

1988

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

AUSTRALIAN SECURITIES COMMISSION BILL 1988

EXPLANATORY MEMORANDUM

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

ASC Bill : Explanatory Memorandum - Corrigendum to Para.357 -
Conferral of Powers on the Corporations and Securities Panel

Paragraph 357 of the explanatory memorandum indicates that the Minister will be able to direct that the Corporations and Securities Panel (established under Part 10 of the Bill - see cl.171) exclusively perform specified functions and powers of the ASC or the Companies Auditors and Liquidators Disciplinary Board. It was envisaged that the initial area of power referred to the Panel would be the proposed power of the ASC to declare certain acquisitions or takeover conduct unacceptable and to make consequential freezing orders.

This approach has been modified. Conferral of powers on the Panel will now be achieved by specific legislative amendment when considered appropriate. This will ensure that conferral of powers on the Panel will be subject to full Parliamentary scrutiny and exposure.

However, because of the importance of ensuring that the unacceptable acquisition or conduct declaration powers under Part 6.9 of the Corporations Bill are exercised by a body that is independent of the investigating authority (the ASC), that Bill now confers immediate exclusive power on the Panel to make such declarations (see corrigendum to that Bill's explanatory memorandum for further details). This achieves in a more immediate and direct manner the result which, as foreshadowed in paragraph 357 of the explanatory memorandum, was planned to have been achieved by Ministerial direction.

Conferral of a hearings power in respect of this declaration power and in respect of any other power legislatively conferred on the Panel will also be achieved in a more explicit way in Part 10 of the ASC Bill (see Division 3 (cls.184-198)). Whereas it was previously envisaged that any conferral of power on the Panel would pick up by reference the ASC's general hearings powers, this method provides for a specific hearings power for the Panel. Although these provisions are generally based on the ASC's hearings powers, a major distinguishing feature is that all Panel hearings must be held in private (sub-cl.185(3)).

As a result of these changes, the numbering of clauses of the Bill has also changed.

The explanatory memorandum should be read as if:

- references to cl.175 were omitted;
- references to cls.176-184 were references to cls.175-183;
- references to cls.185-196 were references to cls.199-210; and
- references to cls.197-223 were references to cls.212-238.

AUSTRALIAN SECURITIES COMMISSION BILL 1988OUTLINE

The main purpose of the Australian Securities Commission Bill 1988 ('the Bill') is to establish an Australian Securities Commission ('ASC') to regulate companies and the securities and futures industries in Australia. The Bill is part of a package of Bills to replace the existing co-operative scheme under which the Commonwealth shares regulatory responsibilities with the States and Northern Territory. The Bill also provides for the formation of a broadly based Advisory Committee to assist the responsible Commonwealth Minister in the ongoing review of the new companies and securities legislation and its administration, and for the formation of an independent Corporations and Securities Panel to conduct hearings into certain designated matters. In addition, the Bill reconstitutes the Accounting Standards Review Board and creates a single Companies Auditors and Liquidators Disciplinary Board in place of the 8 which currently exist.

2. The Bill responds to the April 1987 report of the bipartisan Senate Standing Committee on Constitutional and Legal Affairs in which the Committee found that the co-operative scheme had outlived its usefulness. The Committee unanimously recommended that the Commonwealth Parliament should enact comprehensive legislation covering the field currently regulated by the co-operative scheme.

3. The ASC will be an independent statutory Commission based on the existing National Companies and Securities Commission (NCSC). It will have up to 8 members, at least 3 of whom will be full-time. It will report direct to the responsible Commonwealth Minister and through the Minister to the Commonwealth Parliament.

4. The Bill confers broad investigation, information-gathering and hearings powers on the ASC. The other functions and powers of the ASC are set out in the Corporations Bill and the Close Corporations Bill. All Bills are being introduced together. The Bill makes provision for agreements to be entered into between Commonwealth and State/Territory Governments for the administration of the legislation by State/Territory agencies as delegates of the ASC.

Financial impact statement

5. The costs of establishing and maintaining the ASC and the other bodies established under the Bill will be covered by revenues received from companies and securities and futures industry participants who are regulated by the proposed national scheme legislation. Any agreements with State/Territory Governments for administration of the legislation by their agencies as delegates of the ASC would necessarily involve the Commonwealth retaining revenues sufficient to fund the ASC and other bodies established under the ASC Bill.

Explanatory memorandum

6. The remainder of this explanatory memorandum:

- (a) provides additional background on the existing and proposed companies and securities schemes;
- (b) contains a list of abbreviations used in this explanatory memorandum;
- (c) contains an index of clauses of the Bill; and
- (d) deals sequentially with each clause of the Bill.

BACKGROUND

Co-operative companies and securities scheme

7. On 22 December 1978 the Commonwealth and the six States executed a Formal Agreement that provided the framework for a co-operative Commonwealth-State scheme for a uniform system of law and administration in relation to company law and the regulation of the securities industry in the six States and the Australian Capital Territory. The Northern Territory became a party to the co-operative companies and securities scheme on 28 January 1986.

8. Under the scheme, the National Companies and Securities Commission (NCSC) derives its functions and powers from various pieces of Commonwealth, State and Territory legislation which give effect to the co-operative scheme.

9. The co-operative scheme has the following inherent structural defects:

- (a) Lack of accountability - There is no effective parliamentary scrutiny of co-operative scheme legislation. Commonwealth and State Governments are bound by the Formal Agreement to act in accordance with the legislative policies and views of the Ministerial Council for Companies and Securities; even where these conflict with a Government's own policies or the views of Parliament.

The Commonwealth Government is not only obliged to introduce co-operative scheme legislation that it disagrees with but also cannot introduce scheme legislation that it wishes to introduce but which is not supported by sufficient other members of the Ministerial Council.

The Commonwealth Parliament is reluctant to move amendments to scheme legislation because to do so

would jeopardise the scheme. If the Parliament were to insist that amendments be made, the Commonwealth Minister would have no choice but to refer the amendments to the Ministerial Council for its approval. This would be very unwieldy.

Officials and Ministers can deflect responsibility by suggesting that they couldn't persuade the Ministerial Council to adopt a particular course of action. The quality of decisions suffers as nobody is exposed to the discipline of having to defend them.

The NCSC is not responsible to any Minister because only the Ministerial Council can give it directions.

The State and Northern Territory Parliaments have no opportunity to consider amendments to scheme laws. Amendments take effect automatically in the States and the Northern Territory, subject only to the making of necessary 'translator' regulations to effect very minor modifications.

Outside parties wishing to influence the outcome of a Ministerial Council decision are forced to lobby every Ministerial Council member and their officials.

- (b) Division of functions between National Companies and Securities Commission (NCSC) and its State and Territory delegates - This has led to administrative inefficiencies, unnecessary duplication and additional costs to both government and business. To the business community this has meant costly efforts to find the body or person with the appropriate administrative responsibility to deal with a particular problem. Although over \$135m is raised from, and 1500 staff are involved Australia-wide in, corporate affairs regulation it has not been possible to establish a nationally uniform and efficient administration. The NCSC does not have a free hand in

determining its priorities because the State and Territory Corporate Affairs Commissions regard themselves as being responsible to their relevant Minister rather than the NCSC. For example, the NCSC cannot decide to devote more resources to investigations and less to prospectus examination if a particular Corporate Affairs Commission takes a different view.

(c) Burdensome and lowest common denominator legislation

- The business community has criticised the over-involvement of scheme administrators in legislative policy development which leads to frequent legislative changes and increases the burden of unnecessary business regulation. On the other hand the 'lowest common denominator' effect makes it difficult to achieve significant and desirable legislative policy changes.

10. These defects led the bipartisan Senate Standing Committee on Constitutional and Legal Affairs to conclude in its April 1987 report that the co-operative scheme had outlived its usefulness. The Committee unanimously recommended that the Commonwealth Parliament should enact comprehensive legislation covering the field currently regulated by the co-operative scheme.

Role of the ASC and Advisory Committee

11. The ASC will be an independent statutory Commission with the same sort of discretionary powers which the NCSC now has. It will be responsible for the day-to-day administration of scheme legislation and will report direct to the responsible Commonwealth Minister and through the Minister to the Commonwealth Parliament. The ASC will be more independent of political interference than the NCSC. The Ministerial Council has the capacity to give a direction to the NCSC in respect of particular cases. The ASC will not be subject to any such influence from Government. The ASC will also have a policy

role. The Bill provides that if in the course of performing its functions or exercising its powers the ASC encounters problems which, in its opinion, require a national scheme law to be amended it will be able to advise the Minister accordingly.

12. It is envisaged that the ASC will not be located in Canberra but will be located in a major State capital. The ASC will be able to determine its own policies for administration of the new legislation. Negotiations with the States and Northern Territory are continuing with respect to a proposal whereby their Corporate Affairs Commissions would administer the new national companies and securities legislation as delegates of the ASC. It is envisaged that where the Commonwealth reached an agreement with a State or the Northern Territory for State or Territory personnel and entities to be used to administer the Commonwealth legislation as a delegate of the ASC, the ASC would ensure that the administration was carried out, to the maximum extent practicable, by those personnel and entities. However, the ASC would have power to give directions to its delegates to ensure proper managerial control. The ASC would be able to withdraw a delegation if a delegate failed to conform with the ASC's management plan. In such a case the revenue that would otherwise have been reimbursed to that delegate's State or Territory would be retained by the Commonwealth.

13. The Bill also provides for the establishment of a statutory Advisory Committee, drawn from all sectors of the business community in Australia. The Advisory Committee will ensure that the avenues of advice to the Commonwealth Minister are not limited to the bureaucracy. It is envisaged that the ASC and Advisory Committee will consult each other where practicable before recommending changes in the law and its administration.

14. The ASC's main functions and powers will be conferred by the Corporations Bill which covers the regulation of

companies, and the securities and futures industries. The Corporations Bill is being introduced in conjunction with the ASC Bill.

15. The legislation for the most part, follows the existing companies and securities legislation. Changes of form from the existing legislation, although not of substance derive from the expression of the Bill in language to reflect the Commonwealth constitutional powers and to reflect its character as national legislation. Although principally based on the Commonwealth's constitutional power over trading and financial corporations, a wide range of other supporting constitutional powers have been relied on where appropriate. These include the powers in respect of interstate trade and commerce, posts and telecommunications, banking and insurance, and cheques and negotiable instruments. The opportunity has also been taken to rationalise the structure of the legislation and to correct some minor anomalies.

16. Significant improvements have been made. The consolidation of the existing law into the Corporations Bill and the Australian Securities Commission Bill has led to the removal of much duplicated material and to a major rationalisation of the structure and arrangement of the legislation. In addition, large groupings of sections have, wherever possible, been broken up into smaller groupings, and long sections and subsections split into shorter ones, thus allowing a much greater use of Part, Division and section headings. This should help the reader to find the provisions of concern to him or her and make them easier to follow.

17. The existing law has, in some important areas, been reworked to give it clarity and simplicity. These include, in particular, the constitution and powers of the ASC and the Parts of the Corporations Bill that deal with financial statements of companies, names of corporations, registration of foreign companies, and the transfer of marketable securities.

18. Consideration has been given to a number of areas in which reforms are desirable either to remove unnecessary regulation or to overcome specific inefficiencies or burdens in the existing legislation.

19. However, with the exception of the areas outlined below, the scope of the legislative provisions of the Corporations Bill will be along the lines of the existing law.

Fundraising

20. There is a need to reform the rules applying to companies seeking to raise funds from the public. The present system of prospectus registration has been justly criticised for its inefficiency and complexity, for its imposition of unnecessary delays and costs on business and for its lack of utility for investors. The legislation will remove the current regulatory 'deadwood' and introduce a new approach involving more effective self-enforcement by the market to provide a more efficient framework to facilitate the process of raising funds from the investing public, improve the quality of information to be provided to investors and maintaining appropriate measures for investor protection.

21. Key elements of the proposal are as follows:

- (a) A general provision prohibiting misleading and deceptive conduct in relation to the issue, dealing in or trading in securities. This will take the form of a general catch-all liability clause based on s.52 of the Trade Practices Act 1974. It will apply, inter alia, to prospectuses.
- (b) Prospectuses will be filed but not registered. ASC will not pre-vet prospectuses. Vetting is costly, time consuming and may not reveal prospectus defects. A study by the Victorian Corporate Affairs Commission has found that only approximately 5% of investors

read prospectuses. Even the Securities Information Review Committee established by the NCSC is considering a proposal that for most cases of issues no registered prospectus be required.

- (c) To protect the public against misfeasance, the ASC will be able to audit a filed prospectus on the basis of sample techniques or following a complaint. Following such an audit the ASC will be able to issue stop-orders in respect of an issue involving serious misrepresentation or malpractice. This approach will not preclude bodies such as the stock exchanges from scrutinising the content of prospectuses of listed issues.
- (d) The complex and excessively detailed rules as to the content of prospectuses will be replaced by much more basic disclosure rules and a general requirement that the prospectus contain a fair and accurate presentation of all material information relevant to a decision by an investor to invest in the offering. Despite detailed rules at present there is no guarantee that investors receive all relevant information. The amendments aim to provide investors with the information they require to make an informed investment decision.
- (e) Persons licensed under the Bill and issuers will be able to advertise issues. Allotments will still be on the basis of a form attached to a filed prospectus. False or misleading advertisements will be prohibited.
- (f) New form prospectuses will need to be provided for all issues other than for specified categories e.g. issues to persons in the business of buying and selling shares. (These categories will be similar to the existing exemptions from the prospectus

provisions). Complex problems relating to the meaning of 'offers to the public' and 'section of the public' will thereby be removed.

22. These proposals will also apply to the prescribed interest offer document.

Shareholder Disclosure

23. There has been considerable debate over the last few years as to whether the mix of provisions involving disclosure of beneficial shareholdings is appropriate, in particular disclosure of substantial shareholdings above 10% under s.137-139 of the Companies Act and tracing of beneficial ownership of shares under s.261. The procedure provided by s.261 is cumbersome, ineffective and has been abused. Companies have expressed concern about the excessive paperwork involved in being required to disclose insignificant shareholdings below 1% under s.261.

24. The following approach is proposed:

- (a) reduction of the substantial shareholding threshold from 10% to 5%;
- (b) the tracing provisions of the CA (i.e. s.261) have been altered so that only the ASC will have power to obtain information as to beneficial ownership of shares;
- (c) the existing remedies in s.261A are to be applied to a breach of the substantial shareholdings provisions;
- (d) the abolition of the requirement that substantial shareholder disclosures be in a prescribed form (to enable the existing requirements to be set out more simply in the statute).

Company names

25. It is proposed that the company names provisions be amended to remove the "subjective tests" on whether a name is available for reservation (that is, it will not be necessary to consider if a proposed company name so closely resembles an existing name as to be likely to be mistaken for it; whether a proposed name is undesirable; or whether a proposed name is misleading in relation to the nature, objects or purposes of the business to be conducted under that name). From the standpoint of the incorporator, the existing subjective tests lead to delay in incorporation times, and result in the over zealous rejection of many names which, although on paper appear to be similar, would otherwise have no connection with the business or activity of another company so as to lead to the possibility of confusion arising in anyone's mind. At the same time, substantial bureaucratic resources are invested in determining questions of whether names are in fact similar or are likely to confuse the public or are otherwise undesirable. These resources could be put to better use elsewhere. In the end the registration of a name confers no protection on the registrant in an action for passing off etc. if some other person has a prior and greater right to the name e.g. because it has been registered as a trade or service mark. The registration of a company name confers no property in that name.

26. The practical effect of this proposal will be to allow all company names except:

- (a) identical names; and
- (b) names of a type that are prescribed in Regulations under the Corporations Bill (for example, names suggesting connexion with the Government).

27. The business community will benefit from the proposal because the ASC will be able to process names applications more quickly than at present. In addition, the ASC will benefit because a smaller number of staff will be required on names matters. This, in turn, could benefit the business community through fees for names applications being reduced in real terms (i.e. by either a reduction in money terms or not increasing in line with inflation).

Takeovers Legislation

28. The basic framework of the existing takeovers legislation will be maintained for the purposes of the initial Commonwealth legislation.

29. Any comprehensive review of the takeovers legislation would involve the question whether the basic Eggleston principles underlying the code are still appropriate (in particular the concept that each voting share in a company has attached to it an equal proportion of the value of any premium for control). Given the timing considerations, it is not practicable to give the subject the rigorous analysis it warrants or to engage in adequate public consultation before introduction of the initial legislation. A comprehensive review of the basic approach of the takeovers legislation could follow the commencement of the Commonwealth scheme.

30. The only matter thought feasible for implementation in the initial legislation is the abandonment of pre-vetting of Part A statements, profit forecasts and asset valuations during takeover bids. This is consistent with the similar proposals for abandonment of pre-vetting of prospectuses. Pre-vetting is a resource intensive exercise and in contested takeover bids provides too much scope for litigation against the NCSC. The existing provisions imposing criminal and civil liability for omissions or false or misleading statements in Part A statements and offer documents should ensure that such documents are accurate. So far as profit forecasts or statements on asset valuations are concerned, the ASC should not have to expend resources in order to make a decision best left to the market

(which will devalue any forecast or statement which is overly optimistic).

Transfer of marketable securities

31. A number of amendments are designed to assist in remedying delays in the transfer and registration of securities.

32. The major proposal involves deletion of the requirement that a transferor sign a transfer form. (A broker authorised by the transferor will be able to validate it on the transferor's behalf and will indemnify the transferor and the company in all circumstances where a transfer has been made without authority.) Full compensation will be available from the National Guarantee Fund for any losses arising from unauthorised transfers.

33. It is proposed that transferee acceptance forms also be deleted. These are unnecessary and increase the amount of paper within the system.

Exemption and modification power for ASC in respect of transfer of securities provisions

34. It is proposed that the ASC be given an exemption and modification power in respect of the provisions dealing with transfer of securities. This power will be similar to that proposed in respect of the prospectus, debenture and prescribed interest provisions (based on a widened s.215C of the Companies Act).

35. This extension of Commission powers is designed to enable some flexibility to be introduced into the transfer of securities provisions. This will facilitate testing, perhaps by way of pilot schemes, of new procedures forming part of any longer term system developed to make the transfer and settlement system more efficient. In addition, such powers may also enable preparation for, and phased implementation of, any new system which is

successfully developed without the need for specific legislative amendment at each stage of the system's introduction.

36. The ASC in exercising any such powers will need to be satisfied that the interests of shareholders are adequately protected and that exercise of the power will be likely to enhance the efficiency of the existing transfer and settlement system.

37. Another proposal involves the abolition of the requirement that companies maintain branch registers at the request of a shareholder. This will produce substantial efficiency gains and cost savings to the several parties involved in processing certificates and transfers. It will also significantly simplify the operation of the proposed new transfer and settlement system currently being developed by the Australian Stock Exchange.

38. There has been significant pressure from companies, share registrars, stockbrokers, and the Australian Stock Exchange for the abolition of branch registers to be considered for inclusion in the national scheme legislation. Branch registers are costly and inconvenient to maintain and to co-ordinate, particularly where one shareholder may in fact have shares registered on different registers. Registrars' experience has shown that the majority of requests for share registry information are directed to the principal share office. For this reason and given the abolition of death duties, it is argued that branch registers are no longer of any benefit to shareholders.

Licensing of Representatives - Securities and Futures Industry

39. It is proposed, in accordance with the earlier NCSC proposals, to discontinue licensing of representatives of securities dealers and advisers and of futures brokers and advisers. This will be replaced with a system where brokers and advisers are made fully liable for the conduct of their respective representatives (in addition to being responsible for their training, education and supervision). This liability will extend to actions which are outside the scope of their authority (as is the case with insurance agents under the Insurance (Agents and Brokers) Act).

Memorandum and Articles of Association

40. It is proposed that proprietary companies be relieved of the obligation to lodge a copy of their memorandum and articles of association with the ASC. It is considered the requirement is no longer necessary for private companies given that third parties are sufficiently protected in their dealing with such companies by the abolition of ultra vires and reduction of the rules of constructive notice of company documents. The reform will also facilitate a substantial reduction in administrative costs for the ASC.

Hearings and Investigation Powers

41. It is proposed that the ASC Bill will contain provisions strengthening the existing inspection powers and clarifying the scope of the existing hearings powers. The Bill will also provide for an adjudicative panel, independent from the ASC, to conduct hearings into certain designated matters.

42. The present inspection and special investigation powers are to be amalgamated so that the existing inspection powers will be more effective. In addition, the Minister will be able to direct the ASC to carry out an investigation where this is in the public interest.

43. The ASC's investigative powers (including its powers to conduct an investigative hearing in private along the lines of the powers now contained in the special investigations provisions) are distinct from its general powers to conduct hearings for the purposes of the performance or exercise of its functions or powers. The ASC will be able to use its general hearings powers, for example, to afford natural justice to a person whose licence or registration it proposes to revoke. In addition, the ASC will be able to hold public hearings to ascertain views on the exercise by the ASC of its administrative responsibilities (e.g. a proposed policy statement or guideline).

44. To overcome criticisms that have been levelled against the NCSC for acting as prosecutor, judge and jury, the ASC Bill will provide for the establishment of a separate Panel to conduct hearings into such class of matters as the Minister approves. Initially, the Panel will be empowered to hear cases involving unacceptable conduct during a takeover. These are very controversial matters and amount to about five per year. The ASC will hear all remaining matters. It is proposed that the Minister will progressively confer further functions on the Panel as it develops its expertise and if the panel proves to be an effective means of hearing a large number of adjudicative hearings. If the Panel operated satisfactorily, the work of the Companies Auditors and Liquidators Disciplinary Boards could be transferred to it.

Close Corporations

45. It is proposed to provide a new simplified corporate entity for small business which obviates the need for much of the inappropriate paraphernalia of regulation that is more appropriate for larger companies. This proposal will be implemented in the Close Corporations Bill which is being introduced in conjunction with the ASC Bill and the Corporations Bill.

46. The new form of company will be based on the Companies and Securities Law Review Committee's proposals for a 'close corporation'. The broad purpose behind the Close Corporation legislation to simplify the corporate rules for small business will be achieved by reducing financial and other reporting requirements and replacing the usual concept of management with partnership rules. Memorandum and articles of association will be abolished and replaced with a non-registrable written association agreement. Basic information about the company will be filed in the form of a Founding Statement which will be updated each time there is a change to the material particulars. A Certificate of Compliance will be an annual document witnessing that the Company has stated that accounts have been prepared according to a formula prescribed by the legislation.

ABBREVIATIONS

47. The following abbreviations are used in this explanatory memorandum:

AIA	-	<u>Acts Interpretation Act 1901</u>
AIDC Act	-	<u>Australian Industry Development Corporation Act 1970</u>
ASC	-	Australian Securities Commission
Bill	-	Australian Securities Commission Bill 1988
CA	-	<u>Companies Act 1981</u>
CAC	-	Corporate Affairs Commission
CASA	-	<u>Companies (Acquisition of Shares) Act 1980</u>
CSIB	-	Corporations and Securities Industry Bill 1976
DPP Act	-	<u>Director of Public Prosecutions Act 1983</u>
FIA	-	<u>Futures Industry Act 1986</u>
NCSC	-	National Companies and Securities Commission
NCSC Act	-	<u>National Companies and Securities Commission Act 1979</u>
NCA Act	-	<u>National Crime Authority Act 1984</u>
PSA	-	<u>Public Service Act 1922</u>

SIA	-	<u>Securities Industry Act 1980</u>
TPA	-	<u>Trade Practices Act 1974</u>
TPC	-	Trade Practices Commission

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BILL PART 1 - PRELIMINARY

49. Part 1 of the Bill (cls. 1 to 6) deals with various preliminary matters.

Cl. 1 : Short title

50. When enacted, the Bill will be cited as the Australian Securities Commission Act 1988.

Cl. 2 : Commencement

51. Part I of the Bill will commence upon Royal Assent. The rest of the Bill will commence upon proclamation.

52. In the event that any State or Territory Government has, by the time of passage of this and related Bills, indicated a firm intention to challenge their constitutional validity, the Bills as enacted will not be proclaimed until the High Court has had the opportunity to consider their constitutional validity. Adoption of this course of action is likely to involve continuation of the co-operative scheme at least until well into 1989.

Cl.3 : Objects

53. Clause 3 has no counterpart in the NCSC Act, but is based in part on the preamble to the Formal Agreement with the States and Northern Territory on companies and securities regulation. Its purpose is to assist in the interpretation of the Bill and, in particular, to guide the operation of the ASC. The Bill establishes an Australian Securities Commission to administer the laws of the Commonwealth concerning companies, securities and futures industry. The Bill also establishes a Companies and Securities Advisory Committee to provide informed and expert advice to the Minister about the content, operation and administration of those laws and about the securities and futures markets, and an independent

Corporations and Securities Panel to conduct hearings into certain designated matters. The Bill also creates a single Companies Auditors and Liquidators Disciplinary Board to replace the existing 8 and reconstitutes the Accounting Standards Review Board.

54. In performing its functions the ASC will have among its objectives:

- . the maintenance and improvement of capital markets
- . maintenance of investor confidence
- . achievement of uniformity
- . enforcement of national scheme laws.

Cl.4 : Extension to external Territories

55. The Bill may be extended to external Territories prescribed by regulations (cl.4 - based on NCSC Act s.4). The Bill will not extend to any external Territories at this stage.

Cl.5 : Interpretation

56. Sub-clause 5(1) contains definitions used throughout the Bill. Many of these are found in the NCSC Act and the CA, SIA and FIA. Some of the more important definitions are as follows:

- Advisory Committee: This is the Companies and Securities Advisory Committee established by Bill cl.145. This Committee will be made up of people with prominence in the fields of business, the financial markets, law, economics and accounting. Its function will be to assist the responsible Minister in the ongoing review of the legislation and its administration.

- appropriate officer - This term is used in cl.220 of the Bill which enables the Attorney-General to make arrangements with State and Territory Ministers or Administrators about matters such as State and Territory corporate affairs records, offices and resources.
- Commission - This is the new independent Australian Securities Commission (ASC) established by cl.7 of the Bill. The ASC will be responsible for administering new national companies and securities laws. It will be based on the existing NCSC but will have the capacity to manage effectively all resources available for the administration of the scheme.
- Commission delegate - The ASC will be able to delegate any of its functions or powers (see cl.102) to certain persons or bodies (viz a State or Territory CAC, its own members, staff members - dealt with below - or others approved by the Attorney-General). These persons or bodies are referred to in the Bill as "Commission delegates".
- "eligible person" - This term is used in Bill Part 3 dealing with the ASC's investigative and information gathering powers.
- national scheme law - The ASC will have, under the control of the responsible Minister, the general administration of national scheme legislation. This legislation will comprise this Bill, the proposed Corporations Bill and the Close Corporations Bill. One of the ASC's objects will be to take whatever action it can take, and is necessary, to enforce and give effect to this legislation (see cls. 3 and 11).

- staff member - This term covers public servants working for the ASC (cl. 120), including consultants (cl. 121) and staff seconded to the ASC from other Government agencies (cl. 122).

57. Subject to the Bill, an expression used in this Bill will have the same meaning as in the Corporations Bill (sub-cl.5(2)). The Interpretation Chapter of the Corporations Bill will also apply except so far as the contrary intention appears (sub-cl.5(3)).

Cl.6 : Giving information

58. Clause 6 is new and defines what is meant by 'giving information' for the purposes of the provisions setting out the ASC's investigative or information gathering powers.

BILL PART 2 - THE COMMISSION AND ITS FUNCTIONS
AND POWERS

59. Part 2 of the Bill (cls. 7 to 12) deals with the establishment and membership of the ASC and its objects, functions and powers.

Cl.7 : Establishment

60. Clause 7 is similar to NCSC Act sub-s.5(1). It establishes the ASC. The ASC will be responsible for administering the proposed new Commonwealth companies and securities scheme legislation.

Cl.8 : Commission is a body corporate

61. Clause 8 is based on NCSC Act sub-s.10(1). The ASC will be a body corporate with the usual attributes (perpetual succession, a common seal, capacity to acquire and dispose of property and capacity to sue and be sued in its corporate name).

Cl.9 : Membership

62. Clause 9 is the same as NCSC Act sub-ss.11(1), (3) and (4). The ASC will consist of not fewer than three and not more than eight members appointed by the Governor-General on the nomination of the Minister, at least three of whom will be full-time members. A person will not be nominated for appointment as an ASC member unless he or she is qualified for appointment by virtue of his or her knowledge of, or experience in, one or more of the fields of business, the administration of companies, the financial markets, law, economics and accounting.

63. Clause 9 enables part-time members to be appointed. Negotiations are continuing with the State and Northern Territory Governments regarding the administration of national scheme laws. One element of the Commonwealth proposals being negotiated is that State and Northern Territory Governments

will be able collectively to nominate two part-time ASC members.

64. The ASC will be able to perform or exercise its functions and powers even if the number of its members falls below the statutory minimum for a period of less than three months.

Cl.10 : Chairperson and Deputy Chairperson

65. Sub-clause 10(1) is based on NCSC Act sub-ss.13(1) and (2). Sub-clause 10(2) is new. One of the full-time ASC members will be a Chairperson (to be referred to as the Chairman or Chairwoman, as appropriate). Another full-time member will be the Deputy Chairperson (to be referred to as the Deputy Chairman or Deputy Chairwoman, as appropriate).

Cl.11 : Functions and powers

66. Clause 11 is new but may be compared with NCSC Act s.6. The ASC is to have such functions and powers as are conferred on it by any Commonwealth Act where the ASC is responsible for the general administration (Bill sub-cl. 11(1) and (4)). The Bill confers broad investigation, information-gathering and hearings powers on the ASC. The other functions and powers of the ASC are set out in the Corporations Bill, which covers the regulation of companies, and the securities and futures industries, and in the Close Corporations Bill which provides a new simplified corporate entity for small business. These Bills are being introduced together.

67. The ASC will be required to provide such staff and support facilities as are necessary to the Corporations and Securities Panel (established by the Bill to conduct hearings into designated matters), the Companies Auditors and Liquidators Disciplinary Board and the Accounting Standards Review Board (Bill para.11(2)(a) - new provision).

68. The ASC will also be empowered to advise the Minister about any changes to a national scheme law that it sees as necessary (Bill para.11(2)(b) - new provision).

69. The ASC will also be empowered to do whatever is necessary for the performance of its functions or reasonably incidental thereto (Bill sub-cl. 11(3)).

70. The ASC will be responsible for the general administration of the Bill, subject to the control of the responsible Minister (Bill sub-cl. 11(5)).

Cl. 12 : Directions by Minister

71. Clause 12 may be compared with NCSC Act s.7 and TPA s.29. The Minister is to have power to give written directions to the ASC about the policies it should pursue or the priorities it should follow (Bill sub-cl. 12(1) - cf TPA sub-ss. 29(1) and (2)). The Minister may not give a direction unless prior written notice has been given to the ASC and the ASC Chairperson has had an opportunity to discuss the need for the direction with the Minister. However the Minister is not to have power to give the ASC directions about a particular case (Bill sub-cl. 12(3)).

72. Under this provision the Minister would be able to direct the ASC, for example, to have regard to any relevant policies of the Commonwealth Government, including those applicable to the managing and resourcing of the public sector (see para.13, Policy Guidelines for Commonwealth Statutory Authorities and Government Business Enterprises, October 1987).

73. Clause 12 ensures that the ASC will be more independent of political interference than the NCSC. The Ministerial Council has the capacity to give a direction in respect of particular cases. The ASC will not be subject to any such influence from Government.

BILL PART 3 - INVESTIGATIONS AND INFORMATION-GATHERING

74. Part 3 of the Bill (cls.13 to 93) deals with the investigative and hearings powers of the ASC.

Division 1 : Investigations

75. This Division deals with the powers of the ASC to conduct investigations.

Cl.13 : General Powers of Investigation

76. This clause is based upon CA s.16A, SIA s.13 and FIA s.19.

77. The ASC will be given a general power to investigate where:

(a) it thinks an investigation is expedient for the due administration of a national scheme law; and

(b) it has reason to suspect that there may have been a contravention of a national scheme law, or of another law where the contravention involves a body corporate or fraud or dishonesty.

Cl.14 : Minister may direct investigations

78. This clause is based upon CA s.291, SIA s.16 and FIA s.22 but also reflects the constitutional basis for an investigation. Where the Minister considers that an investigation is in the public interest, the Minister will be able to direct the ASC to investigate the matter. The range of matters over which the Minister may direct an investigation is set out in sub-cl.14(2).

79. The ASC must comply with such a direction (sub-cl.14(3)), but it may still delegate a function or power if appropriate (sub-cl.14(4)).

Cl.15 : Investigation after report of receiver or liquidator

80. This is a new provision.

81. Where the ASC receives a report of a receiver or liquidator it will be able to investigate a matter to which the report relates for the purpose of determining whether a person ought to be prosecuted.

Cl.16 : Interim report on investigation

82. This clause is based on the similar provisions, CA s.305, SIA s.29 and FIA s.35.

83. The ASC is required to prepare an interim report about an investigation if the Minister so directs (sub-cl.16(2)), where it forms an opinion (sub-cl.16(1)) that there has been a contravention of a law and that an interim report would assist in the protection of property, or if it forms an opinion that there is an urgent need for an amendment to a national scheme law. The ASC may also prepare an interim report in any other event (sub-cl.16(2)).

Cl.17 : Final report on investigation

84. This clause is also based on the CA s.305, SIA s.29 and FIA s.35.

85. If the Minister has directed that an investigation be carried out (sub-cl.17(2) and see cl.14), and in any other case, if the Minister so directs (sub-cl.17(1)), the ASC will be required to prepare a final report. In any other case, the ASC may prepare a final report (cl.17(1)).

86. The final report is required to set out a number of matters (sub-cl.17(3)), including the findings of the ASC.

Cl.18 : Distribution of report

87. This clause differs from the corresponding provisions, CA ss.305 and 306, SIA s.29 and FIA s.35.

88. A copy of any report (final or interim) must be given to the Minister (sub-cl.18(1)) and may be given to a person to whom the report materially relates (sub-cl.18(2)) in contrast with the more stringent conditions given in CA sub-ss.306(1) and (2), SIA sub-ss.30(1) and (2) and FIA sub-ss.36(1) and (2)). In all cases, the Minister may publish all or part of a report (sub-cl.18(3)). The Minister is not specifically restricted by provisions corresponding with CA sub-s.306(7), SIA sub-s.30(5) and FIA sub-s.36(5) which dealt with restricting publication certified to be prejudicial to the administration of justice.

Division 2 : Examination of Persons

89. This Division deals with the examination of persons relevant to an investigation held under Division 1. These provisions are similar to corresponding provisions in CA Part VII, SIA Part II and FIA Part II .

Cl.19 : Notice requiring appearance for examination

90. This provision is based on CA s.295, but reflects SIA sub-s.12(3D) and FIA sub-s.18(7) in sub-cl.19(3).

91. Where the ASC suspects or believes, on reasonable grounds, that a person can give information relevant to a matter it is investigating, it may give written notice requiring that person to give all reasonable assistance and to answer questions on oath.

92. Sub-clause 19(3) requires that the notice to the examinee set out the examinee's right to be represented by a lawyer (see cl.23) and the applicable law of self-incrimination (see cl.68).

Cl.20 : Proceedings at examination

93. This new provision provides that upon attending an examination required by a notice issued under cl.19, that person is called the "examinee", and the examiner is called the "inspector". The inspector, if not the ASC, is someone to whom this power has been delegated (see para.19(2)(b)).

Cl.21 : Requirements made of examinee

94. This clause is based on CA sub-s.295(1).

95. The inspector may require the examinee to answer questions or make statements on oath or under an affirmation as to their truth (sub-cl.21(1) and (2)). These questions must be relevant to the investigation conducted under Division 1 (sub-cl.21(3)).

Cl.22 : Examination to take place in private

96. This new provision requires examinations held under this Division to be held in private, with only the inspector, a member of the ASC, any other staff member or person approved by the ASC, the examinee and the examinee's lawyer present.

Cl.23 : Examinee's lawyer may attend

97. This clause is based on CA sub-ss.296(6) and (12).

98. The examinee's lawyer may always attend with the examinee. The lawyer will be able to address the inspector and cross-examine the examinee (sub-cl.23(1)), provided that in doing so the examination is not obstructed (sub-cl.23(2)).

Cl.24 : Record of Examination

99. This clause is based on CA sub-ss.298(1) and (2).

100. A record may be made of the examination (sub-cl.24(1)) and must be made if the examinee so requests. The inspector may require the examinee to read and sign the record (para.24(2)(a)). If requested, the inspector must give a copy of the record to the examinee (para.24(2)(b)).

Cl.25 : Giving to other persons copies of record

Cl.26 : Copies given subject to conditions

101. These clauses are based on CA sub-ss.298(6) to (9). Copies of the record, or related books, or both, may be given to the examinee's lawyer if the lawyer is carrying on or contemplating legal proceedings in respect of matters to which the examination related (sub-cl.25(1)) or to any other person (sub-cl.25(3)). If so given, use of the copy of the record is restricted (sub-cl.25(2)) and may be subject to further conditions (sub-cl.25(3)), which must be complied with (cl.26).

Cl.27 : Record to accompany report

102. Although sub-cl.27(1) is based on CA sub-s.298(10), sub-cl.27(2) is a new provision. A final report of an investigation is to be accompanied by a copy of any record of examination which had been given to any person in respect of that investigation (sub-cl.27(1)). A copy of that record may also accompany the report of another investigation if relevant (sub-cl.27(2)).

Division 3 : Inspection of Books

103. This Division deals with the power of the ASC to inspect books required to be kept by a national scheme law (see definition of "books" in cl.5). This Division is chiefly

1988

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

AUSTRALIAN SECURITIES COMMISSION BILL 1988

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and New Clauses to be Moved on Behalf of the
Government

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

AUSTRALIAN SECURITIES COMMISSION BILL 1988 - AMENDMENTS AND
INSERTION OF NEW CLAUSES.

OUTLINE

The Attorney-General introduced the Australian Securities Commission Bill ('the Bill') into the House of Representatives on 25 May 1988. Its main purpose is to establish an Australian Securities Commission ('ASC') to regulate companies and the securities and futures industries in Australia. It is part of a package of Bills to replace the existing co-operative scheme under which the Commonwealth shares regulatory responsibilities with the States and Northern Territory. The Bill was introduced together with the Corporations Bill and the Close Corporations Bill.

2. The amendments to the Bill to be moved on behalf of the Government can be grouped as follows:

- (a) A new Part 12A dealing with the jurisdiction of the Supreme Courts and the Federal Court under the Corporations Bill, the Australian Securities Commission Bill and the Close Corporations Bill;
- (b) An amendment to replace certain existing rights to Court review of administrative decisions with rights to have those decisions reviewed by the Administrative Appeals Tribunal;
- (c) An amendment to preserve the role of the Director of Public Prosecutions;

- (d) Amendments to require the Corporations and Securities Panel and the Companies Auditors and Liquidators Disciplinary Board to prepare annual reports;
- (e) An amendment to permit the ASC to disclose confidential information to a wider class of agencies and organisations where appropriate;
- (f) An amendment to clarify the ASC's power to enter into contracts of investment; and
- (g) Amendments to clarify aspects of the ASC's and Corporations and Securities Panel's investigation and hearings powers.

FINANCIAL IMPACT STATEMENT

3. The amendments will not have a significant financial impact. Some additional resources will be required in the Administrative Appeals Tribunal but little more in the Federal Court than would be required under the legislation as introduced. By giving an exclusive judicial review jurisdiction to the Federal Court, some cases that might have been brought in the State or Territory Supreme Courts under the legislation as introduced will have to be brought in the Federal Court. It is also proposed to empower the Federal Court to hear appeals from decisions of single Supreme Court judges.

4. Because the legislation confers jurisdiction on State and Federal Courts, it is difficult to quantify what additional resources will be required for the Federal Court. It will depend to a large extent on the preferences of litigants and their advisers. Much of the winding-up jurisdiction, to the extent brought in the Federal Court, could be exercised by Registrars under delegation from the judges.

3.

5. Whilst the simpler procedures of the AAT may give rise to more applications for review of administrative decisions than at present, there have been very few appeals to the Supreme Courts against decisions of either the NCSC or its delegates.

NOTES ON CLAUSES - AMENDMENTS TO AUSTRALIAN SECURITIES
COMMISSION BILL

Amendment (1) : Cl.13 - General powers of investigation

6. Under Cl.13 the ASC has power to investigate matters where it has reason to suspect that a national scheme law may have been contravened. The amendment makes it clear that the ASC has power to investigate unacceptable conduct in connection with a takeover that may fall short of a breach of the law. This will assist the ASC in determining whether to apply to the Corporations and Securities Panel for a declaration of unacceptable conduct under Cl.733 of the Corporations Bill.

Amendment (2) : Cl.19 - Notice requiring appearance for examination

7. Where the ASC wishes to examine a person in an investigation it must give that person a notice in the prescribed form under Cl.19 requiring the person to appear and answer questions. To ensure that natural justice is afforded to the person whose attendance before the ASC is required, the amendment to Cl.19 will make clear that the notice to the person must contain, among other things, a statement of the nature of the matter to which the investigation relates. This will enable the person to be aware of the relevance of the inquiry to him or her.

8. The amendment will also require the notice to set out the person's right to legal representation and the right to claim the privilege against self-incrimination (Cls.23 and 68).

Amendment (3) : Cl.43 - Exercise of certain powers of the Commission in relation to securities

9. The amendment makes a minor drafting correction.

Amendments (4) and (5) : Cl.49 - Commission to cause prosecution to be begun

10. Clause 49 requires the ASC to have the sole duty to cause a prosecution to be begun and carried on for offences revealed by an investigation or record of examination where the ASC considers that it is necessary to do so.

11. The amendments to Cl.49 seek to preserve the statutory functions and powers of the Director of Public Prosecutions and, in particular, the DPP's general functions which are to institute and carry on proceedings for commitment for trial, and to institute and carry on proceedings for summary conviction, in relation to Commonwealth offences.

12. The amendments will empower the ASC to commence and carry on prosecutions but without prejudice to the DPP's statutory powers and functions. In particular, the DPP's powers to take over, to carry on or to terminate a proceeding for commitment for trial or summary conviction and to give directions or furnish guidelines with respect to the prosecution of offences will not be prejudiced.

13. In accordance with Commonwealth prosecution policy the ASC will have to send the DPP a brief of evidence if as a result of an investigation an offence appears to have been committed. Although the ASC will be able to make an initial decision to prosecute, the DPP has the responsibility to determine whether a prosecution should proceed.

14. Similar amendments are proposed to the corresponding provisions in the Corporations Bill (Cl.1315) and the Close Corporations Bill (Cl.142).

15. The amendment proposed to Cl.127 will enable the ASC to provide the DPP with all the information necessary to enable it to exercise all relevant powers and functions in relation to the prosecution of offences created by the Bill.

Amendment (6) : Cl.50 - Commission may cause civil proceeding to be begun

16. Under Cl.50 the ASC is empowered to undertake civil proceedings in a person's name if, following an investigation or examination, it appears to be in the public interest to undertake such proceedings for that person. There is no express requirement that the ASC obtain the person's consent. By contrast, Sub-cl.1325(3) of the Corporations Bill requires the ASC to obtain a person's written consent before applying to the Court on the person's behalf for an order to compensate the person for loss or damage suffered as a result of illegal conduct in relation to securities.

17. The amendment to Cl.50 will bring it into line with Sub-cl.1325(3) of the Corporations Bill so that the ASC will not be able to undertake civil proceedings in a person's name without the person's written consent.

Amendments (7) and (8) : Cl.63 - Non-compliance with requirements made under this Part

18. The amendments make minor drafting corrections.

Amendment (9): Cl. 65 - Obstructing person acting under this Part

19. The amendment brings the penalty into line with the penalty for this offence under co-operative scheme legislation.

Amendment (10) : Cl.70 - Powers of Court where non-compliance with Part

20. Where the ASC is satisfied that a person has unreasonably failed to comply with a requirement made during an investigation or at a hearing it may certify to the Court that such a failure has taken place. The Court will then be able to order that person to comply with the requirement or to punish that person as if in contempt of court, or both. The

Court may do so even if the person has been convicted of an offence in respect of the failure.

21. To overcome the possibility of double jeopardy, the amendment will eliminate the capacity of the Court to punish for contempt.

Amendments (11) and (12) : Cl. 72 - Orders in relation to securities of a body corporate

22. The amendments make minor drafting corrections.

Amendment (13) : Cl.75 - Orders under Division 8, Part 3

23. This amendment, which deletes Sub-cl.75(5) and (6), is consequent upon new Cl.230G which provides for AAT review of orders made by the ASC under Division 8 of Part 3 of the Bill.

Amendment (14): Cl. 121 - Consultants etc.

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25. Clause 127 authorises the ASC to disclose confidential information as required or permitted by law or to assist an Australian or overseas authority to perform or exercise a function or power analogous to any of the ASC's functions or powers.

26. The amendment to Cl.127 (which may be compared with s.16 of the Customs Administration Act 1985) widens these categories of authorised disclosure. It will enable an ASC member, officer or delegate or other authorised person to disclose information to a person or organisation for the purposes of the performance of that person's functions : (otherwise than by law - e.g. disclosure to a stock or futures exchange).

27. The amendment will also permit the disclosure of information to the Advisory Committee, the Panel, the Companies Auditors and Liquidators Disciplinary Board, the Accounting Standards Review Board and to domestic or foreign governments or agencies that do not perform or exercise functions or powers analogous to those of the ASC if the ASC Chairperson or his or her delegate is satisfied that the disclosure will assist such governments or agencies in the performance of their functions or powers.

Amendment (16): Cl. 137 - Limitation on contracts and leases

28. Except as otherwise provided by the Regulations Cl.137 prohibits the ASC, without the Minister's approval, from entering into a contract (other than a contract for employment of staff or consultants) under which the ASC is to pay or receive an amount exceeding \$250,000 or, if a higher amount is prescribed, that higher amount.

29. Sub-clause 135(3) permits the ASC to invest its surplus funds on deposit with an approved bank, in Commonwealth securities or in any other approved manner. These investments are very low risk. Therefore, to the extent that making such investments amounts to 'entering into a contract' under Cl. 137 there is no reason why they should be subject to Ministerial approval. The amendment is designed to obviate the need to obtain Ministerial approval in these circumstances. It may be compared with s.37A of the Housing Loans Insurance Act 1965.

Amendment (17): Insertion of new Cl. 180A - Annual Report

30. Clauses 138, 164 and 230 require the ASC, the Companies and Securities Advisory Committee and the Accounting Standards Review Board to prepare an annual report. There is however no requirement for either the Corporations and Securities Panel or the Companies Auditors and Liquidators Disciplinary Board to prepare an annual report. As these bodies are involved in the administration of important investigatory and disciplinary

powers contained in the legislation it is desirable that they be obliged to prepare annual reports.

31. The amendment will require the Panel to prepare an annual report and furnish it to the Minister by 31 October in each year. The Minister will be required to table the Panel's report in each House of Parliament within 15 sitting days after it is received.

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32. Clause 181 presently requires the President of the Corporations and Securities Panel to sit on each hearing that the Panel conducts in relation to alleged unacceptable conduct during a takeover.

33. The amendments are intended to ensure that the President will not have to sit on each hearing. The President will be able to appoint another member of the Panel to preside at a hearing instead of the President and to designate one of the additional members of the Panel to deputise for the member presiding over the hearing. This flexibility is desirable to enable the Panel to hold more than one hearing at a particular time.

Amendment (21): Cl.184 - Interpretation

34. The amendment is consequent upon the amendments proposed to be made to cl. 181 above.

Amendments (22) and (23) : Cl.185 - Power to hold private hearings

35. Under cl. 185 hearings of the Corporations and Securities Panel are to take place in private. The primary reason for this was to avoid the unnecessary and damaging litigation which could arise from defamatory allegations made at a public hearing. However this will not be as much of a problem where

the parties likely to be affected agree to the hearing being held in public.

36. The amendments therefore will allow hearings to be held in public where the parties likely to be affected agree and the Panel agrees that it is appropriate. In deciding whether or not to hold the hearing in public when all parties agree, the Panel will be able to take into account the likelihood of the hearing being frustrated or damage occurring to other persons if a public hearing were held. The amendments are based on the ASC's discretions to hold hearings in public or private (Cls.52 and 53).

Amendment (24) : Cl.198 - Power of Court where non-compliance with section 189

37. Where the Corporations and Securities Panel is satisfied that a person has unreasonably failed to comply with a requirement made by a Panel member it may certify the failure to the Court. The Court will then be able to order the person to comply with the requirement and may punish the person as if the failure constituted a contempt of Court. The Court may do so even if the person has already been convicted of an offence in respect of the failure.

38. To overcome the possibility of double jeopardy, the amendment will eliminate the capacity of the Court to punish for contempt.

Amendment (25) : Insertion of new cl. 210A - Annual Report

39. Clauses 138, 164 and 230 require the ASC, the Companies and Securities Advisory Committee and the Accounting Standards Review Board to prepare an annual report. However, there is no requirement for either the Corporations and Securities Panel or the Companies Auditors and Liquidators Disciplinary Board to prepare an annual report. As these bodies are involved in the administration of important investigatory and

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disciplinary powers contained in the legislation it is desirable that they be obliged to prepare annual reports.

40. The amendment will require the Disciplinary Board to prepare an annual report and furnish it to the Minister by 31 October in each year. The Minister will be required to table the Disciplinary Board's report in each House of Parliament within 15 sitting days after it is received.

Amendment (26) : Cl. 215 - Failure of witnesses to attend and answer questions

41. Sub-clause 215 (3) provides that a person shall not, at a hearing before the Companies Auditors and Liquidators Disciplinary Board, give evidence that is false or misleading. This provision is based on sub-s. 30H (3) of the existing companies legislation. The Senate Scrutiny of Bills Committee has criticised this provision in that it appears to create a strict liability offence.

42. The amendment will provide a defence to a prosecution for the giving of materially false or misleading evidence.

43. The defence will allow the defendant to prove that when giving the evidence he or she believed on reasonable grounds that it was true and not misleading.

Amendment (27) : Cl. 230 - Annual Report

44. The amendment makes a minor drafting correction.

Amendment (28) : Insertion of New Part 12A - Jurisdiction of Courts under National Scheme Laws

45. The legislation presently provides a general right of appeal to the Federal Court and the Supreme Courts for persons aggrieved by acts, omissions or decisions of the Australian Securities Commission ('ASC') or of the Companies Auditors and Liquidators Disciplinary Board (see Corporations Bill,

Cls.1299, 1320; Close Corporations Bill, Cl.137). Decisions of the Corporations and Securities Panel ('Panel') may be reviewed by the Federal Court under the Administrative Decisions (Judicial Review) Act 1977 ('AD(JR) Act').

Accounting standards made by the Accounting Standards Review Board ('ASRB') under Cl.283 of the Corporations Bill will be able to be disallowed by Parliament. Concurrent jurisdiction is conferred on the State and Territory Supreme Courts and the Federal Court in respect of matters arising under the legislation (see Cl.1329 of the Corporations Bill, Cl.237 of the ASC Bill, and Cl.144 of the Close Corporations Bill).

46. These amendments alter this position in the following respects:

- (a) the general appeal rights to the Courts conferred by Cls.1299 and 1320 of the Corporations Bill and Cl.137 of the Close Corporations Bill are to be omitted;
- (b) except in relation to certain decisions in respect of which administrative review is not appropriate, the Administrative Appeals Tribunal ('AAT'), rather than the Courts, is to be conferred with jurisdiction under the Administrative Appeals Tribunal Act 1975 ('AAT Act') to review the merits of decisions of the ASC, the Minister and the Companies Auditors and Liquidators Disciplinary Board - "decisions" having the same meaning as in sub-s.3(3) of the AAT Act;
- (c) the Courts' power to review decisions of the above bodies on the merits is to be removed - however the Federal Court would have power to review their decisions under the AD(JR) Act as well as having power under the AAT Act to deal with appeals from the AAT on questions of law;
- (d) concurrent jurisdiction in the Federal Court and the Supreme Courts is to be retained for other civil matters arising under the legislation; and

- (e) criminal jurisdiction is to be confined to State and Territory Courts (the conferral of jurisdiction in respect of offences created by the legislation being left to the ordinary provisions of the Judiciary Act investing State and Territory Courts with jurisdiction in respect of federal offences).

47. Clause 237 currently provides for concurrent jurisdiction in matters arising under the Bill to be invested in the Federal Court and the State and Territory Supreme Courts. This would include jurisdiction to try offences created by the legislation, and would notionally, at least, confer criminal jurisdiction on the Federal Court. The Federal Court's present criminal jurisdiction is limited to certain matters under the Conciliation and Arbitration, Bankruptcy and certain other Acts, and is not ordinarily exercised. It is therefore preferable to leave the exercise of criminal jurisdiction in respect of matters arising under the legislation to the State and Territory Courts in the ordinary way. However, for civil matters arising under the legislation, concurrent jurisdiction is vested in the State and Territory Courts and the Federal Court. To achieve these purposes, Cl.237 is proposed to be omitted and replaced with a new Part 12A, dealing with jurisdiction of Courts under national scheme laws.

New Cl. 230A - Jurisdiction of Federal Court of Australia

48. New Cl.230A provides that jurisdiction in any matter arising under a national scheme law is conferred on the Federal Court (Sub-cl.(1)). However, Sub-cl.(2) makes clear that prosecutions for offences against a national scheme law are not to be instituted in the Federal Court, and should be brought in a State or Territory Court.

New Cl. 230B - Jurisdiction of State and Territory Supreme Courts

49. New Cl.230B provides that jurisdiction in any matter arising under a national scheme law is also conferred on the

State Supreme Courts subject to s.9 of the Administrative Decisions (Judicial Review) Act 1977 (Sub-cl.(1)) and on the Territory Supreme Courts (Sub-cl.(2)). The effect of s.9 of the AD(JR) Act is that decisions of the Minister, the ASC, and the Companies Auditors and Liquidators Disciplinary Board will not be able to be reviewed by a State court. Most of these decisions will be reviewable on the merits by the AAT and by the Federal Court under the AD(JR) Act. Decisions of the Corporations and Securities Panel will not be reviewable by the AAT, but will be reviewable by the Federal Court under the AD(JR) Act.

50. Sub-cl.(3) clarifies some jurisdictional matters and also makes clear that the jurisdiction conferred by Cl.230B on the State and Territory Supreme Courts shall be exercised by a single judge.

New Cl. 230C - Transfer of Proceedings

51. New Cl.230C, which is based on s.35 of the Bankruptcy Act 1966, enables proceedings to be transferred from the court in which the proceedings were commenced to another court having jurisdiction in the matters for determination. The proceedings may be transferred on the application of a party or of the court's own motion. This provision will enable proceedings to be transferred to the most appropriate Court. It may also assist in limiting forum shopping.

New Cl. 230D - Courts to act in aid of each other

52. New Cl.230D, which is based on sub-s.29(1) of the Bankruptcy Act 1966, provides that all courts having jurisdiction in matters arising under national scheme laws and the officers of those courts shall act in aid of each other in such matters. This should ensure that, where matters are transferred between courts, the transfer is speedy and efficient.

New Cl. 230E - Appeals from State and Territory Supreme Courts

53. New Cl.230E deals with the course of appeals from the State and Territory Supreme Courts in matters arising under national scheme laws. An appeal lies as of right from a single judge decision of a State or Territory Supreme Court to the Federal Court (Sub-cl.(1)). An appeal may also lie to the High Court, if that Court gives special leave (Sub-cl.(2)). Appeals from the Federal Court may proceed in accordance with the terms of the Federal Court of Australia Act 1976.

New Cl.230F - Effect of Part on other laws

54. New Cl. 230F makes clear that new Part 12A is not intended to affect the operation of s.68 of the Judiciary Act 1903 dealing with the jurisdiction of State and Territory Courts in criminal matters, or the Jurisdiction of Courts (Cross-vesting) Act 1987 which enables the Family Court of Australia to exercise jurisdiction in certain circumstances.

Amendment (29) : New Cl.230G - Review by Administrative Appeals Tribunal of certain decisions

55. New Cl.230G provides for AAT instead of Court review of orders or other decisions made by the ASC where a person has failed to comply with a requirement during an ASC investigation or hearing. The orders involve restrictions on the exercise of property rights (e.g. restraining the acquisition or disposal of securities).

56. Because of judicial power constraints in the Constitution, under Commonwealth legislation full merits review is not available before a court. For this reason, new Cl.230G and new Part 9.4A of the Corporations Bill and new Division 1A of Part 18 of the Close Corporations Bill provide for AAT review of certain administrative decisions.

57. The amendment provides that in new Cl.230G 'decision' will have the same meaning as in the AAT Act. The relevant

provision of that Act is sub-s.3(3) which defines 'decision' widely to include:

- (a) making, suspending, revoking or refusing to make an order or determination;
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement;
- (f) retaining, or refusing to deliver up, an article; or
- (g) doing or refusing to do any other act or thing.

58. AAT review will be available with respect to a decision by the ASC:

- (a) to make an order under Cl.72, 73 or 74 (restraining the exercise of rights relating to securities or futures contracts);
- (b) to make an order under Sub-cl.75(1) varying an order made under ss.72-75; or
- (c) to refuse to vary or revoke such an order.

Amendment (30): Cl 237 - Jurisdiction of courts

59. The omission of Cl.237 is consequent upon the insertion of new Part 12A outlined above.

1988

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

AUSTRALIAN SECURITIES COMMISSION BILL 1988

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and New Clauses Passed By The House of
Representatives To The Bill As Introduced

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

AUSTRALIAN SECURITIES COMMISSION BILL 1988 - AMENDMENTS AND
INSERTION OF NEW CLAUSES.

OUTLINE

The Attorney-General introduced the Australian Securities Commission Bill ('the Bill') into the House of Representatives on 25 May 1988. Its main purpose is to establish an Australian Securities Commission ('ASC') to regulate companies and the securities and futures industries in Australia. It is part of a package of Bills to replace the existing co-operative scheme under which the Commonwealth shares regulatory responsibilities with the States and Northern Territory. The Bill was introduced together with the Corporations Bill and the Close Corporations Bill.

2. The amendments to the Bill to be moved on behalf of the Government can be grouped as follows:

- (a) A new Part 12A dealing with the jurisdiction of the Supreme Courts and the Federal Court under the Corporations Bill, the Australian Securities Commission Bill and the Close Corporations Bill;
- (b) An amendment to replace certain existing rights to Court review of administrative decisions with rights to have those decisions reviewed by the Administrative Appeals Tribunal;
- (c) An amendment to preserve the role of the Director of Public Prosecutions;

- (d) Amendments to require the Corporations and Securities Panel and the Companies Auditors and Liquidators Disciplinary Board to prepare annual reports;
- (e) An amendment to permit the ASC to disclose confidential information to a wider class of agencies and organisations where appropriate;
- (f) An amendment to clarify the ASC's power to enter into contracts of investment; and
- (g) Amendments to clarify aspects of the ASC's and Corporations and Securities Panel's investigation and hearings powers.

FINANCIAL IMPACT STATEMENT

3. The amendments will not have a significant financial impact. Some additional resources will be required in the Administrative Appeals Tribunal but little more in the Federal Court than would be required under the legislation as introduced. By giving an exclusive judicial review jurisdiction to the Federal Court, some cases that might have been brought in the State or Territory Supreme Courts under the legislation as introduced will have to be brought in the Federal Court. It is also proposed to empower the Federal Court to hear appeals from decisions of single Supreme Court judges.

4. Because the legislation confers jurisdiction on State and Federal Courts, it is difficult to quantify what additional resources will be required for the Federal Court. It will depend to a large extent on the preferences of litigants and their advisers. Much of the winding-up jurisdiction, to the extent brought in the Federal Court, could be exercised by Registrars under delegation from the judges.

5. Whilst the simpler procedures of the AAT may give rise to more applications for review of administrative decisions than at present, there have been very few appeals to the Supreme Courts against decisions of either the NCSC or its delegates.

NOTES ON CLAUSES - AMENDMENTS TO AUSTRALIAN SECURITIES
COMMISSION BILL

Amendment (1) : Cl.13 - General powers of investigation

6. Under Cl.13 the ASC has power to investigate matters where it has reason to suspect that a national scheme law may have been contravened. The amendment makes it clear that the ASC has power to investigate unacceptable conduct in connection with a takeover that may fall short of a breach of the law. This will assist the ASC in determining whether to apply to the Corporations and Securities Panel for a declaration of unacceptable conduct under Cl.733 of the Corporations Bill.

Amendment (2) : Cl.19 - Notice requiring appearance for
examination

7. Where the ASC wishes to examine a person in an investigation it must give that person a notice in the prescribed form under Cl.19 requiring the person to appear and answer questions. To ensure that natural justice is afforded to the person whose attendance before the ASC is required, the amendment to Cl.19 will make clear that the notice to the person must contain, among other things, a statement of the nature of the matter to which the investigation relates. This will enable the person to be aware of the relevance of the inquiry to him or her.

8. The amendment will also require the notice to set out the person's right to legal representation and the right to claim the privilege against self-incrimination (Cls.23 and 68).

Amendment (3) : Cl.43 - Exercise of certain powers of the
Commission in relation to securities

9. The amendment makes a minor drafting correction.

Amendments (4) and (5) : Cl.49 - Commission to cause prosecution to be begun

10. Clause 49 requires the ASC to have the sole duty to cause a prosecution to be begun and carried on for offences revealed by an investigation or record of examination where the ASC considers that it is necessary to do so.

11. The amendments to Cl.49 seek to preserve the statutory functions and powers of the Director of Public Prosecutions and, in particular, the DPP's general functions which are to institute and carry on proceedings for commitment for trial, and to institute and carry on proceedings for summary conviction, in relation to Commonwealth offences.

12. The amendments will empower the ASC to commence and carry on prosecutions but without prejudice to the DPP's statutory powers and functions. In particular, the DPP's powers to take over, to carry on or to terminate a proceeding for commitment for trial or summary conviction and to give directions or furnish guidelines with respect to the prosecution of offences will not be prejudiced.

13. In accordance with Commonwealth prosecution policy the ASC will have to send the DPP a brief of evidence if as a result of an investigation an offence appears to have been committed. Although the ASC will be able to make an initial decision to prosecute, the DPP has the responsibility to determine whether a prosecution should proceed.

14. Similar amendments are proposed to the corresponding provisions in the Corporations Bill (Cl.1315) and the Close Corporations Bill (Cl.142).

15. The amendment proposed to Cl.127 will enable the ASC to provide the DPP with all the information necessary to enable it to exercise all relevant powers and functions in relation to the prosecution of offences created by the Bill.

Amendment (6) : Cl.50 - Commission may cause civil proceeding to be begun

16. Under Cl.50 the ASC is empowered to undertake civil proceedings in a person's name if, following an investigation or examination, it appears to be in the public interest to undertake such proceedings for that person. There is no express requirement that the ASC obtain the person's consent. By contrast, Sub-cl.1325(3) of the Corporations Bill requires the ASC to obtain a person's written consent before applying to the Court on the person's behalf for an order to compensate the person for loss or damage suffered as a result of illegal conduct in relation to securities.

17. The amendment to Cl.50 will bring it into line with Sub-cl.1325(3) of the Corporations Bill so that the ASC will not be able to undertake civil proceedings in a person's name without the person's written consent.

Amendments (7) and (8) : Cl.63 - Non-compliance with requirements made under this Part

18. The amendments make minor drafting corrections.

Amendment (9): Cl. 65 - Obstructing person acting under this Part

19. The amendment brings the penalty into line with the penalty for this offence under co-operative scheme legislation.

Amendment (10) : Cl.70 - Powers of Court where non-compliance with Part

20. Where the ASC is satisfied that a person has unreasonably failed to comply with a requirement made during an investigation or at a hearing it may certify to the Court that such a failure has taken place. The Court will then be able to order that person to comply with the requirement or to punish that person as if in contempt of court, or both. The

Court may do so even if the person has been convicted of an offence in respect of the failure.

21. To overcome the possibility of double jeopardy, the amendment will eliminate the capacity of the Court to punish for contempt.

Amendments (11) and (12) : Cl. 72 - Orders in relation to securities of a body corporate

22. The amendments make minor drafting corrections.

Amendment (13) : Cl.75 - Orders under Division 8, Part 3

23. This amendment, which deletes Sub-cl.75(5) and (6), is consequent upon new Cl.230G which provides for AAT review of orders made by the ASC under Division 8 of Part 3 of the Bill.

Amendment (14): Cl. 121 - Consultants etc.

24. The amendment makes a minor drafting correction.

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27. The amendment will also permit the disclosure of information to the Advisory Committee, the Panel, the Companies Auditors and Liquidators Disciplinary Board, the Accounting Standards Review Board and to domestic or foreign governments or agencies that do not perform or exercise functions or powers analogous to those of the ASC if the ASC Chairperson or his or her delegate is satisfied that the disclosure will assist such governments or agencies in the performance of their functions or powers.

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43. The defence will allow the defendant to prove that when giving the evidence he or she believed on reasonable grounds that it was true and not misleading.

Amendment (27) : Cl. 230 - Annual Report

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Amendment (28) : Insertion of New Part 12A - Jurisdiction of Courts under National Scheme Laws

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51. New Cl.230C, which is based on s.35 of the Bankruptcy Act 1966, enables proceedings to be transferred from the court in which the proceedings were commenced to another court having jurisdiction in the matters for determination. The proceedings may be transferred on the application of a party or of the court's own motion. This provision will enable proceedings to be transferred to the most appropriate Court. It may also assist in limiting forum shopping.

New Cl. 230D - Courts to act in aid of each other

52. New Cl.230D, which is based on sub-s.29(1) of the Bankruptcy Act 1966, provides that all courts having jurisdiction in matters arising under national scheme laws and the officers of those courts shall act in aid of each other in such matters. This should ensure that, where matters are transferred between courts, the transfer is speedy and efficient.

New Cl. 230E - Appeals from State and Territory Supreme Courts

53. New Cl.230E deals with the course of appeals from the State and Territory Supreme Courts in matters arising under national scheme laws. An appeal lies as of right from a single judge decision of a State or Territory Supreme Court to the Federal Court (Sub-cl.(1)). An appeal may also lie to the High Court, if that Court gives special leave (Sub-cl.(2)). Appeals from the Federal Court may proceed in accordance with the terms of the Federal Court of Australia Act 1976.

New Cl.230F - Effect of Part on other laws

54. New Cl. 230F makes clear that new Part 12A is not intended to affect the operation of s.68 of the Judiciary Act 1903 dealing with the jurisdiction of State and Territory Courts in criminal matters, or the Jurisdiction of Courts (Cross-vesting) Act 1987 which enables the Family Court of Australia to exercise jurisdiction in certain circumstances.

Amendment (29) : New Cl.230G - Review by Administrative Appeals Tribunal of certain decisions

55. New Cl.230G provides for AAT instead of Court review of orders or other decisions made by the ASC where a person has failed to comply with a requirement during an ASC investigation or hearing. The orders involve restrictions on the exercise of property rights (e.g. restraining the acquisition or disposal of securities).

56. Because of judicial power constraints in the Constitution, under Commonwealth legislation full merits review is not available before a court. For this reason, new Cl.230G and new Part 9.4A of the Corporations Bill and new Division 1A of Part 18 of the Close Corporations Bill provide for AAT review of certain administrative decisions.

57. The amendment provides that in new Cl.230G 'decision' will have the same meaning as in the AAT Act. The relevant

provision of that Act is sub-s.3(3) which defines 'decision' widely to include:

- (a) making, suspending, revoking or refusing to make an order or determination;
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement;
- (f) retaining, or refusing to deliver up, an article; or
- (g) doing or refusing to do any other act or thing.

58. AAT review will be available with respect to a decision by the ASC:

- (a) to make an order under Cl.72, 73 or 74 (restraining the exercise of rights relating to securities or futures contracts);
- (b) to make an order under Sub-cl.75(1) varying an order made under ss.72-75; or
- (c) to refuse to vary or revoke such an order.

Amendment (30): Cl 237 - Jurisdiction of courts

59. The omission of Cl.237 is consequent upon the insertion of new Part 12A outlined above.

1989

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

AUSTRALIAN SECURITIES COMMISSION BILL 1988

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and New Clauses to be Moved on
Behalf of the Government

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

AUSTRALIAN SECURITIES COMMISSION BILL 1988 -
AMENDMENTS AND INSERTION OF NEW CLAUSES

OUTLINE

The Attorney-General introduced the Australian Securities Commission Bill ("the Bill") into the House of Representatives on 25 May 1988. Its main purpose is to establish an Australian Securities Commission ('ASC') to regulate companies and the securities and futures industries in Australia. It is part of a package of Bills to replace the existing co-operative scheme under which the Commonwealth shares regulatory responsibilities with the States and the Northern Territory. The Bill was introduced together with the Corporations Bill and the Close Corporations Bill.

2. The Bill was debated, amended and passed by the House of Representatives in late September 1988. It was introduced into the Senate on 14 October 1988, and referred to a Joint Select Committee of both Houses of Parliament for examination on 17 October 1988. Over the course of its examination, the Committee received and considered 61 written submissions and a large number of letters providing individual views. It also held 12 public hearings between 30 January and 2 March 1989.

3. The Committee's report was tabled on 13 April 1989. In the report, the Committee made a number of recommendations for changes to the Bill. Most amendments to the Bill to be moved on behalf of the Government result from the Government's acceptance of recommendations made by the Committee. Some amendments, such as the amendment providing for the ASC Chairperson to be an ex officio member of the Advisory Committee, will be moved instead of the amendment proposed by the Committee.

4. The most significant of these amendments will establish a Parliamentary Joint Select Committee to inquire into and report on the operation of laws dealing with companies and securities.

Financial Impact Statement

5. The amendments will not have a significant financial impact. The amendment which requires the appointment of a full-time Chairperson to the Corporations and Securities Panel will entail some additional expenditure by the ASC. (The remuneration of the Panel Chairperson is yet to be determined by the Remuneration Tribunal.) However such additional expenditure will not be significant when viewed against the ASC's overall budget.

NOTES ON CLAUSES - AMENDMENTS TO AUSTRALIAN SECURITIES
COMMISSION BILL

THE ADVISORY COMMITTEE'S FUNCTIONS

Amendment (1) : Cl.3 : Objects

6. Paragraph 3(1)(c) provides that one object of the ASC Act is to establish a Companies and Securities Advisory Committee to provide informed and expert advice to the Minister about the content, operation and administration of Commonwealth laws relating to companies, securities and the futures industry and about the securities and futures markets.

7. The Joint Select Committee on Corporations Legislation has recommended that an appropriate amendment of paragraph 3(1)(c) be effected so as to allow the Advisory Committee to provide advice to the Minister about matters relating to corporations as well as to securities and futures markets.

8. The amendment gives effect to this recommendation.

ESTABLISHMENT OF PARLIAMENTARY COMMITTEE

Amendments (2) to (8) : Establishment of Parliamentary Joint
Committee on Corporations and Securities

9. In accordance with the recommendation of the Joint Select Committee on Corporations Legislation, the amendments establish a Parliamentary Joint Select Committee on Corporations and Securities or are consequent upon the Committee's establishment.

10. The Committee is to consist of 10 members, 5 of whom are to be Senators appointed by the Senate and 5 of whom are to be members of the House of Representatives appointed by that House. A Minister, the President of the Senate or the Speaker of the House of Representatives, will not be eligible for appointment as a Committee member. Neither will the Deputy President and Chairman of Committees of the Senate nor the Chairman of Committees of the House of Representatives (new cl.230FA).

11. Subject to the ASC Act all matters relating to the Committee's powers and proceedings will be determined by resolution of both Houses (new cl.230FB).

12. The Committee's duties will be:

(a) to inquire into and report on:

(i) the activities of the ASC or the Panel;

(ii) the operation of any national companies and securities laws or any laws significantly affecting the operation of those laws;

(b) to examine and report on the annual report of the ASC, the Panel, the Companies Auditors and Liquidators Disciplinary Board and the Accounting Standards Review Board; and

(c) to inquire into and report on relevant matters referred to it by a House of Parliament.

(New subcl.230FC(1)).

13. The Parliamentary Committee will be subject to the following restrictions:

(a) The Committee will not be able to investigate a matter that the ASC has investigated or is investigating or that the Panel or the Disciplinary Board has considered, is considering or is about to consider (new para 230FC(2)(a)).

(b) The Committee will not be able to require a person to provide it with information concerning investigations or hearings of the ASC, Panel or Disciplinary Board that are taking place in private (new para 230FC(2)(b)).

5.

(c) The Committee will not be able to reconsider a decision of the ASC, Panel or Disciplinary Board (new para 230FC(2)(c)).

(d) The Committee's findings will not be able to be used as prima facie evidence against a person in any proceedings (new cl.230FD).

TABLING OF MINISTER'S DIRECTIONS

Amendment (9): Cl.12: Directions by Minister

14. Clause 12 permits the Minister to give the ASC written directions about the policies it should pursue, or priorities it should follow, in performing or exercising any of its functions or powers. Any directions which the Minister makes are to be published in the Commonwealth Gazette.

15. The Joint Select Committee on Corporations Legislation has recommended that the Minister should also be required to table in both Houses of Parliament a copy of any directions given to the ASC within 15 sitting days of their publication in the Gazette. A similar requirement is contained in s.8 of the Director of Public Prosecutions Act 1983 and in s.18 of the National Crime Authority Act 1984.

16. The amendment gives effect to the Committee's recommendation. However, failure of the Minister to table the directions in Parliament will not affect their validity.

REPORTS ABOUT SERIOUS CONTRAVENTIONS

Amendment (10): Cl.16: Interim report on investigation

17. Clause 16 requires the ASC to provide interim reports to the Minister in an investigation it is conducting whenever it forms the view that a contravention of the law has been committed.

18. The NCSC expressed its concern to the Joint Select Committee on Corporations Legislation that this provision would require the ASC to prepare an interim report relating to the investigation of every minor contravention of a national scheme law. To overcome this concern, it is proposed to amend para 16(1)(a) to apply only to a serious contravention. The effect of this will be that where the ASC, in the course of an investigation, formed the opinion that a serious contravention of the law of the Commonwealth or a State or Territory had been committed, it would be obliged to prepare an interim report relating to the investigation.

Amendment (11): Cl.18: Distribution of Report

19. Clause 18 deals with the distribution of interim and final reports of the ASC's investigations.

20. In accordance with a recommendation of the Joint Select Committee on Corporations Legislation it is proposed to empower the ASC to give a copy of the whole or part of an interim or final report relating to a serious contravention to the Australian Federal Police, the National Crime Authority, the Director of Public Prosecutions or any other agency that may be prescribed in the regulations.

COMMISSION'S POWER TO BEGIN CIVIL PROCEEDINGS

Amendment (12): Cl.50: Commission may cause civil proceeding to be begun

21. Clause 50 enables the ASC to bring a representative action in a person's name for the recovery of damages or property provided the person's consent is obtained.

22. In evidence before the Joint Select Committee on Corporations Legislation the NCSC argued that the requirement to obtain a person's consent before bringing a representative action would prevent the ASC being able to bring proceedings to recover misappropriated money or property when the persons

controlling the company are amongst the persons from whom recovery would be sought or are associates of such persons or are otherwise under their influence. This argument is based on the rule in Foss v Harbottle (1843) 2 Hare 461 which provides that the company is the proper plaintiff for an action to enforce any right of the company to remedy any wrong to it, or to recover its property. However, the rule in Foss v Harbottle does not apply to an illegal act, a fraud on the minority, or where directors have exercised their powers mala fide or for an improper purpose, or where the wrongdoers are in a position to prevent the company recovering its loss.

23. The Joint Select Committee on Corporations Legislation considered that the legislation should recognise the law as it has been interpreted in the courts on this matter. Accordingly it proposed that where the person on whose behalf a representative action was to be brought was a company the ASC should be able to commence the action without the consent of the company's directors. This would still leave open the possibility that shareholders of the company may refuse consent. In other cases, a person's written consent would still be required.

24. The amendment gives effect to the Committee's recommendation.

SELF-INCRIMINATION

Amendments (13) to (15): Cl.68: Self-incrimination

25. Clause 68 extends the co-operative scheme provisions concerning self-incrimination. Under the co-operative scheme a person is not excused from answering questions of an NCSC inspector on the ground that the answer might tend to incriminate him or her. However if, before answering, the person claims that the answer might tend to incriminate him or her, the answer is not admissible in evidence against the person in criminal proceedings other than proceedings for perjury.

26. Clause 68 extends the co-operative scheme provisions in the following respects:

- (a) It will cover the production of documents. Such an extension of the privilege is entrenched in many other pieces of legislation including the Trade Practices Act 1974, subs.155(7) and Independent Commission Against Corruption Act 1988 (NSW), s.26.
- (b) It will cover information obtained as a direct or indirect consequence of the information originally made available - the so-called use derivative use indemnity (cf. Proceeds of Crime Act 1987, subss.66(12) and (13) and National Crime Authority Act 1984, s.30).

27. The Joint Select Committee on Corporations Legislation, while recognising the importance of the rule against self-incrimination, considered that in appropriate cases the rule should be abrogated by statute to protect the public interest. It recommended that cl.68 should be amended so as to allow the use in criminal proceedings of information obtained as a direct or indirect consequence of the production of books to the ASC.

28. The proposed amendment gives effect to this recommendation.

POWERS OF COMMISSION'S CHAIRPERSON

Amendment (16): Cl.94: Arrangement of Commission's business

Amendment (17): Cl.97: Chairperson may establish Division of Commission

Amendment (18): Cl.99: Chairperson may reconstitute Division

Amendment (19): Cl.120: Staff

29. Clauses 94, 97, 99 and 120 are modelled on ss.16, 19 and 27 of the Trade Practices Act 1974. The Joint Select

Committee has recommended that the extensive powers conferred on the Chairperson by these clauses to arrange the ASC's business and to deal with staffing matters should be vested in the ASC itself to ensure that the ASC can operate as a collegiate body.

30. The proposed amendments give effect to this recommendation.

ANNUAL REPORT OF COMMISSION

Amendment (20): Cl.138: Application of Division 3 of Part XI of Audit Act

31. One effect of cl.138 is that the ASC must prepare and provide an annual report to the responsible Minister, who is then required to table it in Parliament within 15 days.

32. The Joint Select Committee on Corporations Legislation recommended that cl.138 should be redrafted so as to provide criteria which need to be complied with by the ASC in the preparation of its annual report. The Committee envisaged that the ASC should be required to follow the NCSC's example of reporting on matters undertaken during the year such as:

- investigations;
- litigation; and
- other noteworthy administrative matters.

33. The proposed amendment gives effect to the Committee's recommendation by requiring the ASC's annual report to describe:

- (a) the specific goals the ASC has pursued, and the priorities it has followed, in performing its functions during the financial year;
- (b) what progress the ASC has made during that year to achieving those goals; and

(c) any matters that, during that year, have adversely affected the ASC's effectiveness.

COMMISSION'S CHAIRPERSON TO BE EX OFFICIO MEMBER OF ADVISORY COMMITTEE

Amendments (21) to (23) : Cl.147 : Membership

Amendment (24): Cl.150 : Resignation

Amendment (25) : Cl.152 : Remuneration and allowances etc.

34. Clause 11 sets out the ASC's functions and powers. Under para 11(2)(b) one of the ASC's functions is to advise the Minister about any changes to a national scheme law that, in the ASC's opinion, are needed to overcome, or would assist in overcoming, any problems that the ASC has encountered in the course of performing or exercising any of its functions or powers. This provision strikes a balance between recognising the desirability of the ASC giving policy advice to the Minister on matters relevant to its charter, and giving effect to the primary administrative functions of the ASC.

35. Part 9 of the Bill provides for the establishment of a specialist Advisory Committee, separate from the ASC, to perform law reform functions and a general advisory role on the operation of the national scheme. Its advisory functions, set out in cl.148, are wider than the ASC's.

36. The Joint Select Committee on Corporations Legislation has recommended that paragraph 11(2)(b) of the Bill should be redrafted to provide the ASC with the same advisory functions as the Companies and Securities Advisory Committee has under clause 148 of the Bill.

37. The Government does not accept the Committee's recommendation insofar as it could require the ASC to devote considerable resources to the development of policy at the expense of its investigation and enforcement functions. However, in order to ensure that the ASC has a role in the

development of broader policy and to address the legitimate concerns of the Committee, the Government amendments ensure that the Chairperson of the ASC will be an ex officio member of the Advisory Committee.

38. The ASC Chairperson will not receive any remuneration for taking part in the deliberations of the Advisory Committee. However, the duties of the ASC Chairperson as an ex officio member of the Committee would no doubt be considered by the Remuneration Tribunal when fixing the Chairperson's salary.

MEMBERSHIP OF PANEL

Amendments (26) to (28): Cl.172: Membership of the Corporations and Securities Panel

Amendment (29): Cl.173: President of the Panel

Amendment (30): Cl.175: Term of office as member of Panel

Amendments (31) and (32): Cl.178: Termination of appointment

39. Clause 172 provides that the Panel is to consist of such part-time members as hold office in accordance with Part 10 of the Bill.

40. The Joint Select Committee on Corporations Legislation considered that Panel members would have to be available at short notice on a full-time basis for extended periods. Accordingly it recommended that the Bill provide for the Panel to be constituted by at least 5 members, both part-time and full-time. The Committee also recommended that there be a full-time President with powers to make interlocutory and other interim orders as provided for by cl.734 of the Corporations Bill (to protect the rights of persons affected by unacceptable conduct during a takeover). In addition, the Committee recommended that the Minister have the option of appointing a pool of members to the Panel with the qualifications provided for in subclause 172(3).

41. The proposed amendments, together with proposed amendments to the Corporations Bill, give effect to the Committee's recommendations or are consequent upon the Committee's recommendations.

42. The Government accepts that the President of the Panel should be appointed full-time to facilitate the swift determination of declarations and to exercise interlocutory powers. To ensure the availability of an adequate number of members to sit on hearings at short notice the Government agrees with the Committee about the desirability of the Minister appointing a pool of members under cl.172 with appropriate qualifications and expertise.

Amendment (33): New cl.179A: Leave of absence

New cl.179B: Other terms and conditions

43. As is the case with full-time members of the ASC (see cl.113) under new cl.179A the Minister will be able to grant a full-time member of the Panel leave of absence from duty on such terms and conditions as to remuneration or otherwise as the Minister specifies.

44. Clause 179 provides for the remuneration and allowances payable to Panel members. In addition, under new cl.179B a Panel member will hold office on such terms and conditions (if any) as the Minister determines in writing.

HEARINGS BY PANEL

Amendment (34) : Cl.185 : Power to hold private hearings

Amendments (35) and (36) : Cl.186 : Who may be present at hearing

45. Subclause 185(3) provides that, subject to subsection (4), hearings of the Corporations and Securities Panel are to take

place in private. Under subcl.(4), the Panel may direct that a hearing take place in public where all persons who are entitled to be given an opportunity to appear at a particular hearing agree that the hearing take place in public.

46. The Joint Select Committee on Corporations Legislation considered that it would be desirable for Panel hearings to take place in public and that the Panel should be conferred with a discretion to hold public or private hearings where a national scheme law requires it to hold a hearing.

47. The amendments give effect to the Committee's recommendation and are consequent upon it.