974 : Allowing of claim not to constitute admission

2900. This clause is to the same effect as SIA s.122YE.

2901. The allowance of a claim by SEGC will not constitute an admission by any person of any liability. This is intended to include any stockbroker master policy of professional indemnity insurance.

Cl.975 : SEGC to notify claimant where claim disallowed

2902. This clause is to the same effect as SIA s.122YF.

2903. SEGC will be required to notify a claimant of the disallowance of a claim.

Cl.976 : Proceedings in the Court

2904. This clause is to the same effect as SIA s.122YG.

2905. Within three months of notice of disallowance of a claim, a claimant may commence proceedings in the Court to establish the claim (sub-cl.976(1)). If SEGC has not allowed, or disallowed, a claim within a reasonable period, the claimant may similarly commence proceedings (sub-cl.976(2)).

Cl.977 : Arbitration of amount of cash settlement of certain claims

2906. Subject to the insertion of transitional provisions, this clause is to the same effect as SIA s.122YH.

2907. Where SEGC decides to make a cash payment to a claimant in respect of a purchase of securities and SEGC and the claimant are unable to agree to a settlement price, the matter is to be referred to arbitration (sub-cl.977(1)). The arbitration is to be conducted by a special committee of three persons appointed by participating exchanges, a majority of whom must be independent of SEGC and the participating exchanges and must be approved in writing by the Minister.

2908. Where arbitration had been commenced under SIA s.122YH but is not completed before commencement of this Bill, the arbitration shall continue as if it were under this clause. Any amount determined by an arbitration under that previous law but not paid before commencement will be paid out of the Fund by SEGC (sub-cl.977(4) and (5)).

2909. Approval of a person under the previous co-operative scheme provision as an arbitrator will be deemed to have been made by the Minister under this clause (sub-cl.977(5)).

Cl.978 : Form of order of Court establishing claim

2910. This clause is to the same effect as SIA s.122YJ.

2911. Where the Court is satisfied that a claim should be allowed it will be required to make by order, a declaration accordingly, and to direct SEGC to allow the claim. The Court is to be given a wide discretion to make such directions as it thinks just and reasonable in relation to a claim.

Cl.979 : Power of Board to require production of securities etc.

2912. This clause is to the same effect as SIA. s.122YK.

2913. As SEGC will determine any claims upon the NGF, it will be given power to require the production of documents necessary to establish a claim or to exercise its subrogation rights. This will extend to enabling criminal proceedings to be taken against a person. Failure to comply with a requirement to produce may lead to disallowance of a claim.

Cl.980 : Subrogation of SEGC to claimant's rights etc.

2914. This clause is based on SIA s.122ZA and has been extended to cover claims in respect of unauthorised execution of transfers under Division 7.

2915. Where a claim is made under Division 6, 7 or 8 and SEGC has satisfied the claim, SEGC is subrogated to the rights the claimant has against the defaulting etc. dealer (sub-cl.980(1), (2) and (3)). At the time that it satisfies a claim, the SEGC is to notify the defaulting dealer's

professional indemnity insurer, which may elect to be joined as a party to any proceedings between the SEGC and the defaulting dealer. Any judgement obtained against the defaulting dealer by the SEGC may be enforced against the insurer unless the insurer has proved that the insurance policy does not cover the factual circumstances giving rise to the judgment (sub-cl.980(4)).

Cl.981 : Payments of claims only from fund

2916. This clause is to the same effect as SIA s.122ZB.

2917. No property of the SEGC other than the NGF, will be able to be used to meet a claim allowed by the SEGC.

Cl.982 : SEGC may enter into contacts of insurance or indemnity

2918. This clause is to the same effect as SIA s.122ZC.

2919. SEGC will be able to enter into an insurance policy which may insure or indemnify the NGF against losses arising from meeting its obligations in guaranteeing performance of contracts and in meeting claims arising from a dealer's insolvency or unauthorised transfer of securities. A claimant against the NGF will not have any claims against the SEGC's insurer, nor any specific right to claim any moneys paid under the insurance policy (sub-cl.982(4)).

2920. SEGC, an exchange, a Board member or any employee of SEGC have qualified privilege (see cl.89) in respect of a statement that the insurance policy does not apply to a particular person (sub-cl.982(3)).

Cl.983 : Instalment payments

2921. This clause is to the same effect as SIA s.122ZD.

2922. Where claims against the NGF are of such magnitude that they are likely to substantially deplete the NGF, SEGC will be able to make instalment payments to claimants pending recovery of the NGF through the imposition of levies.

Division 10 - Transitional

2923. This Division is based on SIA Division 9 Part IXA with the insertion of a number of provisions necessary to ensure transition from the co-operative scheme.

Cl.984 : Definitions

2924. This clause is partly based on SIA s.122ZE.

2925. The definitions are as follows:

- 'joining day' means the day when a joining exchange became an ASX subsidiary or a member of SEGC.
- 'joining exchange' means an exchange which becomes a member of the SEGC or an ASX subsidiary after the commencement of Part 7.10.
- 'liability provisions' are ss.907 to 916 which deal with claims against the fidelity funds under Part 7.9 of the Bill.
- 'transferred claim' means an outstanding claim against a fidelity fund of an exchange arising before the exchange becomes a joining exchange.

Cl.985 : Assets and liabilities of joining exchange's fidelity fund

2926. This clause is to the same effect as SIA s.122ZF.

2927. A joining exchange will be required to transfer all money in its fidelity fund to the NGF (sub-cl.985(1)). All investments and property of the fidelity fund and rights in connection with the administration of the fidelity fund vest in SEGC and become part of the NGF. SEGC also becomes liable for the fidelity fund's debts and other obligations in connection with the administration of the fidelity fund (sub-cl.985(2)). SEGC is also substituted for the joining exchange in respect of agreements still in force entered into by the exchange (sub-cl.985(5)) and in respect of Court or Tribunal proceedings which relate to administration of the fidelity fund (sub-cl.985(7)).

Cl.986 : Final accounts in respect of joining exchange's fidelity fund

2928. This clause is to the same effect as SIA s.122ZG.

2929. Within 2 months of becoming a member of SEGC or becoming an ASX subsidiary, a joining exchange will be required to arrange for a statement of assets and liabilities to be prepared for its fidelity fund and appoint an auditor to audit the statement (sub-cl.986(1)). The auditor will be required to audit the statement within a month of the statement being prepared and provide a report to the Board and a copy to the board of the joining exchange (sub-cl.986(3)). The Board will be required to give the ASC a copy of the report within 14 days of receipt of the report.

Cl.987 : Application of liability provisions in relation to transferred claims

2930. This clause is to the same effect as SIA s.122ZH.

2931. It provides that the SEGC will take over the responsibilities of the joining exchange and satisfy claims out of the NGF in relation to claims which arose before the

exchange became a joining exchange but which have not been considered or satisfied under the fidelity fund provisions. Claims will be assessed and paid out in accordance with cls.907 to 916 of Part 7.9.

Cl.988 : Claims under corresponding law

2932. This provision has no equivalent in SIA.

2933. Claims under a corresponding SIA provision that have not been disallowed on the commencement of Part 7.10 will be deemed to be claims under that Part. Actions by NSEGC under a corresponding law will on the commencement of Part 7.10 be deemed to have been done by SEGC under a provision of this Part which corresponds to the relevant SIA provision.

Cl.989 : Expenses incurred under corresponding law

2934. This provision has no equivalent in SIA.

2935. Legal, administrative and other expenses relating to the operation of the previous Fund incurred under a corresponding SIA provision will, on the commencement of this Part, be included as expenses under this Part.

Cl.990 : Money payable under corresponding law

2936. This provision has no equivalent in SIA.

2937. Moneys payable under SIA s.122GB (development account payments) immediately before the commencement of Part 7.10 will be deemed to be payable under cl.944 (sub-cl.990(1)).

2938. Any money payable before commencement to NSEGC under a corresponding SIA provision must be paid to SEGC, and if it was to have been paid to the previous Fund, must be paid by SEGC to the Fund (sub-cl.990(2)).

Cl.991 : Contracts made under corresponding law

2939. This provision has no equivalent in SIA.

2940. Contracts of insurance and indemnity entered into by NSEGC prior to the commencement of Part 7.10 will be deemed to have been entered into by SEGC.

Cl.992 : Periods prescribed by business rules of exchange for purposes of corresponding law

2941. This provision has no equivalent in SIA.

2942. Periods prescribed by a participating exchange's business rules for the purposes of a corresponding law in relation to "completion" or "prescribed" periods will be deemed to be also prescribed for the purposes of the relevant provisions of this Part.

Cl.993 : Court proceedings and orders

2943. This provision has no equivalent in SIA.

2944. Court proceedings under a corresponding SIA law will be continued under the appropriate provision of this Part. Court orders made under a corresponding law and directed to NSEGC will be deemed to have been made under the equivalent provision of this Part and directed to SEGC.

2945. Court proceedings under a corresponding SIA law will be continued under the appropriate provision of this Part. Court orders made under a corresponding law and directed to NSEGC will be deemed to have been made under the equivalent provision of this Part and directed to SEGC.

PART 7.11 - CONDUCT IN RELATION TO SECURITIES

2946. Part 7.11 (cls.944 to 1015) regulates conduct in relation to securities.

2947. A person who engages in a variety of forms of 'wrongful' conduct in the securities industry (as listed in this Part) will be liable according to this Part.

2948. A new clause prohibiting a person from engaging in misleading or deceptive conduct is included. This clause is followed by specific provisions dealing with both criminal and civil liability for false or misleading statements in prospectuses (previously found in CA ss.108 and 107 respectively) and provisions dealing with liability in respect of unlawful market activity (previously found in SIA ss.123-131). Penalties in respect of all offences under this Part are found in Schedule 3 to the Bill.

2949. Interpretations of the words buy-back arrangements, corresponding law, debenture, expert, management company, promoter, prospectus, prescribed interest, participation interest, share and securities are found in Chapter 1. Specific definitions relevant to the Securities Chapter are also found in this Chapter. Interpretations for the terms 'engaging in conduct' misleading representations and 'statements in a prospectus' are found in cls.762, 765 and 96 respectively.

2950. It should also be noted that a number of other provisions relevant to this Part are contained elsewhere in the Bill. They are clauses 1323-1326 inclusive which deal with the freezing of assets of a person, injunctions and other orders that a Court may make. Clause 1324 (injunctions) enables the ASC to bring representative actions in certain cases and clause 1325 (other orders) lists a range of orders that a Court may make in respect of a Contravention of Part 7.11 or 7.12.

Division 1 - Additional Operation of Part

Cl.994 : Holding companies

2951. This provision is new.

2952. It seeks to apply this Part, so far as possible to holding companies. The provision is severable.

2953. The following holding companies are referred to, holding companies of:

- (a) a foreign corporation
- (b) a trading corporation formed within the limits of the Commonwealth;
- (c) a body corporate that is incorporated in a Territory or an external Territory;
- (d) a banking corporation;
- (e) an insurance corporation; or
- (f) a company.

2954. The aim of extending this Part to holding companies is to provide a full range of investor protection in the securities market. Holding companies exist and are capable of exerting important influences in the securities market. Accordingly, it has been sought to apply the relevant regulatory provisions in the Bill to them.

2955. A similar provision in respect of Part 7.12 is found in cl.1016.

Division 2 - Prohibited ConductCl.995 : Misleading or Deceptive Conduct

2956. This a new provision. It finds a parallel in TPA s.52.

2957. Clause 995 is a general 'catch all' provision prohibiting the engaging in of misleading and deceptive conduct or conduct that is likely to mislead or deceive in any dealing in securities. The provision applies to securities in relation to a corporation and to eligible securities in relation to a person. Both 'securities' and 'eligible securities' are defined in Chapter 1. Corporations and other persons are dealt with separately in this provision in order to indicate more clearly the linkages with constitutional heads of power.

2958. This clause is drafted along the lines of TPA s.52 and will operate in addition to the specific prohibitions found in the Bill. Without limiting the generality of para.995(1)(a), para.995(1)(b) specifies some instances of conduct where this clause may apply, namely: in the allotment or issue of securities; in the issue of a prospectus; in the making of a takeover offer or announcement; or in the carrying on of any negotiations preparatory to the above activities. Contravention of the provision will not be an offence under the Bill (sub-cl.995(3)) but will give rise to civil liability.

2959. Clause 995 operates in addition to the provisions found in Parts 7.11 and 7.12 of the Bill.

2960. The provision is considered to be important in maintaining integrity in the securities market. While supporting deregulatory, moves in general, the Government is concerned that investors be protected from unscrupulous activity in the securities market. This clause emphasises that persons, in their dealings in the securities industry, should not engage in misleading or deceptive conduct (cl.762 gives a guide to what constitutes the relevant conduct).

2961. A guide to what type of conduct is misleading or deceptive can be gained from the many cases decided under TPA s.52. The Courts have tended to give a broad meaning to the terms. It can also be noted that TPA s.52 may itself apply in some cases of securities dealing. In order to stress the undesirability of the conduct in question it was considered important to include a similar provision to s.52 in the Bill. Persons who engage in misleading and deceptive conduct thus run, at the very least, the risk of civil liability.

2962. Specific liabilities for specified circumstances are provided in the remaining provisions in Part 7.11.

Cl.996 : False or misleading statement in, or omission from prospectus

2963. This clause is based on CA s.108.

2964. Section 108 CA provided a broad base for criminal liability and it has been retained in the CB. The reference to false or misleading statements in cl.996 picks up the broader scope given to CA s.108 by the deeming provision contained in CA sub-s.94(1).

2965. A person will be guilty of an offence for authorising or causing the issue of a prospectus containing a false or misleading statement or from which there is a material omission (CB sub-cl.996(1)). Defences are provided in sub-cl.996(2) and (3).

Cl.997 : Stock market manipulation

2966. Subject to the changes to the provision's coverage outlined below, this clause is based on SIA s.123.

2967. A brief outline of cl.997 is as follows:

- (a) a person will be prohibited from entering or carrying out 2 or more transactions -
- (i) in securities of a corporation that have the effect of increasing (sub-cl.997(1)), reducing (sub-cl.997(4)) or maintaining (sub-cl.997(7)) the price of the securities of the corporation on a stock market with intent to induce others to buy or subscribe for (sub-cl.(1)), sell (sub-cl.(4)), or to buy, sell or subscribe (sub-cl.(7)) for securities of the corporation or of a related body corporate.
 - (ii) in securities of a body corporate that is not a corporation that have the effect of increasing (sub-cl.997(3)), reducing (sub-cl.997(6)) or maintaining (sub-cl.997(9)), the price of securities of the body corporate on a stock market with intent to induce other persons to buy or subscribe for (sub-cl.(3)), sell (sub-cl.(6)), or to buy, sell or subscribe for (sub-cl.(9)), securities of a corporation that is related to the body corporate.
- (b) a corporation will be prohibited from entering or carrying out 2 or more transactions in securities of a body corporate that is not a corporation that have the effect of increasing (sub-cl.997(2)), reducing (sub-cl.997(5)) or maintaining (sub-cl.997(8)) the price of securities of the body corporate on a stock market with intent to induce others to buy or subscribe for (sub-cl.(2)), sell (sub-cl.(5)), or to sell, buy or subscribe for (sub-cl.(8)), securities of the body corporate or of a corporation or of a related body corporate.

Cl.998 : False trading and market rigging transactions

2968. Subject to the changes to the provision's coverage outlined below, this clause is based on SIA s.124.

2969. False trading and market rigging are prohibited.

2970. A brief outline of this clause is as follows:

- (a) A person will be prohibited from creating a false or misleading appearance of active trading in, or creating a false or misleading appearance with respect to the market for any "eligible securities" - defined in cl.9 ('false trading' : sub-cl.998(1)).
- (b) A corporation is prohibited from creating such an appearance for any securities (excluding eligible securities) (sub-cl.998(2)).
- (c) A person will be prohibited from maintaining, increasing, reducing or causing fluctuations in the market price of any eligible securities by:
 - (i) buying or selling any securities where no change in the beneficial ownership occurs; or
 - (ii) any fictitious transactions or devices. (sub-cl.998(3)).
- (d) A corporation is prohibited from engaging in the conduct described in (c) in respect of the market price of any securities other than "eligible securities" (sub-cl.998(4));
- (e) "False trading" under (a) and (b) above will include:
 - (i) being concerned either directly or indirectly in a transaction involving any securities where there is no change in the beneficial ownership ("wash sales");

- (ii) offering to sell securities at a specified price where he or a person associated with him offers to buy substantially the same number at substantially the same price; or
 - (iii) offers to buy securities at a specified price where he or a person associated with him offers to sell substantially the same number at substantially the same price (sub-cl.998(5)).
- (f) It will be a defence to a prosecution under sub-cl.998(1) or (2) constituted by an act referred to in sub-cl.998(5) if the defendant establishes that his purpose was not to create a false or misleading appearance of active trading (sub-cl.998(6)).
- (g) No change occurs in beneficial ownership, for the purposes of these prohibitions, if a person who had an interest in the securities before the purchase or sale (or a person associated with him) has an interest after the purchase or sale (sub-cl.998(7)).
- (h) A defendant has a defence in a prosecution for contravention of sub-cl.998(3) or (4) in relation to a purchase or sale that did not involve a change in beneficial ownership if he establishes that his actions were not intended to create a false or misleading market (sub-cl.998(8)).
- (i) Transactions for the purpose of the prohibition on 'wash sales' in para. 998(5)(a) will include an offer or invitation (sub-cl.998(9)).

Cl.999 : False or misleading statements in relation to securities

2971. Subject to the changes to the provision's coverage outlined below, this clause is based on SIA s.125.

2972. A person is prohibited from making a false or misleading statement that is likely to induce the sale or purchase of "eligible securities" (defined in cl.9) or affect their market price if, when he makes the statement, he does not care whether it is true or false or he knows or ought reasonably to have known that it is false or misleading (sub-cl.999(1)).

2973. A corporation is subject to the same prohibition with regard to statements likely to induce the sale or purchase of any securities (sub-cl.999(2)).

Cl.1000 : Fraudulently inducing persons to deal in securities

2974. Subject to the changes to the provision's coverage outlined below, this clause is based on SIA s.126.

2975. A person is prohibited from inducing or attempting to induce another person to deal in "eligible securities" (defined in cl.9) by making a statement, promise or forecast he knows to be misleading, false or deceptive by recklessly making such a statement, by dishonestly concealing material facts, or by recording any information that the person knows to be false or misleading (sub-cl.1000(1)).

2976. A corporation is prohibited from so inducing or attempting to induce a person to deal in any securities (sub-cl.1000(2)).

2977. It is a defence to a prosecution based on recording or storing false or misleading information that the defendant had no reasonable grounds for expecting that the information would be available to any other person (sub-cl.1000(3)).

Cl.1001 : Dissemination of information about illegal transactions

2978. Subject to the changes to the provision's coverage outlined below, this clause is based on SIA s.127.

2979. A person is prohibited from disseminating information to the effect that the price of securities of a corporation is likely to rise or fall or be maintained by reason of transactions or other things done in relation to that corporation or a related body corporate where the transaction or thing is entered into or done by the person or an associate OR where the person benefits from the dissemination of the information. The transactions or other things done must also have been in contravention of the prohibition against:

- stock market manipulation (see cl.997);
- false trading or market rigging (see cl.998);
- false or misleading statements (see cl.999); or
- fraudulently inducing persons to deal in securities (see cl.1000).

2980. A corporation is prohibited from disseminating information to the effect that the price of any securities of a body corporate is likely to rise or fall in the same circumstances as sub-cl.1001(1) (sub-cl.1001(2)).

Cl.1002 : Insider trading

2981. Subject to the changes to the provision's coverage outlined below, this clause is based on SIA s.128.

2982. Insider trading is prohibited. Compensation will be payable in certain circumstances to persons who suffer loss as a result of insider trading (see cls.1005 and 1013)).

2983. A brief outline of cl.1002 is as follows:

- (a) A person will be prohibited from dealing in securities in three sets of circumstances:
- (i) if he is or has been in the past 6 months, connected with a corporation and has price sensitive information in relation to that corporation as a result of his connection he must not deal in its securities (sub-cl.1002(1));
 - (ii) if he is or has been in the past 6 months connected with a body corporate that is a corporation and, as a result of his connection, has price sensitive information (or information concerning certain transactions) in relation to any body corporate, he must not deal in securities of the latter body corporate (sub-cl.1002(2));
 - (iii) he must not deal in securities where he has the price sensitive information about them referred to in sub-cl. (1) and (2) if:
 - he obtained the inside information from another person and is aware or ought to be aware that that person is prohibited from dealing under sub-cl. (1) and (2); and
 - when the information was obtained he was associated with the other person or had an arrangement with him for the communication of such information with a view to dealing by him and/or the other person.

(sub-cl.1002(3)).

- (b) A person who is prohibited, because of inside information, from dealing in securities must not:
- (i) cause or procure any other person to deal in those securities (sub-cl.1002(4)); or
 - (ii) communicate his relevant inside information to another person if:
 - the securities in question can be traded on a stock market; and
 - the first-mentioned person knows, or ought reasonably to know that the other person will make use of the information for the purpose of dealing himself in the securities or causing another person to deal in them.

(sub-cl.1002(5)).

- (c) A body corporate will be prohibited from dealing in securities if one of its officers would be so prohibited because of inside information (s-cl.1002(6)) unless:
- (i) the decision to enter the transaction was taken by someone other than that officer;
 - (ii) arrangements were in place to ensure that the information was not communicated to that person and that no advice with respect to the transaction was given to him by a person in possession of the information; and
 - (iii) the information was not communicated and such advice was not given.

(sub-cl.1002(7)).

(d) Sub-clause 1002(6) does not preclude a body corporate from dealing in securities of another merely because an officer of the first body corporate has information obtained in the course of his duties about proposed dealings by the first body corporate in securities of the second (sub-cl.1002(8)).

(e) A person will be connected with a body corporate for the purpose of the provisions relating to insider trading if, being an individual -

(i) he is an officer of that body corporate or a related body corporate;

(ii) he is a substantial shareholder (within the meaning of Part 6.7) in that body corporate or a related body corporate; or

(iii) he occupies a position that may reasonably be expected to give him, by virtue of a professional or business relationship or by virtue of being an officer of a substantial shareholder, access to information of a kind to which sub-cl.1002(1) and (2) apply.

(sub-cl.1002(9)).

(Note: for the purposes of sub-cl.1002(9) "officer" includes a receiver, official manager, liquidator and body corporate, and a trustee or other person administering a compromise or arrangement made between the body corporate and its creditors (sub-cl.1002(12)).

(f) A licensed dealer will be able to enter into a transaction relating to listed securities as agent for, and on the specific instruction of, a person

with whom he is not associated if he has not given advice to that other person in relation to the dealing (sub-cl.1002(10)).

- (g) There will be a defence to prosecutions under these provisions that the other party to the transaction knew or ought reasonably to have known of the information before entering the transaction (sub-cl.1002(11)).

Division 3 - Powers of Court

Cl.1003 : Provisions relating to Prosecutions

2984. This clause finds a parallel in TPA sub-ss.79(4) and (6).

2985. The joining of a criminal action with an action for a civil remedy - such as an injunction (under cl.1324) or corrective advertising order (CB sub-cl.1004(1)) is made possible by this clause.

Cl.1004 : Order to disclose information or publish advertisements

2986. This is a new provision. It finds a parallel in TPA s.80A.

2987. The Court, in addition to its powers under clause 1324 is empowered to make orders for affirmative disclosure or corrective advertising in the event of a contravention of this Part or Part 7.12.

Division 4 - Civil Liability

Subdivision A - General

Cl.1005 : Civil Liability for contravention of this Part or Part 7.12

2988. This provision finds a parallel in TPA s.82 and sub-s.85(3).

2989. Cl.1005 is a general damages clause. While damages were available under the previous legislation this provision adopts a new format (based on TPA s.82). The clause operates to provide a remedy in addition to any other remedy available at law (sub-clause 1005(3)) but is subject to the specific CB provisions found in cls.1006 to 1015.

2990. A person who suffers loss or damage by conduct of another person that was engaged in in contravention of a provision of this Part or Part 7.12 may recover the amount of the loss or damage by action against that person or any person involved in the contravention whether or not the other person or any person involved in the contravention has been convicted of an offence in respect of the contravention.

2991. An action under this provision or under para.1013(1)(d) may be commenced at any time within 3 years after the date on which the cause of action arose.

2992. Sub-cl.1005(4) (based on TPA sub-s.85(3)) provides a defence for publishers. It compliments cl.1027 and establishes a defence where it is proved that the defendant is a person whose business it is to publish or arrange for the publication of advertisements and that the person received the advertisements for publication in the ordinary course of business and did not not know nor have reason to suspect that its publication would amount to a contravention of a provision of this Part or Part 7.12.

Subdivision B - Liability in Respect of Prospectuses

Cl.1006 : Civil Liability for false or misleading statement in, or omission from, prospectus

2993. This clause is based on CA s.107.

2994. Any person who is named in or authorises or causes the issue of a prospectus that contains a false or misleading statement or an omission will be liable to compensate subscribers who as a consequence suffer loss or damage. Defences are provided for each of the categories of persons who may be liable under this provision. The defences in respect of directors and experts mirror those found in the CA with the addition of a due diligence requirement on their part. Named persons and the corporation have defences based on reasonable mistake, reasonable reliance on others and the exercise of due diligence.

2995. Actions may be brought against any or all of the following persons for false or misleading statements in or omissions from a prospectus:

- . those persons presently specified in CA para.107(1)(a)-(d) and the following additional persons:
- . the corporation;
- . experts for their statements;
- . persons named, with their consent, in a prospectus as an auditor, banker, solicitor, stockbroker, sharebroker or underwriter of the corporation or for or in relation to the issue or proposed issue of securities;
- . other persons named with their consent in a prospectus.

2996. By expanding the range of persons who may be held liable for 'defective' prospectuses it is sought to provide another means in the Bill of ensuring prospectus integrity. The Bill aims to make all persons involved in the preparation of a

prospectus responsible for the prospectus. At the same time it can be noted that the provision does not act indiscriminately or unfairly. Each of the persons who may be liable under cl.1005 is provided with a defence and in general will only be liable if they have not exercised due diligence. A person who is named as a trustee for the holders of debentures or prescribed interests will not for that reason alone be taken to have authorised or caused the issue of a prospectus (sub-cl.1006(3)).

2997. Specific defences in relations to actions, concerning prospectuses, under cl.1005 are found in Bill cls.1007-1012.

Cl.1007 : No liability to person with knowledge of relevant matters

2998. A general exclusion from liability is found in cl.1007. A person referred to in sub-cl.1006(2) will not be liable if the person who suffered loss or damage knew that the statement was false or misleading or was aware of the omitted matter.

Cl.1008 : Directors not liable in certain circumstances

2999. This clause is based on CA paras.107(5)(a), (b), (c) and (d).

3000. Clause 1008 provides specific defences for directors who would otherwise be liable under cl.1005.

3001. A director or a person who authorised or caused himself or herself to be named and is named in the prospectus as a director is not liable in an action under cl.1005 if one of the defences listed in cl.1008 is proved. However, in regard to the defences in sub-paras.1008(5)(a) and 1008(5)(b)(ii) it is made clear that a director is required to make such reasonable inquiries as are necessary to justify his or her belief.

Cl.1009 : Liability of experts

3002. This clause is based on CA sub-s.107(7).

3003. Clause 1009 provides defences for an expert who would otherwise be liable under cl.1005.

3004. The expert like the director is also required to exercise diligence in the formation of his or her opinions - he or she must believe and have had reasonable grounds to believe that statement they make for the purposes of inclusion in a prospectus are true and not misleading para.1009(3)(c).

Cl.1010 : Liability of persons named in prospectus etc

3005. This clause limits the liability of named persons and any other person who authorised or caused the issue of part only of the prospectus, to misstatements and omissions in that part and only if that part is included in, or substantially in, the form and context to which the person agreed.

3006. A person will be taken to be named in part only of a prospectus if there is an express statement in the prospectus to that effect (sub-cl.1010(2)). Where there is no such statement then a named person's liability will extend to the contents of the entire prospectus.

Cl.1011 : No liability for mistake etc. if reasonable precautions taken

3007. Clause 1001 provides a general defence for the corporation, the promoter, named persons and persons who authorised or caused the issue of the prospectus.

3008. The defence is that that any false or misleading statement made or omission:

- (a) was due to a reasonable mistake;

- (b) was due to reasonable reliance on information supplied by another person; or
- (c) was due to the act or default of another person, to an accident or to some other cause beyond the defendant's control provided the defendant took reasonable precautions and exercised due diligence to ensure that all statements made were true and not misleading and there were no material omissions from the prospectus.

3009. Sub-cl.1011(2) excludes servants or agents of the defendant when the prospectus was issued from being 'another person' for the purposes this clause.

Cl.1012 : Indemnity

3010. This provision is based on CA s.107(8).

3011. It provides an indemnity to directors and experts who are named without their consent in a prospectus. The indemnity does not extend to named persons due to their different treatment (from directors and experts) in the liability provisions.

Subdivision C : Liability in respect of unlawful market activity

3012. This subdivision contains provisions dealing with compensation to victims of insider trading - cl.1002 (cl.1013) and of contraventions of cls.997-1001 (cl.1014) and related clauses.

Cl.1013 : Liability for insider trading

3013. This clause is based on SIA sub-ss.130(1) and (8).

3014. Provisions equivalent to the following SIA sub-sections are located as follows:

- SIA sub-s.130(2) : cl.1013
- SIA sub-ss.130(3) and (4) : cl.1014
- SIA sub-s.130(7) : sub-cl.1005(3).

3015. The time limit for actions (previously 2 years under SIA sub-s.130(5)) is now 3 years - sub-cl.1005(2).

3016. Compensation will be payable in certain circumstances to persons who suffer losses from some of the contraventions of the basic prohibitions in relation to trading in securities.

3017. A person who deals, or procures another person to deal, in securities in contravention of the prohibitions on insider trading (see cl.1002 - other than the prohibition in sub-cl.1002(5) on the communication of insider information) will be liable (whether the person has been convicted of an offence in relation to the contravention or not):

- (a) to compensate the other party to the transaction for any loss sustained, being the difference between the price at which the securities were transacted and that at which they would have been transacted had the inside information been generally known; and
- (b) to account to the body corporate that issued the securities for any profit accruing to the insider.

(sub-cl.1013(1)).

3018. "Officer" in relation to a body corporate for the purposes of para.1013(1)(b) is given a wide meaning (sub-cl.1013(2))

NB : Cl.1013 is complementary to the general compensation provision in cl.1005 and does not in any way limit that provision.

Cl.1014 : Liability for other unlawful activity

3019. This clause is to the same effect as SIA sub-s.130(2).

3020. A person who contravenes cls.997-1001 (whether convicted of an offence or not) is liable to pay compensation to any other person who suffers loss in a transaction entered into with the person. The loss recoverable is the difference between the price at which the securities were transacted and that at which they would have been transacted had the contravention not taken place.

3021. This clause is also complementary to the general compensation provision in cl.1005 and does not in any way limit that provision.

Cl.1015 : Amount Recoverable

3022. This clause is to the same effect as SIA sub-ss.130(3) and (4).

3023. The amount of compensation or profit for which a person is liable (under cls.1013 or 1014) will be reduced by any award made under this Part or sub-cl.232(6) by reason of the same act or transaction (sub-cl.1015(1)). The onus will lie on the person liable to pay the amount to prove that the liability arose from the same act or transaction (sub-cl.1015(2)).

PART 7.12 : OFFERING SECURITIES FOR SUBSCRIPTION OR PURCHASE

Division 1 - Additional Operation of Part

Cl.1016 : Holding Companies etc

3024. This provision is new.

3025. It seeks to apply this Part, so far as possible to holding companies. The provision is severable (note also cl.994).

3026. Sub-cl.1016(2) provides for a reference to a corporation to include a reference to a holding company of any of the listed constitutional corporations. The aim of extending these provisions is to provide a full range of investor protection in the securities market. Holding companies exist in the market and are capable of exerting important influences in the issue of securities. Accordingly, it has been sought to apply the relevant regulatory provisions in the Bill to them.

3027. Sub-cl.1016(3) operates in addition to sub-cl.1016(2). It is based upon the use by a person of an eligible communications service (defined in Chapter 1). A person will be prohibited from issuing, by the use of an eligible communications service, securities of a body corporate being a holding company unless the requirements of the Prospectus Division are satisfied.

Division 2 : Prospectuses

3028. Division 2 of Bill Part 7.12 regulates the issue of securities and the use of prospectuses. The provisions are based on Division 1 of Part IV CA but reflect substantial reforms. The new provisions seek to ensure that the public is informed fairly about any invitation or offer of securities

and is given all information relevant and necessary to the making of an informed investment decision in respect of that invitation or offer. Provisions (found in Part 7.11) also address the issues of responsibility and liability for false or misleading statements or omissions from a prospectus and impose liability on all persons involved in the preparation of the prospectus for failings in the prospectus (cls.1006 to 1012, Part 7.11).

3029. The provisions in this Part complement other laws which regulate the securities industry.

3030. Prospectuses will be required for all offers, invitations and issues of securities except for excluded offers, invitations and issues. Excluded offers, issues and invitations of securities are defined in the Bill (cl.66 and see also cl.65, excluded corporations). As a consequence of the definition of securities (i.e. it includes prescribed interests) and the requirement that a prospectus be issued in respect of all offers, invitations and issues of securities, prospectuses will be required for all issues of prescribed interests. Prescribed interests are dealt with in detail in Division 5.

3031. Interpretations are provided in Chapter 1 and also in the Securities Chapter. Penalties for contravention of provisions of the Part are found in Schedule 3 to the Bill.

3032. Prospectuses will be lodged with the ASC but will not be registered and pre-vetted as presently occurs under the CA. Registration and vetting of prospectuses by the various State CAC offices has been the subject of numerous complaints, from businessmen and other persons who have been involved in prospectus preparation, as causing unnecessary delays and increased costs. Pre-vetting of prospectuses has also involved a substantial part of the CACs' time and resources. Despite all care on the part of CAC officers misleading

prospectuses could and on occasions did slip through. Consequently, on balance, it has been considered to be desirable to improve the efficiency of issuing securities by removing both of these procedures. At the same time other means of ensuring prospectus integrity and investor protection have been included.

3033. Content requirements have also been altered. Section 98 of the CA and the regulations thereunder contained detailed prospectus content requirements. These provisions were specific and whilst requiring extensive quantities of material to be disclosed did not necessarily ensure that the investor received adequate information about the securities in question. The present amendments complement the removal of pre-vetting and seek to remedy the above mentioned problems.

3034. The new content clause lists basic material to be included in a prospectus such as a director's interest in the issue and the date of issue. A general requirement that the prospectus contain all such information as investors and their professional advisers would reasonably require and expect to find in the prospectus for the purpose of making an informed investment assessment, about the securities in question, has also been included. As a result of this clause prospectus contents may be variable as between persons who are targeted in the offer. For instance, a prospectus directed at institutional investors may differ from a prospectus directed at individual investors. While the full ramifications of this provision will be left to be worked out in the market place the ASC will maintain an important 'watch dog' role over prospectus preparation and issue.

3035. The ASC's investigative powers have been improved (over those of the NCSC) and it has been given a new power to order, in certain circumstances, that the issue of securities cease (see cl.1033). This latter power is considered to be very important in creating a new role for the ASC in the prospectus

area. While any ASC involvement in pre-vetting and registration of prospectuses has been substantially curtailed, if a prospectus is misleading or otherwise 'defective' the issuer may be subject to an ASC order that stops the 'issue' of the securities in question (cl.1033). (Issue is broadly defined in Chapter 1 to include circulate, distribute and disseminate).

3036. The ASC will also retain the exempting power presently conferred on the NCSC by CA s.215C. Clause 1084 replaces CA s.215C. Consequently the Bill provides a flexible means of exempting issues from the need to comply with the provisions of this Part on a case by case basis.

Cl.1017 : Exceptions

3037. This Division does not apply to an excluded issue of securities, an excluded offer of securities for subscription or purchase, or an excluded invitation to subscribe for or buy securities. Excluded issues, offers and invitations and excluded corporations are defined in CB sub-cl.66 and 65 respectively.

Cl.1018 : Prospectus in Relation to Securities

3038. A person will not be able to allot or issue, offer or invite subscription or purchase of securities unless:

- (a) a prospectus in respect of those securities has been lodged with the Commission; and
- (b) the prospectus complies with the requirements of Division 2 of Part 7.12.

3039. Prospectuses will no longer be registered by the ASC but they will need to be lodged with the ASC. The ASC will not pre-vet lodged prospectuses but may at any time undertake a

detailed consideration of a prospectus and if necessary order that the issue of securities the subject of a defective prospectus cease.

Cl.1019 : Prohibition on Invitations or Offers in Respect of Securities of Proposed Corporation

3040. This provision is based on CA s.95 and sub-s.552(9).

3041. A person shall not issue a form of application for the issue of or make an invitation for or an offer of securities in respect of a corporation that has not been formed.

Cl.1020 : Forms of Application for Securities to be Attached to Prospectus

3042. This clause is based on CA s.96.

3043. A person must not issue a form of application for securities of a corporation unless the form is attached to a prospectus and a copy of both the form and the prospectus have been lodged with the ASC.

Cl.1021 : Specific Provisions Applicable to all Prospectuses

3044. This clause is based on CA s.98.

3045. However, unlike CA s.98 the specified contents required are more limited. The detailed content rules of CA s.98 were frequently criticised for being overly complex. Despite the detail that they required they did not always provide the information that private and professional investors needed to make an informed investment decision.

3046. The new content rules aim to overcome these defects and at the same time maintain prospectus integrity.

3047. Print size is specified in the clause, sub-cl.1021(2) is based on CA para.98(1)(a).

3048. The following basic information is to be provided in the prospectus:

- . the prospectus is to be dated, sub-cl.1021(3) and (4) are based on CA para.98(1)(b) and sub-s.98(2)
- . directors' names, qualifications and interest in the promotion are to be stated, sub-cl.1021(6) is based on CA para.98(1)(m)
- . it should state that a copy of the prospectus has been filed with the ASC, the date of such filing and that the ASC takes no responsibility as to the contents of the prospectus, sub-cl.1021(13) is based on CA para.98(1)(c)
- . the life-time of prospectuses will be 6 months from the date of the issue of the prospectus, sub-cl.1021(5) is based on CA para.98(1)(g).

3049. Directors and all persons who are named in the prospectus as proposed directors, or the director's agent authorised in writing, should sign the prospectus, sub-cl.1021(12) is based on CA para.103(2)(b)).

3050. Regulations may be made requiring prospectuses included in a specified class of prospectuses, or relating to a specified class of securities or corporations to contain specified matters or reports (CB sub-cl.1021(7) is based on CA sub-s.98(3)). The regulation making power may be used if there is a need or demand for more specific requirements to be included in prospectuses for particular securities at some future stage. However, it is envisaged that before the regulation making power would be exercised in this manner consultations with persons likely to be affected by the change would be undertaken.

3051. CB sub-cl.1021(8), (9), (10) and (11), are based on CA sub-ss.98(6), (8), (9), and (10).

3052. The ASC may, as the occasion requires, publish policy statements concerning contents of particular prospectuses. These statements will not be binding but will nonetheless be persuasive and may constitute guidelines relevant to the ASC's use of its stop issue order power.

Cl.1022 : General Provisions Applicable to All Prospectuses

3053. This provision is new. It complements the above provision and is aimed in part at ensuring prospectus integrity.

3054. This provision finds a parallel in s.163 of the Financial Services Act 1986, UK.

3055. The above clause requires specific information to be included in a prospectus. In addition, this clause provides that a prospectus will also be required to contain such information as investors and their professional advisers would reasonably require and expect to find in the prospectus for the purpose of making an informed investment decision. For example, a full and true description of the securities in question will be required as will all relevant financial information about the corporation.

3056. The provision provides a guide to the preparers of a prospectus about what information should be included (sub-cl.1022(2)). The information should be known to them or it should be reasonable for them to obtain that information. The information that will be required will depend on the nature of the securities and the corporation; the kinds of persons likely to consider subscribing for or buying the securities; the fact that certain matters may reasonably be expected to be known to professional advisers; and information that may be known to investors or their professional advisers by virtue of any other legislation (sub-cl.1022(3)).

3057. The information supplied under this clause should not be false, misleading or deceptive.

Cl.1023 : Special Provisions Applicable to Prospectuses In Relation to Debentures

3058. This clause is based on CA s.97.

3059. A prospectus concerning the offer or invitation of debentures will need to contain an undertaking by the corporation that it will, within 2 months after the acceptance of any money as a deposit or loan from a person in response to an invitation or offer, issue to that person a document that acknowledges, evidences or constitutes an acknowledgement of the indebtedness of the corporation.

3060. The document will need to acknowledge that debt and comply with CB cl.1045 (sub-cl.1023(2) (clause 1045 is based on CA sub.ss.97(3), (4) and (5)).

Cl.1024 : Supplementary Prospectuses

3061. This a new provision.

3062. This provision finds a parallel in s.164, Financial Services Act 1986, UK.

3063. In recognition of the fact that the nature of the contents of a prospectus can vary over time this clause provides for the issue of supplementary prospectuses. A supplementary prospectus will need to be lodged with the ASC where, during the life time of the prospectus, there is a significant change affecting any matter contained in the prospectus or a significant new matter arises that should be included in the prospectus. The supplementary prospectus will contain particulars of the change or new matter. The clause aims to ensure the accuracy and reliability of prospectuses throughout their lifetime. The issue of a supplementary prospectus will not increase the lifetime of the original prospectus.

3064. The provision provides that if there is a significant change affecting any matters contained in the prospectus or a significant new matter arises then the person who lodged the prospectus will be required to lodge a supplementary prospectus that contains particulars of those matters. In determining what is significant, the matters referred to in sub-cl.1024(2) are relevant.

3065. Sub-cl.1024(3) and (4) provide for the situation where the person who lodged the prospectus is not aware of the change or new matter. In such a case a person, who is named in the prospectus or otherwise authorises or causes the issue of the prospectus and is aware of the change or new matter, will be required to give notice of the change or new matter (i.e. is listed in sub-cl.1006(2)), to the person who lodged the prospectus.

3066. Sub-cl.1024(5) relates to the stop issue order power of the ASC. Where the ASC makes such an order, concerning a defective prospectus, the person who lodged the prospectus will be able to lodge a supplementary prospectus that remedies any defect found in the prospectus. In such a case, however, the ASC will consider the supplementary prospectus to see if it does in fact remedy the identified defects, before it lifts any stop issue order that is in place.

3067. After a supplementary prospectus is lodged every prospectus that is issued will need to be accompanied by a copy of the supplementary prospectus (CB sub-cl.1024(6)).

3068. Sub-cl.1024(7) lists the circumstances in the CB when a reference to a prospectus is also a reference to a supplementary prospectus.

Cl.1025 : Certain Notices etc not to be Published

3069. This clause is based on CA s.99 but reflects the new approach to advertising of securities.

3070. The prohibitions found in CA s.99 on advertising of securities are relaxed in part by this clause. This approach is made possible by virtue of the inclusion of clauses 765 and 995 which expand on the meaning of misleading representations and prohibit the engaging in of conduct that is misleading or deceptive or likely to mislead or deceive in relation to securities, respectively. Advertising of securities by the issuer of the prospectus, the holder of a dealers licence or investment advisers licence or an exempt dealer will be permissible provided the following material is included in the advertisement, namely:

- . a statement that a prospectus has been lodged
- . the date of the prospectus and statement where a copy of the prospectus can be obtained
- . a statement that allotments or issues of, or contracts for the subscription for or purchase of securities to which the prospectus relates will only be made on receipt of a form of application attached to a prospectus
- . a statement of any interest that the person publishing the notice has in the success of the offer or invitation.

3071. Sub-clause 1025(3) specifies that except as allowed in the above sub-clause persons shall not publish advertisements concerning the securities of a corporation. Sub-clause 1025(4) has been added to ensure that bodies other than corporations do not seek to use advertising as a means of circumventing the provision of this Division. Particular reference in this regard is made to holding companies. Consequently, unless sub-cl.1025(2) applies, corporations that publish newspapers or periodicals are not to publish notices concerning securities of a body corporate. This provision complements cls.994 and 1016.

Cl.1026 : Certain Reports referring to Prospectuses not to be Published

3072. This clause is based on CA s.100.

3073. The publication of certain reports referring to prospectuses will be prohibited except in specified circumstances.

3074. In the new clause the order of prohibition and permission has been reversed in order to be consistent with drafting of clause 1025.

Cl.1027 : Evidentiary Provisions etc.

3075. This clause is based on CA s.101.

3076. Evidentiary provisions for the two preceding provisions are contained in cl.1027.

Cl.1028 : Retention of over-subscriptions in Debenture Issues

3077. This clause is based on CA s.102.

3078. The retention of over-subscriptions to a debenture issue will be prohibited unless the corporation specifies in the prospectus:

- (a) that it reserves the right to retain over subscriptions; and
- (b) the limit on the amount of over-subscriptions that may be retained.

Cl.1029 : Documents to be kept by Corporations

3079. This clause is based on CA sub-s.103(3).

3080. A corporation will be required to keep a true copy of a lodged prospectus and any consents required in respect of the prospectus at its registered office in Australia for the period of the term of the prospectus (6 months).

Cl.1030 : Document containing offer of securities for sale deemed to be prospectus

3081. This clause is based on CA s.104.

3082. Any document that directly or indirectly offers securities for sale to the public will be deemed to be a prospectus and all provisions relating to prospectuses and offering securities will apply to such documents.

Cl.1031 : Allotment or Issue of securities where Prospectus indicates application for quotation on stock market

3083. This clause is based on CA s.105.

3084. Any allotment or issue will be void and any application moneys must be repaid if the prospectus indicates that an application has been, or is proposed to be made, for listing of the securities, and the listing is not achieved within the specified time. Despite the fact that content requirements have been relaxed (see CA para.98(1)(ka)) the provision has effect where the statements in question are made. Listing on a securities exchange or application for listing is a matter that the preparers of prospectuses may use to sell the issue. Where a statement to this effect is made, cl.1013 will apply.

Cl.1032 : Expert's consent to issue Prospectus containing Statement by the Expert

3085. This clause is based on CA s.106.

3086. A prospectus that contains a statement by an expert must not be issued unless the expert has given and not withdrawn written consent to the issue of the prospectus with the

statement included in the form and context in which it is included.

Cl.1033 : Order to stop issue of securities

3087. This is a new provision.

3088. It finds a parallel in ss.60 and 69 of the Securities Act, 1978, Ontario.

3089. In order to ensure that prospectus integrity is maintained the ASC has been given the power, to make orders stopping the issue of securities to which a prospectus relates where certain 'defects' are found. Relevant 'defects' are specified in sub-cl.1033(2). The power is flexible, it can be exercised on an interim basis and orders made can be revoked. It is envisaged that the ASC will exercise this power whenever the situation requires. It will not merely be an auxiliary power but will be important in establishing the ASC's role in the marketplace. 'Issue', in relation to securities, is defined in Chapter 1 to include 'circulate, distribute and disseminate'. Consequently it can be seen that the potential scope of stop issue order power is quite broad.

3090. While prospectuses will no longer be pre-vetted and registered the ASC may consider, in detail, a lodged prospectus at any time. The ASC may by random checking discover or may be put on notice of a shortcoming in a prospectus or the conduct of a corporation. This provision makes clear that despite the simplification of procedures for the issuing of a prospectus issuers have not been given a free rein to engage in misleading or other unsavoury practices in the issue of securities. The ASC will act as a 'watch dog' on their activities and should they engage in the conduct listed in this clause the ASC will be entitled to hold a hearing to consider whether it should direct that the issue of the securities of the corporation in question be stopped.

3091. Where any of the failings referred to in sub-cl.1033(2) are found by the ASC in its investigations and are substantiated in a hearing, a stop issue order, in writing, may be made. The listed failings include: the prospectus contravenes in a substantial respect any of the requirements of this Division, the prospectus contains a promise, estimate or forecast that is false, misleading or deceptive, or the prospectus contains a material misrepresentation. Paragraphs 1033(2)(d)-(g) inclusive, particularly paragraphs 1033(2)(f)-(g) list 'failings' on the the part of the corporation's management that may also result in a stop issue order being made in respect of any prospectuses currently in force in respect of securities of that corporation. The scope of this clause can be seen to be quite wide.

3092. However, despite its broad scope the clause makes clear that the power should not be exercised unjustly. Except in special circumstances where an interim order is warranted, no stop issue order will be made under sub-cl.1033(1) unless the ASC has held a hearing and given a reasonable opportunity to any interested person to make submissions on the question whether such an order should be made.

3093. Sub-cl.1033(4) allows the ASC to make an interim stop issue order if it considers that any delay pending the holding of a hearing would be prejudicial to the public interest. An interim order can also be made at any time during the hearing. (sub-cl.1033(6)). Interim orders will have effect for 21 days from making or a lesser time if the interim order is revoked (sub-cl.1033(5)).

3094. While an order is in force under this clause the Division applies as if the prospectus had not been lodged and no one can lodge a further prospectus in relation to the securities. Lodgement of a supplementary prospectus, under s.1024, to remedy the defect is however allowable (sub-cl.1033(7)).

3095. The ASC is given the power to revoke any stop issue order if it becomes satisfied that whether because of the lodgement of a supplementary prospectus or otherwise, the circumstances that resulted in the making of the order no longer exist, sub-cl.1033(8).

Cl.1034 : Transitional

3096. This clause provides transitional provisions in respect of prospectuses registered under a corresponding law (see cl.58) within 6 months before the commencement of this Part.

3097. Such prospectuses will be deemed to be a prospectus lodged with the Commission for the purposes of this Part. Prospectuses that were previously lodged with but not registered by the NCSC should be relodged with the ASC.

Division 3 - Restrictions on Allotment and Variation of Contracts

3098. Division 3 of Part 7.12 of the Bill places restrictions on the allotment of shares and the variation of contracts.

Cl.1035 : Prohibition of allotment unless minimum subscription received

3099. This clause is based on CA sub-ss.110(1)-(4).

3100. Shares that have been offered to the public will not be able to be allotted until the appropriate minimum subscription and the sum payable on application have been received.

Cl.1036 : Repayment of subscriptions

3101. This clause is based on CA sub-ss.110(5)-(7).

3102. A company has 4 months from the issue of a prospectus to have the minimum subscription and to receive the amount payable on application as provided for by cl.1035. If these requirements are not satisfied, the company must repay all money received from applicants within 7 days of the expiration of that 4 month period. If repayment is not made by the company, directors will be personally liable, jointly and severally in respect of repayment of those monies together with interest thereon.

3103. It will be a defence to both offence proceedings and liability in respect of a contravention if a director proves that failure to make the required repayment was not due to any misconduct or negligence on his or her part.

Cl.1037 : Allotment voidable at applicant's option

3104. This clause is based on CA sub-ss.110(8) and (9).

3105. An allotment made in contravention of this Division is voidable at the option of an applicant, notwithstanding the fact that the company is in the course of being wound up. The option may be exercised by serving written notice on the company within the required time.

Cl.1038 : Restriction on varying contracts referred to in prospectus

3106. This clause is based on CA s.112.

3107. The terms of a contract referred to in a prospectus cannot be varied before the statutory meeting unless the variation is made subject to the approval of the statutory meeting.

Cl.1039 : Certain conditions void

3108. This clause is based on CA sub-s.110(11).

3109. Any condition which attempts to have the effect of waiving compliance with any requirement of this Division is void.

Cl.1040 : Securities not to be allotted or issued after 6 months

3110. This clause is based on CA sub-s.110(12).

3111. The allotment or issue of securities shall not be made more than six months after the issue of the relevant prospectus.

Cl.1041 : Validity of allotment or issue of securities

3112. An allotment or issue of securities in contravention of cl.1040 will not be void or voidable merely because a contravention has occurred.

Cl.1042 : Liability of Directors for loss or damage

3113. This clause is based on CA sub-s.110(10).

3114. In addition to liability for repayment of monies received by the company, contravention of a provision of this Division will give rise to liability on the part of directors to compensate the company and any person to whom an allotment has been made, for any loss, damage or cost suffered or incurred because of the allotment. Liability is not dependent upon a conviction for an offence.

Cl.1043 : Application moneys to be held in trust until allotment

3115. This clause is based on CA s.111.

3116. All moneys received from an applicant pursuant to a prospectus must be held in trust until securities have been allotted to that applicant.

Division 4 - Debentures

3117. This Division is based on CA Division 5 of Part IV and does not change the substantive law in relation to debentures. The Division contains a limited re-arrangement of the co-operative scheme provisions for ease of reference. In this regard provisions based on CA sub-ss.97(3), (4), (5) and (12) contained in CA Division 1 of Part IV relating to Prospectuses has been brought within this Division.

Cl.1044 : Application to close corporations

3118. This clause is a new provision.

3119. The provisions of the Bill relating to debentures will apply to debentures issued by close corporations (i.e registered under the Close Corporations Bill) with such modifications as are necessary or as are prescribed by regulations.

Cl.1045 : How debentures may be described

3120. This clause is based on CA sub-ss.97(3), (4), (5) and (12).

3121. A document, which acknowledges, evidences or constitutes an acknowledgment of the indebtedness of a corporation relating to money accepted by the corporation in response to an invitation to subscribe for or buy debentures or an offer to the public of debentures for subscription or purchase (Bill sub-cl.1023(1)), will be required to be described or referred to in certain ways (Bill sub-cl.1045(1)).

3122. Unless the document will be able to be described under Bill sub-cl.1045(3) as a mortgage debenture or certificate of mortgage debenture stock or under Bill sub-cl.1045(4) as a debenture or certificate of debenture stock, the document will have to be described as an unsecured note or an unsecured deposit note (Bill sub-cl.1045(2)).

3123. For a document to be described or referred to as a mortgage debenture or a certificate of mortgage debenture stock it must include a statement containing certain information (Bill sub-cl.1045(3)). For the document to be described as a debenture or certificate of debenture stock it must include a statement containing the information set out in Bill sub-cl.1045(4).

Cl.1046 : Application

3124. The following provisions of this Division will apply to debentures issued before or after the commencement of this Part.

Cl.1047 : Register of Debenture Holders

3125. This clause is based on CA s.147.

3126. A corporation that issues debentures will be required to keep a register of debenture holders (Bill sub-cl.1047(1)).

3127. A foreign corporation that issues debentures to an applicant whose application has an address in Australia or an external Territory or issues debentures following an application made pursuant to a prospectus registered under this Part will also be required to keep a register of debenture holders (Bill sub-cl.1047(2)).

3128. A register kept under this section will be required to contain certain particulars and to be open for inspection by debenture holders and shareholders of the corporation and by any other person for a fee (Bill sub-cl.1047(3)).

3129. A registered holder of debentures or a shareholder in a corporation will be entitled to a copy of the register of debenture holders. A registered holder of debentures will be entitled to a copy of any trust deed relating to the issue of those debentures (Bill sub-cl.1047(5) and (6)).

3130. "Debenture" will be defined, for the purposes of the section, to exclude:

- (a) a cheque, order for the payment of money or bill of exchange; or
- (b) a promissory note having a face value of at least \$50,000;

but will include a unit of a debenture (Bill sub-cl.1047(9)).

Cl.1048 : Branch registers of debentures holders

3131. This clause is based on CA s.148 subject to the modification described below.

3132. A corporation that issues debentures will be able to keep a branch register of debenture holders inside or outside Australia (Bill sub-cl.1048(1)).

3133. This clause differs from CA s.148 in that a corporation will no longer be obliged to keep a branch register in a State or Territory at the request of a debenture holder resident in that State or Territory. Removal of this obligation to maintain a branch register is consistent with the policy being adopted in relation to a branch register of members (see Bill cl.214).

3134. A branch register will be deemed to be part of the principal register of debenture holders (Bill sub-cl.1048(2)).

3135. The branch register will be required to be kept in the same manner as the principal register is kept (Bill sub-cl.1048(3)).

3136. Debentures registered in a branch register will be required to be distinguished from debentures registered in the principal register (Bill sub-cl.1048(5)).

3137. A corporation will be able to discontinue a branch register and will be required to transfer all entries in that register to another register of debenture holders kept by it (Bill sub-cl.1048(6)).

3138. The definition of debenture will be the same as in Bill cl.1047 (Bill sub-cl.1048(8)).

Cl.1049 : Specific performance of contracts

3139. This clause is based on CA s.149.

3140. A contract to take up and pay for debentures will be able to be enforced by an order for specific performance.

Cl.1050 : Perpetual Debentures

3141. This clause is based on CA s.150.

3142. A condition contained in any debenture will not be invalid by reason only that the debenture is thereby made irredeemable or redeemable only on the happening of a contingency however remote or on the expiration of a period however long.

Cl.1051 : Re-issue of redeemed debentures

3143. This clause is based on CA s.151.

3144. A company will be able to re-issue redeemed debentures provided that:

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

(Bill sub-cl.1051(1)).

3145. After re-issue the new holder is deemed always to have had the same priorities that would have applied if the debenture had never been redeemed (Bill sub-cl.1051(2)).

Cl.1052 : Qualifications of trustee for debenture holders

3146. This clause is based on CA s.152.

3147. A corporation that issues invitations to subscribe for or buy debentures or offers debentures for subscription or purchase or a body corporate that offers debentures as consideration under a takeover scheme will be required to provide in a trust deed for the appointment of a trustee.

3148. Only a Public Trustee, a company entitled to take a grant of probate of the will or letters of administration of the estate of a dead person, a company registered under the Life Insurance Act 1945, an Australian bank and certain approved body corporates will be qualified to act as a trustee for debenture holders (Bill sub-cl.1052(1)).

3149. A borrowing corporation will not be allowed to issue debentures until the person proposed to be appointed as trustee has consented to act and the appointment as trustee made (Bill sub-cl.1052(4)).

3150. Certain body corporates will be prohibited from appointment as or holding office as trustee without the leave of the court (Bill sub-cl.1052(5)).

Cl.1053 : Retirement of trustees

3151. This clause is based on CA s.153.

3152. A trustee for debenture holders will only be able to retire upon the appointment of a suitably qualified replacement.

Cl.1054 : Contents of trust deed

3153. This clause is based on CA s.154.

3154. If a corporation offers debentures to the public, or a body corporate offers debentures under a takeover scheme for the acquisition of shares, the relevant trust deeds will be required to contain certain particulars as to the maximum amount that can be borrowed. Also, if a trust deed or the relevant debentures do not expressly contain certain covenants by each borrowing corporation, then either of them will be deemed to contain covenants to the effect that the borrowing corporation will:

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

(Bill sub-cl.1054(1), (2) and (3)).

3155. Similar provisions to those specified in (a) to (c) will also apply to a guarantor body (Bill sub-cl.1054(4)) which, for the purposes of the application of those covenants, will be deemed to be a party to the trust deed (Bill sub-cl.1054(5)).

Cl.1055 : Power of Court in relation to certain irredeemable debentures

3156. This clause is based on CA s.155.

3157. In certain circumstances the Court will be able to order that the security for debentures be enforced either immediately or as the Court directs.

Cl.1056 : Duties of Trustees

3158. This clause is based on CA s.156. A trustee will have certain duties imposed on him to protect the interests of debenture holders including a requirement that he exercise reasonable diligence to ascertain whether the property of the borrowing corporation and each of its guarantor bodies is sufficient to discharge the principal debt (Bill sub-cl.1056(1)).

3159. The trustee will be able to apply to the ASC in certain circumstances for an order imposing restrictions on the activities of the corporation. The ASC will also be able to direct the trustee to apply to the Court for an order (Bill sub-cl.1056(2) and (3)).

3160. Where the trustee applies to the Court for an order the Court will be able to make certain orders having regard to the rights of all creditors (Bill sub-cl.1056(6)).

Cl.1057 : Powers of trustee to apply to the Court for directions

3161. This clause is based on CA s.157.

3162. The trustee for debenture holders will be able to apply for and receive directions from the Court regarding any matter or question concerning the performance of his functions as trustee or the interests of debenture holders.

Cl.1058 : Obligations of borrowing corporation

3163. The borrowing corporation will have to submit periodical three monthly reports to the trustee for debenture holders and copies of those reports to the ASC (Bill sub-cl.1058(1)). Matters to be included in these reports are set out in Bill sub-cl.1058(2) and (3). Particulars of any charge created by the borrowing corporation or any guarantor corporation must be furnished to the trustee for debenture holders (Bill sub-cl.1058(4)).

3164. Also the borrowing corporation and every relevant guarantor corporation must lodge with the ASC and the trustee a profit and loss account and balance sheet:

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

(Bill sub-cl.1058(5)).

3165. A borrowing corporation that is a holding company must submit a set of consolidated accounts for itself and each of its subsidiaries that is a guarantor corporation to the ASC and the trustee, for the same periods and within the same time periods stated in Bill sub-cl.1058(5) (Bill sub-cl.1058(6)). However, the trustee will be able also to require guarantor subsidiary companies to lodge accounts required under Bill sub-cl.1058(5) (Bill sub-cl.1058(7)). A copy of the notice under Bill sub-cl.1058(7) will have to be lodged with the ASC (Bill sub-cl.1058(8)).

3166. Nothing in Bill sub-cl.1058(5), (6), or (7) will apply to a pastoral company which has an exemption under s.11 of the Banking Act and is declared by the ASC to be a body corporate to which those sub-clauses will not apply (Bill sub-cl.1058(9)).

3167. In general, accounts prepared for the purpose of these three monthly reports will have to comply with certain accounts and audit provisions of the Bill (sub-cl.1058(12), (13), (14) and (15)).

3168. The trustee will have certain powers and obligations regarding accounts prepared by borrowing corporations and guarantor corporations (Bill sub-cl.1058(17), (18), (19) and (20)).

Cl.1059 : Obligation of guarantor body to provide information

3169. This clause is based on CA s.159.

3170. A borrowing corporation will be able to require any of its guarantor corporations to furnish information for inclusion in the three monthly reports of the borrowing corporations.

Cl.1060 : Loans and deposits to be immediately repayable on certain events

3171. This clause is based on CA s.160.

3172. Subject to certain qualifications, a borrowing corporation will be bound to repay loans and deposits received where the trustee for debenture holders considers that reports submitted by the company indicate that the purpose or project for which the moneys were raised has not been achieved or completed within the appropriate time.

Cl.1061 : Invitations or offers by excluded corporations

3173. This clause is based on CA s.161.

3174. An invitation by an excluded corporation (under Bill cl.65 - declared corporations including authorised dealers in the short term money market, Australian banks and exempt pastoral companies) will be deemed not to be an invitation or offer to the public for the purposes of this Division.

Cl.1062 : Liability of trustees for debenture holders

3175. The clause is based on CA s.163.

3176. Subject to certain exceptions, any trust deed provision that exempts the trustee from or indemnifies a trustee for liability for a breach of trust where the trustee fails to show the required degree of care and diligence will be void.

Division 5 : Prescribed Interests

3177. The provisions of Division 5 of Part 7.12 of the CB (cls.1063-1076) are based on CA Division 6 of Part IV. The provisions regulate the offering of 'prescribed interests'. Prescribed interests are defined in Chapter 1 to include almost any profit making scheme which does not fit within an exclusion relating to other interests (e.g. interests arising out of life insurance policies which are regulated under other Commonwealth legislation).

3178. The CB restricts the right to issue prescribed interests to public corporations (defined in Chapter 1) or agents of public corporations authorised for that purpose (sub-cl.1064(1)-(7)). The prospectus provisions found in Division 2 apply to this Division by virtue of the fact that prescribed interests are securities within the meaning of this Chapter of the Bill. The word 'of' in the context of

'securities' of a corporation, refers to securities 'made available by' a corporation, in the context of the prescribed interest provisions (see cl.5). The stop issue provisions that apply to prospectuses will apply to prescribed interests by virtue of the fact that a prospectus should accompany all issues of securities (other than excluded issues).

3179. The prescribed interest provisions found in the restructured format of the Bill should not cause significant disruption to the prescribed interests industry as the restrictions essentially follow those of the CA. However it should be noted that in order to provide added protection to investors the covenants found in cl.1069 (previously CA s.168) will now be deemed to be in a deed relating to prescribed interests whether they are there or not.

3180. The general prohibition against engaging in misleading and deceptive conduct contained in cl.995 applies to all securities including prescribed interests.

Cl.1063 : Modification of Certain Provisions

3181. This clause is based on CA sub-s.170(3).

3182. This clause makes clear that the provisions of the Bill and in particular the prospectus provisions apply to prescribed interests. Any modifications of those provisions, as are necessary or as are prescribed by regulations, for them to apply to prescribed interests are to be made.

Cl.1064 : Issue of Prescribed Interests Restricted

3183. This clause is based on CA ss.164 and 169.

3184. Section 169 CA permitted prescribed interests to be offered or issued to the public by a public company (as defined in CA s.164). The CB parallels this provision although the new clause is restated in terms that highlight the relevant heads of Commonwealth constitutional powers relied on in these provisions.

3185. The corporations power is used to prohibit public constitutional corporations from issuing or offering a prescribed interest unless as authorised under the provisions (sub-cl.1064(1)). The power is also used to prevent such a corporation from dealing in a prescribed interest offered by a person, not being such a corporation (sub-cl.1064(2)).

3186. Further, a person will be prevented from dealing with an unauthorised prescribed interest made available by a person other than a public corporation (sub-cl.1064(3)).

3187. Authorised agents of public corporations are permitted to make available, offer or issue invitations to subscribe for or buy prescribed interests (sub-cl.1064(7)). The effect of the prohibition based on the corporations power is reinforced by provisions relying on a range of other constitutional powers available to the Commonwealth.

3188. These provisions prohibit any person from dealing in prescribed interests made available by a person other than a public corporation or its authorised agent:

- . by use of eligible communications services, namely postal, telegraphic, telephonic or other like services (defined in cl.5), sub-cl.1064(4), or
- . in eligible circumstances namely, in interstate, overseas or inter-territory trade or commerce (see cl.63), sub-cl.1064(5).

3189. Use is also made of the constitutional power over cheques and negotiable instruments to prevent a person from suing on a cheque or other bill of exchange or promissory note used in a transaction concerning the making available of a prescribed interest by a person not being a public corporation or its authorised agent (sub-cl.1064(6)).

Cl.1065 : No Issue Without Approved Deed

3190. This clause is based on CA s.171.

3191. A person will be prohibited from issuing, offering or inviting subscriptions for prescribed interests of a public corporation unless there is in force in relation to the interest an approved deed. A person will also be prohibited from referring to the approval of a deed or of a trustee in other documents.

Cl.1066 : Approved Deeds

3192. This clause is based on CA ss.165 and 166 but reflects the fact that the ASC will not pre-vet deeds.

3193. Unlike the position under the CA, the ASC will not be required to pre-vet and approve each deed lodged with it. Deeds will however need to be lodged with the ASC and trustees and representatives will need to be approved by the ASC.

3194. An approved deed will be one that complies with the requirements of the Division and of the regulations, is lodged with the ASC and has an ASC approved trustee or representative appointed for the purposes of the deed.

3195. Sub-cl.1066(2) is a transitional provision concerning deeds that were approved deeds immediately before the commencement of this Division.

Cl.1067 : Approval of Trustees

3196. This clause is based on CA s.167.

3197. The ASC will be able to grant approval, on such terms and conditions as it thinks fit, to a company acting as trustee or representative for the purposes of the deed

(sub-cl.1067(1)). The ASC will also be able to revoke the approval if terms or conditions subject to which the approval was granted have been breached (sub-cl.1067(2)).

Cl.1068 : Lodgment of Consolidated Copies of Deed

3198. This clause is based on CA sub-s.166(4) and (5).

3199. Provision is made where an instrument or instruments amend a deed for the management company to lodge a printed consolidated copy of the deed with the ASC.

Cl.1069 : Covenants to be Included in Deeds

3200. This clause is based on CA s.168 but reflects amendments concerning the deemed existence of the listed covenants in deeds.

3201. The covenants contained in this clause parallel those found in CA s.168. Paras.1069(1)(c), 1069(1)(d), 1069(1)(e)(ii) and 1069(1)(f) dealing with buy-back covenants have been added. 'Buy-back' arrangements are defined in cl.5. Paragraph 1069(1)(n) allows other covenants to be prescribed by the regulations. These provisions, which expand upon the buy back arrangements found in CA para.1069(1)(b)(iii) and impose additional obligations on the trustee or representative, are based on the findings of the NCSC licensing review.

3202. Under the CA a number of problems came to light concerning the offering of a prescribed interest scheme when there was no approved deed containing the statutory covenants. Although a criminal penalty may have been incurred pursuant to CA para.174(1)(a) for failure to produce an approved deed, it appeared that the statutory covenants by which duties and obligations were be imposed on the trustee and manager of the trust did not apply. The new provisions

aim to fill this void. In order to remedy this situation the covenants listed in cl.1069 will now be deemed to be included in the deed whether or not they are actually included in the deed (see sub-cl.1069(5)-(7)). Consequently if there is an offer, invitation or issue of any prescribed interest without there being an approved deed or the approved deed is defective in not referring to all of the required covenants, the deed constituting the interest will be deemed to contain the covenants set out in sub-cl.1069(1), (see sub-cl.1069(5), (6), (7), (8) and (9)).

3203. Sub-cl.1069(8) provides for the above deeming to occur so far as practicable in a situation where there is no deed. The provision seeks to ensure that there is a 'deed containing the covenants' in a situation where there is in fact no formal trust deed.

3204. While only certain covenants are specified in this clause it can be noted that the clause also contains a power to prescribe by regulation other covenants that should be included in deeds. These covenants may be subject to the deeming provisions if this becomes necessary. Sub-cl.1069(9) deals with the situation where a covenant is prescribed by regulation. Except so far as the regulations otherwise provide, every deed that is in force when a regulation comes into force will be deemed to contain the covenant/s prescribed in the regulations.

3205. Sub-cl.1069(5) and (6) deem covenants concerning primarily trustees obligations and buy back arrangements to be contained in deeds which were approved under the previous corresponding law.

3206. Further to the deeming of certain covenants to exist, sub-cl.1069(10) provides for the situation where prices are to be calculated. In the absence of any formula, prices will be calculated as prescribed or as the ASC determines.

3207. In addition to the covenants to be included in the deed, deeds should not contain misleading or deceptive information. Preparers of deeds should as a matter of course include in the deed such items as a true disclosure of the nature and extent of the undertaking, scheme, enterprise or investment contract, the nature of the prescribed interest, the rights of the holders of the prescribed interest, full particulars of the trustee or representative etc.

3208. Sub-cl.1069(7), (8), (9), (10) are based on CA sub-s.168(3)-(6).

Cl.1070 : Register of Holders of Prescribed Interests

3209. This clause is based on CA s.172.

3210. The management company will be required to keep, at its registered office, its principal place of business in Australia or another place approved by the ASC a register of holders of prescribed interests in respect of each deed with which the company is concerned. The register will contain details of the names of holders of prescribed interests, the extent of their holdings and the dates during which time the interests were held.

Cl.1071 : Returns and Information Relating to Prescribed Interests

3211. This clause is based on CA s.173.

3212. A management company will be required to lodge a return within 2 months after the end of each financial year applicable to a deed containing a list of interest holders and such other particulars as are prescribed.

Cl.1072 : Buy-back covenant and buy-back arrangements

3213. This provision is new.

3214. It relates to the buy-back covenants found in cl.1069 and imposes certain notification duties on trustees, representatives and the management company.

3215. The trustee or representative in relation to a deed that is or has been an approved deed is required to notify the management company if he or she considers the buy-back covenant to be inadequate (sub-cl.1072(1)). Failure to give the requisite notices or non compliance with a buy-back covenant results in the contravention of this clause.

Cl.1073 : Preservation of Civil Liability

3216. This clause is based on CA sub-s.174(2).

3217. A person will not be relieved from any liability to a holder of a prescribed interest made available by a corporation merely because the person has been convicted of an offence in respect of a contravention of a provision of this Part.

Cl.1074 : Winding Up of Schemes

3218. This clause is based on CA s.175.

3219. Where the management company goes into liquidation or, in the opinion of the trustee or representative, it has ceased to carry on business or has failed to comply with a provision of the deed to the prejudice of holders of prescribed interests, the trustee will be required to convene a meeting of holders.

Cl.1075 : Non-application of Division in Certain Circumstances

3220. This clause is based on CA s.176.

3221. The Division will not apply in the case of the sale of any prescribed interest by a personal representative, liquidator, receiver or trustee in bankruptcy in the normal course of realisation of property.

Cl.1076 : Liability of Trustees

3222. This clause is based on CA s.177.

3223. With certain limited exceptions, a provision contained in an approved deed or in any contract with the holders of prescribed interests to which such a deed relates will be void insofar as it would have the effect of exempting a trustee under the deed from liability for breach of trust where the trustee fails to show the required care and diligence.

Division 6 : Hawking of Securities

3224. The security hawking provisions were previously found in the Offences provisions of the CA in s.552. It is considered that these provisions are more appropriately found with the other security trading provisions in the Bill.

3225. While the provisions are redrafted in a different form to the CA their effect is basically the same. The new provisions refer to securities rather than to shares and debentures. This does not change the ambit of the provision as shares were broadly defined in CA sub-s.552(14). Differences occur in the definition of going from place to place and the fact that the Bill does not use the terminology 'offer to the public' or 'member of the public'.

Cl.1077 : Interpretation

3226. In this Division references to a person going from place to place will include references to a person communicating with other persons at different places by the use of an eligible communications service (defined in Chapter 1 to mean postal, telegraphic, telephonic or other like services, within the meaning of para.51(5) of the Constitution) (para.1077(a)). The use of modern means of communication for the purpose of security hawking will clearly fall within the meaning of the legislation.

3227. References to the buying or purchasing of securities includes a reference to acquiring securities by barter or exchange. (para.1077(b) is based on CA sub-s.552(15)).

Cl.1078 : Restriction on Hawking Securities

3228. This clause is based on CA sub-ss.552(1) and (2).

3229. A person will be prohibited from going from place to place issuing invitations to subscribe for or buy securities of a corporation or offering securities of a corporation for subscription or purchase unless the ASC has exempted the corporation whose securities are in question from the operation of this provision. Problems have arisen with the interpretation of the terms 'offer to the public' and 'member of the public', which are used in the CA. These terms are not used in the Bill in relation to the security hawking nor the prospectus provisions. In place of these words the Bill refers to offers, invitations and issues and excluded offers, invitations and issues (see cls.65 and 66).

Cl.1079 : Restriction on Written Offers in Respect of Securities

3230. This clause is based on CA sub-ss.552(3), (4), (5) and (15)).

3231. Except in the circumstances set out in sub-cl.1079(4) a person will not be able to issue written invitations to buy securities nor written offers for purchase of securities to persons other than persons whose ordinary business is the buying or selling of securities unless the invitation or offer is accompanied by a statement in writing complying with this clause or a prospectus that complies with Division 1.

3232. Sub-cl.1079(2) provides that sub-cl.1079(1) applies in relation to an invitation or offer that is broadcast, televised or included in a cinematograph film.

Cl.1080 : Particulars to be Included in Statement

3233. This clause is based on CA sub-s.552(6).

3234. This provision specifies the contents of the statement referred to in cl.1079(1).

Cl.1081 : Prohibition on Hawking of Securities of Proposed Corporation

3235. This provision parallels the prohibition in CA sub-s.552(8) in respect of a proposed corporation.

Cl.1082 : Power of Court to Make Orders

3236. This clause is based on CA sub-ss.552(12) and (13).

3237. Where a person is convicted of an offence in respect of an invitation or offer in contravention of this Division, a Court may order that any contract made pursuant to the invitation or offer is void and may give such consequential directions as it thinks proper for the repayment of any money or the re-transfer of any securities.

Division 7 - Exemptions and Modifications

Cl.1083 : Australian Banks

3238. This clause is based on CA s.215B.

3239. Australian banks (defined in Chapter 1) will not be required to comply with the provisions contained in Divisions 2, 4 and 6 when acting in the ordinary course of their business.

Cl.1084 : Powers of Commission

3240. This clause is based on CA s.215C.

3241. The ASC will by instrument in writing be able to exempt a person from compliance with all or any of the provisions in the Bill relating to:

- (a) Division 2 Prospectuses
- (b) Division 3 Restrictions on Allotment and variation of contracts
- (c) Division 4 Debentures
- (d) Division 5 Prescribed Interests
- (e) Division 6 Security Hawking.

3242. If a person contravenes or fails to comply with a condition of an exemption the Court, on application of the ASC, may order the person to comply with the condition (sub-cl.1084(5)).

3243. The ASC will have power to declare, by instrument in writing, that a Division has effect as if all or any of the provisions in the Division are omitted, modified or varied in manner specified in the declaration in their application to a particular person (sub-cl.1084(6)).

3244. There is a general requirement for the ASC to publish a copy of an instrument executed under cl.1084 in the Gazette (sub-cl.1084(8)).

3245. Sub-cl.1084(9) is a transitional provision. It provides for exemptions or declarations made under a previous corresponding law to be continued in force. Accordingly NCSC exemptions made in respect of prospectuses for example, will continue to be available in so far as this is possible under the Bill.

PART 7.13 - TITLE TO, AND TRANSFER OF, SECURITIESIntroduction

3246. Part 7.13 deals with title to shares and other interests in a company and the transfer of securities. Special provisions relating to the transfer of marketable securities and marketable rights are included. Divisions 1 and 2 are based very closely on Division 7 of Part IV of the Companies Act. Division 3 is based on Division 8 of that Part but includes a number of reforms.

3247. These reforms include provision for a broker to execute a transfer of marketable securities on behalf of the owner where the owner has given the dealer selling instructions in respect of the securities (see cl.1104). Transferee acceptance forms have also been deleted (see cl.1101). In addition, a wide exemption and modification power has been granted to the ASC in respect of the provisions in this Part (see cl.1113).

Division 1 - Title to Securities.Cl.1085 : Nature of shares and other interests

3248. This clause is to the same effect as CA s.178.

3249. A share or other interest in a company is :

- (a) personal property;
- (b) transferable or transmissible as provided by the articles; and
- (c) subject to the articles, is capable of devolution by will or by operation of law.

(sub-cl.1085(1)).

3250. Subject to the above, the laws applicable to ownership of, and dealing with, personal property apply to shares or other interests of a member in a company, including equitable interests in respect of a share or other interest (sub-cl.1085(2)).

3251. For the purpose of any law, a share or other interest of a member in a company will be taken to be situated in the State or Territory in which the register of members of the company is kept. If the name of the member is entered on a branch register, the interest will be taken to be situated in the State, Territory or country other than Australia in which the branch register is kept (sub-cl.1085(3)).

Cl.1086 : Numbering of shares

3252. This clause is to the same effect as CA s.179.

3253. Each share in a company must be distinguished by an appropriate number unless all shares in the company or the class are and remain fully paid up and rank equally (para.1086(2)(a)) or all the shares are evidenced by share certificates (para.1086(2)(b)).

Cl.1087 : Certificate to be evidence of title

3254. This clause is to the same effect as CA s.180.

3255. A certificate issued in accordance with this clause specifying any shares held by a member of the company is prima facie evidence of the title of the member to the shares. Such a certificate is required to be under the common seal of the company and to state:

- (a) the name of the company and the short title of this Act;
- (b) the class of shares; and

- (c) the nominal value of the shares and the extent to which the shares are paid up.

Cl.1088 : Company may have duplicate common seal

3256. This clause is to the same effect as CA s.181.

3257. A company will be able, if authorised by its articles, to have a duplicate common seal, which must be a facsimile of the original with the addition on its face of the words "Share Seal" or "Certificate Seal". A certificate sealed with such a duplicate deal is deemed to be sealed with the common seal.

Cl.1089 : Loss or destruction of certificates

3258. This clause is to the same effect as CA s.182.

3259. Where a certificate of title to shares, debentures or prescribed interests is lost or destroyed, the company is required, on application by its owner, to issue a duplicate certificate to the owner within 21 days after the application or payment of a required company fee (which cannot exceed a maximum prescribed amount) or within any longer period approved by the Commission (sub-cl.1089(1)). The application must be supported by a written statement and an undertaking that, if found, the certificate will be returned. The directors may require the applicant to place an appropriate advertisement or to lodge a bond indemnifying the company against loss (sub-cl.1089(3)).

Division 2 - Transfer of Securities

Cl.1090 : Definition

3260. This definition only appears once for the purpose of all provisions in Division 2. It previously appeared a number of times in CA ss.182 to 188.

Cl.1091 : Instrument of transfer

3261. This clause is to the same effect as CA s.183.

3262. A company is not able to register a transfer of shares, debentures or interests unless a proper instrument of transfer has been delivered to the company (sub-cl.1091(1)). However, this does not prejudice the power of the company to register as a shareholder, debenture holder or interest holder a person to whom a right has devolved by will or by operation of law (sub-cl.1091(2)). Transfers by personal representatives are treated as if the personal representative is the registered holder (sub-cl.1091(3)).

3263. Where the dead holder is represented by a personal representative under a law in a different State to that in which the holder was registered, a transfer by that representative is to be registered by the company provided an appropriate declaration is made by the representative in relation to grants of representation in the State of registration (sub-cl.1091(4)).

3264. An application by a personal representative for registration is treated as a transfer to the representative (sub-cl.1091(7)).

Cl.1092 : Registration of transfer at request of transferor

3265. This clause is to the same effect as CA s.184.

3266. On the written request of a transferor of any share, debenture or interest in a company, the company is required to enter the name of the transferee in the register in the same manner as if the application for entry were made by the transferee (sub-cl.1092(1)).

3267. A company, at the transferor's request, must also require the transferee, or other person holding the documents of title, to produce them for registration of the transfer (sub-cl.1092(2)). The transferor may apply to the Court for certain orders if the transferee or other person fails to comply with such a requirement (sub-cl.1092(3) and (4)).

Cl.1093 : Notice of refusal to register transfer

3268. This clause is to the same effect as CA s.185.

3269. If a company refuses to register a transfer of any share, debenture or interest in the company, it must, within 2 months of the date of lodgement of the transfer, send the transferee notice of the refusal.

Cl.1094 : Remedy for refusal to register transfer or transmission

3270. This clause is to the same effect as CA s.186.

3271. Where directors refuse to register a transfer or transmission without just cause the Court will be able to order the transfer to be registered or may make such other order as it considers just and reasonable for the purchase of the shares .

Cl.1095: Certification of transfers

3272. This clause is to the same effect as CA. s.187.

3273. The certification by a company of any instrument of transfer in relation to any shares, etc. of the company is taken as a representation by the company that there have been produced to the company such documents as on their face show prima facie title to the shares in the transferor named in the instrument of transfer (sub-cl.1095(1)).

3274. If a person acts on the basis of a certification which was false and negligently made, the company is liable as if it had been fraudulently made (sub-cl.1095(2)). A company is able to limit its exposure to such liability (provided the certification was not made fraudulently) to a minimum of 42 days (sub-cl.1095(3)).

Cl.1096 : Duties of company with respect to issue of certificates

3275. This clause is based on CA s.188.

3276. Within 2 months after the allotment of any shares etc., and within 1 month after the date on which a valid transfer of shares etc is lodged with it, the company is required to complete and have ready for delivery all the appropriate certificates, debentures or other documents in connection with the allotment or transfer. The company must send the certificates to the transferee or allottee unless otherwise instructed in writing by them (sub-cl.1096(1) and(2)).

3277. A person can apply to the ASC for a declaration that a company is not required to comply with the above obligations in relation to the person (sub-cl.1096(3)).

3278. Where a company fails to comply with its above obligations an appropriate Court order can be sought after the company is given notice of the default (sub-cl.1096(4)).

Division 3 - Transfer of Marketable Securities and Marketable Rights

3279. Division 3 (cls.1097 to 1112) contains provisions designed to facilitate the processing of marketable securities and rights to marketable securities. Some amendments have been made to the Companies Act provisions to expedite the share transfer process. Those amendments, and consequential amendments to the National Guarantee Fund provisions, are:

- (a) deletion of the requirement that a transferor sign security transfer forms. The transferor's broker will be able to execute the transfer on the owner's behalf by placing the broker's validation stamp on the transfer. The transfer will still need to be accompanied by the relevant certificate(s) and a transfer executed by a broker where the broker has not received selling instructions from the owner will not be sufficient to pass title to the shares. In addition, it will be an offence for a broker to execute a transfer unless the broker has received selling instructions from the owner. A broker will be liable to indemnify all parties suffering loss as a result of any unauthorised transfer;
- (b) extension of the National Guarantee Fund provisions to provide compensation to both the owner and the transferee where a broker transfers the owner's shares without authority (see Division 7 of Part 7.10);
- (c) deletion of transferee acceptance forms that were previously required (CA Schedule 4, Forms 4, 9 and 11) where the transfer related to securities or rights involving uncalled liabilities;
- (d) the addition of two new consolidated transfer forms - one relates to multiple transfers of securities to one transferee and the other to multiple transfers of rights to one transferee. The new forms will mean that where there are several transferors, details relating to the transferee need only be completed once rather than repeated on every transfer (see Schedule 2 of the Bill).

3280. While several of the CA provisions remain unchanged in substance some have been restructured and some drafting changes have been made for the purposes of greater clarity.

Cl.1097 : Interpretation

3281. This clause is based on CA s.189 with the following modifications:

- (a) the definition of "associate" is new and is based on CA para. 194(3)(b).
- (b) the definitions of "duly completely", "duly completed Part 1", "eligible body", "execution time", "issuing body" and "stamp" are new definitions.
- (c) the definition of "marketable right" replaces the definition of "right to a marketable security".
- (d) the definition of "marketable security" incorporates the new definition of "eligible body" with the result that the old definition of "prescribed corporation" is no longer necessary.
- (e) provisions relating to the stamping of documents now appear in a separate clause (cl.1099).

Cl.1098 : Document duly completed in accordance with a particular form

3282. Sub-clause 1098(1) is based on CA sub-s.191(3).

3283. This provision deals with the requirements for due completion of a document in accordance with a form or part of a form appearing in Schedule 2 of the Bill. A document is not duly completed unless it contains a name and address and a stamp which purports to be that required by the form.

3284. Sub-clauses 1098(2) to (5) apply where consolidated transfer forms are used (see Schedule 2, Forms 4 and 8 and Part 3 of Forms 1, 2, 3, 5, 6 and 7 of that Schedule). Such forms are designed to be used where a transferee broker wishes to register a number of transfers to the one transferee. Under CA, the transferee broker would need to fill in transferee details on every transfer form. By use of the new consolidated transfer form, the transferee broker will only need to fill in the transferee's details once.

3285. For due completion where a consolidated transfer form is used the following requirements must be met:

- (a) Part 3 of each transfer form will need to bear a transferee's broker's stamp which has on it a transfer consolidation number (sub-cl.1098(3)).
- (b) the consolidated transfer form (Part 4 or 8 of the Schedule) must set out the transfer consolidation number stamped on the Part 3 of each of the transfer forms (sub-cl.1098(4)).

3286. Sub-clause 1098(5) provides that due completion of the consolidated transfer form will not be dependent on the total number of securities to which the form relates being accurately stated or all the transfer consolidation numbers coinciding exactly with those on the transfers. This is designed to prevent a mistake by the transferee broker in respect of one of the transfers (e.g. where the consolidation number doesn't match that in the consolidated transfer), resulting in all the other transfers, whose consolidation numbers do match those in the consolidated transfer, being rejected on the basis that the form is not duly completed.

Cl.1099 : Stamping of documents

3287. This clause is to the same effect as CA sub-ss.189(5) and (6) and contains interpretation provisions dealing with the stamping of transfers.

Cl.1100 : Sufficient transfers

3288. This clause is to the same effect as CA s.190.

3289. A sufficient transfer (previously in CA a "sufficient instrument of transfer") under Division 3 can be used as a proper instrument of transfer for the purposes of cl.1091 of the Bill and for the purposes of any other law or instrument relating to marketable securities or marketable rights.

Cl.1101 : What is a sufficient transfer of marketable securities or marketable rights : generally

3290. This clause is to the same effect as CA sub-ss.191(1) and (2) except that para.(b) of both those sub-sections has been deleted as a result of deletion of transferee acceptance forms in Schedule 2 (previously CA Schedule 4, Form 4) and that the clause (paras.1101(1)(c) and (d)) now refers to the forms and parts of forms which can be used to effect a consolidated transfer.

3291. A document will only be regarded as a sufficient transfer of marketable securities (or rights) if it relates to those securities (or rights) and is duly completed in accordance with a specified form or parts of specified forms in Schedule 2.

3292. The forms in CA, Schedule 4 have been modified as a result of the reforms to enable a transferor brokers to execute a transfer on behalf of a transferee broker and to enable a transferee broker to use a consolidated transfer form where the transferee's purchase is made up of transfers from a number of transferors (see Schedule 2 to the Bill).

Cl.1102 : What is a sufficient transfer by an authorised trustee corporation

3293. This clause is to the same effect as CA s.192 except that the clause reflects the deletion of CA Forms 9 and 11 from the Schedule.

3294. In a transfer of marketable securities or rights other than by way of sale, gift or exchange by an authorised trustee corporation (see cl.9) to the beneficial owner of the securities or rights, a document will constitute a sufficient transfer if it relates to those securities or rights and is duly completed in accordance with the specified form.

Cl.1103 : Transferee's execution of transfer of marketable securities

3295. This clause is to the same effect as CA sub-ss.193(1) and (3)).

3296. The clause sets out the effects of the execution of a sufficient transfer of marketable securities on a transferee's rights and obligations in respect of the company or other issuing body whose securities are transferred e.g. the transferee is deemed to have accepted the securities on the same terms and conditions as the previous holder (sub-cl.1103(2)).

Cl.1104 : Transferee's execution of transfer of marketable rights

3297. Sub-clauses 1104(1) and (2) are based on CA sub-s.193(2).

3298. Sub-clause 1104(3) has been added as a result of the removal of transferee acceptance forms (see cl.1101). It also ensures consistency in the treatment of marketable securities (see sub-cl.1103(3)) and marketable rights where the relevant

securities are shares. Where marketable rights are transferred, the transferee is deemed to have applied for the allotment of the securities and to have agreed to the terms of subscription of the issuing body. Where the rights relate to shares, the transferee is deemed to have agreed to become a member, and be bound by the constitution, of the issuing body.

Cl.1105 : Effect where document purports to bear transferor's broker's stamp

3299. This clause is based on CA sub-s.194(1) but contains changes as a result of the deletion of transferor's signatures on transfer forms.

3300. Where a transfer is duly completed and bears a stamp purportedly that of the transferor's broker, the transferor broker and his associates are deemed to have warranted the accuracy of the certified statements in the document and the right of the transferor to sell or dispose of the securities or rights (sub-cl.1105(2)).

3301. Where a transferor's broker executes a transfer and has received selling instructions from the owner in relation to the securities transferred, the broker is deemed to have been authorised to execute, and to have executed, the document on the transferor's behalf. In such a case, the broker and each of the broker's associates are liable to indemnify the transferor as well as the issuing body, the transferee and the transferee's broker against any loss resulting from wrongful stamping or unauthorised execution of the transfer (sub-cl.1105(3)).

3302. Unauthorised transfers i.e. those executed by the broker without instructions, will not be sufficient to pass title. Owners of the securities the subject of the unauthorised transfer and transferees suffering loss as a result of it will be able to claim against the National Guarantee Fund (see Division 7 of Part 7.10).

Cls.1106 to 1108 : New provisions on effect of securities exchange stamp

3303. Transfers that purport to bear the stamp of a securities exchange are treated separately. This is designed to overcome possible confusion over an exchange's liability (i.e. where a transfer bears a stamp that purports to be that of the exchange) by virtue of that liability currently being dealt with together with that of the transferor's broker's in CA sub-s.194(1).

3304. In addition, warranties by a securities exchange are the subject of one clause while indemnities by or for a securities exchange are the subject of another. The indemnity provisions make it clear that an exchange, as well as the transferor's broker, can be liable for losses suffered by specified parties. The exchanges will continue to be entitled to cross indemnity from transferor brokers.

Cl.1106 : Warranties by securities exchange where document purports to bear its stamp

3305. This clause is based on CA paras.194(1)(a) and (b).

3306. Where a duly completed transfer bears a stamp purporting to be that of a securities exchange, the exchange will be deemed to have made the same warranties as the transferor broker (see sub-cl.1105(2)).

Cl.1107 : Indemnities by securities exchange where documents purport to bear their stamps

3307. Where a securities exchange has stamped a document of transfer (e.g. a split transfer form), and another document of transfer relating to all or any of the securities or rights (e.g. a security transfer or broker's transfer form), has been stamped by the transferor's broker, the exchange is liable to indemnify the issuing body, the person specified as the

transferor, the transferee and the transferee's broker in the document bearing the exchange's stamp against any loss arising from wrongful stamping or unauthorised execution by the transferor broker of the form bearing that broker's stamp (sub-cl.1107(1) and (2)). However, the exchange is entitled to recover any amounts so paid from the above transferor broker or the broker's associates (sub-cl.1107(3)).

Cl.1108 : Joint and several warranties and liabilities

3308. If 2 or more persons are liable in respect of the warranties and indemnities under cl.1105 or cl.1107 they are liable jointly and severally (sub-cl.1108(1) and (2)). This extends the previous CA position in which only the broker's liability to cross indemnify an exchange was expressed to be joint and several.

Cl.1109 : Registration of certain instruments

3309. This clause is to the same effect as CA s.195.

3310. A company or other "eligible body" (defined in cl.1097) receiving a sufficient transfer for registration is entitled to assume, in the absence of contrary knowledge:-

- (a) that a stamp on a document of transfer is what it purports to be (para.1109(a)); and
- (b) that when a transfer under cl.1102 is executed, the authorised trustee corporation held the relevant securities in trust for the transferee and that the transfer was not made by way of a sale, gift or exchange (para.1109(b)).

Cl.1110 : Operation of Division

3311. This clause is to the same effect as CA s.196.

3312. These provisions operate to ensure that the provisions relating to the transfer of marketable securities and marketable rights:

- (a) apply despite any provision to the contrary in the Bill or in any other law, trust deed or other instrument relating to transfer of marketable securities or rights (sub-cl.1110(1) and (6));
- (b) do not affect the terms and conditions on which marketable securities or rights are sold (sub-cl.1110(2));
- (c) do not affect a company's rights to refuse to register a person as the holder of shares or to allot marketable securities to the person except that such an objection will not be valid if it relates only to the form of the instrument of transfer (sub-cl.1110(3));
- (d) do not constitute a breach of any law, memorandum, articles, trust deeds or other instrument (sub-cl.1110(4));
- (e) do not prevent the use of forms of transfer or modes of execution otherwise permitted by law (sub-cl.1110(5));

Cl.1111 : Occupation need not appear in instrument, register etc.

3313. This clause is to the same effect as CA s.197.

3314. It is not necessary in an instrument of transfer of marketable securities or rights to state the occupation of the transferor or transferee regardless of the constitution of a company or other eligible body or the terms of creation or issue of the securities or rights (sub-cl.1111(1) and (2)).

3315. The omission from any register or document relating to marketable securities of the occupation of the person who is, or is entitled to be, registered as the holder of the securities does not breach any law, memorandum, articles, trust deed or any other document relating to the securities (sub-cl.1111(3)).

Cl.1112 : Offences

3316. Subject to the creation of the new offence mentioned below, this clause is to the same effect as CA s.198.

3317. It is an offence for a broker to stamp a document of transfer unless the instrument relates to a sale or purchase made in the ordinary course of business of the broker for a consideration of not less than the unencumbered market value of the securities (sub-cl.1112(1)).

3318. A provision additional to those in CA s.198 makes it an offence for a person to use a stamp that purports to be that of a transferor broker on a transfer document unless:

- (a) the stamp is genuine;
- (b) the broker has the transferor's authority; and
- (c) the person is the transferor's broker or an authorised agent (sub-cl.1112(2)).

3319. Paragraph 1112(2)(b) is consequential on the deletion of transferor signatures on transfer forms - transferor broker's will now be able to execute transfer documents on behalf of the transferor. Even though unauthorised execution of transfers by brokers will not be sufficient to pass title and compensation will, in any event, be available under the NGF, it is important for the integrity and efficiency of the transfer system that the broker only execute transfer

documents where he has the authority of the owner of the particular securities to do so. Paragraph 1112(2)(b) provides that a transferor broker's deemed authority under para.1105(3)(a) is to be disregarded in determining whether the broker actually had authority to execute the transfer.

3320. A securities exchange is prohibited from using its stamp on a transfer document unless a duly completed Part 1 (see sub-cl.1097(1)) has been lodged with the issuing body or the exchange holds the latter document on which the transferor broker certifies that such a document has or will be so lodged (sub-cl.1112(3)).

3321. An authorised trustee corporation (see cl.9) is prohibited from executing transfer documents under cl.1102 where the transfer involves a sale, gift or exchange or the recipient is not the beneficial owner of the securities or rights (sub-cl.1112(4)).

3322. It is an offence for a person other than an authorised trustee corporation to knowingly cause or permit the execution of a document that may be used as, but is not, a sufficient transfer under cl.1102 (sub-cl.1112(5)).

3323. A person is not permitted to lodge with a company or other eligible body a document stamped or executed in a prohibited manner for the purpose of registration, allotment or issue of marketable securities (sub-cl.1112(6)).

Division 4 - Exemptions and Modifications

Cl.1113 : Powers of Commission

3324. This is a new provision although the power it confers on the ASC is partly based on CA s.215C and CASA ss.57 and 58.

3325. Where the ASC is satisfied that security holders will be adequately protected and that transfer of the securities will be made more efficient (sub-cl.1113(2)) it will be able to:

- (a) exempt particular securities or classes of securities, subject to any conditions it wishes to impose, from any of the provisions of Part 7.13 or any regulations made for the purposes of the Part (sub-cl.1113(3)); and
- (b) modify or vary the operation of any of the provisions, or any regulations made for their purposes, in their application to particular securities or classes of securities (sub-cl.1113(6)).

3326. The ASC must publish a copy of an exemption or a modification declaration in the Gazette (sub-cl.1113(7)).

PART 7.14 - MISCELLANEOUS

3327. This Part (cls.1114-1119) includes provisions dealing with the Court powers, use of particular titles associated with the securities industry and, books and records. The clauses in the Part are based on SIA ss.14, 133 and 136-139.

Cl.1114 : Power of Court to make certain orders

3328. This clause is to the same effect as SIA s.14.

3329. A brief outline of this clause is as follows:

(a) If it appears to the Court

(i) on the application of the ASC that a person has contravened (or is about to contravene) any law relating to dealing in "eligible securities" (defined in cl.9), the conditions of a licence or the business or listing rules of a securities exchange; or

(ii) on the application of a securities exchange, that a person has contravened its business or listing rules

the Court may make such orders as it thinks fit including those listed in paras.1114(1)(c) to (h); (but not if it would unfairly prejudice any person (sub-cl.1114(4))).

(b) the Court is empowered to make an interim order (sub-cl.1114(2)); no undertakings as to damages shall be required before such an order is made (sub-cl.1114(3)).

- (c) the Court may require that notice be given or published before making an order under sub-cl.1114(1) (sub-cl.1114(5)).
- (d) among the examples of orders in sub-cl.1114(1) is the appointment of a receiver of the "property" (defined in sub-cl.1114(7)) of a dealer. The receiver is given wide powers by sub-cl.1114(6)).
- (e) contravention of an order under this section or the requirements of such a receiver is prohibited (sub-cl.1114(8)).
- (f) the Court may rescind, vary or suspend an order made under this clause (sub-cl.1114(9)).

Cl.1115 : Restrictions on use of titles "stockbroker", "sharebroker" and "stock exchange"

3330. This clause is based on SIA s.133. The persons to whom, and the circumstances in which, that section applied have been modified for constitutional reasons.

3331. A corporation will be prohibited from using the title "stockbroker" or "sharebroker" if it is not a member of a stock exchange (sub-c.1115(1)). A person other than a corporation who is not a stock exchange member will be prohibited from engaging in conduct which would give the impression that the person is a sharebroker or stockbroker who deals in "eligible securities" - see cl.9 (sub-cl.1115(2)).

3332. A body corporate that is not a stock exchange will be prohibited:

- (a) in the case of a corporation, from using the title stock exchange or a title creating the same impression (sub-cl.1115(3))

- (b) in the case of body corporate not being a corporation, from engaging in conduct giving the impression that it conducts a stock market on which eligible securities are traded or on which information is provided in relation to such securities (sub-cl.1115(4)).

Cl.1116 : Preservation and disposal of records etc.

3333. This clause is to the same effect as SIA s.136.

3334. This clause deals with the preservation and disposal of records. It is also an offence to falsify those records.

3335. A brief outline of this clause is as follows:

- (a) Anyone required to keep a register or record under the Chapter must keep it for the prescribed period even if they cease to carry on business before the expiration of that period (sub-cl.1116(1)).
- (b) The prescribed period for a register or record other than an accounting record is 5 years from the day on which the last entry was made. For an accounting record the period is 7 years after the last day of the accounting period to which the record relates (sub-cl.1116(2)).
- (c) These provisions do not apply to a contract note received or issued by a dealer if the matters referred to in sub-cl.842(3) are recorded by the exchange or (subject to any conditions imposed by the ASC) by the dealer in a manner approved by the ASC and the record is retained for 5 years (sub-cl.1116(3)).
- (d) The ASC will have certain powers regarding disposal of documents lodged with it (sub-cl.1116(4)).

Cl.1117 : Concealing etc. of books relating to securities

3336. This clause is based on SIA s.137 with certain amendments.

3337. It will be an offence to conceal, destroy or alter a book required to be kept by a dealer, licence holder (or a representative holding a proper authority from him) or financial journalist or to send such a book out of Australia (sub-cl.1117(1)).

3338. It will be a defence to a prosecution under sub-cl.1117(1) that the act was not done with an intent to defraud, to defeat the Chapter or obstruct an investigation (sub-cl.1117(2)).

Cl.1118 : Falsification of records

3339. This clause is to the same effect as SIA s.138.

3340. A person will be prohibited from recording false or misleading material, destroying, removing or falsifying recorded matter or not recording (with intent to falsify) matter that is required to be used in connection with the keeping of a book under this Chapter or other record referred to in cl.1116. This prohibition applies only where the material is recorded or stored in an illegible form by means of a mechanical device, an electronic device or other device (sub-cl.1118(1)). It will be a defence if it is proved that the person acted honestly and that in all the circumstances the act or omission constituting the offence should be excused (sub-cl.1118(2)).

Cl.1119: Precautions against falsification of records

3341. This clause is to the same effect as SIA s.139.

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3342. A person required by the Chapter to keep records must take reasonable precautions to guard against any falsification.

The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that every entry, no matter how small, should be recorded to ensure the integrity of the financial statements. This includes not only sales and purchases but also expenses, income, and transfers between accounts.

The second part of the document provides a detailed breakdown of the accounting cycle. It outlines the ten steps involved in the process, from identifying the accounting entity to preparing financial statements. Each step is explained in detail, with examples provided to illustrate the concepts.

The third part of the document discusses the various types of accounts used in accounting. It distinguishes between assets, liabilities, equity, revenue, and expense accounts, and explains how they are classified and balanced. It also covers the concept of debits and credits, and how they are used to record transactions.

The fourth part of the document discusses the importance of internal controls in accounting. It explains how internal controls help to prevent errors and fraud, and ensure the accuracy and reliability of the financial information. It provides examples of internal controls that can be implemented in a business.

The fifth part of the document discusses the role of the accountant in a business. It explains the various responsibilities of an accountant, including recording transactions, preparing financial statements, and providing financial advice to management. It also discusses the importance of ethical behavior in accounting.

The sixth part of the document discusses the various methods used to record transactions. It compares the double-entry system with the single-entry system, and explains the advantages and disadvantages of each. It also discusses the use of journals and ledgers to record transactions.

The seventh part of the document discusses the various methods used to adjust the accounts. It explains the importance of adjusting entries, and provides examples of the different types of adjustments that may be required. It also discusses the impact of adjustments on the financial statements.

The eighth part of the document discusses the various methods used to prepare financial statements. It explains the different types of financial statements, including the balance sheet, income statement, and statement of cash flows. It also discusses the importance of presenting the financial statements in a clear and concise manner.

The ninth part of the document discusses the various methods used to analyze the financial statements. It explains the different ratios and metrics used to evaluate the performance of a business, and provides examples of how to calculate and interpret these ratios.

The tenth part of the document discusses the various methods used to control the costs of a business. It explains the different types of costs, and provides examples of how to track and control these costs. It also discusses the importance of budgeting in cost control.