

1988

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CLOSE CORPORATIONS BILL 1988

CLOSE CORPORATIONS (FEES)

BILL 1988

CLOSE CORPORATIONS (LIQUIDATORS'
RECOVERY TRUST FUND CONTRIBUTION)

BILL 1988

CLOSE CORPORATIONS (ADDITIONAL
LIQUIDATORS' RECOVERY TRUST FUND
CONTRIBUTION) BILL 1988

EXPLANATORY MEMORANDUM

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

CLOSE CORPORATIONS BILL 1988

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SCHEDULE

Penalties for offences committed
by natural persons

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CLOSE CORPORATIONS (LIQUIDATORS'
RECOVERY TRUST FUND CONTRIBUTIONS)

BILL 1988

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CLOSE CORPORATIONS (ADDITIONAL
LIQUIDATORS' RECOVERY TRUST
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CLOSE CORPORATIONS BILL 1988 AND
RELATED FEES AND LEVY BILLS

OUTLINE

The purpose of the Close Corporations Bill 1988 ('the Bill') is to introduce a new corporate entity to be known as the 'close corporation'.

2. The Bill is based on proposals for a new corporate form tailored specifically to the needs of small business enterprises, developed by the Companies and Securities Law Review Committee. The broad purpose behind the Bill is to simplify the corporate rules for small business by reducing financial and other reporting requirements and by abandoning the company law distinctions between directors and shareholders in favour of simple principles based on partnership laws.

3. The Close Corporations (Fees) Bill 1988, the Close Corporations (Liquidators' Recovery Trust Fund Contribution) Bill 1988 and the Close Corporations (Additional Liquidators' Recovery Trust Fund Contribution) Bill 1988 provide support for the Bill in terms of the funding of functions carried out under the Bill.

Financial impact statement

4. The costs of administering the Close Corporations legislation will be covered by revenues received from those incorporating and operating such bodies. Any agreements with State/Territory governments for administration of close corporations legislation by State/Territory Government 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.

5. The Close Corporations Bill provides a simple form of incorporation for small business enterprises which will result in significantly reduced financial and reporting costs for those enterprises compared with the cost of incorporating as a company.

Explanatory Memorandum

5. The remainder of this explanatory memorandum:
- (a) contains a list of abbreviations used in this explanatory memorandum;
 - (b) contains an index of clauses of the Bill; and
 - (c) deals sequentially with each clause of the Bill.

ABBREVIATIONS

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

ASC - Australian Securities Commission

Bill - Close Corporations Bill 1988

CA - Companies Act 1981

CC - Close corporation

CONTENTS OF THE BILL

7. The Bill is divided into the following Parts:

- Part 1 - Preliminary
- Part 2 - Registration
- Part 3 - Names
- Part 4 - Legal Capacity and Powers
- Part 5 - Membership
- Part 6 - Title to and Transfer of Securities
- Part 7 - Internal Administration
- Part 8 - Accounts and Certificates of Compliance
- Part 9 - Transactions on behalf of Close Corporation
- Part 10 - Provisions relating to Shares
- Part 11 - Charges
- Part 12 - Arrangements and Reconstructions
- Part 13 - Receivers and Managers
- Part 14 - Official Management
- Part 15 - Liability of Members for Corporation's Debts and Liabilities
- Part 16 - Winding Up
- Part 17 - Liquidators' Recovery Trust Fund

Part 18 - General

Schedule - Penalties for offences committed by natural persons

BILL PART 1 - PRELIMINARY

8. Part 1 of the Bill deals with various preliminary matters.

Cl.1 : Short title

9. When enacted the Bill will be cited as the Close Corporations Act 1988 (Bill cl.1).

Cl.2 : Commencement

10. It is anticipated that all of the provisions of the Bill will be proclaimed to come into operation on the same day (Bill cl.2).

11. 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 : Application to Crown

12. This provision is based on CA ss.314, 322, 334 and 358 which binds the Crown in respect of certain CA provisions which will also apply to CC's by virtue of cls.103, 104, 105, 114 - 121 of this Bill.

Cl.4 : Extension to external Territories

13. The Bill may be extended to external Territories prescribed by regulation. At this stage the Bill will not extend to any external Territories.

Cl.5 : Administration

14. The ASC Bill provides for the establishment of the Australian Securities Commission to regulate companies and securities and futures industry in Australia. The ASC will also regulate close corporations by deriving its powers to do so from both the ASC Bill and this Bill.

Cl.6 : General Dictionary

15. Bill Cl.6 contains relevant definitions. In order that the legislation may be kept as simple as possible for users, definitions are only provided for terms that are specifically applicable to close corporations. This effect is reinforced by sub-cl.6(2) which incorporates any necessary definitions from the CB. Some of the more important definitions which are included are as follows:

- association agreement : the association agreement is outlined in cl.67. It is an optional written agreement which sets out the corporation's internal management rules which may or may not vary the internal management rules set out in the legislation.
- certificate of compliance : this certificate, to be lodged within 6 months of the end of each accounting period, must include the information required by cls.83 and 84.
- decisive number of members : certain decisions by members of a close corporation are required to be made by a decisive number of members. Those decisions are required by cl.67 in respect of a supplementary association agreement and by cls.89, 90, 98, in respect of the acquisition by a CC of its own shares.
- founding statement : the founding statement is a document to be lodged with the Commission upon

incorporation which sets out the information required by cl.19. The founding statement is only required to be lodged on incorporation but is required to be amended each time there is a change in the information required by cl.19.

- member : the identification of persons as CC members is according to the criteria set out in cls.52, 54, 55, 61, 62 and 63. Membership does not depend on registration of a person's name in the founding statement but certain consequences flow from non-registration - (see Bill cl.59).
- supplementary association agreement : a written association agreement may be varied by a supplementary association agreement if it is entered into by a decisive number of members as required by sub-cl.67(4).

Cl.7 : Dormant close corporations

16. Bill cl.7 is based on CA s.266A which defines a dormant corporation. A dormant CC is required by cl.84 to declare that dormancy in its annual activities statement, which is to be included in the annual certificate of compliance.

Cl.8 : New close corporations

17. Bill cl.8 defines a new close corporation for the purposes of cl.27 which allows the Commission to take certain actions in relation to close corporations that are not trading corporations.

Cl.9 : What is a holding company

18. Although CC's may hold shares in other companies they are prohibited by cl.50 from becoming a holding company. Clause 99 defines a CC as a holding company if a body corporate is its subsidiary. Subsidiary, in turn, is defined by cl.10.

Cl.10 : What is a subsidiary

19. The definition of subsidiary is based on CA s.7.

Cl.11 : Control of a body corporate's board

20. Bill Cl.11 for the purposes of cl.10, sets out the circumstances in which the composition of a body corporate's board is to be taken to be controlled by a CC.

Cl.12 : Matters to be disregarded

21. Bill cl.12 sets out certain matters to be disregarded in determining whether a body corporate is a subsidiary as defined in cl.11.

Cl.13 : Involvement in Contraventions

22. Bill cl.13 extends the Bill's offence provisions to persons defined as having been involved in contraventions.

Cl.14 : Receivers and Managers

23. Bill cl.14 is an interpretative provision based on CA s.5(7) which extends the definition of receiver for the purposes of CA s.321 which is applied to CC's by virtue of cl.106 of this Bill.

Cl.15 : How certain provisions of the Corporations Act apply to close corporations

24. Bill cl.15 ensures that the provisions of the CB which will apply to CC's are readily translated.

BILL PART 2 - REGISTRATION

25. Bill Part 2 deals with matters relating to the formation of CC's.

Cl.16 : Formation

26. Bill cl.16 sets out the general requirements of the legislation for forming a CC and restricts the size of a CC to 10 natural persons.

Cl.17 : Share capital

27. Bill cl.17 requires a CC to have a share capital divided into one class of fully paid shares of the same value, and with the same rights. The requirement for fully paid shares is a way of avoiding problems associated with the forfeiture or suspension of shares and charges on uncalled capital.

28. Although all CC shares will carry equal voting rights it is not intended to prevent a member with a greater number of shares exercising greater corresponding voting power.

Cl.18 : Registration

29. Bill cl.18 sets out the requirements for registration of a CC which include lodging of documents required by the Bill and lodging of a statement that complies with cl.19 of the Bill. The statement that complies with cl.19 is to be submitted on a founding statement form made available by the ASC.

30. Sub-clause 18(2) makes compliance with the requirements of cl.35 (reservation of names) and cls.60 to 63 (membership requirements) a pre-requisite to registration.

Cl.19 : Requirements as to founding statement

31. Clause 19 sets out the information to be included in the founding statement which is required by cl.18 to be lodged before registration of a CC. The required information has been kept to the minimum necessary in the interest of simplified administration.

Cl.20 : Changes in particulars in founding statement or membership register

32. CC's will be required to lodge a change of particulars form each time a change takes place in any of the matters set out in the founding statement.

33. Although failure to lodge a change of particulars form will not be an offence, other consequences will flow from the failure to notify a change of members - (see Bill cl.59).

Cl.21 : Certificate of registration

34. Bill cl.21 provides for the issue of a certificate evidencing the incorporation of a CC in the same way as CA sub-s.86(5) provides for the issue of a certificate of registration in respect of companies incorporated under that Act.

Cl.22 : Effect of certificate

35. Bill cl.22 is based on CA and provides that a registration certificate issued under cl.21 is conclusive evidence of incorporation, that the requirements of the Act relating to registration have been complied with and that the day of commencement of the registration of the CC is the day specified in the certificate.

Cl.23 : Incorporation

36. Bill cl.23 provides that from the day of commencement of the registration of a CC, as evidenced by a certificate issued under cl.21, the CC is a body corporate with the traditional powers and attributes as set out in sub-cl.23(2).

Cl.24 : Conversion of company into close corporation

37. Bill cl.24 provides for the conversion of companies to close corporations in a manner which will preserve the

identity of the company with the effect that the continued existence of the company as a close corporation does not -

- (a) affect the property, or the rights or obligations of that corporate body; or
- (b) render defective any legal proceedings by or against that corporate body;

and any legal proceedings that could have been continued or begun by or against the company may be continued or begun by or against the corporation.

Cl.25 : Lodgement of activities statement

38. Clause 25 describes the corporations activities statement which is a pre-requisite to incorporation and must be lodged not more than 7 days before the founding statement (required by cl.18) and not more than 28 days before the CC is registered.

39. The activities statement requirement establishes a link between the nature of a close corporation to be registered under this Bill and the constitutional powers of the Commonwealth. That link is established by written evidence of actual or intended activities of the company of a kind that would make the close corporation subject to valid Commonwealth company laws.

40. The activities statement must state as mentioned in sub-cl.25(3) or 25(4), whether or not it also states as mentioned in sub-cl.25(2). Sub-clause.25(2) allows a CC to state to the effect that the subscribers intend the proposed CC to be dormant throughout a substantial period beginning at its incorporation.

41. If, after 21 days after the day of the proposed corporation's incorporation, the subscribers will have interests that together constitute a controlled interest in

the proposed CC, the statement must state that the subscribers intend that, within 3 months after:

(a) the day of the proposed corporation's incorporation;
or

(b) the period mentioned in sub-cl.25(2);

as the case requires, trading activities within the meaning of the CC Act will be the whole or a substantial part of the corporation's activities (Bill sub-cl.25(3)).

42. If, within 21 days after the day of the proposed CC's incorporation or within the period mentioned in sub-cl.25(2), the subscribers intend that persons other than the subscribers will be members and have interests in the corporation that together constitute a controlling interest in it, the statement must attest to that intention (Bill sub-cl.25(4)).

Cl.26 : Further activities statement when control of corporation is to change

43. As an additional requirement supporting the constitutional link, a further signed statement will be required within certain time limits (see Bill paras.26(1)(c) and (d) and (2)(c)) as to whether it is intended that, within the next 3 months, trading activities within the meaning of the Act will be the whole or substantial part of the activities of the corporation.

Cl.27 : Commission to take action

44. Apart from new CC's and those in respect of which an application for an order to wind up the CC on the ground provided for in CB cl.459(1) (winding up of a CC that is not a trading corporation) the ASC shall

(a) make an application under CB sub-cl.459(1) to wind up the CC; or

(b) take action in relation to a CC under CB cl.572.

Cl.28 : Presumptions about loss of trading corporation status

45. In forming its opinion for the purpose of cl.28, the ASC will be deemed to be satisfied, unless it is satisfied to the contrary, that a CC is not a trading corporation if the actions detailed in sub-cl. 28(2), (3) and (4) have occurred.

Cl.29 : Close corporation to take action

46. Bill cl.29 places an obligation on a CC to take steps to wind itself up if it ceases to have characteristics attracting Commonwealth powers.

BILL PART 3 - NAMES

47. Bill Part 3 deals with the reservation and registration of CC names.

Cl.30 : Names available for registration

48. This provision is based on CA s.38.

In CA s.38, however, a name would not be available if, in the opinion of the NCSC, such a name was undesirable or too closely resembled another name as to be likely to be mistaken for it. These subjective tests have not been included in Bill cl.30.

49. A name will be available to a proposed CC or a CC unless the name:

- (a) is a name reserved or registered by another body corporate; or

(b) is a name, or a name of a kind that is declared by the regulations to be acceptable for registration.

(Bill sub-cl.30(1) - based on CA para.38(1)(a) and (c)).

50. If the name of a company is registered under the Corporations Act and the members of the company state in the founding statement that they desire to convert to a CC (sub-cl.19(2), the company may use that name when it converts to a CC (Bill sub-cl.30(3)).

51. For the purpose of determining whether a proposed name is the same as a name already reserved or registered, certain words, abbreviations, symbols and marks are to be disregarded (Bill sub-cl.30(5)). This sub-clause is based on sub-s.26(3) of th U.K. Companies Act 1985.

52. The Minister will be able to consent to a name being a available to a body corporate (Bill sub-cl.30(4)).

Cl.31 : Words or abbreviations to be included in names

53. It will be mandatory for a CC to have the words 'Close Corporation' or the abbreviations "C.C." as part of and at the end of its name.

Cl.32 : Close corporation may have number as name

54. The ASC shall include in the name of a CC its registration number if the foundation statement lodged for the purposes of its incorporation does not specify a name (Bill cl.32).

Cl.33 : Reservation of name not required in certain circumstances

55. Names of proposed CC's need not be reserved where -

(a) that name consists only of a number; or

- (b) the name is available as a consequence of a company registered under the Corporations Act converting to a CC (Bill sub-cl.30(3)).

(Bill cl.33B).

Cl.34 : Registration of name without reservation

56. The ASC will register a CC although its name is not reserved where it is a name -

- (a) which is not already registered or reserved; or
- (b) is not a name, or name of a kind, that is declared by the regulations to be unacceptable for registration; or
- (c) is the name of a company applying for registration as a close corporation by the name by which it is registered under the Corporations Act (as described in Bill sub-cl.19(2)).

(Bill cl.34C).

Cl.35: Reservation and registration of name of a proposed close corporation

57. An application for the reservation of the name of a proposed CC must be made to the Commission in the prescribed form (Bill sub-c.35(1)).

58. Where the name is available for reservation, the ASC is required to reserve the name for 2 months after the date of lodgement of the application (Bill sub-cl.35(2)).

59. Where a proposed CC has reserved a name and the Commission incorporates the CC by that name, the ASC will be required to register the name of the CC (Bill sub-cl.35(3)).

60. If a person who has a name reserved under cl.35 notifies the ASC in writing that the name should no longer be reserved, the ASC will be required to cancel the reservation of the name (Bill sub-cl.35(4)).

61. Reservation of a name does not of itself entitle a proposed CC to be incorporated by that name (Bill sub-cl.35(5)).

Cl.36 : Reservation and registration of proposed new name of close corporation

62. A CC which proposes to change its name will be required to have that name reserved and registered in the manner described by Bill sub-cl.36(3).

Cl.37 : Extensions of reservation

63. A CC may apply to the ASC for a 2 month extension of the reservation of a name already reserved (Bill cl.37).

Cl.38 : Cancellation of registration where close corporation is dissolved or converted into a company

64. The registration of the name of a CC will be cancelled by the ASC where the CC is dissolved or is converted into a company under the Corporations Act (Bill cl.71).

Cl.39 : Change of name

65. A CC will be able to change its name, with the approval of the ASC, to a name reserved under sub-cl.36(3) (Bill sub-cl.36(1) and (2)).

66. The ASC will be able to direct a CC to change its name if, for whatever reason, that name is not available for registration (Bill sub-cl.39(3)).

Cl.40 : Restriction on use of name 'close corporation'

67. Only a trading corporation that is a CC, or is a body corporate incorporated in a Territory, shall be able to use the words 'Close Corporation' or the abbreviation 'CC' in its name (Bill cl.39C).

Cl.41 : Publication of close corporation's name

68. Bill cl.41 sets out generally the requirements in relation to the publication of the name of a CC and provides that a person who signs, issues or authorises, on behalf of the CC, a negotiable instrument which does not set out the CC's name shall be liable to the holder of the negotiable instrument of the amount due on it, unless the amount is paid by the CC.

BILL PART 4 - LEGAL CAPACITY AND POWERS

69. Bill Part 4 deals with the legal capacity and powers of a CC particularly in its relationship with third parties.

Cl.42 : Interpretation

70. Clause 42 is an interpretative provision for the purposes of cls.43, 44 and 45.

Cl.43 : Object of section 44

71. The object of cl.44 will be to exclude the common law doctrine of ultra vires in its application to CC's (Bill cl.44).

Cl.44 : Legal capacity

72. In the interests of simplicity and certainty the doctrine of ultra vires will be excluded completely in its application to CC's. A CC will have the legal capacity of a natural person and, in addition, will have the power to undertake

certain things which are appropriate for corporate bodies (Bill sub-cl.44(1)).

Cl.45: Application of certain State and Territory laws

73. Bill cl.45 ensures that close corporations may carry on business throughout Australia and may be subject to State and Territory law unless that law is inconsistent with this Bill.

Cl.46 : Close corporation not to act as trustee

74. An important exception to the general principle that a CC will have the same powers as a natural person will be that a CC will not have the power to act as a trustee under any express trust except where it is required to so act by the operation of law (Bill cl.46). This means that a CC will not be able to act as the trustee of a unit trust or superannuation fund. This limitation seems necessary to ensure that CC creditors are not burdened with the legal difficulties arising from action against a corporate trustee of a trading trust. If a person purporting to act on behalf of a CC acts so as to lead innocent persons to believe that the CC had become a trustee under an express trust, the person and not the CC will be liable for any debts incurred (Bill sub-cl.46(2)).

Cl.47 : Persons having dealings with close corporations

75. A person dealing with CC is entitled to make the assumptions set out in Bill sub-cl.47(3) except where the person with whom the CC member is dealing has actual knowledge that the matter he or she would be entitled to assume is not correct, or that person's connection or relationship with the CC is such that he or she ought to know that the matter is not correct (Bill sub-cl.47(4) and (5)).

Cl.48 : Lodgement of documents etc. not to constitute constructive notice

76. Except as regards registrable charges (Bill sub-cl.48(2)) the doctrine of constructive notice will be abolished in respect of CC's so that a person will not be taken to have knowledge of the matters set out in Bill sub-cl.48(1) merely because the founding statement or other document has been lodged.

Cl.49 : Effect of fraud

77. Bill cl.49 ensures that Bill cl.44 operates regardless of the fraudulent instruction of the person assumed to be a member or agent of the CC, except where the third party has actual knowledge of the fraud.

Cl.50 : Close corporation not to be holding company

78. A CC which becomes a holding company of another body corporate will contravene Bill sub-c.50(2). CC's will be prohibited from being holding companies as it seems more appropriate that complex corporate structures be regulated under the Corporations Act.

Cl.51 : Close corporation not to make or issue offers or invitations to the public in respect of its shares

79. CC's will be prohibited from issuing offers or invitations to the public in respect of shares (Bill cl.51).

BILL PART 5 - MEMBERSHIP

80. Bill Part 5 makes provision for matters relating to CC membership.

Cl.52 : Capacity of shareholding or membership

81. Bill cl.52 defines the capacity in which shares may be held in a CC and the capacity in which a person may be a member of a CC.

Cl.53 : Membership register

82. A CC will be required to establish and maintain a membership register (Bill cl.53).

Cl.54 : Subscribers to become members

83. Subscribers to a CC's founding statement will automatically become members on incorporation of the CC which will be required to enter the member's name(s) and shareholding on the CC's membership register.

Cl.55 : Persons becoming members after registration

84. Where a person becomes the holder of shares in a CC, and that person is not already a member, that person will automatically become a member and it will be a requirement that that person's name and shareholding be entered on the membership register (Bill cl.55).

Cl.56 : Change in shareholding

85. The corporation's membership register shall reflect any change in a member's shareholding held in a particular capacity.

Cl.57 : Members holding shares otherwise than beneficially

86. A CC's membership register will be required to record the fact that a member holds shares other than beneficially (Bill cl.57).

Cl.58 : Members holding shares in different capacities

87. A CC's membership register will be required to record the fact that a person holds shares in different capacities and the shareholding in each capacity shall be recorded separately (Bill cl.58).

Cl.59 : Unregistered members

88. Subject to sub-cl.59(2) non-registration of a member will have the effect of depriving that member of the right to exercise the rights and powers attaching to that membership (Bill sub-cl.59(1)).

Cl.60 : Maximum number of members

89. To allow, subject to any agreement to the contrary, all members to take part in the management of the corporation, CC membership will be limited to 10 (Bill cl.60). In determining the number of CC members for the purposes of Bill cl.60(1) joint members will be counted separately except where shares are held jointly and non-beneficially as a result of an acquisition by will or by operation of law (Bill sub-cl.60(2)).

Cl.61 : Only natural person to be members

90. To avoid the complexities of regulation which arise from inter-company relationships, CC membership will be limited to natural persons, with body corporates being excluded from membership except by will or by operation of law. In general, all forms of direct and indirect corporate membership of CC's will be prohibited to prevent CC's being used as subsidiaries by large corporations (Bill sub-cl.60(1) and (2)).

Cl.62 : Majority of members to be residents

91. A majority of members of a CC will be required to be residents of Australia which means that a sole shareholder of a CC must be a resident of Australia (Bill sub-cl.62(1)).

Cl.63 : Disqualification

92. Persons who have had certain action taken against them under the Corporations Act or a corresponding law, will not be able to become a CC member without first successfully applying to the Court (Bill sub-cl.63(1)).

93. A person who is already a CC member and who becomes subject to certain action by virtue of the Corporations Act, or a corresponding law, will be prevented from taking part in the management of a CC, unless that member successfully applies to the Court (Bill sub-cl.59(3)).

Cl.64 : Effect of death of sole member

94. A CC will continue in existence even though a sole member dies. It will continue until it is wound up or a person becomes a member (Bill cl.54).

PART 6 - TITLE TO AND TRANSFER OF SECURITIES

95. Bill Part 6 provides for the transfer of CC shares.

Cl.65 : Transfer of shares

96. Unless otherwise agreed by the members pursuant to Bill sub-cl.65(4) a member's shares shall not be transferred to another person without the agreement of all the members of the corporation (Bill sub-cl.65(1)).

97. However, the consent of other members may not be refused without just cause (Bill sub-cl.65(3)).

98. A member may apply to the Court where another member refuses to agree to the transfer of the first member's shares (Bill sub-cl.65(5)).

Cl.66 : Application of Part 7.13 of Corporations Act

99. Bill cl.66 applies the provisions of the Corporations Act which deal with the procedural aspects of the transfer and registration of shares.

BILL PART 7 - INTERNAL ADMINISTRATION

100. Bill Part 7 regulates the relationship between CC members and defines membership rights.

Cl.67 : Association Agreement

101. Members of a CC may enter into a written association agreement to define the CC's internal management rules (Bill sub-cl.67(1)). The association agreement will not be a public document nor will it be subject to the common law doctrine of constructive notice.

102. An association agreement may be varied by a written supplementary association agreement if it is entered into by a decisive number of members (Bill sub-cl.67(3)). The legislation provides a formula to determine what is a decisive number of members (Bill cl.6(1)).

Cl.68 : Model association agreement

103. If the regulations set out a model association agreement a CC may adopt any or all of those provisions, and where a CC does not have an association agreement, the provisions set out in the regulations will apply (Bill cl.68).

Cl.69 : This Division subject to contrary agreement

104. A CC may vary the provisions of Division 1, Part 7 of the Bill through its association agreement or by oral or written agreement of all the members of the CC so long as the variation is not inconsistent with the CC's written association agreement (Bill cl.69).

Cl.70 : Indemnity

105. A CC shall indemnify every member in respect of payments made and liabilities incurred in the ordinary and proper conduct of the corporation's affairs (Bill cl.70). This provision is subject to variation (Bill cl.69).

Cl.71 : Loans by members

106. Bill cl.71 provides that CC members who lend money to the corporation are entitled to be paid interest at the prescribed rate. This provision is subject to variation (Bill cl.69).

Cl.72 : Participation in management

107. Unless a person is disqualified from managing corporations under the Corporations Act so that sub-cl.63(3) applies, all CC members are entitled to take part in the management of the corporation (Bill cl.72). This provision is subject to variation (Bill cl.69).

Cl.73 : Allotment of shares

108. CC's may only allot shares with the consent of all of the members (Bill cl.73). This provision is subject to variation (Bill cl.69).

Cl.74 : Members not to be remunerated

109. A member of a CC will not be entitled to remuneration for acting in the affairs of the corporation (Bill cl.74). This provision is subject to variation (Bill cl.69).

Cl.75 : Resolution of differences

110. All the members of the corporation must consent to a change in the CC's principal function but a majority of members may decide on any difference arising as to the

ordinary matters connected to the affairs of the CC (Bill cl.75). This provision is subject to variation (Bill cl.69).

Cl.76 : Convening of meeting of members

111. There will be no requirements for formal meetings for CC's but where any member wishes to call a meeting he or she may do so by notice in writing to the other members (Bill sub-cl.76(1)). This provision is based on CA s.241.

Cl.77 : Members to render accounts

Cl.78 : Accountability of members for benefits

Cl.79 : Members not to compete with corporation

112. These provisions impose certain duties on CC members in the form of modified partnership rules.

Cl.80 : Member to compensate corporation for loss resulting from conduct of member

113. Bill cl.80 imposes liability on CC members similar to that imposed on directors of companies by CA sub-s.229(2) so that a member will be liable to the corporation for any loss caused by his or her failure to act, in the carrying out of the business of the corporation, with the degree of care and diligence that may reasonably be expected from a person of his or her knowledge and experience.

Cl.81 : Application of Part 3.4 of the Corporations Act

114. A CC member will be able to seek an oppression remedy based on CA Part IX as included in the Corporations Act (Bill cl.81).

PART 8 - ACCOUNTS AND CERTIFICATES OF COMPLIANCE

115. Bill Part 8 contains provisions in relation to the reduced accounting and reporting requirements for CC's.

Cl.82 : Duty to keep accounts

116. Bill cl.80 is based on CA sub-paras.267(1)(b)(i) and (ii) and is simply a requirement for CC's to maintain proper accounts.

Cl.83 : Annual certificate of compliance

117. There will be no requirement for CC's to lodge annual returns but it will be necessary to lodge a certificate of compliance which states whether the corporation has complied with the Act's accounting requirements (Bill cl.83) and annual activities statement requirements (Bill cl.84).

Cl.84 : Annual activities statement

118. This provision is necessary in order to ensure the continuity of the Act's constitutional requirements. The annual activities statement in accordance with the requirements of Bill cl.84 must be included in the certificate of compliance (Bill sub-cl.84(2)). The necessary form will be supplied by the ASC.

PART 9 - TRANSACTIONS ON BEHALF OF CLOSE CORPORATION

119. Bill Part 9 deals with the agency powers and liabilities of CC members.

Cl.85 : Members to be agents of corporation

120. Bill cl.85 adopts the partnership rules in respect of agency. Every member of a CC will be capable of binding the corporation unless the person with whom the member deals knows that the member is not authorised to act by virtue of the

association agreement, or does not know that the member is a member (Bill sub-cl.85(1) and (3)).

121. Any CC member will be able to appoint a third party as the agent of the corporation, or hold out that person as the agent of the corporation, in which case the common law rules of actual and ostensible authority will apply (Bill sub-cl.85(5)).

Cl.86 : Ratification of contracts made before formation of corporation

122. Bill cl.86 is based on CA s.81 and applies rules in respect of pre-incorporation contracts.

PART 10 - PROVISIONS RELATING TO SHARES

123. Bill Part 10 deals with the ability of a CC to purchase its own shares.

Cl.87 : Restriction on acquisition by corporation of its shares or units of its shares

Cl.88 : Corporation may acquire shares in accordance with this Division

124. A CC will only be able to acquire shares in itself within the limits imposed by the CC Act (Bill cls.87 and 88).

Cl.89 : Consent and declaration of solvency by members

125. Bill cl.89 requires the members of a CC intending to acquire its own shares to sign, within 6 months before the acquisition, a declaration of solvency containing a statement to the effect of that set out in Bill para.89(1)(b).

126. The declaration of solvency must be lodged with the Commission before the acquisition (Bill sub-cl.89(4)).

127. A copy of the declaration of solvency must be kept at the registered office of the CC until the acquisition and must be made available for inspection by any creditor of the corporation (Bill sub-cl.89(5)).

Cl.90 : Withdrawal from participation in declaration of solvency

128. A member who changes his or her mind as to the solvency of the corporation in relation to a proposed acquisition may withdraw from the declaration of solvency in the manner provided by Bill sub-cl.90(1).

Cl.91 : Publication of notice of proposed acquisition of shares

129. As a measure of protection to creditors and so that they may exercise their rights under Bill sub-cl.91(2), (3), (4) and (5), a CC will be required to advertise its intention to acquire its own shares in each State and Territory in which it carries on business in the manner required by Bill cl.135.

130. Creditors will have the right to seek an injunction against a CC acquiring its own shares on the grounds set out in Bill sub-cl.91(4).

Cl.92 : Corporation to cancel shares acquired

131. Any of its shares acquired by a CC must be cancelled (Bill cl.92).

Cl.93 : Interpretation

Cl.94 : Prohibition

Cl.95 : Order for compensation

Cl.96 : Power to grant relief

Cl.97 : Exceptions

Cl.98 : Authorisation

Cl.99 : Powers of Court

Cl.100 : Members' duties not affected

Cl.101 : Consequences of corporation financing dealings in its shares etc.

132. Bill cls.93-101 adopt a validation procedure, for a CC financing dealings in its own shares, based on CA sub-ss.129(10)-(15). The provisions have been modified only so that they translate to CC's.

PART 11 - REGISTRATION OF CHARGES

133. Bill Part 11 (cl.102) adopts the provisions of the Corporations Bill which deal with the registration of charges.

PART 12 - ARRANGEMENTS AND RECONSTRUCTIONS

134. Bill Part 12 (cl.103) adopts the provisions of the Corporations Bill which deal with arrangements and reconstructions.

PART 13 - RECEIVERS AND MANAGERS

135. Bill Part 13 (cl.104) adopts the provisions of the Corporations Bill which deal with receivers and managers.

PART 14 - OFFICIAL MANAGEMENT

136. Bill Part 14 (cl.105) adopts the provisions of the Corporations Bill which deal with official management.

PART 15 - LIABILITY OF MEMBERS FOR CORPORATION'S DEBTS AND LIABILITIES

137. Bill Part 15 deals with the issue of limited liability and the circumstances in which members will be held personally liable to contribute to the corporation's debts and liabilities.

Cl.106 : Members generally not liable

138. Bill cl.106 grants limited liability, in general terms, to CC members. Members will be personally liable in certain circumstances upon insolvency of the corporation.

Cl.107 : Liability if number of members exceeds 10

139. Members, who were members at the relevant time, will be personally liable if the membership exceeds 10, the corporation begins to be wound up and the property of the corporation is insufficient to satisfy the corporation's liability in full (Bill cl.107).

Cl.108 : Liability where proper accounting records not kept

140. Members who were members when a debt is incurred, will be personally liable for that debt where the CC has not lodged a certificate of compliance, and has not complied with the cl.82 requirements in relation to the keeping of accounts, and is unable to pay the debt (Bill cl.108).

Cl.109 : Liability if corporation becomes a holding company

141. If a CC which has become a holding company and subsequently becomes insolvent, members who were members at the time the corporation became a holding company will be personally liable for the corporations liabilities (Bill cl.109).

Cl.110 : Liability for unreasonable delay in taking action where corporation insolvent

142. Members are personally liable for payment of the corporation's debts where the corporation becomes insolvent and has not taken action of a kind specified in Bill para.110(1)(b).

Cl.111 : Liability of signatories to declaration of solvency if corporation insolvent

143. Where a CC acquires its own shares and it subsequently becomes insolvent, the members who signed the declaration of insolvency, as required by Bill cl.89, will be personally liable for payment of the corporation's debts (Bill sub-cl.111(1)). For the members to be personally liable the liquidator must apply to the Court which must be satisfied that, when the relevant declaration of solvency was made, the corporation was not able, taking into account any payment that had to be made for the acquisition, to pay its debts as and when they became due (Bill para.111(1)(c)). Members who can prove reasonable grounds for the opinion of solvency will not be held personally liable (Bill sub-cl.111(2)).

Cl.112 : Liability where insolvency resulted from unlawful acquisition of shares

144. This provision imposes personal liability on members of an insolvent CC which has unlawfully acquired its own shares (Bill cl.112).

Cl.113 : Corporation not liable to member who pays debt of corporation

145. The effect of a member becoming personally liable to pay the debts or discharge the liabilities of the corporation will not be to make the corporation liable to the member in respect of the amount paid by the member (Bill cl.113).

PART 16 - WINDING UP

146. Bill Part 16 (cl.114) adopts the provisions of Parts 5.4, 5.5 and 5.6 of the Corporations Bill which deal with winding up, subject to the following provisions.

Cl.115 : Replacement of sections 459, 460, 461 and 462

147. Part 5.4 of the Corporations Bill as it applies to this Bill is varied by the omission of cls.459, 460, 461 and 462 and the substitution of provisions contained in cl.114.

Cl.116 : Voluntary Winding Up

148. Section 491 of the Corporations Bill as varied by cl.117 applies to close corporations.

Cl.117 : Decision or notice to constitute a special resolution

149. Bill cl.117 defines what is a special resolution with respect to decisions of close corporations for the purposes of applying cl.491 of the Corporations Bill.

Cl.118 : Priority of Commission's costs

150. The ASC will be entitled to be ranked ahead of secured creditors for payment of costs associated with an application to wind up a CC (Bill cl.118).

Cl.119 : Ranking of claims

151. Amounts owing to CC members by way of loans to the corporation will rank for payment after all external creditors have been paid in full (Bill cl.119).

Cl.120 : Provisional liquidator

152. A majority of members of a CC will be empowered to appoint an official liquidator to be the provisional

liquidator of the corporation until a liquidator is appointed (Bill cl.120).

Cl.121 : Financial assistance to liquidator from recovery trust fund

153. In the past, investigation of corporate insolvencies has often been hampered by lack of funds available to liquidators. CC's will be required to contribute on registration to a liquidator's recovery trust fund. The liquidator will be empowered to apply ex parte to the Court for an order that an amount be advanced from the trust fund by the ASC to defray the costs of investigation and/or any civil recovery proceedings (Bill sub-cl.121(1)). If proceedings in which the liquidator was assisted by funds from the recovery trust fund are successful, the liquidator will be required to pay an amount back into the recovery trust fund as is determined in accordance with the regulations (Bill sub-cl.121(2)).

PART 17 - LIQUIDATORS' RECOVERY TRUST FUND

154. Bill Part 17 establishes a liquidator's trust fund to assist liquidators in the investigation of CC's and in associated legal proceedings for recovery of monies.

Cl.122 : Definition

155. Bill cl.122 defines 'fund' for the purposes of Part 17.

Cl.123 : Establishment of fund

156. The ASC will be required to establish the fund and to hold the funds assets on trust to be applied in the manner provided by this Bill (Bill cl.123).

Cl.124 : Money constituting fund

157. This provision describes the sources of the trust monies which will be held in the fund (Bill cl.124).

Cl.125 : Investment of fund

158. The ASC will be allowed to invest the trust money in the manner prescribed (Bill cl.125).

Cl.126 : Fund to be kept in separate bank account

159. The ASC will be required to keep the trust moneys in a separate bank account (Bill cl.125).

Cl.127 : Registration of corporation subject to corporation contributing to fund

160. A contribution to the fund by subscribers to a founding statement will be a pre-requisite to incorporation as a CC (Bill sub-cl.127(1)).

Cl.128 : Additional contributions to fund

161. The ASC will be empowered to require additional payments into the fund by each CC (Bill cl.128).

Cl.129 : Payments out of fund

162. A liquidator must apply for a payment out of the fund in the manner prescribed by Bill cl.138F (Bill cl.129).

Cl.130 : Contributions not payable unless imposed by another Act

163. The mandatory contribution to the fund will be imposed by the Close Corporations (Liquidators' Recovery Trust Fund Contribution) Bill 1988 and the Close Corporations (Additional

Liquidators' Recovery Trust Fund Contribution) Bill 1988 (Bill cl.130).

PART 18 - GENERAL

164. Bill Part 18 contains general provisions relating to the administration of CCs.

Cl.131 : Power to grant relief

165. The Court's power to grant relief to persons involved in the affairs of a CC is based on CA s.535 (Bill cl.131).

Cl.132 : Injunctions

166. The Court's capacity to grant injunctions in respect of contraventions of this Bill is similar to that provided by CA s.574.

Cl.133 : Other orders

167. The Court will also be empowered to make appropriate orders with respect to the compensation of persons who have suffered loss or damage as a result of conduct by a person who has contravened this Bill (Bill cl.133).

Cl.134 : Power to prohibit payment or transfer of money or property

Cl.135 : Power to punish for contempts

Cl.136 : Power to give directions with respect to meetings

Cl.137 : Appeals from decisions of Commission

Cl.138 : Appeals from decisions of receivers, liquidators etc.

Cl.139 : Irregularities

Cl.140 : Power to compel compliance

Cl.141 : Power of Commission to intervene in proceeding

Cl.142 : Proceedings, how taken

Cl.143 : Time for instituting criminal proceedings

Cl.144 : Jurisdiction of courts

Cl.145 : Standard of proof

Cl.146 : Evidence of convictions

Cl.147 : Costs

Cl.148 : Civil proceedings not to be stayed

Cl.149 : Form and evidentiary value of books

Cl.150 : Admissibility of books in evidence

Cl.151 : Admissions and representations by members

Cl.152 : Interpretation

Cl.153 : Offences relating to property, books etc.

Cl.154 : Offence where proper accounts not kept

Cl.155 : Incurring of debts or fraudulent conduct

Cl.156 : Court may impose personal liability

Cl.157 : Certain rights not affected

Cl.158 : Inducement to be appointed liquidator or official manager

Cl.159 : Falsification of books

Cl.160 : Frauds by officers

Cl.161 : False or misleading statements

Cl.162 : False information etc.

Cl.163 : General penalty provisions

Cl.164 : Penalty notices

Cl.165 : Continuing offences

168. All of these provisions apply the principles to be found in CA Part XIV Miscellaneous and Offences provisions.

Cl.166 : Dividends

169. CC's will not be subjected to the complex common law rules on dividends. Instead, as long as the corporation is satisfied as to the matters set out in Bill paras.166(1)(a) and (b), it may make a payment to members (Bill Cl.166).

170. Payments in breach of Bill sub-cl.166(1) will be recoverable by a liquidator in a subsequent liquidation (Bill sub-cl.166(2)).

Cl.167 : Service of Documents

171. A document may be served on a CC by either delivering the document to any member or by leaving it at, or posting it to, the corporation's registered office (Bill sub-cl.167(1)). The mode of service of documents is varied where a liquidator has been appointed (Bill sub-cl.167(2)) and where an official manager has been appointed (Bill sub-cl.167(3)).

Cl.168 : Vesting of Property

172. CA s.531 provides for the vesting of property in a person where the Court has so ordered and is adopted for the purposes of orders made under this Bill (Bill cl.168).

Cl.169 : Rules

173. This is a provision providing a power to make rules of Court for the purposes of giving effect to this Bill (Bill cl.169).

Cl.170: Regulations

173. This provision provides a general regulation - making power for the purpose of giving effect to this Bill (Bill cl.170).

CLOSE CORPORATIONS (FEES) BILL 1988

The fees that will be charged in connection with the proposed Close Corporations Bill will be set out in regulations to be made under the Close Corporations (Fees) Bill (hereinafter referred to as the "Fees Bill").

Cl.1 : Short title

2. The Fees Bill when enacted may be cited as the Close Corporations (Fees) Act 1988 (Fees Bill cl.1).

Cl.2 : Commencement

3. The Fees Bill when enacted will come into operation on a day to be fixed by proclamation (Fees Bill cl.2).

Cl.3 : Interpretation

4. Expressions used in the Fees Bill will have the same meaning as in the Close Corporations Bill (Fees Bill cl.3).

Cl.4 : Fees payable

5. There will be payable to the Commonwealth such fees as are prescribed (Fees Bill sub-cl.4(1)).

6. Where a document has been lodged with the ASC without payment of the prescribed fee, such document will still be regarded as having been lodged (cf. sub-s.4(2) of the Companies (Fees) Act 1981 which deemed such document not to have been lodged until the fee had been paid). The prescribed fee payable upon lodgement of the document will however become a debt due to the Commonwealth (Fees Bill sub-cl.4(2)).

7. The Minister or the ASC shall not deal with any application until the appropriate fee has been paid (Fees Bill sub-cl.4(3)).

8. The Commonwealth will be able to waive, reduce or refund fees that would otherwise be payable or paid under cl.4 (Fees bill sub-cl.4(5)).

Cl.5 : Regulations

9. The Governor-General will be able to make regulations prescribing fees of up to \$2,500 (Fees Bill cl.5 - cf. s.5 of the Companies (Fees) Act 1981 in which the limit on the level of fees that could be prescribed was \$1,000).

CLOSE CORPORATIONS (LIQUIDATORS' RECOVERY TRUST FUND CONTRIBUTION) BILL 1988

This Bill deals with the imposition of a tax upon the subscribers to a founding statement of a proposed close corporation.

Cl.1 : Short Title

2. When enacted this Bill will be cited as the Close Corporations (Liquidators' Recovery Trust Fund Contribution) Act 1988 (Bill cl.1).

Cl.2 : Commencement

3. The Bill when enacted will commence on the same day as cl.127 of the Close Corporations Act commences (Bill cl.2).

Cl.3 : Incorporation

4. This Bill shall be read as one with the Close Corporations Act 1988 (Bill cl.3).

Cl.4 : Imposition of Tax

5. A tax to be known as the liquidators' recovery trust fund contribution is to be imposed by this Bill upon the subscribers to a founding statement of a proposed close corporation (Bill cl.4).

Cl.5 : Amount of Tax

6. The tax to be imposed will be a prescribed amount not exceeding \$50.00. (Bill cl.5).

Cl.6 : Regulations

7. The Governor-General will be able to make regulations prescribing a tax (Bill cl.6).

CLOSE CORPORATION (ADDITIONAL LIQUIDATORS' RECOVERY TRUST FUND CONTRIBUTION) BILL 1988

This Bill deals with the imposition of a tax upon close corporations where the ASC has determined that additional liquidators' recovery trust fund contributions are required.

Cl.1 : Short title

2. When enacted this Bill will be cited as the Close Corporations (Additional Liquidators' Recovery Trust Fund Contribution) Act 1988 (Bill cl.1).

Cl.2 : Commencement

3. The Bill, when enacted will commence on the same day as cl.128 of the Close Corporations Act commences (cl.2).

Cl.3 : Incorporation

4. This Bill shall be read as one with the Close Corporations Bill (cl.3).

Cl.4 : Imposition of tax

5. A tax to be known as the additional liquidators' recovery trust fund contribution is to be imposed by this Bill upon close corporations (cl.4).

Cl.5 : Amount of tax

6. The Australian Securities Commission will determine the amount of the tax but it will not exceed \$50.00 (cl.5).









