



CORPORATIONS LEGISLATION  
AMENDMENT BILL (No. 2) 1991

DRAFT LEGISLATION AND EXPLANATORY PAPER

Prepared by the Business Affairs Division of the  
Commonwealth Attorney-General's Department, for and on  
behalf of the Attorney-General, the Hon. Michael Duffy.

August 1991

Attorney-General's Department

Corporations Legislation Amendment Bill (No. 2) 1991  
Draft Legislation and Explanatory Paper

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#### Abbreviations

The following abbreviations are used in this explanatory paper:

ACN Australian Company Number

ARBN Australian Registrable Body Number

ASX Australian Stock Exchange Limited

ASC Australian Securities Commission

the Law Corporations Law as set out in Section 82 of the  
Corporations Act 1989 (Cth)

the Bill Corporations Legislation Amendment Bill (No. 2)  
1991.

State Includes the Northern Territory, unless otherwise  
indicated.

State Corporations (Name of State/Territory) Act  
Application 1990 of each of the States and the Northern  
Act Territory, respectively.

## PREFACE

### Purpose of Paper

The purpose of this paper is to explain the contents of the exposure draft of the Corporations Legislation Amendment Bill (NO. 2) 1991 (hereafter referred to as 'the Bill') which contains amendments to the Corporations Law ('the Law') as set out in section 82 of the Corporations Act 1989.

The amendments relate to:

- the National Guarantee Fund;
- fundraising;
- registration numbers of companies and registrable bodies;  
and
- miscellaneous substantive and technical amendments.

### Request for Comments

Comments on the exposure draft of this Bill are requested from the public, and should be sent no later than Friday, 8 November 1991 to the First Assistant Secretary, Business Affairs Division, Attorney-General's Department, Canberra, ACT 2600.

As it is intended that the legislation be introduced into Parliament and passed during the Budget sittings this year, it will not be possible to consider submissions received after this date. Persons wishing to make submissions are encouraged to do so as early as possible during the exposure period.

It will be assumed that submissions are not confidential and will be available to the public unless the contrary is indicated when the submission is made. However, if an application is made pursuant to Freedom of Information legislation for access to a submission in respect of which a claim of confidentiality has been made, the principles of that legislation will apply.

## INTRODUCTION

The introduction to this explanatory paper contains:

- (a) a description of the framework of the new national scheme (paras 2 - 26), and
- (b) an outline of the amendments proposed by the Bill to the new national companies and securities scheme (paras 27 - 53).

### FRAMEWORK OF NEW NATIONAL SCHEME

2. The purpose of this part is to give an outline of the framework of the new national scheme.

#### Heads of Agreement between the Commonwealth, the States and the Northern Territory for future regulation of companies and securities

3. The administrative and legislative framework of the new national companies and securities scheme, which commenced on 1 January 1991, stems from the Heads of Agreement on future corporate regulation in Australia. That Agreement was approved by Commonwealth, State and Northern Territory Ministers responsible for companies and securities administration and regulation in Alice Springs on 28/29 June 1990.

4. In those Heads of Agreement Ministers agreed on the establishment of a new scheme for the regulation of companies, securities and futures industries under which the Corporations Act 1989 and the Australian Securities Commission Act 1989 (ASC Act) would form the basis of the substantive legislation of the new scheme. However, Ministers agreed that those Commonwealth laws would be amended to limit their effect to the Australian Capital Territory. The Australia-wide effect of the new scheme would come about by an application of laws regime. Under that regime each of the States and the Northern Territory would pass complementary legislation applying the Commonwealth laws as laws of those jurisdictions.

5. The Alice Springs Heads of Agreement will form the basis of a new formal agreement between the Commonwealth and the States and the Northern Territory on future corporate regulation. The new formal agreement is being considered by State Ministers. It has been agreed that when the Agreement is approved by all Governments, the Commonwealth will introduce amending legislation to annex the Agreement to the Commonwealth legislation. The principal features of the Heads of Agreement agreed to by Ministers are set out below.

## Administration

6. The principal objective of the new scheme is the establishment of a single national regulatory framework. Consistent with that approach, the Australian Securities Commission is established as the principal administering authority under the new scheme, replacing the National Companies and Securities Commission and former State Corporate Affairs offices. Under the new scheme the States have no responsibility for the matters transferred to the ASC's authority. The ASC is formally accountable and responsible to the Commonwealth Attorney-General and the Commonwealth Parliament, and does not have any formal responsibility or accountability to State Ministers or State Parliaments. Under the Heads of Agreement, it has been acknowledged, however, that the ASC will maintain existing standards of service in each State and the Northern Territory and will regularly report on those levels in accordance with established performance indicators.

## Roles of Commonwealth and States in relation to the Ministerial Council for Corporations

7. The Ministerial Council continues with its existing membership, although with a revised role in the light of the new national arrangements. The Commonwealth Attorney-General is permanent Chairman of the Council. Consistent with the operation of the ASC as a national Commonwealth agency, the Council has no control or power of direction over the ASC. On the other hand, in relation to legal policy issues the Council is consulted in relation to all legislative proposals involving amendment of companies and securities laws.

8. However, the Commonwealth has sole responsibility in relation to legislative proposals for the national markets (ie takeovers, securities, public fundraising and futures). In relation to other legislative proposals, that is, principally "traditional" company law type matters, the Ministerial Council must approve the legislation before its introduction into the Commonwealth Parliament, but the Commonwealth is not obliged to introduce any such proposal with which it does not concur. In addition, for the purposes of Ministerial Council voting on those legislative proposals for which the Commonwealth and States share responsibility, the Commonwealth has 4 votes and each State and the Northern Territory has 1 vote. The Commonwealth also has a casting vote. At the time of introducing legislative proposals into the Commonwealth Parliament, the Commonwealth is required to table in the Parliament the outcome of the advice of the Ministerial Council arising out of its consideration of the proposal. Where amendments to legislative proposals for which

the Commonwealth and States share responsibility are moved in the Commonwealth Parliament, the Commonwealth is to use its best endeavours to consult with the Ministerial Council on those amendments.

### Legislative Framework

9. The Corporations Legislation Amendment Act 1990 ("the Amendment Act"), which was introduced into the Commonwealth Parliament on 8 November 1990 and passed in December 1990. gave effect to the Commonwealth's obligations under the Heads of Agreement. The States and the Northern Territory passed complementary legislation, (in N.S.w. for example the corporations (NSW) Act 1990) to give effect to their corresponding obligations under the Heads of Agreement.

10. That legislation, which brought the new national scheme into operation, commenced on 1 January 1991.

11. To give effect to the legislative scheme set out in the Agreement, the Amendment Act altered the Corporations Act 1989 and the Australian Securities Commission Act 1989 to remove their former Commonwealth constitutional underpinning as laws applying over all Australia, and substantially recast those Acts as laws applying for the Australian Capital Territory.

12. The consequence of this is that the original Commonwealth Corporations Act 1989 has been retained but now serves a different function. The Amendment Act converted the Corporations Act in such a way as to separate the machinery provisions, which relate to the application of the law and the supporting legislative infrastructure (called the covering provisions), from the substantive laws to be applied. Parts 2 - 13 of the Corporations Act establish the legal framework in which the substantive companies and securities law will operate as part of a new national scheme of applied laws. These Parts provide for the way in which the law of the new scheme is to apply and be cited; the judicial, administrative and enforcement arrangements; the mechanisms for the making of subordinate instruments {such as regulations, rules of court etc}; and other machinery matters for the new national scheme. The complementary State and Territory Application Acts contain corresponding provisions.

13. The major feature of the Corporations Act of the Commonwealth, and the States Application Acts, is the use of these legal devices to establish an innovative constitutional framework that creates a uniform legal text that has the appearance, and for most practical purposes, the effect of a single national law. This text, which sets out the substantive law relating to companies, the securities and



futures industries to apply throughout Australia is called the "Corporations Law". To establish the Corporations Law the Amendment Act inserted into the Corporations Act a new Section 82 which sets up the opening provisions of the Law. Section 7 of the Amendment Act created the text of the Corporations Law out of the existing Corporations Act (as modified by the various Schedules of the Amendment Act). Section 5 of the Corporations Act (as amended) applies the Corporations Law set out in Section 82 of the Act in the Australian Capital Territory as a law for the government of the Capital Territory.

14. A similar approach is adopted in Part 4 of the Amendment Act to convert the ASC Act into a law for the Capital Territory, some provisions of which are applied by complementary Application Legislation in each State and the Northern Territory as the ASC Law of the State or Territory.

15. The national operation of the new scheme comes about by each State and the Northern Territory having complementary Application Legislation applying the Corporations Law (as set out in the Commonwealth's Corporations Act) as the law of each of those jurisdictions. This ensures its Australia-wide application. Section 7 of the State Application Acts applies the Corporations Law "as in force for the time being". The Corporations Law thus has been applied in a way that ensures that any further amendments to the Corporations Law by the Commonwealth Parliament (in accordance with the arrangements described in paras 7 and 8 above) will automatically apply in the States and the Northern Territory.

16. In this way the Corporations Law states the uniform text of the new national law applying in all jurisdictions.

#### 'Federalisation' of Administrative Law, Investigations and Prosecutions

17. A further major innovation that is adopted in the State laws is the "federalising" formula. Under this device, the applied State and Territory laws have the characteristics of, and are to be treated, so far as practicable, as if they were Commonwealth rather than State or Territory Laws. The "federalisation" approach involves the State Application Acts applying Commonwealth administrative review, criminal law and prosecution legislation in relation to the *national* scheme laws. The State laws confer powers on Commonwealth authorities and officers to exercise their powers and *functions* under those Commonwealth laws applied in the States, as if the Corporations Law or ASC Law of the jurisdiction was Commonwealth legislation.

#### Law Reform

18. The Attorney-General has announced that the Government will be undertaking a major reform program in relation to companies and securities law.

19. Earlier this year Parliament enacted a Bill containing major amendments to the law relating to insider trading and the introduction of a requirement for the *consolidation* of accounts for related corporate entities. These major reforms to the Corporations Law came into operation on 1 August 1991.

20. The current Hill deals with reform of other discrete areas of the Corporations Law. Those areas are the fundraising provisions, the Australian company number provisions and legislative backing for the *introduction* of a mandatory settlement period for share transactions.

21. In relation to fundraising, the Bill proposes a number of technical amendments which will remove current uncertainties in relation to the operation of the provision.

22. Amendments are proposed to the Australian company number provisions to finetune those provisions to meet business concerns regarding the cost of complying with the ACN requirements.

24. The amendments to facilitate new settlement procedures for stock exchange *transactions* will assist the Australian Stock Exchange to compete with exchanges offshore.

25. It is expected that this Bill will be introduced into Parliament in the Budget sittings after the end of a three month public exposure period.

26. A third Bill is scheduled for exposure later this year. It will contain major amendments to the areas relating to loans to directors, directors duties, insolvency law and further proposals for improvements in clearance and settlement procedures for the Stock Exchange.

## SUMMARY OF THE PRINCIPAL FEATURES OF THE BILL

### Introduction of fixed date settlement for market transactions

27. The proposed amendments will facilitate the introduction of a securities lending scheme by the ASX. The scheme is being provided to enable a fixed settlement regime to be introduced. The purpose of this regime is to ensure that settlement of a sale of securities takes place within 5 days of trade. It is anticipated that this requirement will reduce the risk in settlements of share transfers and the claims on the National Guarantee Fund, lead to more certainty for market participants and improve the international competitiveness of the ASX.

28. These amendments will contribute to bringing Australia's system for clearance and settlement of equities transactions up to world standards.

29. In 1989 the Group of 30 (an organisation made up of major financial intermediaries in the US, the UK, Europe and Japan who are concerned with the workings of international finance systems) issued a report which focused on clearance and settlement of transactions in securities. The report called for new procedures to reduce risks and to improve the efficiency of clearance and settlement processes. The aim of G30 is to introduce efficiencies into major equity markets by recommending standardisation for clearing and settlement procedures. The report was endorsed by the International Organisation of Securities Commissions (IOSCO).

30. Australia's existing settlement system has significant limitations which make the implementation of the G30 recommendations fundamental to the maintenance of the competitive position of the Australian securities market. Also major offshore markets have adopted these recommendations and are in the process of introducing their own programmes of reform. Failure to implement the changes in Australia could lead to those offshore markets becoming more efficient and more competitive than the domestic market. This will in turn erode the liquidity of the Australian securities markets.

### Securities Loans Guarantees

31. The Exchange proposes to introduce a fixed settlement system for securities transactions under which settlement would routinely take place on the fifth business day after trading. The introduction of this T+5 settlement requirement is a preliminary step to the introduction of CHES which envisages a completely automated settlement system.

32. As a broker may not have securities ready for delivery on the settlement day for a variety of reasons, the Exchange proposes to establish a securities lending scheme in association with institutional investors. Under the scheme, a broker whose client failed to deliver securities in time to meet a T+5 settlement requirement, or who was otherwise unable to comply with the T+5 requirement, would be able to borrow securities from a pool of securities owned by the institutional investor through the scheme operated by the ASX, in order to meet the T+5 requirements. The broker would return the securities under the loan in due course. As part of the loan arrangements, the broker will be required to provide collateral.

33. The Exchange will administer the scheme and will be exposed to the risk that the borrowing broker will fail to pay collateral or return the securities.

34. Amendments to the Corporations Law are proposed which will enable the Exchange to claim from the National Guarantee Fund in either of these circumstances.

#### Netting

35. In a further move to speed settlement procedures, the Exchange is considering introducing netting not only of cash obligations but also of obligations to deliver securities. The aim is to reduce the movement of documents when a series of transactions relating to the same securities must be settled on the same day.

36. The ASX has not yet determined the precise manner by which netting will occur.

37. The requirement to pay a net amount of cash to the Exchange clearing house and to transfer a net number of securities does not fit easily into the existing Contract Guarantee provisions (Division 6). Therefore proposed Division 68 is inserted to provide a right to claim against the NGE where the netting rules apply and there is a failure to pay a net amount or to transfer a net number of securities.

38. The Government does not necessarily endorse the introduction of a delivery netting system by the Exchange. The provisions relating to netting of delivery obligations have been inserted for the purpose of obtaining public comment.

#### Transfer Delivery Service

39. To speed settlement particularly between brokers in different cities, the Exchange has instituted a transfer delivery service. The transfer delivery service permits a

selling broker to deliver securities in (say) Hobart which will be "received by" a buying broker in (say) Perth on the same day. This is achieved by the selling broker delivering securities to the Exchange in Hobart and the Exchange instructing its office in Perth to deliver out an equivalent quantity of securities to the buying broker in Perth. Normally the securities delivered by the selling broker will be registered into the name of the Exchange's clearing nominee, although sometimes they will be on-delivered by the Exchange to satisfy another delivery obligation in the same city.

40. Again, the existing contract guarantee provisions (Division 6) may not allow the buying and selling broker using a delivery service to make a claim in respect of a failure to deliver securities or to pay the consideration in respect of a purchase. A defective delivery to the clearing nominee will be matched randomly in the system and the buying broker to whom the defective delivery is distributed is likely to be a broker other than the one who bought from the broker who supplied the inadequate documents. The buying broker who contracted with the defaulting broker may have received valid settlement documents through the random matching and arguably therefore has no claim against the Fund under section 950. The buying broker to whom the defective documents have been allocated might not have a claim because arguably the selling broker who contracted with him or her, has supplied valid settlement documents under the agreement between them by delivering the documents to the transfer delivery service.

41. Division 6C would provide specifically for claims against the Fund in respect of losses incurred through the operation of the transfer delivery service.

#### Other Amendments

42. Other amendments to the National Guarantee Fund provisions include:

- a provision enabling the Securities Exchanges Guarantee Corporation Limited (SEGC) to borrow if the Board considers that it is in the interests of the sound financial management of the Fund. The SEGC has advised that such a power is necessary; and
- a provision enabling the SEGC to levy borrowers under guaranteed securities loans;

#### Fundraising

43. Significant reforms to the regulation of corporate

fundraising came into effect under the Corporations Law on 1 **January** 1991. These new fundraising provisions have been the subject of some controversy. They have been subject to critical examination by industry, legal practitioners and **other** professional advisers.

44. The Government is satisfied with the substance of the fundraising reforms. The new provisions have resulted in **better** information being provided to potential investors and a more informed market.

45. However, the Government recognises that the experience since 1 January has resulted in the identification of a number of matters which warrant clarification. This Bill includes a number of essentially technical amendments for this purpose with a view to ensuring commercial certainty.

46. The more significant of the amendments to the fundraising provisions:

- make it clear that the fundraising provisions do not apply to trading of securities on the stock exchange;
- clarifying how the prospectus provisions apply to other secondary offers of securities; and
- clarify the operation of various defences against civil liability for misstatements in, and omissions from prospectuses.

47. This Government is committed to raising the standard of conduct in the financial markets in order to restore local and international confidence. The reforms to the fundraising provisions in the Corporations Law are a significant step to achieving this end. Now that the regulation of primary offers of securities has been placed on a better footing, the Government will be looking to see whether further reforms to the regulation of secondary markets are desirable. To this end the Attorney-General has asked the Companies and Securities Advisory Committee to report on the need for, and the content of, a statute based continuous disclosure regime for listed securities.

48. The regulation of prescribed interests and arrangements (such as unit trusts) under the Corporations Law has also been the subject of some controversy. Leaving aside the Government's recent decision concerning unlisted property trusts, the issue of whether the trustee or the management is responsible for the keeping of the books of accounts for prescribed interests has caused particular concern.

49. The ASC has adopted the view that the Law does not permit the trustee to cause the management company to keep these books of account as had been the usual practice prior to 1 January 1991, but rather must keep the books itself. The ASC has under its discretionary powers granted trustees relief from this apparent obligation until 31 December 1991.

50. Earlier this year the Attorney-General asked the Australian Law Reform Commission and the Companies and Securities Advisory Committee to conduct a wide ranging review of the regulatory framework for prescribed interests and other collective schemes. Pending the outcome of this review and in order to avoid unnecessary and costly disruption to the *administration* of unit trusts, the Bill contains an amendment to make it clear that the trustee may continue to cause the books of accounts for prescribed interests to be kept by the management company.

#### Registration Numbers of Companies and Registrable Bodies

51. The purpose of the Australian Company Number (ACN) and Australian Registrable Body Number (ARBN) is to provide a simple way of assisting persons dealing with companies, foreign companies and registrable bodies to identify those bodies. The ACN and the ARBN are a unique *nine* digit identifying number for each Australian company, foreign company and other registrable body.

52. A moratorium on the use of an ACN or ARBN currently applies to the requirement for companies, foreign companies and other registrable bodies to display their ACN or ARBN on public documents or eligible negotiable instruments under s.219(3) and s.362(4) of the Corporations Law. However, companies and bodies are still required to display their ACN or ARBN on their common seal and any document that is required by the Law to be lodged with the ASC. This moratorium expires on 31 December 1991.

53. The amendments proposed to the ACN and ARBN provisions are:

- cash register receipts produced by an electronic machine and which set out information which is stored in the machine will not be required to contain the ACN or ARBN of the company or body issuing the receipt;
- alternative abbreviations for ACN and ARBN (without full stops) will be available for use by companies and bodies in all official documents.

- the definition of 'public document' has been redrafted to clarify that, other than official documents of a company, the requirement for an ACN or ARBN to appear on company documents will only apply to documents that are signed or issued in the course of, or for the purposes of, a particular transaction or dealing. An advertising document issued by a company which is not also used as a document for undertaking some form of transaction with a person will not be required to contain the company's ACN or ARBN;
- the ASC will be empowered to exempt companies or bodies that operate in transportation of persons or goods from being required to place its ACN or ARBN on documents that are used in connection with transportation where it is necessary or desirable in the interests of promoting or maintaining consistency in international practice relating to the form, content or use of transport documents.

#### Miscellaneous substantive and technical amendments

##### Non -marketable securities

54. To facilitate the trading of new products in Australian securities markets, the ASC will be able by declaration to extend the benefits conferred on marketable securities and marketable rights by the Law to other securities.

55. Other miscellaneous amendments concern Australian residence of a secretary (section 240) and the use of "limited" and "no liability" by bodies other than companies (section 369).

53. The remaining amendments in Schedule 4 are technical - correcting erroneous references and grammatical and typographical errors.



**Corporations Legislation Amendment Bill (No. 2) 1991**

**1990-91**

**A BILL  
for**

**An Act to amend the *Corporations Act 1989* and related  
legislation, and for related purposes**

The Parliament of Australia enacts:

**PART 1 - PRELIMINARY**

**Short title**

1. This Act may be cited as the *Corporations Legislation Amendment Act (No. 2) 1991*.

**Commencement**

2.(1) Subject to this section, this Act commences on the day on which it receives the Royal Assent.

(2) Part 1990 is taken to have commenced on 1 January 1991.

**PART 2 - AMENDMENTS OF THE CORPORATIONS LAW**

**Corporations Law**

3. In this Part, "Corporations Law" means the Corporations Law set out in section 82 of the *Corporations Act 1989*'.

**Amendments relating to the National Guarantee Fund**

4. The Corporations Law is amended as set out in Schedule 1.

**Amendments relating to fundraising**

5. The Corporations Law is amended as set out in Schedule 2.

**Amendments relating to registration numbers of companies and registrable bodies**

6. The Corporations Law is amended as set out in Schedule 3.

**Miscellaneous substantive and technical amendments of the Corporations Law**

7. The Corporations Law is amended as set out in Schedule 4.

**Commencement and application of changes to Corporations Law resulting from this Act**

8. The Corporations Law is amended as set out in Schedule 5.

**PART 3 - AMENDMENTS OF THE CORPORATIONS LEGISLATION  
AMENDMENT ACT 1990**

**Principal Act**

9. In this Part, "Principal Act" means the *Corporations Legislation Amendment Act 1990*.

**Schedule 1**

10. Schedule 1 to the Principal Act is amended by inserting "(last occurring)" before ", substitute" in the amendment of subsection 1224(1).

**SCHEDULE 1**

Section 4

**AMENDMENTS OF THE CORPORATIONS LAW RELATING  
TO THE NATIONAL GUARANTEE FUND**

**Subsection 920(i) (definition of "claim"):**

After "6,", insert "6A, 6B, 6C,".

**Subsection 920(1) (definition of "property"):**

After "money" insert ", securities".

**Subsection 920(1) (definition of "settlement documents"):**

After "a transaction" insert "other than a guaranteed securities loan".

**Subsection 920(1) (definition of "transaction"):**

After "securities" insert ", or a guaranteed securities loan".

**Subsection 920(1):**

Insert:

`borrower', in relation to a guaranteed securities loan, has the meaning given by section 954B;

`clearing nominee', in relation to a participating exchange, means a subsidiary of the participating exchange operated for the purpose of facilitating the transfer of securities;

`guaranteed securities loan' has the meaning given by section 954B;

`guaranteed transfer delivery service arrangement' has the meaning given by section 954X;

`marketable securities' means marketable securities or marketable rights within the meaning of Division 3 of Part 7.13;

`transfer', except in Division 7, has the meaning affected by section 924;

`transfer documents', except in Division 7, has the meaning given by section 924;".

**After section 923:**

Insert in Division 1 of Part 7.10:

**Transfer of securities etc. and payment of money**

"924.(1) This section has effect for the purposes of this Part (other than Division 7).

"(2) A person (called the `transferor') transfers securities to another person (called the `transferee') if, and only if, the transferor delivers, or causes to be delivered to the transferee, documents (called `transfer documents') that are sufficient to enable the transferee:

(a) except in the case of marketable rights within the meaning of Division 3 of Part 7.13 - to become registered as the holder of the securities; or

(b) in the case of such marketable rights - to obtain the issue to the transferee of the securities to which the marketable rights relate;

without the transferor doing anything more, or causing anything more to be done, by way of executing or supplying documents.

"(3) If a person:

(a) causes property (other than securities or money) to be transferred to another person; or

(b) causes documents that are sufficient to enable another person to become the legal owner of property (other than securities or money) to be delivered to another person;

the first-mentioned person is taken to have transferred the property to the other person.

"(4) If a person causes money to be paid to another person, the first-mentioned person is taken to have paid the money to the other person.

"(5) In this section:

`person' includes a partnership.

**Attributing securities and payments to transactions**

"924A. If.

(a) either:

(i) a number of securities are transferred to a participating exchange or a member organisation of a

participating exchange in respect of a number of transactions; or

(ii) a payment is made to a participating exchange or a member organization of a participating exchange in respect of a number of transaction; and

(b) apart from this section, it is not possible to tell, for the purposes of this Part, how many of the securities are transferred, or how much of the payment is made, in respect of each of the transactions; and

(c) the business rules of the participating exchange include provisions determining how many of the securities are transferred, or how much of the payment is made, in respect of each of the transactions;

those provisions have effect accordingly for the purposes of this Part."

**Subsection 927(2):**

After "954(5)" insert ", 954F(2), 954Q(2), 954Z(2), 459(3)".

**After subsection 927(5):**

Insert:

"(5A) A delegation under this section continues in force even if there is a change in the membership of the Board or of the sub-committee."

**After section 927:**

Insert:

**Sub-delegation by management sub-committee**

"927A.(1) A management sub-committee may delegate to:

(a) a member of the Board; or

(b) a member of the sub-committee; or

(c) an officer of SEGC;

all or any of the powers, authorities and discretions that have been delegated under 25 subsection 921(2) to the sub-committee.

"(2) A delegation must be in writing signed by a majority of the members of the sub-committee.

"(3) A delegation may be varied or revoked at any time by writing signed by a majority of the members of the sub-committee.

"(4) A delegation continues in force even if there is a change in the membership of the sub-committee.

"(5) A power, authority or discretion performed or exercised by a person under a delegation is taken to have been exercised by the Board.

"(6) A delegation of a power, authority or discretion does not prevent the performance or exercise of the power, authority or discretion by the Board or by the subcommittee that made the delegation.

"(7) Section 109ZE has effect in relation to a delegation subject to this section.

"(8) In this section:

`delegation' means a delegation under this section;

`management sub-committee' means a management sub-committee appointed under subsection 927(1).".

**After section 928:**

Insert in Division 3 of Part 7.10:

**Interpretation - borrowing**

"928A. In this Division, a reference to borrowing money includes a reference to obtaining credit.".

**After paragraph 930(f):**

Insert:

"(fa) money paid into the Fund under subsection 930B(2);".

**Paragraph 930(j):**

Omit the paragraph, substitute:

"(j) money paid to SEGC for the purposes of a claim under Division 6, 6A or 6C; and".

**After section 930:**

Insert:

**Power to borrow etc. for purposes of the Fund**

"930A.(1) If the Board considers that, in the interests of the sound financial management of the Fund, money should be borrowed for the purpose of meeting a payment due out of the Fund, SEGC may borrow money for that purpose on such terms and conditions as the Board thinks appropriate.

"(2) SEGC may give security, including security over the assets of the Fund, in respect of SEGC's obligations in relation to a borrowing under subsection (1).

"(3) If:

(a) money borrowed under subsection (1) is a loan from a participating exchange; and

(b) the participating exchange borrowed money for the purpose of making the loan to SEGC;

SEGC may give security, including security over the assets of the Fund, in relation to the participating exchange's obligations in respect of the borrowing referred to in paragraph (b).

#### **Money borrowed and paid to SEGC**

"930B.(1) This section applies where money borrowed by SEGC under subsection 930A(1) is paid to SEGC.

"(2) SEGC must pay the money into the Fund.

"(3) If.

(a) the money was borrowed for the purpose of meeting a payment due out of the Fund; and

(b) the borrowed money has been paid into the Fund; and

(c) the payment due out of the Fund has not yet been made;

then, for the purposes of Division 4, the amount in the Fund is taken to be reduced by the amount of the borrowed money.

#### **Money borrowed and not paid to SEGC**

"930C.(1) This section applies where money borrowed by SEGC under subsection 930A(1) is not paid to SEGC but is payable to other persons at the direction of SEGC.

"(2) SEGC must not direct that any of the money be paid to a person unless the payment is of a kind that can, under section 932, be made out of the Fund."

#### **After paragraph 932(i)(b):**

Insert:

"(ba) money payable to a person or partnership under section 972A;".

**After paragraph 932(1)(c):**

Insert:

"(da) to the extent that the money referred to in section 935 is insufficient for the purpose, payments of principal, interest and other amounts payable by SEGC in respect of money borrowed, and security given, under section 930A;".

**Subsections 932(2) and (3):**

After "Division 6" insert ", 6A, 6B, 6C".

**Subsection 935(1):**

Add at the end:

"; and (c) principal, interest and other amounts payable by SEGC in respect of money borrowed, and security given, under section 930A."

**Subsection 938(I) (paragraph (b) of the definition of "leviable dealer"):**

Add at the end:

"; or (iii) in the case of a guaranteed securities loan - the borrower;".

**Subsection 938(I) (definition of "reportable transaction"):**

Omit the definition.

**Subsection 938(I):**

Insert:

"`leviable transaction' means:

(a) a sale or purchase of securities by a person or partnership where, as at the time when the agreement for the sale or purchase is made:

(i) the sale or purchase is a reportable transaction as defined in subsection 920(1); and



(ii) the person or partnership is a member organisation of a 25 participating exchange and carries on a securities business in this jurisdiction; or

(b) a guaranteed securities loan where, as at the time when the loan is entered into, the borrower carries on a securities business in this jurisdiction."

**Subsections 938(2), (3) and (5):**

Omit "reportable", substitute "leviable".

**After section 948:**

Insert:

**Effect of using guaranteed transfer delivery service**

"948A. If:

(a) a dealer is, under a reportable transaction that is a sale or purchase of securities, obliged to transfer securities of a particular kind and number to another dealer; and

(b) both dealers are parties to a guaranteed transfer delivery service arrangement; and

(c) for the purpose of discharging the obligation, the first-mentioned dealer:

(i) elects, in accordance with the arrangement, to bring about a transfer of securities of that kind and number to the other dealer 15 by the means provided for in the arrangement; and

(ii) for the purpose of so bringing about that transfer, transfers securities of that kind and number to the clearing nominee for the arrangement;

then, for the purposes of the application of this Division in relation to the sale or 20 purchase, the obligation to supply settlement documents in relation to the sale or purchase is taken to be discharged by the transfer of securities to the clearing nominee."

**Subsection 949(3):**

After "a dealer" insert "who is a member organisation of the Exchange".

**Subsections 949(3), (4) and (5):**

Omit "Exchange subsidiary", substitute "Exchange body".

**Subsections 949(3) and (4):**

Omit "that subsidiary" (wherever occurring), substitute "that body".

**Section 949:**

Add at the end:

"(7) In this section;

`Exchange body' means the Exchange or an Exchange subsidiary.".

**After subsection 950(1):**

Insert:

"(1A) A dealer may make a single claim under this section in respect of 2 or more purchases.

"(1B) A claim made under subsection (1A) is to be treated for the purposes of subsection (2) as if it consisted of a separate claim in respect of each of the purchases to which it relates.".

**After section 950:**

Insert:

**No claim if netting provisions of business rules apply to transaction**

"950A. If the provisions of the business rules of a participating exchange referred to in subsection 954N(1) or 954P(1) apply in relation to a reportable transaction that is a sale or purchase of securities, a claim may not be made under section 949 or 950 in respect of the sale or purchase.".

**Section 953:**

Omit all the words after paragraph (c), substitute:

"SEGC must satisfy the claim by paying to the claimant the amount that, when the claimant became entitled to make the claim, was the amount of the actual pecuniary loss suffered by the claimant in respect of the purchase.".

**After section 954:**

Insert:

***"Division 6A - Securities loans guarantees***

**Interpretation - general definitions**

"454A.(1) In this Division:

`borrower', in relation to a guaranteed securities loan, has the meaning given by section 95413;

`claim' means a claim under this Division against SEGC;

`collateral', in relation to a guaranteed securities loan, means an amount paid by the 30 borrower as security for the performance of the borrower's obligations under the loan;

`compliance period', in relation to an obligation under a guaranteed securities loan, means:

(a) if the business rules of the lender as in force when the loan is made prescribe a period in relation to the obligation for the purposes of this paragraph - that period; or

(b) otherwise - a period that is reasonable having regard to the obligation and all the circumstances relating to the loan;

`excluded amount', in relation to a guaranteed securities loan, means an amount payable by the borrower by way of a fee or charge, or by way of interest or a penalty, in respect of the loan;

`guaranteed securities loan' has the meaning given by section 954B;

`tender', in relation to a guaranteed securities loan, has the meaning given by section 954B;

`security benefit' means:

(a) property (other than securities) or money transferred or paid to a person because the person is or was the holder of a security; or

(b) a right that a person has because the person is or was the holder of a security, including, for example:

(i) a right to be paid an amount or to be issued with additional securities; or

(ii) a right that arises out of a reduction of share capital, a scheme of arrangement or compromise or a takeover.

"(2) A reference in the definition of `security benefit' in subsection (1) to a right is a reference to a right, whether existing or future, and whether contingent or not.

### **Interpretation - guaranteed securities loan and related concepts**

"954B.(1) For the purposes of this Part, an agreement is a guaranteed securities loan

if:

(a) under the agreement:

(i) a participating exchange is to transfer marketable securities of a 30 specified kind and number to, or as directed by, a person or partnership; and

(ii) in order to put the participating exchange in the same position as if the agreement had not been made, the person or partnership is later to transfer to, or as directed by, the participating exchange such securities and security benefits as the agreement requires; and

(b) the person or partnership is a member organisation of the participating exchange on the day on which the agreement is entered into; and

(c) the agreement is entered into after the commencement of this section; and

(d) the agreement is of a kind that, according to the business rules of the participating exchange, is to be guaranteed under this Division.

"(2) For the purposes of the application of this Part in relation to a guaranteed securities loan:

(a) the participating exchange referred to in subparagraph (1)(a)(i) is the lender; and

(b) the person or partnership referred to in subparagraph (1)(a)(i) is the borrower; and

(c) the securities transferred as mentioned in subparagraph (1)(a)(i) are the borrowed securities.

"(3) The fact that an agreement includes obligations in addition to those mentioned in subsection (1) does not prevent the agreement from being a guaranteed securities loan.

### **Effect of using guaranteed transfer delivery service**

"954C.(1) If:

(a) a party to a guaranteed securities loan is obliged under the loan to transfer securities of a particular kind to, or as directed by, the other party to the loan; and

(b) those parties are also parties to a guaranteed transfer delivery service arrangement; and

(c) for the purpose of wholly or partly discharging the obligation, the first-mentioned party:

(i) elects, in accordance with the arrangement, to bring about a transfer of a particular number of securities of that kind, to, or as directed by, the other party, by the means provided for in the arrangement; and

(ii) for the purpose of so bringing about that transfer, transfers that number of securities of that kind to the clearing nominee for the arrangement;

then, for the purpose of the application of this Division, the obligation is taken to be discharged to the extent of that number of securities of that kind.

"(2) In this section:

'party', in relation to a guaranteed securities loan, means the lender or the borrower.

**Claim by lender in respect of borrower's failure to discharge obligation**

"9S4D.(1) If, as at the end of the compliance period in relation to an obligation of the borrower under a guaranteed securities loan to transfer or pay securities or security benefits, or to pay some other amount (not being an excluded amount):

(a) the lender has transferred borrowed securities in accordance with the agreement; and

(b) the lender has paid, or is ready, willing and able to pay, as directed by the borrower, each amount (if any) required to be paid under the loan by the lender upon discharge of the obligation; and

(c) the obligation remains undischarged to any extent;

the lender may, subject to section 9S4J, make a claim in respect of the obligation.

"(2) A participating exchange may make a single claim under this section in respect of a number of obligations, whether arising under the same or different guaranteed securities loans.

"(3) A claim made under subsection (2) is to be treated for the purposes of sections 9S4G and 9S4H as if it were a separate claim in respect of each of the obligations to which it relates.

**No claim if netting provisions of business rules apply to obligation**

"954E. If the provisions of the business rules of a participating exchange referred to in subsection 954N(1) or 954P(1) apply in relation to an obligation under a securities 25 loan, a claim may not be made under this Division in respect of the obligation.

**How and when claim to be made**

"954F.(1) A claim must be in writing and must be served on SEGC within 6 months after the day on which the claimant became entitled to make the claim.

"(2) A claim that is not made within the period required by subsection (1) is barred 30 unless the Board otherwise determines.

**How claim in respect of securities or non-money security benefits is to be satisfied**

"954G.(1) Subject to section 954J, SEGC must allow a claim in respect of an obligation under a guaranteed securities loan to transfer securities or security benefits (other than money) if the Board is satisfied that:

(a) the claimant is entitled to make the claim; and

(b) the claimant has:

(i) under the guaranteed securities loan, paid as directed by the borrower; or

(ii) for the purposes of the claim, paid to SEGC;

each amount (if any) required to be paid under the loan by the claimant upon the discharge of the obligation; and

(c) the obligation is still undischarged to the extent of a particular number of securities or security benefits of a

particular kind (in this section called the **'outstanding items'**).

"(2) Subject to subsections (3) and (4), if SEGC allows the claim, it must transfer to, or as directed by, the claimant, securities or security benefits of the same kind and number as the outstanding items.

"(3) If the Board is satisfied that:

(a) the claimant has obtained from any source securities or security benefits of the same kind and number as the outstanding items; and

(b) the claimant obtained those securities or security benefits for the purpose of putting itself in the same position (as nearly as practicable) as it would have been in but for the borrower's failure to discharge the obligation;

SEGC must satisfy the claim by paying to the claimant the claimant's reasonable costs of 25 obtaining those securities or security benefits.

"(4) If subsection (3) does not apply but the Board is satisfied that it is not reasonably practicable for SEGC to obtain securities or security benefits of the same kind and number as the outstanding items within the pre-cash settlement period, SEGC must

satisfy the claim by paying to the claimant the amount that, as at the time when the Board 30 decides it is so satisfied, is the actual pecuniary loss suffered by the claimant in respect of the failure to discharge the obligation.

"(5) In this section:

'pre-cash settlement period' means:

(a) if the business rules of the claimant as in force when the Board allows the claim prescribe a period, for the purposes of this section, in relation to a class of claims that includes the claim - that period; or

(b) otherwise - such period as the Board, having regard to all the circumstances of the claim, considers reasonable.

#### **How claim in respect of an amount of money is to be satisfied**

"954H.(1) Subject to section 9547, SEGC must allow a claim in respect of an obligation under a guaranteed securities loan to pay a security benefit that is an amount of money, or to pay some other amount, if the Board is satisfied that:

(a) the claimant is entitled to make the claim; and

(b) the obligation is still undischarged to the extent of a particular amount (in this section called the `outstanding amount').

"(2) If SEGC allows the claim, it must pay to, or as directed by, the claimant an amount equal to the outstanding amount.

"(3) If:

(a) the claim is in respect of a failure to pay collateral in relation to the guaranteed securities loan concerned; and

(b) SEGC allows the claim and pays to the claimant the amount of the unpaid collateral;

then, for the purposes of the application of this Division and Division 6C in relation to the loan, the payment by SEGC has effect as if it were a payment of the collateral by the borrower.

#### **Nexus with this jurisdiction**

"954J. A participating exchange may not make a claim in respect of a guaranteed securities loan unless:

(a) the borrower was carrying on a securities business in this jurisdiction on the day on which the agreement for the loan was entered into; or

(b) if the borrower was not so carrying on such a business and was not carrying on a securities business in any other jurisdiction on that day - the last securities business that the borrower carried on in a jurisdiction before the day on which the agreement for the loan was entered into was carried on in this jurisdiction.

#### **Preventing double recovery**

"954K. If SEGC allows a claim under section 954D of the Corporations Law of another jurisdiction in respect of a failure to discharge an obligation under a guaranteed securities loan, SEGC must not allow a claim under section 954D of the Corporations Law of this jurisdiction in respect of the same failure.

#### ***"Division 6B - Claims in respect of net obligations***

#### **Interpretation**

"954L. In this Division:



`claim' means a claim under this Division against SEGC;

`dealer', in relation to a participating exchange, means the participating exchange or a member organisation of the participating exchange.

### **Effect of using guaranteed transfer delivery service**

"954M. If:

(a) a person or partnership (in this section called the `transferor') is, under provisions of a kind referred to in subsection 954P(1), obliged to transfer securities of a particular kind to another person or partnership (in this section called the `transferee'); and

(b) the transferor and transferee are parties to a guaranteed transfer delivery service arrangement; and

(c) for the purpose of wholly or partly discharging the obligation, the transferor:

(i) elects, in accordance with the arrangement, to bring about a transfer of a particular number of securities of that kind to the transferee by the means provided for in the arrangement; and

(ii) for the purpose of so bringing about the transfer, transfers that 25 number of securities of that kind to the clearing nominee for the arrangement;

then, for the purposes of the application of this Division, the obligation is taken to be discharged to the extent of that number of securities of that kind.

### **Claim in respect of failure to pay net amount in respect of transactions**

"954N.(I) If:

(a) under provisions of the business rules of a participating exchange, the total of the amounts that become due and payable to a dealer by other dealers on a particular day in respect of transactions of a particular kind or kinds entered into after the commencement of this section is set off against the total of the amounts that become due and payable by the dealer to other dealers on that day in respect of transactions of that kind or those kinds entered into after that commencement; and

(b) depending on which of those totals is the greater, the provisions oblige:

- (i) the dealer to pay to the participating exchange; or
- (ii) the participating exchange to pay to the dealer;

within a specified period, the difference between those totals; and

(c) as at the end of that period, that obligation remains undischarged to the extent of a particular amount

the person or partnership to which the amount is payable may, subject to section 954U, make a claim in respect of the obligation.

"(2) Entitlement to make the claim is not affected by a dealer ceasing to be a member organisation of the participating exchange after the obligation arose.

#### **Claim in respect of failure to transfer net number of securities in respect of transactions**

"954P.(1) This section applies if:

(a) under provisions of the business rules of a participating exchange, the total number of marketable securities of a particular kind to be transferred on a particular day to a dealer by other dealers, or by a clearing nominee of the participating exchange, in respect of transactions of a particular kind or kinds entered into after the commencement of this section is set off against the total number of securities of that kind to be transferred on that day by the dealer to other dealers, or to the clearing nominee, as the case may be, in respect of transactions of that kind or those kinds entered into after that commencement; and

(b) depending on which of those totals is the greater, the provisions oblige:

- (i) the dealer to transfer to some other dealer or dealers nominated under the provisions; or

- (ii) some other dealer or dealers nominated under the provisions to transfer to the dealer;

within a specified period, securities of that kind equal in number to the difference between those totals; and

(c) as at the end of that period, the obligation to transfer, or any of the obligations to transfer, as the case requires, remains undischarged to the extent of a particular number of securities of that kind (in this section called the **'default securities'**).

"(2) Unless the nomination under the provisions referred to in subsection (1) is made by a clearing nominee of the participating exchange, the person or partnership to which the default securities should have been transferred may, subject to section 954U, make a claim in respect of the failure to transfer the default securities.

"(3) If:

(a) the nomination under the provisions referred to in subsection (1) is made by a clearing nominee of the participating exchange; and

(b) the participating exchange has not taken action as mentioned in paragraph (4)(b);

the person or partnership to which the default securities should have been transferred may, subject to section 954U, make a claim in respect of the failure to transfer the default securities.

"(4) If:

(a) the nomination under the provisions referred to in subsection (1) is made by a clearing nominee of the participating exchange; and

(b) for the purpose of remedying the failure to transfer the securities, the participating exchange has transferred securities of the same kind and number as the default securities to the person or partnership to which the default securities should have been transferred;

the following provisions have effect:

(c) the participating exchange is subrogated to all the rights and remedies of the person or partnership in relation to the failure to transfer the default securities;

(d) the participating exchange may, subject to section 954U, make a claim in respect of its actions to remedy the failure;

(e) any claim made under subsection (3) in respect of the failure is taken not to have been entitled to be made.

"(5) Entitlement to make a claim is not affected by a dealer ceasing to be a member 30 organisation of the participating exchange after the obligation to transfer arose.

**How and when claim to be made**

"954Q.(1) A claim must be in writing and must be served on SEGC within 6 months after the day on which the claimant became entitled to make the claim.

"(2) A claim that is not made within the period required by subsection (1) is barred unless the Board otherwise determines.

**How claim under subsection 954N(1) is to be satisfied**

"954R.(1) Subject to section 954V, SEGC must allow a claim under subsection 954N(1) if the Board is satisfied that:

(a) the claimant is entitled to make the claim; and

(b) the obligation referred to in paragraph 954N(1)(b) still remains undischarged to the extent of a particular amount.

"(2) If SEGC allows the claim, SEGC must pay to the claimant the amount referred to in paragraph (1)(b).

**How claim under subsection 954P(Z) or (3) is to be satisfied**

"954S.(1) Subject to section 954V, SEGC must allow a claim under subsection 954P(2) or (3) if the Board is satisfied that:

(a) the claimant is entitled to make the claim; and

(b) the obligation referred to in paragraph 954P(1)(c) still remains undischarged to the extent of a particular number of securities of a particular Idnd (in this section called the **'outstanding securities'**).

"(2) Subject to subsections (3) and (4), if SEGC allows the claim, it must transfer to the claimant securities of the same kind and number as the outstanding securities.

"(3) If the Board is satisfied that:

(a) the claimant has obtained from any source securities of the same kind and number as the outstanding securities; and

(b) the claimant obtained those securities for the purpose of putting itself in the same position (as nearly as practicable) as it would have been in but for the failure to transfer the outstanding securities to the claimant;

SEGC must satisfy the claim by paying to the claimant the claimant's reasonable costs of obtaining those securities.

"(4) If subsection (3) does not apply but the Board is satisfied that it is not reasonably practicable for SEGC to

obtain securities of the same kind and number as the 30 outstanding securities within the pre-cash settlement period, SEGC must satisfy the claim by paying to the claimant the amount that, as at the time when the Board decides it is so satisfied, is the actual pecuniary loss suffered by the claimant in respect of the failure to transfer the outstanding securities.

"(5) In this section:

'pre-cash settlement period' means:

(a) if the business rules of the participating exchange that is referred to in paragraph 954P(1)(a) as in force when the Board allows the claim prescribe a period, for the purposes of this section, in relation to a class of claims that includes the claim - that period; or

(b) otherwise - such period as the Board, having regard to all the circumstances of the claim, considers reasonable.

#### **How claim under subsection 954P(4) is to be satisfied**

"954T.(1) Subject to section 954V, SEGC must allow a claim by a participating exchange under subsection 954P(4) if the Board is satisfied that:

(a) the participating exchange, is entitled to make the claim; and

(b) the participating exchange has paid or transferred to SEGC any money or property it has obtained because of the right of subrogation given by paragraph 954P(4)(c) in relation to the failure to transfer the default securities.

"(2) If SEGC allows the claim, it must pay to the participating exchange the participating exchange's reasonable costs of obtaining and transferring the securities transferred as mentioned in paragraph 954P(4)(1r).

"(3) Money or property paid or transferred to SEGC under paragraph (1)(b) forms 20 part of the Fund.

#### **Nexus with this jurisdiction**

"954U. A person or partnership may not make a claim in respect of a failure by a person or partnership (in this section called the 'defaulter') to discharge an obligation to pay an amount or transfer securities unless:

(a) the defaulter was carrying on a securities business in this jurisdiction on the day on which the obligation arose; or

(b) if the defaulter was not so carrying on such a business and was not carrying on a securities business in any other jurisdiction on that day - the last securities business that the defaulter carried on in a jurisdiction before the day on which the obligation arose was carried on in this jurisdiction.

### **Preventing double recovery**

"954V.(1) If SEGC allows a claim under subsection 454N(1) or 954P(2) of the Corporations Law of another jurisdiction in respect of a failure to pay an amount or to transfer securities, SEGC must not allow a claim under the corresponding subsection of 35 the Corporations Law of this jurisdiction that relates to the same failure.

"(2) If SEGC allows a claim under section 954P (other than subsection 954P(2)) of the Corporations Law of this or another jurisdiction in respect of a failure to transfer securities, SEGC must not allow a claim, or another claim, as the case requires, under section 954P (other than subsection 954P(2)) of the Corporations Law of this jurisdiction that relates to the same failure.

### ***"Division 6C - Transfer delivery service guarantees***

#### **Interpretation**

"954W. In this Division:

'claim' means a claim under this Division against SEGC;

`claimable obligation' means:

(a) an obligation under a transaction where:

(i) the transaction is a reportable transaction for the purposes of Division 6; and

(ii) the transaction is a sale of securities by a person or partnership to a person or partnership; and

(iii) the parties to the transaction were member organisations of the same participating exchange on the day on which the transaction was entered into;

being the obligation of the seller to transfer securities; or

(b) an obligation of the lender or borrower under a guaranteed securities loan to transfer securities; or

(c) an obligation to transfer securities that arose under provisions of a kind referred to in subsection 954P(1);

'discharge', in relation to an obligation, means:

(a) except in the case of a sale obligation - discharge the whole or a part of the obligation; or

(b) in the case of a sale obligation - discharge the whole of the obligation;

'guaranteed transfer delivery service arrangement' has the meaning given by section 954X;

'loan obligation' means an obligation of the kind referred to in paragraph (b) of the definition of 'claimable obligation';

'sale obligation' means an obligation of the kind referred to in paragraph (a) of the definition of 'claimable obligation'.

#### **Interpretation - guaranteed transfer delivery service arrangement and related concepts**

"954X.(1) For the purposes of this Part, an arrangement is a guaranteed transfer delivery service arrangement if:

(a) the arrangement is entered into by a participating exchange, a clearing nominee of the participating exchange and a number of member organisations of the participating exchange; and

(b) under the arrangement, a party to the arrangement (other than the clearing nominee) may, if the party so elects, bring about a transfer of securities of a particular idnd and number to another party to the arrangement (other than the clearing nominee) by:

(i) the first-mentioned party transferring securities of that kind and number to the clearing nominee; and

(ii) the clearing nominee then transferring securities of that kind and number to the other party; and

(c) the arrangement is of a land that, according to the business rules of the participating exchange, is to be guaranteed under this Division.

"(2) For the purposes of the application of this Part in relation to a guaranteed delivery service arrangement, the

clearing nominee referred to in paragraph (1)(a) clearing nominee for the arrangement.

### **Claims in respect of default by clearing nominee**

"954Y.(1) This section applies if:

(a) a party to a guaranteed transfer delivery service arrangement (in this Division called the '**transferor**') is obliged to transfer securities of a particular kind to, or as directed by, another party to the arrangement (in this Division called the '**transferee**'); and

(b) the obligation is a claimable obligation; and

(c) for the purpose of discharging the obligation, the transferor:

(i) elects, in accordance with the arrangement, to bring about a transfer of a particular number of securities of that kind to, or as directed by, the transferee by the means provided for in the arrangement; and

(ii) for the purpose of so bringing about the transfer, transfers that number of securities of that kind to the clearing nominee for the arrangement; and

(d) for the purpose of bringing about the transfer of securities referred to in subparagraph (c)(i) by the means provided for in the arrangement, the clearing nominee later purports to transfer that number of securities of that kind to, or as directed by, the transferee; and

(e) the clearing nominee is in default under the arrangement because the transfer documents in relation to the purported transfer, so far as they relate to a particular number of securities of that kind (in this Division called the '**default securities**'), are not sufficient for the purpose referred to in subsection 924(2); and

(f) if the obligation is a sale obligation - the transferee has paid, or is ready, willing and able to pay, to the transferor, under the agreement for the sale, the consideration for the sale; and

(g) if the obligation is a loan obligation and the action taken by the transferor as mentioned in paragraph (c) was taken for the purpose of wholly discharging the obligation or the undischarged part of the obligation - the transferee has paid, or is ready, willing and able to pay to, or as directed by, the transferor, each amount (if any) required to be paid,



under the guaranteed securities loan, by the transferee on the discharge of the obligation.

"(2) If the participating exchange that is a party to the transfer delivery service arrangement has not taken action as mentioned in paragraph (3)(a) or (b), the transferee (even if it is the participating exchange) may, subject to section 954ZC, make a claim in respect of the clearing nominee's default.

"(3) If the participating exchange that is a party to the transfer delivery service arrangement has, for the purpose of remedying the clearing nominee's default:

(a) where the participating exchange is also the transferee - obtained marketable securities of the same kind and number as the default securities; or

(b) in any other case - transferred securities of the same kind and number as the default securities to, or as directed by, the transferee;

the following provisions have effect:

(c) unless the participating exchange is also the transferee - the participating exchange is subrogated to all the rights and remedies of the transferee in 35 relation to the purported transfer of securities by the clearing nominee;

(d) the participating exchange may, subject to section 954ZC, make a claim in respect of its actions to remedy the default;

(e) any claim made under subsection (2) in respect of the clearing nominee's default is taken not to have been entitled to be made.

"(4) A person or partnership may make a single claim under subsection (2) or (3) in respect of 2 or more defaults.

"(5) A claim made under subsection (4) is to be treated for the purposes of sections 954ZA and 954ZB as if it were a single claim in respect of each of the defaults to which it relates.

"(6) Entitlement to make a claim in respect of an obligation of the kind referred to in paragraph (c) of the definition of 'claimable obligation' in section 454W is not affected by some or all of the dealers referred to in paragraph 954P(1)(a) ceasing after the obligation arose to be member organisations of the participating exchange concerned.

**How and when claim to be made**

"954Z.(1) A claim must be in writing and must be served on SEGC within 6 months after the day on which the claimant became entitled to make the claim.

"(2) A claim that is not made within the period required by subsection (1) is barred unless the Board otherwise determines.

**How claim under subsection 954Y(2) is to be satisfied**

"954ZA.(1) Subject to section 954ZD, SEGC must allow a claim under subsection 954Y(2) if the Board is satisfied that:

- (a) the claimant is entitled to make the claim; and
- (b) if paragraph 954Y(1)(f) applies - the claimant has:
  - (i) paid to the transferor; or
  - (ii) for the purposes of the claim, paid to SEGC;

the consideration, under the agreement for the sale, for the sale; and

- (c) if paragraph 954Y(1)(g) applies - the claimant has:
  - (i) paid to, or as directed by, the transferor; or
  - (ii) for the purposes of the claim, paid to SEGC;

each amount (if any) required to be paid, under the guaranteed securities loan, by the claimant on the discharge of the obligation.

"(2) Subject to subsections (3) and (4), if SEGC allows the claim, it must transfer to, or as directed by, the claimant securities of the same kind and number as the default securities.

"(3) If the Board is satisfied that:

- (a) the claimant has obtained from any source securities of the same kind and number as the default securities; and
- (b) the claimant obtained those securities for the purpose of putting itself in the same position (as nearly as practicable) as it would have been in but for the clearing nominee's default;

SEGC must satisfy the claim by paying to the claimant the claimant's reasonable costs of obtaining those securities.

"(4) If subsection (3) does not apply but the Board is satisfied that it is not reasonably practicable for SEGC to obtain securities of the same kind and number as the default securities within the pre-cash settlement period, SEGC must satisfy the claim by paying to the claimant the amount that, as at the time when the Board decides that it is so satisfied, is the actual pecuniary loss suffered by the claimant in respect of the clearing nominee's default.

"(5) In this section:

'pre-cash settlement period' means:

(a) if the business rules of the participating exchange that is a party to the transfer delivery service arrangement concerned, being those business rules as in force when the Board allows the claim, prescribe a period, for the purposes of this section, in relation to a class of claims that includes the claim - that period; or

(b) otherwise - such period as the Board, having regard to all the circumstances of the claim, considers reasonable.

#### **How claim under subsection 954Y(3) is to be satisfied**

"954ZB.(1) Subject to section 954ZD, SEGC must allow a claim under subsection 954Y(3) if the Board is satisfied that:

(a) the claimant is entitled to make the claim; and

(b) if paragraph 954Y(1)(f) applies - the transferee has paid to the transferor the consideration payable, under the agreement for the sale, for the sale; and

(c) if paragraph 954Y(1)(g) applies - the transferee has paid to, or as directed by the transferor each amount (if any) required to be paid, under the guaranteed securities loan, by the transferee on the discharge of the obligation; and

(d) the claimant has paid or transferred to SEGC any money or property it has obtained because of the right of subrogation given by paragraph 954Y(3)(c) in relation to the purported transfer of securities by the clearing nominee.

"(2) If SEGC allows the claim, it must pay to the claimant the claimant's reasonable costs of:

(a) if paragraph 954Y(3)(a) applies - obtaining the securities referred to in that paragraph; or

(b) if paragraph 954Y(3)(b) applies - obtaining and transferring the securities referred to in that paragraph.

"(3) Money or property paid or transferred to SEGC under paragraph (1)(d) forms part of the Fund.

#### **Nexus with this jurisdiction**

"954ZC. A person or partnership may not make a claim under subsection 954Y(2) or (3) unless:

(a) in the case of the participating exchange referred to in that subsection - the participating exchange was carrying on a business in this jurisdiction on the day of the purported transfer referred to in paragraph 954Y(1)(d); or

(b) otherwise:

(i) the person or partnership was carrying on a securities business in this jurisdiction on the day of the purported transfer referred to in paragraph 954(1)(d); or

(ii) if the person or partnership was not so carrying on such a business and was not carrying on a securities business in any other jurisdiction on that day - the last securities business that the person or partnership carried on in a jurisdiction before that day was carried on in this jurisdiction.

#### **Preventing double recovery**

"954ZD. If SEGC allows a claim under section 954Y of the Corporations Law of this or another jurisdiction in respect of a purported transfer of securities SEGC must not allow a claim, or another claim, as the case requires, under section 954Y of the Corporations Law of this jurisdiction that relates to the same purported transfer."

#### **Subsection 955(i) (definition of "securities"):**

Omit the definition.

#### **Subsection 955(2) and section 956:**

Before "securities" (wherever occurring) insert "marketable".  
41.

#### **Section 959:**

Repeal the section, substitute:

#### **How and when claim may be made**

"959.(1) A claim must:

(a) be in writing; and

(b) be served on SEGC:

(i) if a notice under subsection (4) applies to the claim - before the end of the last application day specified in the notice; or

(ii) in any other case - within 6 months after the day on which the claimant first became aware that the claimant had suffered loss as a result of the unauthorised execution.

"(2) For the purposes of subsection (1), a notice under subsection (4) applies to a claim if the claim is in respect of an unauthorised execution, by the dealer named in the notice, during the applicable period specified in the notice.

"(3) A claim that is not served on SEGC by the time required by paragraph (1)(b) is barred unless the Board otherwise determines.

"(4) SEGC may publish, in each State and Territory in a daily newspaper circulating in that State or Territory, a notice that:

(a) is in the prescribed form; and

(b) names a particular dealer; and

(c) requires that all claims in respect of unauthorised executions, by the named dealer, during a period (in this section called the 'applicable period') specified in the notice in accordance with subsection (5) must be served on SEGC before the day (in this section called the 'last application day') specified in the notice in accordance with subsection (6).

"(5) The applicable period must be a period that starts and ends before:

(a) if each publication of the notice occurs on the same day - the day on which the notice is published; or

(b) in any other case - the first day on which the notice is published.

"(6) The last application day must be at least 3 months after:

(a) if each publication of the notice occurs on the same day - the day on which the notice is published; or

(b) in any other case - the last day on which the notice is published.

"(7) SEGC, a member of the Board and any employee of, or person acting on behalf of, SEGC each have qualified privilege in respect of the publication of a notice under subsection (4).".

**Paragraph 961A(b):**

(a) After "such a business" insert "and was not carrying on a securities business in any other jurisdiction on that day".

(b) After "carried on" insert "in a jurisdiction".

**Paragraph 966A(b):**

(a) After "such a business" insert "and was not carrying on a securities business in any other jurisdiction on that day".

(b) After "carried on" insert "in a jurisdiction".

**Division 9 of Part 7.10 (Heading):**

Omit the heading, substitute:

***"Division 9 - General provisions relating to claims".***

**After section 970:**

Insert:

**Claimant may be required to exercise right of set-off**

"970A. If:

(a) a person (in this section called the 'claimant') has made a claim in respect of a liability of another person (in this section called the 'defaulter'); and

(b) the claimant has a right, whether under an agreement or otherwise, to set off a liability of the claimant to the defaulter against the liability referred to in paragraph (a);

SEGC may refuse to allow the claim until the claimant has exercised the right.

**Effect of set-off on claim**

"970B.(1) If:

(a) SEGC allows a claim by a person (in this section called the 'claimant') in respect of a liability of another person (in this section called the 'defaulter'); 30 and

(b) the liability of the defaulter to the claimant has been reduced, by an amount of money or a number of securities (in this section called the '**set-off reduction**'), because of:

(i) the exercise by the claimant or the defaulter of a right of set-off, whether under an agreement or otherwise; or

(ii) the operation of an agreement so far as it provides for the automatic set off of liabilities; and

(c) but for this section, the reduction of the defaulter's liability would not be taken into account when working out the obligations of SEGC in respect of the claim;

this section applies for the purposes of working out those obligations.

"(2) If:

(a) SEGC is required to satisfy the claim by paying an amount; and

(b) the set-off reduction consists of an amount;

the amount SEGC must pay in respect of the claim is reduced by the amount of the setoff reduction.

"(3) If:

(a) SEGC is required to satisfy the claim by paying an amount; and

(b) the set-off reduction consists of a number of securities;

then:

(c) the Board must work out the value of the securities; and

(d) the amount SEGC must pay in respect of the claim is reduced by the value worked out under paragraph (c).

"(4) If:

(a) SEGC is required to satisfy the claim by transferring securities of a particular kind; and

(b) the set-off reduction consists of a number of securities of that kind;

the number of securities that SEGC must transfer in respect of the claim is reduced by the number referred to in paragraph (b).

"(5) If:

(a) SEGC is required to satisfy the claim by transferring securities of a particular kind; and

(b) the set-off reduction consists of a number of securities that are not of that kind; then:

(c) the Board must work out:

(i) the value of the securities that constitute the set-off reduction; and

(ii) the number of securities of the kind referred to in paragraph (a) that are equal in value to the value worked out under subparagraph (i); and

(d) the number of securities that SEGC is required to transfer in respect of the claim is reduced by the number worked out under subparagraph (c)(ii).

"(6) If:

(a) SEGC is required to satisfy the claim by transferring securities of a particular kind; and

(b) the set-off reduction consists of an amount of money;

then:

(c) the Board must work out the number of securities of that kind that are equal in value to that amount; and

(d) the number of securities that SEGC must transfer in respect of the claim is reduced by the number worked out under paragraph (c).".

**Subsection 972(1):**

Omit "prescribed", substitute "determined in writing by the Board".

**After subsection 972(1):**

Insert:

"(1A) A rate of interest determined by the Board for the purposes of subsection (1):



(a) must not exceed the rate that, when the determination is made, is fixed by Rules of Court for the purposes of paragraph 52(2)(a) of the Federal Court of Australia Act 1976; and

(b) must not be less than 5% per year.

"(1B) As soon as practicable after determining a rate of interest for the purposes of subsection (1), the Board must cause a copy of the determination to be published in the Gazette.".

**Discretion to pay amounts not received etc. because of failure to transfer securities**

"972A.(1) If the Board is satisfied that:

(a) a person or partnership (in this section called the 'defaulter') has failed to discharge an obligation to transfer securities to another person or partnership (in this section called the 'entitled entity'); and

(b) the entitled entity:

(i) has made a claim under Division 6, 6A, 6B or 6C in respect of the failure and has had securities transferred to it, or an amount paid to it, in satisfaction of the claim; or

(ii) unless it is a participating exchange - would have been entitled to make a claim under Division 6B or 6C in respect of the failure if a participating exchange had not transferred securities to it for the purpose of remedying the failure; or

(iii) if it is a participating exchange - would have been entitled to make a claim under Division 6C in respect of the failure if it had not obtained securities for the purpose of remedying the failure; and

(c) if the defaulter had duly transferred securities in accordance with the obligation, an amount would have been paid, or property would have been transferred, to the entitled entity as the holder of the securities; and

(d) the entitled entity has not received, and is not entitled to receive (otherwise than from the defaulter):

(i) the amount or property; or

(ii) an equivalent amount or equivalent property in respect of securities transferred as mentioned in paragraph (h); and

(e) if subparagraph (b)(i) applies and an amount has been paid in satisfaction of the claim - the amount paid does not adequately compensate the entitled entity for the loss of the amount or property referred to in paragraph (c);

the Board may determine in writing that there be paid to the entitled entity, in respect of the loss of the amount or property referred to in paragraph (c), a specified amount that the Board considers to be fair and reasonable in all the circumstances.

"(2) If a determination is made under subsection (1), SEGC must pay to the entitled entity the amount specified in it."

**Paragraph 973(I)(a):**

Omit "or 952(3)", substitute ", 952(3), 954G(2), 954S(2) or 954ZA(2)".

**Subsection 973(3):**

Omit the subsection, substitute:

"(3) If.

(a) SEGC buys securities for the purpose of complying, in relation to a claim, with a provision referred to in paragraph (1)(a); and

(b) SEGC satisfies the claim by paying an amount to the claimant;

SEGC must, as soon as practicable after satisfying the claim, sell the securities and pay the proceeds of the sale into the Fund.

"(4) In this section:

'securities' includes security benefits, within the meaning of Division 6A, other than amounts of money."

**Paragraph 977(1)(a):**

Omit the paragraph, substitute:

"(a) a cash settlement provision requires SEGC to pay an amount in respect of a claim; and"

**Paragraph 977(1)(b):**

Omit "person", substitute "claimant".

**After subsection 977(1):**

Insert:

"(1A) Where:

(a) in relation to a claim, paragraph 973B(3)(c), (5)(c) or (6){c} requires the Board to work out the value of securities, or the number of securities that are equal in value to some other value or amount; and

(b) the value or number cannot be determined by agreement between the Board and the claimant;

the value or number is to be determined by arbitration in accordance with this section."

**Section 977:**

Add at the end:

"(7) In this section:

`cash settlement provision' means section 953, subsection 954G(3) or (4), 954H(2), 954R(2), 954S(3) or (4), 954T(2), 954ZA(3) or (4) or 954ZB(2), section 960 or subsection 964(1) or (2) of the Corporations Law of this jurisdiction."

**After subsection 979(1):**

Insert:

"(1A) The Board may, for the purposes of section 973A or 973B, by notice in writing served on a person, require the person to give SEGC specified information relating to the existence or exercise of rights of set-off."

**Subsection 979(2):**

After "(1)" insert "or (1A)".

**After subsection 980(1):**

Insert:

"(1A) Where SEGC allows a claim under Division 6A in respect of an obligation under a guaranteed securities loan, SEGC is subrogated to all the claimant's rights and remedies in relation to that obligation.

"(1B) Where SEGC allows a claim under subsection 954N(1) or 954P(2) or (3) in respect of an obligation to pay an amount or to transfer securities, SEGC is subrogated to all the claimant's rights and remedies in relation to that obligation.

"(1C) Where SEGC allows a claim under subsection 954P(4) in respect of a failure to transfer securities, SEGC is subrogated to all the rights and remedies that the claimant has in relation to that failure because of the subrogation effected by paragraph 954P(4)(c).

"(1D) Where SEGC allows a claim under subsection 954Y(2) in respect of a purported transfer of securities, SEGC is subrogated to all the claimant's rights and remedies in relation to that purported transfer.

"(1E) Where SEGC allows a claim under subsection 954Y(3) in respect of a 30 purported transfer of securities, SEGC is subrogated to:

(a) if the claimant is also the transferee referred to in that subsection - all the claimant's rights and remedies in relation to that purported transfer; or

(b) otherwise - all the rights and remedies that the claimant has in relation to that purported transfer because of the subrogation effected by paragraph 954Y(3)(c)."

**Subsection 980(5):**

After "6," insert "6A, 6B, 6C,".

**Subsection 983(2) (definition of "claim")**

After "6," insert "6A, 6B, 6C,".

**After section 983:**

Insert in Division 9 of Part 7.10:

**Power of Commission to modify effect of claims Divisions**

"983A.(i) The Commission may, in writing, declare that the provisions of a claims Division are to have effect in their application in relation to a particular transaction, or a particular class of transactions, either generally or as otherwise provided in the declaration, as if specified modifications were made to the provisions.

"(2) A declaration may relate to transactions whether entered into before or after the making of the declaration.

"(3) A declaration has effect accordingly.

"(4) The Commission must cause a copy of a declaration to be published in the **Gazette**.

"(5) A reference in this section to the provisions of a claims Division includes a reference to regulations made for the purposes of the provisions, or any of the provisions, of the Division.

"(6) In this section:

`claims Division' means Division 6, 6A, 6B, 6C, 7 or 8."

Corporations Legislation Amendment Bill (No. 2) 1991

## SCHEDULE 2

Section 5

### AMENDMENTS OF THE CORPORATIONS LAW RELATING TO FUNDRAISING

#### Section 9 (definition of "minimum subscription"):

(a) Omit "to the public".

(b) Omit "or for which the public are invited to subscribe", substitute ", or in relation to which an invitation to subscribe has been issued".

#### Section 9:

Insert:

"`excluded prospectus', in relation to securities of a body corporate, means a primary 10 prospectus in relation to the securities where:

(a) each offer of any of the securities for subscription that is contained in the prospectus is an excluded offer; and

(b) each invitation to subscribe for any of the securities that is contained in the prospectus is an excluded invitation;

`primary prospectus', in relation to securities of a body corporate, means a written notice or other instrument:

(a) inviting applications to subscribe for the securities; or

(b) offering the securities for subscription;

and includes a document that is taken because of paragraph 1030(1)(a) to be a primary 20 prospectus in relation to the securities;

`secondary prospectus', in relation to securities of a body corporate, means a written notice or other instrument:

(a) inviting offers to buy the securities; or

(b) offering the securities for purchase;

but does not include a document that is taken because of paragraph 1030(1)(a) to be a primary prospectus in relation to the securities;

'seller', in relation to a secondary prospectus in relation to securities of a body corporate, means the person inviting

offers to buy the securities, or offering the securities for purchase;".

**Section 96:**

Repeal the section.

**Paragraph 244(1)(a):**

Omit the paragraph, substitute:

"(a) issues a primary prospectus (other than an excluded prospectus) in relation to shares in the company; and".

**After section 993:**

Insert in Part 7.11:

***"Division 1 - Interpretation***

**Interpretation - statement in a prospectus**

"994. For the purposes of this Part, a statement is taken to be in a prospectus if it is:

(a) contained in a report or memorandum that appears on the face of, or is issued with, the prospectus; or

(b) incorporated by reference in the prospectus, whether the reference occurs in the prospectus or in any other document.".

**Section 1006(2):**

Omit "The", substitute "If the prospectus is a primary prospectus, the".

**Section 1006(2)(e):**

Omit the paragraph, substitute:

"(e) if the prospectus includes a statement that purports to be, or to be based on, a statement made by an expert and the expert gave consent under section 1032 to the issue of the prospectus - that expert;".

**After section 1006(Z):**

Insert:

"(2A) If the prospectus is a secondary prospectus, the reference in subsection 1005(1) to any person involved in the contravention includes a reference to all or any of the following persons:

(a) the seller;

(b) if the seller is a corporation - a person who was a director of the corporation at the time of the issue of the prospectus;

(c) if the prospectus includes a statement purporting to be made by an expert or to be based on a statement made by an expert and the expert gave consent under section 1032 to the issue of the prospectus - that expert;

(d) a person named, with the consent of the person, in the prospectus as stockbroker, sharebroker or underwriter of the seller or for or in relation to the sale of the securities;

(e) a person named, with the consent of the person, in the prospectus as an auditor, banker or solicitor of the seller or for or in relation to the sale of the securities;

(f) a person named, with the consent of the person, in the prospectus as having performed or performing any function in a professional, advisory or other capacity not mentioned in paragraph (c), (d) or (e) for the seller or in relation to the sale of securities."

**Section 1007:**

After "1006(2)" insert "or (2A)".

**Subsection 1008(1):**

Omit the subsection, substitute:

"(1) A person referred to in paragraph 1006(2)(b) or (c) or (2A)(b) is not, in the circumstances set out in the following provisions of this section, liable in an action under section 1005 to a person who suffered loss or damage as a result of a false or misleading statement in, or an omission from, the prospectus."

**Subsection 1008(2):**

Omit "The", substitute "If the person is a person referred to in paragraph 1006(2)(c), the".

**Subsection 1008(4):**

After "statement in" insert ", or omission from,".

**Subsection 1008(5):**

Omit the subsection.



**After section 1008:**

Insert:

**Directors not liable where they have reasonable grounds for believing prospectus to be correct**

"1008A.(1) A person referred to in paragraph 1006(2)(b) or (c) or (2A)(b) is not, in the circumstances set out in the following provisions of this section, liable in an action under section 1005 to a person who suffered loss or damage as a result of:

(a) a false or misleading statement (in this section called the `defective statement') in the prospectus; or

(b) an omission from a statement (in this section also called the `**defective statement**') in the prospectus.

"(2) If the defective statement:

(a) purports to be, or to be based on, a statement made by an expert; or

(b) is contained in what purports to be a copy of, or extract from, a report or valuation of an expert;

the person is not liable if it is proved that:

(c) the defective statement fairly represented the statement referred to in paragraph (a), or the purported copy or extract was a correct and fair copy of, or extract from, the report or valuation, as the case may be; and

(d) the person, after making such inquiries (if any) as were reasonable, had reasonable grounds to believe, and did believe until the time of the allotment, issue or sale of the securities, that the person who made the statement referred to in paragraph (a), or who made the report or valuation, as the case may be:

(i) was competent to make it; and

(ii) had given the consent required by section 1032 to the issue of the prospectus; and

(iii) had not withdrawn that consent.

"(3) If the defective statement:

(a) purports to be a statement made by an official person; or

(b) is contained in what purports to be a copy of, or extract from, a public official document; '

the person is not liable if it is proved that the defective statement fairly represented the statement referred to in paragraph (a), or that the purported copy or extract was a correct and fair copy of, or extract from, the document, as the case may be.

"(4) If none of paragraphs (2)(a) and (b) and (3)(a) and (b) applies in relation to the defective statement, the person is not liable if it is proved that he or she, after making such inquiries (if any) as were reasonable, had reasonable grounds to believe, and did believe until the time of the allotment, issue or sale of the securities:

(a) if paragraph (1)(a) applies - that the defective statement was true and not misleading; or

(b) if paragraph (1)(b) applies - that there were no material omissions from the defective statement."

**Subsection 1009(1):**

Omit the subsection.

**Subsection 1009(2):**

After "(h)" insert "or (2A)(c), (e) or (f)".

**Paragraph 1009(2)(a):**

Omit "an expert", substitute "a person referred to in that paragraph, or to be based 15 on a statement made by the person as a person referred to in that paragraph".

**After paragraph 1009(2)(a):**

Insert:

"(ba) an omission of any material matter from a statement in the prospectus purporting to be made by the person as a person referred to in that paragraph, or to be based on a statement made by the person as a person referred to in that paragraph; or".

**Paragraph 1009(2)(b):**

(a) Omit "an omission", substitute "any other omission".

(b) Omit "an expert", substitute "a person referred to in that paragraph".

**Subsection 1009(3):**

(a) After "1006(2)(e)" insert "or (2A)(c)".

(b) After "statement" (first occurring) insert "in, or an omission from, the prospectus".

**Paragraph 1009(3)(b):**

After "statement," insert "or of the omission, as the case may be,".

**Paragraph 1009(3)(c):**

Omit "that" (first occurring), substitute "in the case of a statement - that".

**Subsection 1009(4):**

After "(h)" insert "or (2A)(e) or (f)".

**Subsection 1009(4):**

After "statement" (first occurring) insert "in, or an omission from, the prospectus".

**Paragraph 1009(4)(a):**

After "statement," insert "or of the omission, as the case may be,".

**Paragraph 1009(4)(b):**

Omit "that" (first occurring), substitute "in the case of a statement - that".

**Subsections 1010(1) and (2):**

After "or (h)" insert "or (2A)(d), (e) or (f)".

**Subsection 1011(1):**

After "(f)" insert "or (2A)(d)".

**Subsection 1018(1):**

Omit "shall not", substitute "must not allot or issue,".

**Paragraph 1018(5)(b):**

After "occasion" insert "(if any)".

**After subsection 1018(7):**

Insert:

"(7A) For the purposes of this section, securities of a corporation are not taken to have stopped being listed for quotation on a stock market of a stock exchange merely because of a temporary suspension of quotation of the securities, unless the suspension results from removal of the corporation from an official list of the stock exchange."

**Section 1020:**

After "the issue of" insert ", or a form of offer to buy,".  
55.

**Subsection 1021(5):**

Omit the subsection, substitute:

"(5) The prospectus must contain a statement :

(a) in the case of a primary prospectus - that no securities will be allotted or issued; or

(b) in the case of a secondary prospectus - that no securities will be sold;

on the basis of the prospectus later than 6 months after the date of issue of the prospectus."

**Subsection 1021(6):**

Omit "The prospectus shall", substitute "If the prospectus is a primary prospectus, it must".

**After subsection 1021(6):**

Insert:

"(6A) If the prospectus is a secondary prospectus and the seller is not a corporation, 15 the prospectus must include an address in Australia for the purposes of section 1029A."

**Subsection 1021(8):**

Add at the end:

":(d) primary prospectuses;

(e) secondary prospectuses."

**Subsection 1021(9):**

Omit the subsection.

**Subsection 1021(13):**

Omit "The prospectus shall", substitute "If the prospectus is a primary prospectus, it must".

**After subsection 1021(13): Insert:**

"(13A) If the prospectus is a secondary prospectus, it must be signed by the seller."

**Paragraph 1022(2)(a)**

Before "any" insert "if the prospectus is a primary prospectus -

**After paragraph 1022(2)(a):**

"(ba) if the prospectus is a secondary prospectus:

(i) if the seller is a natural person - any person referred to in any of paragraphs 1006(2A)(a) to (f) inclusive; or

(ii) if the seller is a corporation - any person referred to in any of paragraphs 1006(2A)(b) to (f) inclusive; or".

**Paragraph 1022(2)(b):**

Before "any" insert "in any case -".

**After section 1022:**

Insert:

**Conditions requiring waiver of requirements etc. void**

"1022A. A condition is void if it:

(a) requires or binds an applicant for, or buyer of, securities of a corporation to waive compliance with any requirement of section 1021 or 1022; or

(b) purports to affect an applicant for, or buyer of, securities of a corporation with notice of any contract, document or matter not specifically referred to in the prospectus."

**Subsection 1023(1):**

Omit all the words before "contain", substitute "A primary prospectus in relation to of a corporation must".

**Subsection 1023(2):**

Omit "an invitation or offer referred to in subsection (1), a", substitute "a primary prospectus in relation to debentures of a corporation, the".

**Paragraph 1024(1)(b):**

After "issued" insert ", or sold, as the case requires,". 57.

**Subsection 1024(3):**

After "1006(2)" insert ", or 1006(2A), as the case requires,".

**Paragraph 1024(4)(a):**

After "1006(2)" insert ", or 1006(2A), as the case requires".

**Subsection 1024(7):**

(a) Omit "96" substitute "994".

(b) After "(13)" insert ",(13A)".

(c) After "1029," insert "1029A,".

**Paragraph 1025(2)(e):**

Omit "or purchase of".

**Paragraph 1025(3)(a):**

Omit "or purchase".

**Paragraph 1025(3)(b):**

Omit "or buy".

**Subparagraph 1025(3)(c)(i):**

Before "prospectus" insert "primary".

**Subparagraph 1025(3)(c)(ii):**

Omit "or purchase".

**Subparagraph 1025(3)(c)(iii):**

Omit "or buy".

**Subparagraph 1025(3)(c)(iv):**

Before "prospectus" insert "primary".

**Subparagraph 1026(2)(c)(ii):**

(a) Omit "or purchase".

(b) Omit "or buy".

**Subsection 1026(3):**

Before "prospectus" insert "primary".

After section 1027:

Insert:

**Application of sections 1025, 1026 and 1027 to sales of securities**

"1027A. The regulations may provide for the application of sections 1025, 1026 and with prescribed modifications, in relation to:

(a) an offer, or intended offer, of securities of a corporation, for purchase; or

(b) an invitation, or intended invitation, to buy securities of a corporation; or

(c) a secondary prospectus in relation to securities of a corporation.".

**Section 1029:**

Omit "which a" substitute, "whose securities a primary".

**After section 1029:**

Insert:

**Secondary prospectuses - documents to be kept**

"1029A.(1) The seller in relation to a secondary prospectus in relation to securities of a corporation must cause:

(a) a true copy, verified by a statement in writing, of any consent required by section 1032 to the issue of the prospectus; and

(b) a true copy, verified by a statement in writing, of every material contract referred to in the prospectus or, in the case of such a contract that is not reduced to writing, a

memorandum, verified by a statement in writing, giving full particulars of the contract;

to be deposited at the relevant address within 7 days after lodgment of the prospectus.

"(2) The seller must cause the copies of the documents so deposited to be kept at the relevant address for at least 6 months after lodgment of the prospectus and, during that period, must allow any person to inspect the copies without charge.

"(3) In this section:

`relevant address' means:

(a) if the seller is a corporation - the registered office of the corporation; or

(b) in any other case - the address specified in the prospectus for the purposes of this section."

**Subsection 1030(i):**

Omit "Where", substitute "Subject to subsection (1A), where".

**Paragraph 1030(1)(a):**

After "be a" insert "primary".

**After subsection 1030(1):**

Insert:

"(1A) Subsection (1) does not apply in relation to an offer for sale, or an invitation to make an offer to buy, if:

(a) the offer or invitation is made or issued at an official meeting of a securities exchange in the ordinary course of trading on a stock market of that securities exchange; and

(b) a sale resulting from the acceptance of the offer, or from the acceptance of an offer made because of the invitation, as the case may be, would not be a transaction that, when reported to the securities exchange, would, under the securities exchange's business rules or listing rules, be described as `special'."

**Subsection 1030(7):**

After "section" insert "(other than subsection (1A))".

**Subsection 1031(1):**



(a) Before "is void" insert ", or any sale, whenever made, pursuant to the prospectus, as the case requires,".

(b) Omit "the corporation", substitute "the responsible person".

**Subsection 1031(2):**

Omit "a corporation", substitute "a person".

**Paragraph 1031(2)(b):**

After "if" (first occurring) insert "the person is a corporation and".

**Subsection 1031(3):**

Omit all the words after "application of", substitute "the responsible person in relation to the prospectus concerned made before any security is purported to be allotted or issued, or sold, as the case requires, as mentioned in subsection (1), exempt the allotment or issue, or the sale, as the case may be, of the securities from the operation of this section.".

**Subsection 1031(5):**

Omit the subsection, substitute:

"(5) Without limiting the application of any of the provisions of this section apart from this subsection, this section applies, in relation to securities agreed to be taken by a person underwriting an offer of, or invitation in relation to, those securities that is contained in a prospectus, as if the person had applied for those securities pursuant to the prospectus.".

**Subsection 1031(6):**

(a) Omit "corporation that", substitute "person who".

(b) Omit "corporation is", substitute "person is".

**Subsection 1031(7):**

After "directors" insert "of the corporation referred to in subsection (1)".

**Subsection 1031(9):**

Omit "inviting persons to subscribe for, or offering to accept subscriptions for,", substitute "in relation to".

**Subsection 1031(10):**

After "applicant for" insert ", or buyer of,".

**Subsection 1031(11):**

Insert:

"'responsible person', in relation to a prospectus in relation to securities of a corporation, means:

(a) in the case of a primary prospectus - the corporation; or

(b) in the case of a secondary prospectus - the seller in relation to the secondary prospectus.".

**Subsection 1033(1):**

Omit all the words after "direct", substitute:

"that:

(a) if the prospectus is a primary prospectus - no further securities to which the prospectus relates be allotted or issued; or

(b) if the prospectus is a secondary prospectus - no further securities be sold pursuant to the prospectus.".

**Paragraph 1033(7)(b):**

Omit the paragraph, substitute:

"(b) if the order relates to a primary prospectus - a person is not entitled to lodge a further primary prospectus in relation to the securities, other than a supplementary prospectus under section 1024; and

(c) if the order relates to a secondary prospectus - a person is not entitled to lodge a further secondary prospectus in relation to securities that are or include any of the securities to which the first-mentioned secondary prospectus relates, unless:

(i) the seller in relation to the further secondary prospectus is not, and is not an associate of, the seller in relation to the firstmentioned secondary prospectus; or

(ii) the further secondary prospectus is a supplementary prospectus under section 1024.".

**Subsection 1035(1):**

Omit "A", substitute "Subject to subsection (IA), a".

**After subsection 1035(1):**

Insert:

"(1A) Subsection (1) does not prohibit a company from making an allotment of shares

(a) the allotment is an excluded issue; or

(b) the offer or invitation referred to in that subsection is an excluded offer or an excluded invitation."

**Subsection 1036(1):**

Omit all the words before "4 months" (first occurring), substitute "If subsection 1035(1) still prohibits allotment of shares at the end of".

**Section 1038:**

Omit "prospectus", substitute "primary prospectus (other than an excluded prospectus)".

**Section 1039:**

After "applicant for" insert ", or buyer of,".

**Section 1040:**

(a) Omit "A", substitute "Subject to subsection (2), a".

(b) Omit "prospectus" (first occurring), substitute "primary prospectus".

(c) Add at the end:

"(2) Subsection (1) does not prohibit a corporation from making, or an officer or promoter of a proposed corporation from authorising or permitting, an allotment or issue of securities if:

(a) the allotment or issue is an excluded issue; or

(b) the prospectus referred to in that subsection is an excluded prospectus.

"(3) The seller in relation to a secondary prospectus must not sell securities on the basis of the prospectus after the end of 6 months after the issue of the prospectus."

**Section 1041:**

Omit "or issue", substitute ", issue or sale".

**Section 1042:**

Repeal the section.

**Subsection 1043(1):**

(a) Omit "Where", substitute "Subject to subsection (3), where".

(b) Omit "or purchase".

(c) Omit "or buy".

**Section 1043:**

Add at the end:

"(3) This section does not apply to money paid because of an excluded offer or an excluded invitation."

**Paragraph 1066(1)(a):**

Add at the end "and that approval has not been revoked".

**Subsection 1066(2):**

Omit the subsection, substitute:

"(2) Where a deed has ceased after the commencement of this Division to be an d deed, section 1065 does not prevent:

(a) a person from asking the management company to do an act involved in complying with the terms of a buy-back covenant contained, or taken to be contained, in the deed; or

(b) the management company from doing such an act."

**Subparagraph 1069(1)(e)(iii):**

After "keep" insert ", or cause to be kept,".

**Paragraph 1069(1)(f):**

After "send," insert "or cause to be sent,".

**Subsection 1073(1A):**

Omit the subsection, substitute:

"(1A) A person must not contravene:

(a) a covenant contained, or taken to be contained, in a deed that is, or has at any time been, an approved deed; or

(b) a covenant deemed, because of subsection 1069('n, to be contained in a deed; or

(c0 a covenant deemed, because of subsection 1069(8), to be given by a deed."

**Subsection 1073(2):**

Add at the end "by notice in writing given to the management company".

**Section 1073:**

Add at the end:

"(3) The obligations of the parties to a contract are suspended:

(a) during the period of 21 days after a notice is given under subsection (2) in relation to the contract; and

(b) during the period beginning when an application is made under subsection 1013A(1) in relation to a notice so given and ending when the application, and each appeal (if any) arising out of it, have been finally determined or otherwise disposed of.

"(4) Subject to an order under subsection t073A(3), a notice under subsection (2) of this section takes effect:

(a) unless, within 21 days after the notice is given, the management company applies under subsection 1073A(1) in relation to the notice - at the end of those 21 days; or

(b) otherwise - at the end of the period during which the obligations of the parties to the contract are suspended because of paragraph (3)(b) of this section."

**After section 1073:**

Insert:

**Court may affirm voidable contract where breach is not material**

1073A.(I) Within 21 days after a person gives a notice under subsection 1073(2), the management company may apply to the Court for an order declaring the notice to have had no effect.

"(2) The Court may extend the period within which the management company may apply under subsection (1), even if the notice under subsection 1073(2) has taken effect.

"(3) If, on an application under subsection (1), the Court is satisfied that:

(a) the offer or invitation that led to the contract being entered into contravened section 1018, but only because of a contravention of Division 2 of Part 7.12 (or of regulations in force for the purposes of a provision of that Division) that:

(i) was minor or insubstantial; and

(ii) has not materially prejudiced, and is not reasonably likely to prejudice materially, the interests of the person who gave the notice under subsection 1073(2); and

(b) in all the circumstances, it is just and equitable to declare the notice to have had no effect;

the Court may by order so declare.

"(4) On an application under subsection (1), the onus of proving the matter referred to in subparagraph (3)(a)(ii) is on the management company."

**Sections 1079 and 1080:**

Repeal the sections.

### SCHEDULE 3

Section 6

#### AMENDMENTS OF THE CORPORATIONS LAW RELATING TO REGISTRATION NUMBERS OF COMPANIES AND REGISTRABLE BODIES

##### Section 9:

Omit the definition of "public document", substitute:

"'public document', in relation to a body corporate, means:

(a) an instrument of, or purporting to be signed, issued or published by or on behalf of, the body that:

(i) when signed, issued or published, is intended to be lodged or is required by or under this Law or the ASC Law to be lodged; or

(ii) is signed, issued or published under or for the purposes of this Law, the ASC Law or any other Australian law; or

(b) an instrument of, or purporting to be signed or issued by or on behalf of, the body that is signed or issued in the course of, or for the purposes of, a particular transaction or dealing; or

(c) without limiting paragraph (a) or (b), a business letter, statement of account, invoice, receipt, order for goods, order for services or official notice of, or purporting to be issued or signed by or on behalf of, the body;".

##### Section 9:

Insert:

"`abbreviation', in the case of a reference to a particular abbreviation containing one or more full stops, has a meaning affected by section 99A;".

##### Before section 100:

Insert in Division 8 of Part 1.2:

##### Abbreviations containing full stops

"99A. A reference to a particular abbreviation containing one or more full stops includes a reference to that abbreviation without the full stop, or without one or more of the full stops, as the case may be.".

**Subsection 102A(3):**

Omit ", 344,", substitute "or 344, subsection 383C(1) or section". 67.

**After subsection 219(3):**

Insert:

"(3A) Subsection (3) has effect subject to Division 2 of Part 4.2."

**Subparagraph 362(2)(c)(ii):**

Omit "abbreviated", substitute "abbreviation".

**After subsection 362(4):**

Insert:

"(4A) Subsection (4) has effect subject to Division 2 of Part 4.2."

**Paragraph 362(9)(b):**

Omit "abbreviated", substitute "abbreviation".

**Heading to Part 4.2:**

Omit the heading, substitute:

**"PART 4.2 - NAMES AND REGISTRATION NUMBERS**

***"Division 1 - Names".***

**After section 383A:**

Insert in Part 4.2:

***"Division 2 - Exemptions from requirements to publish registration numbers***

**Machine-produced receipts**

"383B. Neither of paragraphs 219(3)(a) and 362(4)(a) applies in relation to a receipt

that:

(a) is produced by an electronic, mechanical or other device;  
and



(b) sets out information reproduced from, or worked out on the basis of, information entered, recorded or stored in the device.

### **Transport documents**

"383C.(1) On application by a body, the Commission may by writing exempt the body, or a specified class of bodies that includes the body, from complying (either generally or as otherwise specified) with subsection 219(3) or 362(4), as the case requires, in relation to specified documents.

"(2) However, the Commission may do so only if it is satisfied that the exemption is necessary or desirable in the interests of promoting or maintaining consistency in international practices relating to the form, content or use of transport documents.

"(3) An application under subsection (1) must:

(a) specify the documents to which the exemption applied for would relate; and

(b) if the application is for an exemption to be given to a class of bodies - specify the class; and

(c) set out why, in the applicant's opinion, the exemption should be given to the body, or to that class, as the case requires.

"(4) Subsection (1) has effect subject to section 102A.

"(5) The Commission may require an applicant under subsection (1) to give the Commission such further information in relation to the application as the Commission thinks necessary.

"(6) An exemption may be given subject to specified conditions that, in the Commission's opinion, are necessary or desirable to ensure that the registration number of a body to which the exemption relates can easily be found out by persons to whom the body issues or publishes documents specified in the exemption.

"(7) For example (but without limitation), an exemption might be subject to a condition that a body to which the exemption relates must display its name and registration number in a particular way at each place where documents specified in the exemption are issued or published.

"(8) A body to which an exemption relates must not contravene a condition to which the exemption is subject.

"(9) On application by the Commission, the Court may order a body to which an exemption relates to comply with a condition:

(a) to which the exemption is subject; and

(b) that the body has contravened.

"(10) The Commission may by writing vary or revoke an exemption.

"(11) An exemption, or a variation or revocation of an exemption, takes effect on the day when:

(a) the exemption, or the variation or revocation of the exemption, as the case may be, is given to the body that applied for the exemption; or

(b) a copy of the exemption, or of the variation or revocation, as the case may be, is published in the *Gazette*;

whichever happens later.

"(12) In this section:

`body' means a company or a registrable body;

`document' includes a public document, or an eligible negotiable instrument, of a body;

`transport document' means a document (for example, but without limitation, a ticket, waybill or bill of lading) used in connection with the transportation, by sea, land or air, of persons, goods or mail."

### **Schedule 3:**

Insert before "Section 408:"

#### **"Subsection 383C(8):**

Penalty: \$1,000 or imprisonment for 3 months."

**SCHEDULE 4**

Section 7

**MISCELLANEOUS SUBSTANTIVE AND TECHNICAL AMENDMENTS OF THE  
CORPORATIONS LAW**

**Section 9 (paragraph (a) of the definition of "clients'  
segregated account"):**

Omit the paragraph, substitute:

"(a) the person maintains, whether in Australia or elsewhere,  
with an Australian bank; and".

**Section 85A:**

Omit "law", substitute "Law".

**Paragraph 224(1)(d):**

Omit the paragraph, substitute:

"(d) is convicted as mentioned in subsection 229(3);".

**Subsection 240(4):**

Omit "each" substitute "one".

**Paragraph 318(2)(b):**

Omit "members of", substitute "members or".

**Section 369:**

(a) Omit "that word, is the final word", substitute "either of  
those expressions, is the final expression".

(b) Omit "company".

**Paragraph 874(1)(b):**

After "Part" insert "or a corresponding previous law".

**Subsection 874(3):**

Omit "in Australia (whether in this jurisdiction or not),",  
substitute "(whether in 25 Australia or elsewhere),".

**After section 955:**

Insert:

## **Extended application of Division to non-marketable securities**

"955A.(1) If a declaration by the Commission under subsection 1113A(1) is in force in relation to particular non-marketable securities, or a particular class of non-marketable securities:

(a) this Division, including the regulations made for the purposes of the provisions of this Division, applies in relation to those securities, or securities of that class, as if those securities, or securities of that class, were marketable securities; and

(b) the Commission may, by writing, declare that this Division, and regulations 10 made for the purposes of this Division, are to have effect in relation to their application to those securities, or securities of that class, subject to modifications specified in the declaration.

"(2) A declaration under paragraph (1)(b) has effect accordingly.

"(3) The Commission must cause a copy of a declaration under paragraph (1)(b) to be published in the *Gazette*.

"(4) In this section:

'non-marketable securities' means securities that are not marketable securities."

### **Subsection 995(4):**

Omit "subsection (1)", substitute "subsection (2)".

### **Subsection 1030(3):**

Omit "Act", substitute "Law".

### **After section 1113:**

Insert in Part 7.13:

### **Power of Commission to extend application of Division 3**

"1113A.(1) The Commission may, by writing, declare that Division 3, and regulations made for the purposes of the provisions of that Division, are to apply to particular non-marketable securities, or a particular class of non-marketable securities, as if those securities, or securities of that class, were marketable securities or marketable 30 rights within the meaning of that Division.

"(2) In a declaration under subsection (1), the Commission may also specify modifications of Division 3, and of regulations made for the purposes of the provisions of that Division, that are to have effect in relation to the application of that Division and those regulations to the non-marketable securities, or the class of non-marketable 35 securities, to which the declaration relates.

"(3) A declaration under subsection (1) has effect accordingly.

"(4) The Commission must cause a copy of a declaration under subsection (1) to be published in the Gazette.

"(5) In this section:

'non-marketable securities' means securities that are not marketable securities or marketable rights within the meaning of Division 3."

**Paragraph 1224(1)(c):**

Omit all the words after "account", substitute "of the person as required by this Chapter or a corresponding previous law; or".

**Subsection 1224(1):**

Omit all the words after "specified bank accounts", substitute "that the person holds or maintains (whether in Australia or elsewhere), subject to such terms and conditions as the Court imposes".

**SCHEDULE 5**

Section 8

**COMMENCEMENT AND APPLICATION OF CHANGES TO CORPORATIONS LAW  
RESULTING FROM THIS ACT**

**After Division 1 of Part 9.10:**

Insert:

***"Division 2 - Changes resulting from the Corporations  
Legislation Amendment Act (No. 2) 1991***

**Commencement of certain changes**

"1365.(1) The following provisions of this Law, as in force after the commencement 10 of section 4 of the *Corporations Legislation Amendment Act (No. 2) 1991*, are taken to have commenced on 1 January 1991:

- (a) the definition of 'property' in subsection 920(1);
- (b) subsection 927(SA);
- (c) paragraph 961A(b);
- (d) paragraph 966A(b).

"(2) The following provisions of this Law, as in force after the commencement of section 5 of the *Corporations Legislation Amendment Act (No. 2) 1991*, are taken to have commenced on 1 January 1991:

- (a) subparagraph 1069(1)(e)(iii);
- (b) paragraph 1069(1)(f).

"(3) The following provisions of this Law, as in force after the commencement of section 7 of the *Corporations Legislation Amendment Act (No. 2) 1991*, are taken to have commenced on 1 January 1991:

- (a) paragraph (a) of the definition of 'clients' segregated account' in section 9;
- (b) section 369;
- (c) paragraph 874(1)(b); (d) paragraph 1224(1)(c).

**Application of certain changes**

"1366.(1) In relation to a claim under Division 7 of Part 7.10 in respect of a loss that a person became aware of before the commencement of section 4 of the *Corporations Legislation Amendment Act (No. 2) 1991*:

(a) section 959 of this Law, as in force after that commencement, does not apply; and

(b) section 959 of this Law, as in force before that commencement, continues to apply.

"(2) In relation to a prospectus issued before the commencement of section 5 of the *Corporations Legislation Amendment Act (No. 2) 1991*:

(a) the following Division and sections of this Law, as in force after that commencement, do not apply:

(i) Division 4 of Part 7.11;

(ii) section 1029;

(iii) section 1029A;

(iv) section 1031

(v) section 1040;

(vi) section 1041; and

(b) the following Division and sections of this Law as in force before that commencement continue to apply:

(i) Division 4 of Part 7.11;

(ii) section 1024;

(iii) section 1031;

(iv) section 1040;

(v) section 1041."

#### **NOTES**

1. No. 109, 1989, as amended. For previous amendments, see No. 110, 1940; and No. 110, 1991.

2. No. 110, 1990.

## ADDITIONAL NOTES

1, On the commencement of section 4 of this Act, headings to sections 938 and 939 of the Corporations Law set out in section 82 of the Corporations Act 1989 are altered by omitting "reportable".

2. On the commencement of section 5 of this Act, headings of sections of the Corporations Law set out in section 82 of the Corporations Act 1989 are altered as follows:

(a) the heading to section 1008 is omitted and the following heading is substituted: **"Non-consenting directors not liable"**;

(b) the heading to section 1023 is altered by inserting **"primary"** before "prospectuses";

(c) the heading to section 1029 is omitted and the following heading is substituted: "Primary prospectuses - documents to be kept";

(d) the heading to section 1038 is altered by inserting **"primary"** before 20 "prospectus";

(e) the heading to section 1040 is altered by omitting "or issued" and substituting ", issued or sold";

(f) the heading to section 1041 is altered by omitting "or issue" and substituting ", issue or sale".

3. On the commencement of section 6 of this Act, the heading to section 362 of the Corporations Law set out in section 82 of the Corporations Act 1989 is altered by omitting "name etc." and substituting **"body's name and registration number"**.

4. On the commencement of section 7 of this Act, headings of sections of the Corporations Law set out in section 82 of the Corporations Law Act 1989 are altered 30 as follows:

(a) the headings to sections 150 and 151 are altered by omitting "or 3" and substituting ", 3 or 4";

(b) the heading to section 323 is altered by inserting "or 4" after "3";

(c) the heading to section 1113 is altered by omitting "Powers" and substituting "General powers".



## CLAUSE BY CLAUSE COMMENTARY

This paper deals sequentially with the contents of each clause of the exposure draft.

### PART 1 - PRELIMINARY

#### Clause 1 - Short Title

The short title is to be the Corporations Legislation Amendment Act (NO. 2) 1991.

#### Clause 2 - Commencement

2. It is proposed that the Corporations Legislation Amendment Sill (No. 2) 1991 (except Part 3) commence on the day on which it receives Royal Assent.

3. It is proposed that Part 3, which makes a technical amendment to subsection 1224(1), be taken to have commenced on 1 January 1991, the date on which the major portion of the new national scheme came into effect.

### PART 2 - AMENDMENTS TO THE CORPORATIONS LAW

#### Clause 3 - Corporations Law

4. The phrase "Corporations Law" is defined as the Corporations Law set out in section 82 of the Corporations Act 1989.

#### Clause 4 -..Amendments relating to the National Guarantee Fund

#### Clause 5 - Amendments relating to fundraising

#### Clause 6 - Amendments relating to registration numbers of companies and registrable bodies

#### Clause 7 - Miscellaneous and technical amendments of he Corporation Law

#### Clause 8 - Commencement and application of changes to the Corporations Law resulting from this Act

5. These provisions will bring into effect the proposed amendments of the Law as set out in Schedules 1 (National Guarantee Fund), 2 (fundraising), 3 (registration numbers), 4 (miscellaneous and technical) and 5 (commencement and application of changes).

PART 3 - AMENDMENTS OF THE CORPORATIONS  
LEGISLATION AMENDMENT ACT 1990

Clause 9 - Principal Act

6. The Corporations Legislation Amendment Act 1490 is defined as the Principal Act for the purposes of Part 3.

Clause 10 - Schedule 1

7. The Corporations Legislation Amendment Act 1990 amended subsection 1224(1) (of the Law) which deals with the power of the Court to restrain dealings with the bank accounts of a futures broker by substituting "that the person holds or maintains in Australia (whether in this jurisdiction or not)" for the expression "of the person".

8. The amendment proposed in the Bill makes it clear that the substitution was intended to amend the last reference to "of the person" occurring in subsection 1224(1).

SCHEDULE 1 - AMENDMENTS OF THE CORPORATIONS LAW RELATING TO  
THE NATIONAL GUARANTEE FUND

Background

9. "Exchange" is defined in section 9 of the Corporations Law to mean Australian Stock Exchange Limited. It is used in this sense many times in the Bill and this explanatory paper.

10. In this Bill and explanatory paper, the term "Participating exchange\*" is used a number of times. This phrase is defined in section 761 of the Law to mean the Australian Stock Exchange Limited and other securities exchanges (but not Exchange subsidiaries) that are members of the Securities Exchanges Guarantee Corporation (SEGC) (see sections 66 to 69 of the Corporations Act 1989 and sections 926 to 928 of the Law). The SEGC administers the National Guarantee Fund (see Part 7.10 of the Law).

11. Also in the Bill and explanatory paper, reference is made to the "business rules" of a participating exchange. Any amendment to the business rules or listing rules of a securities exchange may be disallowed by the Attorney-General in accordance with the procedure set out in section 774 of the Law.

12. Under section 774, a securities exchange must lodge with the Australian Securities Commission (ASC) written notice of any amendment of its business or listing rules as soon as practicable after the amendment is made (subsection 774(1)). If the amendments are not lodged with the ASC within 21 days

after they are made, the amendments cease to have effect (subsection 774(3)). The ASC must send to the Attorney-General a copy of the notification as soon as possible after its receipt (subsection 774(4)). Within 28 days of receipt of the notice by the ASC, the Attorney-General may, if he or she thinks fit, disallow the whole or a specified part of such an amendment (subsection 774(5)).

13. In the event that the Attorney-General decides to disallow an amendment to the business or listing rules, the ASC must, as soon as practicable after the disallowance, give notice of the disallowance to the relevant securities exchange. On receipt of that notice the amendment, to the extent of the disallowance, ceases to have effect (subsection 774(6)).

## Section 920 - Interpretation

### Background

14. The proposed amendments insert additional definitions and amend certain existing definitions in subsection 920(1).

### Proposed amendments

15. The proposed amendments:

- insert references to the new Divisions 6A (Securities loans guarantees), 6B (Claims in respect of net obligations) and 6C (Transfer delivery service guarantees) of Part 7.10 in the definition of "claim";
- ensure that the definition of "settlement documents" in section 920 does not apply in relation to guaranteed securities loans;
- ensure that the definition of "transaction" (currently defined as a sale or purchase of securities) includes a guaranteed securities loan.

16. In addition, a proposed amendment inserts "securities" in the definition of "property". This is relevant particularly to Division 8 claims relating to dealer insolvency. Section 963 requires the claimant to show that "property" was entrusted to or received by the dealer on behalf of or as trustee for a person. The amendment ensures the coverage of, for example, FAST securities for which certificates are not issued. The comparable definition in the Securities Industry Act referred to "money, securities, and documents of title to, and instruments of transfer relating to, securities". This amendment thus confirms that the coverage has not been reduced by any change of words from those in the Securities Industry Act.

17. The amendments to section 920 insert the following additional definitions:

- "clearing nominee" - which is defined as a subsidiary of a participating exchange operated for the purpose of facilitating the transfer of securities. Its use is described in more detail in the introduction to Division 6C below.
- "marketable securities" - which is defined to mean marketable securities or marketable rights within the meaning of Division 3 of Part 7.13.

18. It also provides cross-references to the definitions of "borrower", "guaranteed securities loan", "guaranteed transfer delivery service arrangement", "transfer" and "transfer documents".

#### Proposed Section 924 Transfer of securities etc. and Payment of money

##### Background

19. Section 924 was repealed by the Corporations Legislation Amendment Act 1990. A new section 924 is proposed.

##### Proposed Amendment

20. This proposed section is an interpretation provision which will provide the meaning of the following words used in Part 7.10 (but not for the purpose of Division 7): transfer, transfer documents, transferee and transferor.

21. Under proposed section 924, the transferor transfers securities to a transferee if, and only if, the transferor delivers or causes to be delivered to the transferee documents (called "transfer documents") that are sufficient to enable the transferee to become the registered holder of the securities without the transferor doing anything more (or causing anything more to be done) by way of executing, or supplying documents (proposed subsection 924(2)). Thus paragraph 954Y(1)(e) defines default by the clearing nominee in terms of a purported transfer that is not sufficient for the purpose referred to in subsection 924(2). Special provision is made for marketable rights (paragraph 924(2)(b))

22. Subsection 924(3) provides that where a person causes property (other than securities or money) to be transferred, or causes title documents to be delivered, to another person, the first person is taken to have transferred the property to the other person.

23. Similarly, if a person causes money to be paid to another person, the first person is taken to have paid the money to the other person (subsection 929(4)).

#### Proposed Section 924A - Attributing securities and payments to transactions

##### Background

24. The cash settlement procedure of the Australian Stock Exchange Limited (the Exchange) requires each member to pay to the clearing house of the Exchange (or the clearing nominee to pay to the member as the case may be) any net amount calculated by deducting the total of the amounts payable to a dealer by other dealers in respect of transactions settled that day from the total amount payable by the dealer to other dealers in respect of transactions settled that day. This amount is provided by the Exchange clearing house to each member in a Settlement Statement.

25. A netting procedure may be instituted by the Exchange in respect of delivery of securities (see Division 6B).

26. Where payment is required to be made to the Exchange or securities are required to be delivered to the Exchange by a dealer in respect of a number of transactions entered into by the dealer it may not be possible to ascertain how the amount paid or the securities delivered are to be attributed to each transaction. Such difficulty arises where the dealer has failed to deliver the full amount of money or all the securities the subject of the settlement statement to the participating exchange.

27. The Business Rules of the Exchange may set out rules for determining how money and securities are to be attributed to transactions in these circumstances.

##### Proposed Amendment

28. The proposed section gives effect, for the purposes of Part 7.10, to the Business Rules of a participating exchange which determine how many of the securities transferred and how much of the payment made is attributable to each of a number of *transactions*, when it is not otherwise possible to tell how the money or securities are to be attributed.

#### Section 927 - Management Sub-Committee

##### Background

29. Sub-section 927 (2) expressly empowers the Board to delegate all or any of its powers to a management sub-

committee except the power to delegate (section 927), to determine that a payment be made from the Fund into a securities industry development account (section 944) and to determine that a late claim is not barred (subsections 954(5) (in Division 6) and 969(3) (in Division 8)).

#### Proposed amendment

30. It is proposed to insert in the list of powers that cannot be delegated in subsection 927(2) the references to the comparable provisions in proposed Divisions 6A, 6B and 6C (proposed subsections 954F(2), 954Q(2) and 9542(2) and Division 7 (proposed section 959(3)) which allow the Board to determine that a late claim not be barred.

31. Further, it is proposed to insert subsection 927(SA) which provides that a delegation under section 927 continues in force even if there is a change in the membership of the Board or of the sub-committee.

#### Proposed Section 927A - Sub-delegation by management sub-committee

##### Background

32. Section 927 expressly empowers the Board to delegate all or any of its powers (with only the specified exceptions) to a management sub-committee, and provides powers are to be exercised by a majority of the members of the sub-committee. Some of the powers of the Board are exercised in situations where participation by a sub-committee would be inconvenient. An example is the individual assessment of smaller claims.

##### Proposed amendment

33. The proposed amendment would assist the efficient operation of the Board by allowing the sub-committee to delegate a delegated power, authority or discretion of the sub-committee to a member of the sub-committee or of the Board or to an officer of the Securities Exchanges Guarantee Corporation (SEGC) (proposed subsection 927A(1)).

34. The delegation must be in writing signed by a majority of the members of the sub-committee and may be varied or revoked (subsections 927A(2) and (3)). A delegation continues in force even if there is a change in the membership of the subcommittee (proposed subsection 927A(4)). A "power, authority or discretion" {which is defined in subsection 927A(7)} exercised by a person under a delegation is taken to have been exercised by the Board {subsection 972A(5)}. A delegation of a power, authority or discretion does not

prevent its exercise by the Board or management sub-committee that made the delegation (subsection 927A{6}).

35. Section 109ZE has effect in relation to a delegation subject to section 927A {subsection 927A(7)}. Section 109ZE makes certain provisions regarding the effect of the delegation of powers, eg, that the powers that may be delegated do not include that power to delegate.

36. Certain words and phrases used in the proposed section are defined in subsection 927A(8).

#### Proposed Section 928A - Interpretation - borrowing

37. Proposed section 928A provides that a reference to borrowing money includes a reference to *obtaining* credit. This *amendment* relates to proposed section 930A.

#### Section 930 - Property constituting Fund

##### Background

38. Section 930 lists the property which constitutes the National Guarantee Fund.

##### Proposed amendment

39. The proposed amendment, by adding paragraph (fa), includes in the list of property which constitutes the Fund, money paid into the Fund under proposed subsection 930B(2).

40. A further proposed amendment would omit paragraph 430(j) and substitute a paragraph which would make money paid to the SEGC for the purposes of a claim under Divisions 6, 6A and 6C part of the Fund.

41. This provision would include in the Fund the purchase price paid to the SEGC by a buying dealer making a claim under section 950 in respect of default by the selling dealer, the collateral paid to the SEGC by a lender claiming in respect of a borrower's failure to return securities under proposed section 954G and amounts received from a participating exchange which has exercised its rights of subrogation under proposed paragraph 954ZB(1)(d).

#### Proposed Section 930A - Power to borrow etc. for purposes of the Fund

42. Section 929 requires the SEGC to hold the assets of the Fund in trust for the purposes set out in the Law.

43. The SEGC has requested that it be empowered to borrow and to give security over Fund assets so as to allow the SEGC greater flexibility to determine the optimum time to liquidate assets which may be required to meet claims. Occasions may arise when it may be more desirable to borrow funds for a prompt pay-out of a claim rather than liquidate Fund assets.

44. Proposed subsection 930A(1) empowers the SEGC to borrow on such terms and conditions as the Board of the SEGC thinks appropriate if the Board considers that it is in the interests of the sound financial management of the Fund. Proposed subsection 930A(2) empowers the SEGC to give security, including security over the assets of the Fund, in relation to a borrowing under proposed subsection 930A(1).

45. Because an exchange, rather than the SEGC, may have established relations with banks and other *lending institutions*, proposed subsection 930A(3) empowers the SEGC to give security over the assets of the Fund in relation to the participating exchange's obligations to repay a loan when such loan by the participating exchange was used to lend money to the SEGC.

#### Proposed Section 930B - Money borrowed and paid to SEGC

46. Money borrowed by the SEGC which is paid to the SEGC under proposed subsection 930A(1) is to be paid into the National Guarantee Fund (subsection 930B(2)).

47. For the purposes of Division 4 (Levies where Fund less than minimum amount), if money has been borrowed to meet a claim on the SEGC, and the money has been paid into the Fund but the claim has not been paid out of the Fund, the amount in the Fund is reduced by the amount of any borrowed moneys (subsection 930B(3)). This provision will ensure that the Board retains its flexibility in assessing whether or not to determine that a levy is payable.

48. If, for example, the Board made an assessment that it was likely that it might recover from a defaulting dealer only a small proportion of the amount of a claim, it may then levy without waiting for the borrowed funds to be paid out of the Fund in satisfaction of the claim.

#### Proposed Section 930C - Money borrowed and not paid to SEGC

49. When money is borrowed under subsection 930A(1) and is not paid to the SEGC, but is payable at the direction of the SEGC (for example where the SEGC establishes a line of credit with a financial institution), the SEGC may direct that it be paid only for the purposes listed in section 932. Subsection



932(1) provides a list of the allowable payments out of the National Guarantee Fund.

## Section 932 - Payments out of Fund

### Subsection 932(1)

#### Background

50. Subsection 932(1) lists the payments which the Board may pay out of the Fund.

#### Proposed Amendment

51. The proposed amendment would insert paragraphs 932(1)(ba) and (da) which would enable the Board to pay from the National Guarantee Fund:

- money payable under proposed section 972A, which will provide a discretion to pay amounts in respect of dividends, rights etc which a claimant would have received if a default had not occurred in respect of the transfer of securities; and
- principal, interest or other amounts due in respect of money borrowed to the extent that interest and profits from the investment of the Fund did not cover these payments (see section 935).

### Subsections 932(2) and (3)

#### Background

52. Subsection 932(2) defines "claim" in paragraphs 932(1)(a) and (b) as a claim under Division 6, 7 or 8 of Part "7.10 or a claim that is a transferred claim in relation to a joining exchange. Subsection 932(3) provides that amounts payable out of the Fund in connection with claims under Division 6 (Contract guarantees) or 7 (Unauthorised transfers) have priority over amounts payable in connection with claims under Division 8 (Claims in respect of insolvent members).

#### Proposed Amendments

53. The proposed amendment to subsection 932(2) inserts references to proposed Divisions 6A (Securities loans guarantees), 6B (Claims in respect of net obligations) and 6C (Transfer delivery service guarantees).

54. The proposed amendment to subsection 932(3) will ensure that amounts payable in connection with claims under proposed

Divisions 6A, 6B and 6C will also be paid in priority to those payable under Division 8.

### Section 935 - Interest and Profits from investment of Fund

#### Background

55. Section 935 provides that the interest and profits from investment of the Fund are to be applied to pay the Fund's administrative expenses and all premiums payable in respect of contracts of insurance or indemnity entered into under section 982. Interest and profits not immediately required for this purpose are to be paid into the Fund.

#### Proposed amendment

56. It is proposed that the SEGC will also be required to pay the principal, interest and other amounts payable in respect of money borrowed under proposed section 930A from the interest and profits accruing from investment of the Fund and only to the extent that the interest and profits are insufficient, will these amounts be paid from the Fund itself (proposed paragraph 932(1)(da)).

### Section 938 - Levy on transactions

#### Background

57. Subsection 938(2) empowers the SEGC, where the amount in the Fund is less than the minimum amount, to make a determination that a levy on reportable transactions is payable. The amount of the levy is payable by a leviable dealer in relation to a reportable transaction (subsection 938(5)). The terms "leviable dealer" and "reportable transaction" are defined in subsection 938(1).

#### Proposed Amendments

58. The proposed amendments include in the definition of "leviable dealer", the borrower in the case of a guaranteed securities loan (subsection 938(1)).

59. The definition of "reportable transaction" is to be omitted from section 938 and a definition of "leviable transaction" substituted. Briefly, leviable transactions are reportable transactions as presently defined and guaranteed securities loans. The definition includes the necessary link with the jurisdiction.

60. The phrase "leviable transaction" will replace "reportable transaction" in subsections 938(2), (3) and (5).

## Proposed Section 948A - Effect of using guaranteed transfer delivery service

### Background

61. Certain provisions in Division 6 of Part 7.10 refer to the supply of settlement documents (a term which is defined in subsection 920(1)). An example is section 950 which relates to a claim against the NGF by a buying dealer when the selling dealer has not supplied to the buying dealer settlement documents in relation to the purchase.

62. The Exchange has introduced a transfer delivery service which permits the selling broker to deliver securities to the Exchange in one city, for the securities to be registered into the name of the Exchange's clearing nominee, and for the Exchange to supply comparable settlement documents to the buying broker in another city on the same day. The procedure is explained more fully in the introduction to proposed Division 6C below.

### Proposed Amendment

63. Proposed section 948A provides that where, for the purposes of discharging an obligation to transfer securities under a reportable transaction that is a sale or purchase, a dealer elects to use the transfer delivery service to bring about the transfer, the obligation to supply settlement documents in relation to the sale or purchase is taken, for the purposes of the application of Division 6, to be discharged by the transfer of securities by the dealer to the clearing nominee. Proposed section 924 defines transfer.

64. An ineffective transfer out of the clearing nominee is dealt with in Division 6C (Transfer delivery service guarantees).

## Section 949 - Claim by selling dealer in respect of default by buying dealer

### Background

65. Subsection 949(3) provides that if the business rules of an Exchange subsidiary purport to authorise that subsidiary to make a claim on behalf of a dealer, the subsidiary is entitled to make that claim. This provision was drafted at a time when the business rules governing the operation of the Exchange's clearing house were rules of the various Exchange subsidiaries. As a consequence of the general conversion of business rules of Exchange subsidiaries into national business rules, the provision which authorises the claim to be made on behalf of a dealer is now a national business rule

(Rule 4.40), and the body authorised by the Rule to make the claim is the Exchange rather than an Exchange subsidiary.

#### Proposed amendments

66. The proposed amendments omit the phrase "Exchange subsidiary" from subsections 949(3), (4) and (5) and substitute "Exchange body" (which is defined in proposed subsection 949(7) to mean the Exchange or an Exchange subsidiary). A corresponding amendment is made to the phrase "that subsidiary" (subsections 949(3) and (4)).

#### Section 950 - Claim by buying dealer in respect of default by selling dealer

##### Background

67. Subsections 949(2), 951(2) and 952(2) make provision for a dealer or client to make a single claim in respect of a number of transactions with the one dealer but provide that such a claim is to be treated by the Board of the SEGC as if it consisted of a separate claim in respect of each transaction.

##### Proposed Amendment

68. Proposed subsections 950(1A) and (1B) insert similar provisions in section 950 which relates to claims by buying dealers in respect of defaults by selling dealers.

#### Proposed Section 450A - No claim if ,netting provisions of business rules apply to transaction

##### Background

69. The Exchange is considering the introduction of a system of securities netting which is explained in the introduction to Division 6B below. The Attorney-General has not yet endorsed the use of such a system and the provisions inserted in the Bill relating to such a system are included for the purposes of public comment.

##### Proposed Amendment

70. The proposed amendment would prevent a person making a claim in respect of a reportable transaction under Division 6 (Contract guarantees) if the provisions of the business rules of the Exchange regarding the netting of securities or cash applied to the transaction. A claim could, however, be made under proposed Division 6B (Claims in respect of net obligations) in respect of a failure to pay a net amount or

to transfer a net number of securities in respect of transactions.

### Section 953 - Cash settlement of claim where settlement documents unobtainable

#### Background

71. Where the SEGC allows a claim by a buying dealer or a buying client under subsections 950(2) or 952(3) the Board may decide to pay to the claimant an amount equal to the pecuniary loss suffered by that claimant where it is not reasonably practicable for the Board to provide settlement documents. Such a situation may arise where an orderly market does not exist in the relevant securities or there are insufficient securities being offered for sale on the stock market.

#### Proposed Amendment

72. The proposed amendment to the concluding words of the section requires the Board to pay the claimant the actual pecuniary loss where the preconditions contained in the section are satisfied. The amendment makes this provision consistent with proposed comparable provisions in other Divisions of this Part, eg subsections 954G(3), 4545(4) and 9542A(4).

### Proposed Division 6A - Securities loans guarantees

#### Introduction

73. In accordance with recommendations of the Group of Thirty, the Exchange is seeking to introduce a fixed rolling settlement system for securities transactions, under which settlements would routinely take place on the fifth business day after trading (T + 5). The Exchange proposes to introduce the T + 5 system after the commencement of these amendments.

74. When broker-broker settlement is required to take place at a fixed time after trade, brokers need access to securities borrowing facilities on or prior to the settlement day for a variety of reasons. A broker may not have securities ready for delivery on the settlement day for reasons beyond his or her control. For example, the selling client may fail to deliver settlement documents to the broker on time or the sale may be a short sale permitted by the Law and the business rules.

75. Where the trade is sufficiently large, the broker may use a private lending arrangement with an institution (or an

intermediary for an institution) to acquire securities as needed.

76. Private lending arrangements are not cost-effective in respect of small "retail" trades. Unless an adequate securities lending scheme is in place, defaults in respect of small retail trades may be high and the requirement for T + 5 may not often be honoured.

77. To facilitate T+5 settlement the Exchange proposes to establish a Securities Lending Department to administer a scheme for retail securities lending. It is proposed that the Exchange will enter into contractual arrangements with one or more financial institutions, under which the institutions will agree to make securities available to the Exchange which will then make the securities available for loan to brokers.

78. The Exchange will arrange for securities from the Securities Lending Pool to be on-lent to brokers pursuant to standard lending arrangements reflected in the business rules. One of the requirements of the lending arrangement will be the payment of collateral by the borrowing broker, equivalent to 105% of the value of the securities on loan.

79. As it is envisaged that the Exchange will borrow securities from institutional lenders as a principal and then on-lend to brokers, the Exchange is thereby exposed to a risk of loss should a borrowing broker not pay collateral or other money due in respect of the loan, or not return the securities pursuant to the borrowing arrangements.

80. The transferee to whom the borrower directs the lender to transfer the borrowed securities may also suffer loss where it does not receive valid securities through the transfer delivery service because the system randomly allocates to the borrowing broker's buyer some invalid securities delivered into the transfer delivery service by an unrelated person on the same day. Proposed new Division 6C, discussed below, is designed to allow a claim in these circumstances, as well as in relation to other transfer delivery service problems.

81. The extension of potential liability for the Fund will be offset, to a degree, by a reduction in the Fund's exposure to reportable transactions as a consequence of the reduction of the interval of time between transactions and settlement under the T + 5 fixed settlement regime.

82. It should be noted that these amendments apply only to the exposure of a participating exchange under a 'retail' securities lending scheme. Larger, 'wholesale' loans will not be supported by National Guarantee Fund coverage.

### Proposed Section 954A - Interpretation - general definitions

83. This new section includes a number of definitions for the purposes of the proposed Division 6A.

84. The proposed amendment includes definitions of such terms as "claim", "collateral", "compliance period", "excluded amount" and "security benefit".

85. It also provides cross-references to the definitions of "borrower", "guaranteed securities loan" and "lender" in section 954B.

86. The term "excluded amount" is defined to mean an amount paid as a fee or charge, or by way of interest or a penalty, in respect of the loan. A claim cannot be made in respect of non payment of such amounts (see proposed subsection 954D(1)).

87. The term "security benefit" is also defined in proposed section 954A as property (other than securities) or money transferred or paid to a person because he or she is or was the holder of a security. It also includes rights that a person has as the holder of a security. Such rights may be existing or future, contingent or not (subsection 954A(2)).

### Proposed Section 954B - Interpretation - guaranteed securities loan and related concepts

88. The proposed section defines a "guaranteed securities loan", "lender", "borrower" and "borrowed securities" for the purposes of Part 7.10.

89. An agreement is a "guaranteed securities loan" if it is an agreement (entered into after the commencement of the section) under which:

- a participating Exchange (the lender) is to transfer marketable securities (the borrowed securities) to or as directed by a person or partnership that is a member of the lender (the borrower); and
- the borrower is later to transfer to or as directed by the Exchange such benefits as the agreement requires, to restore the position of the lender.

90. The agreement must also be of a kind that according to the Business Rules of the lender is to be guaranteed under proposed Division 6A.

91. An agreement may contain additional obligations to those mentioned in subsection 954B(1) and still be a guaranteed

securities loan (subsection 954B(3)). This provision is intended to avoid any uncertainty that a securities loan may not also require, for example, the payment of a loan fee.

Proposed -Section 954C - Effect of using guaranteed transfer delivery service

92. The Exchange has introduced a transfer delivery service which permits the selling broker to deliver securities to the Exchange in one city, for the securities to be registered into the name of the Exchange's clearing nominee, and for the Exchange to supply comparable settlement documents to the buying broker in another city the same day. The procedure is explained more fully in the introduction to Proposed Division 6C below.

93. Proposed section 454C applies where a party (either a lender or a borrower) to a guaranteed securities loan is obliged under the loan to transfer securities and, for the purpose of wholly or partly discharging the obligation, that party elects to bring about a transfer by the means provided for in the guaranteed transfer delivery service arrangement and, for the purpose of so bringing about the transfer, transfers securities to the clearing nominee for the arrangement. In these circumstances, for the purposes of Division 6A, the obligation to transfer the securities is taken to be discharged to the extent of the number of securities transferred to the clearing nominee.

94. An ineffective transfer out of the clearing nominee is dealt with in Division 6C (Transfer delivery service guarantees).

Proposed Section 954D - Claim by lender in respect of borrower's failure to discharge obligations

95. Proposed section 954D will entitle the lender under a guaranteed securities loan to make a claim against the Fund if, at the end of the compliance period, the lender has transferred the borrowed securities in accordance with the agreement but the borrower has not discharged completely (apart from any obligation regarding an excluded amount which is defined in proposed section 954A) its obligation to transfer or pay securities or security benefits or some other amount.

96. The term "compliance period" is defined in proposed subsection 954A(1) as the period prescribed by the business rules of the Exchange, or if no period is prescribed, a period that is reasonable having regard to the obligation and all the circumstances of the loan.



97. To make a claim the lender must have paid or be ready willing and able to pay as directed by the borrower all amounts the lender would have to repay if the borrower had discharged the obligation (proposed paragraph 954D(1)(b)). The effect of this provision is that lenders must have paid or be ready to repay collateral paid by the borrower.

98. A lender may make a single claim in respect of a number of obligations which may or may not be under the same guaranteed securities loan (subsection 954D(2)) but each claim is to be treated by the SEGC as a separate claim in respect of each of the obligations to which it relates (subsection 954D(3)).

#### Proposed Section 954E - No claim if netting provisions of business rules apply to obligation

99. The Exchange is considering the introduction of a system of securities netting which is explained in the introduction to Division 6B below.

100. Proposed section 954E would prevent a person making a claim under Division 6A (Securities loans guarantees) in relation to an obligation under a securities loan if the provisions of the business rules of the Exchange regarding the netting of securities or cash applied to the obligation under a securities loan. A claim may, however, be made under proposed Division 6B (Claims in respect of net obligations).

#### Proposed Section 954F - How and when claim to be made

101. This proposed section generally follows subsections 954(4) and (5) in Division 6 (Contract guarantees), and proposed sections 954Q in Division 6B (Claims in respect of net obligations) and 954Z in Division 6C (Transfer delivery guarantees).

102. The proposed section provides that a claim must be in writing and served on the SEGC within 6 months after the claimant became entitled to make the claim (subsection 954F(1)). Unless the SEGC Board otherwise determines, a claim made later is barred (subsection 954F(2)).

#### Proposed Section 954G - How claim in respect of securities or non-money security benefits is to be satisfied

103. Subject to proposed section 954J, the SEGC must allow a claim in respect of an obligation under a guaranteed securities loan to transfer securities or security benefits other than money if the Board is satisfied that the criteria set out in proposed section 954G are met.

104. These criteria are that:

- the claimant is entitled to make the claim;
- the claimant has paid as directed by the borrower or to the SEGC any amount required to be paid under the loan on discharge of the obligation (eg collateral); and
- the obligation is still undischarged to some extent (subsection 954G(1)).

105. The second requirement ensures that the claimant does not retain the collateral and claim for failure to supply return documents. Specific provision is also made in proposed section 954K to prevent recovery in more than one jurisdiction.

106. The principal obligation of the SEGC, if it allows a claim, is to transfer to or as directed by the claimant, securities or security benefits of the same kind and number as were outstanding under the loan (proposed subsection 954G(2)).

107. If the Board is satisfied that the claimant has obtained equivalent securities (or security benefits) for the purpose of putting itself in the position it would have been in but for the failure of the borrower to discharge the loan, the SEGC must satisfy the claim by paying the claimant's reasonable costs of obtaining those securities or security benefits (proposed subsection 954G(3)).

108. However, if the claimant has not obtained equivalent securities as described in subsection 954G {3} and the Board is satisfied that it is not reasonably practicable for the SEGC to do so within the "pre-cash settlement period" (defined in proposed subsection 954G(5)) the SEGC must instead pay the claimant the amount of the claimant's actual pecuniary loss proposed (subsection 954G(4)).

Proposed Section 954H - How claim in respect of an amount of money is to be satisfied

109. Subject to the nexus provisions of proposed section 954J, the SEGC must allow a claim in respect of an obligation under a guaranteed securities loan to pay a security benefit that is an amount of money or to pay some other amount, if the Board is satisfied that the criteria set out in proposed section 954H are met.

110. These are:

- that the claimant is entitled to make the claim; and

- that the obligation is still undischarged to the extent of a particular amount (section 954H(1)).

111. If the SEGC allows a claim it must pay to, or as directed by, the claimant an amount equal to the amount by which the borrower's obligation is undischarged (subsection 954H(2)).

112. A payment by the SEGC to the claimant, in respect of a claim for unpaid collateral, has effect for the purposes of Division 6A and Division 6C as if it were a payment of the collateral by the borrower (subsection 954H(3)).

#### Proposed Section 954J - Nexus with this jurisdiction

113. This new provision is comparable to section 961A (Division 7 - Unauthorised transfer), section 966A (Division 8 - Claims in respect of insolvent members) and proposed sections 954U (Division 6B - Claims in respect of net obligations) and 954ZC (Division 6C - Transfer delivery service guarantees).

114. For the purposes of an appropriate jurisdictional nexus, this proposed section provides that a participating exchange may not make a claim in a particular jurisdiction in respect of a guaranteed securities loan unless the borrower was carrying on a securities business in that jurisdiction on the day on which the loan was made or if the borrower was not so carrying on such a business, the last securities business that the borrower carried on before the day on which the loan was made, was carried on in that jurisdiction.

#### Proposed Section 954R - Preventing double recovery

115. This proposed section is comparable to subsection 954(2A) (Division 6 - Contract guarantees), section 961B (Division 7 - Unauthorised transfer) and section 965 (Division 8 - Claims in respect of insolvent members) and proposed sections 954V (Division 6B - Claims in respect of net obligations) and 954ZD (Division 6C - Transfer delivery service guarantees).

116. This proposed section would prevent recovery under more than one Law. It provides that where the SEGC has allowed a claim under section 954D of the Law of one jurisdiction, it must not allow a claim that relates to the same failure to discharge the obligation under that section of the Law of another jurisdiction.

#### Proposed Division 6B - Claims in respect of net obligations

##### Introduction

117. The ASX has advised that it is considering adopting a system of netting of security delivery obligations. The Attorney-General has made no decision on whether to endorse such a system and the provisions relating to netting in the Bill have been included to seek public comment.

118. Netting of cash obligations is already done through the Exchange's Broker-Broker Settlement System.

119. The proposed delivery netting system would permit multilateral netting between dealers. The quantity of a given security which is owed by a dealer in respect of transactions due for settlement on a given day, would be offset against the quantity of the same asset owed to that same dealer in respect of transactions due for settlement on that day.

120. Netting arrangements will be implemented by amendments to the business rules.

121. Division 6B would provide a right to claim against the NGF where the netting rules apply and there is a failure to pay a net amount or to transfer a net number of securities.

#### Proposed Section 954L - Interpretation

122. This proposed section includes the definitions of "claim" and "dealer". A "claim" is defined to mean a claim under proposed Division 6B against the SEGC. A "dealer" in relation to a participating exchange means the participating exchange or a member organisation of the participating exchange.

#### Proposed Section 954M - Effect of using guaranteed transfer delivery service

123. This proposed section is similar to proposed sections 948A (Division 6 - Contract guarantees) and 954C (Division 6A - Securities loans guarantees)(see above).

124. The Exchange has introduced a transfer delivery service which permits the selling broker to deliver securities to the Exchange in one city, for the securities to be registered into the name of the Exchange's clearing nominee, and for the Exchange to supply comparable settlement documents to the buying broker in another city the same day. The procedure is explained more fully in the introduction to proposed Division 6C below.

125. Proposed section 954M would provide that where a person or partnership is, under the business rules, obliged to transfer securities and for the purpose of wholly or partly discharging the obligation elects to bring about a transfer

of a particular number of securities by means of a transfer delivery service arrangement then for the purpose of Division 6B, the obligation is taken to be discharged to the extent of the number of securities transferred to the clearing nominee. Proposed section 924 defines what constitutes a transfer.

126. An ineffective transfer out of the clearing nominee is dealt with in Division 6C (Transfer delivery service guarantees).

Proposed Section 954N - Claim in respect of failure to pay net amount in respect of transactions

127. Proposed section 954N applies where the business rules of a participating exchange provide for the netting of the amounts payable by a dealer to other dealers. Where a dealer fails to discharge an obligation to pay the net amount by the end of the period specified in the business rules, the person or partnership to which the net amount should have been paid is then entitled to make a claim under proposed subsection 954N(1) (subject to establishing the required nexus with the jurisdiction contained in proposed section 954U).

128. If a broker subsequently ceases to be a member organisation of the participating exchange, the entitlement to make a claim is unaffected (proposed subsection 954N(2)).

Proposed Section 954P - Claim in respect of failure to transfer net number of securities in respect of transactions

129. Proposed section 954P applies where the business rules of a participating exchange:

- provide for the netting of a dealer's delivery obligations;
- require dealers to transfer securities to another dealer or dealers nominated under the rules within a specified period; and
- at the end of that period, a dealer has failed to discharge all or part of that obligation (subsection 954P(1)).

130. Where the nomination referred to above is made by a clearing nominee of a participating exchange, then the person or partnership to whom the securities should have been transferred may make a claim (proposed subsection 954P(2)).

131. Where the clearing nominee has nominated the person or partnership to whom the securities are to be transferred but the participating exchange has not remedied the default of the transferor, then the person or partnership to which the

outstanding securities should have been transferred may make a claim in respect of the failure (proposed subsection 954P(3)).

132. However, if the clearing nominee has made a nomination and the participating exchange has remedied the default by transferring securities of the same kind and number as the outstanding securities to the nominated person or partnership, then the participating exchange may make a claim in respect of its action in remedying the default (proposed paragraph 954P(4)(d)). Further, the participating exchange is subrogated to the rights and remedies of the person or partnership to whom the securities should have been transferred (proposed paragraph 954P(4)(c)) and that person is not entitled to claim under proposed subsection 954P(3) (proposed paragraph 959P(4)(e)).

133. Entitlement to claim is not affected by a dealer ceasing to be a member organisation after the obligation arose (proposed subsection 954P(5)).

#### Proposed Section 9540 - How and when claim to be made

134. This proposed section is comparable to subsections 954(4) and (5) in Division 6 (Contract guarantees) and proposed sections 954F in Division 6A (Securities loans guarantees) and 954Z in Division 6C (Transfer delivery service guarantees).

135. The proposed section provides that a claim must be in writing and served on the SEGC within 6 months after the claimant became entitled to make the claim (proposed subsection 954Q(1)). Unless the SEGC Board otherwise determines, a claim made later is barred (proposed subsection 954Q(2)).

#### Proposed Section 954R - How claim under subsection 954N(1) is to be satisfied

136. Proposed subsection 954R(1) requires the SEGC to allow a section 954N(1) (failure to pay net transactions) if it is satisfied that the and that the obligation an amount is still claim under proposed amount in respect of claimant is entitled to make the claim remains undischarged to any extent, ie outstanding.

137. If the SEGC allows the claim, it must pay the claimant the amount outstanding as described in proposed paragraph 954R(1)(b) (proposed subsection 954R(2)).

#### Proposed Section 954S - How claim under subsection 954P(2) or (3) is to be satisfied

138. Proposed section 954S provides for the manner in which claims under proposed subsections 954P(2) and (3) are to be satisfied. In each case the requirement to allow the claim is subject to proposed section 954V which prevents double recovery.

139. Proposed subsection 954S(1) requires the SEGC to allow a claim under subsections 954P(2) or (3) if the Board is satisfied that the claimant is entitled to make the claim and the obligation to the claimant to transfer a particular number of securities of a particular kind remains undischarged to any extent. These are then referred to as "outstanding securities".

140. The primary obligation on the SEGC if it allows the claim is to transfer to the claimant securities of the same kind and number as the outstanding securities (proposed subsection 954S(2)).

141. If the Board is satisfied that the claimant has obtained equivalent securities to the outstanding securities for the purpose of putting itself in the same position it would have been in but for the default, the SEGC must pay the claimant's reasonable costs of obtaining those securities to the claimant (proposed subsection 954S(3)).

142. If, however, the claimant has not obtained equivalent securities as described in proposed subsection 954S(3) and the Board is satisfied that it is not reasonably practicable for the SEGC to obtain equivalent securities within the "pre-cash settlement period" (defined in subsection 954S(5)) the SEGC must pay to the claimant the actual pecuniary loss suffered by the claimant (proposed subsection 954S(4)).

Proposed -Section 954T - How claim under subsection 954P(4) is to be satisfied

143. Subject to section 954V, the SEGC must allow a claim under subsection 954P(4) (ie by the participating exchange which has remedied a default) if it is satisfied that:

- the participating exchange is entitled to make the claim;
- the participating exchange has paid or transferred to the SEGC any money or property it has obtained because of the right of subrogation provided by proposed paragraph 954P(4)(c) in relation to the default (proposed paragraph 954T(1)(b)).

144. This money or property paid to the SEGC pursuant to proposed paragraph 954T(1)(b) then forms part of the Fund (subsection 954T(3)).

145. If the SEGC allows the claim, then it must pay the participating exchange its reasonable costs of obtaining and transferring the securities (proposed subsection 954T(Z)).

Proposed Section 954U - Nexus with this jurisdiction

146. This provision is comparable to section 961A (Division 7 - Unauthorised transfer), section 966A (Division 8 - Claims in respect of insolvent members) and proposed sections 959J (Division 6A - Securities loans guarantees) and 9542C (Division 6C - Transfer delivery service guarantees).

147. So as to provide an appropriate jurisdictional nexus, this proposed section provides that a person or partnership may not make a claim in a particular jurisdiction in respect of a failure by another (the defaulter) to discharge an obligation to pay an amount or transfer securities unless the defaulter was carrying on a securities business in that jurisdiction on the day on which the obligation arose or if the defaulter was not so carrying on such a business in any jurisdiction, the last securities business that the defaulter carried on before the day on which the obligation arose was carried on in that jurisdiction.

Proposed Section 959V - Preventing double recovery

148. This proposed section is comparable to subsection 954(2A) (Division 6 - Contract guarantees), section 961B (Division 7 - Unauthorised transfer) and section 965 (Division 8 - Claims in respect of insolvent members) and proposed sections 959K (Division 6A - Securities loans guarantees) and 9542D (Division 6C - Transfer delivery service guarantees).

149. This proposed section would prevent double recovery under the Law of two or more jurisdictions. It provides that where the SEGC has allowed a claim under proposed subsection 954N(1) or proposed subsection 954P(2) of the Law of one jurisdiction, it must not allow a claim under the corresponding subsection of the Law of another jurisdiction that relates to the same failure to pay an amount or transfer securities (subsection 954V(1)).

150. Similarly, if the SEGC has allowed a claim under proposed section 954P (other than subsection 954P(2)) of the Law of any jurisdiction, it must not allow a claim or another claim, under that provision of the Law of this jurisdiction that relates to the same failure to transfer securities (proposed subsection 954V(2)).

Proposed Division 6C - Transfer delivery service guarantees



## Introduction

151. The Exchange has introduced a service entitled the FAST Interbroker Delivery Service to improve the efficiency of interbroker delivery of FAST securities.

152. FAST is the acronym for Flexible Accelerated Security Transfer System. The principal features of the FAST scheme are that securities within the scheme are able to be held in uncertificated form and transfer of those securities may be made without supporting share certificates.

153. This transfer delivery service for example permits a selling broker to deliver securities in (say) Hobart which will be "received by" a buying broker in (say) Perth on the same day. This is achieved by the selling broker delivering securities to the Exchange in Hobart and the Exchange instructing its office in Perth to deliver out an equivalent quantity of securities to the buying broker in Perth. Normally the securities delivered by the selling broker will be registered into the name of the Exchange's clearing nominee.

154. Although designed principally for same day settlement interstate, the service may also be used for settlement of intrastate transactions. This has the advantage of minimising the document flow within the settlement system.

155. An essential feature of the service is that the buying broker will obtain different securities from those delivered by the selling broker.

156. The proposed amendments are necessary because the operation of Division 6 of Part 7.10, providing contract guarantees in relation to sales and purchases of securities, is, as it stands, not clear when applied to transfer delivery service transactions.

157. Where securities are delivered directly from the selling broker to the buying broker without using the transfer delivery service and the selling broker has improperly or incorrectly stamped the transfer so that the documents handed over on settlement are not sufficient to discharge the obligations of the seller, the buying broker may have a claim against the Fund under section 950.

158. Where the transfer delivery service is used, however, the defective delivery will flow into a pool of delivered securities and the buying broker to whom that defective delivery is allocated is likely to be a broker other than the one who bought from the broker responsible for the defective delivery (the defaulting broker).

159. Arguably the buying broker who contracted with the defaulting broker has no claim against the Fund under section 950 if he or she has received valid settlement documents through the transfer delivery service and it then cannot perhaps be said that "settlement documents in relation to the purchase have not been supplied to the claimant under the agreement for the purchase" (paragraph 950(2)(c)). The buying broker to whom the defective delivery has been allocated might have no claim because, arguably, the selling dealer with whom that buying broker contracted has supplied valid settlement documents under the agreement between them by delivery into the transfer delivery service. If these arguments were both sustained, a transaction which should give rise to a claim against the Fund would not do so because of the mechanics of the operation of the transfer delivery service.

160. The transfer delivery service at present depends on the operation of the "business rules" to confer authority on the Exchange to make a claim under section 950 on behalf of the buying broker. It is desirable, to avoid any possible **doubt** as to the effectiveness of the "business rule", to provide specifically for claims against the Fund in respect of losses incurred through the operation of the transfer delivery service. This is proposed to be achieved by the introduction of a new Division 6C.

161. Division 6C would also allow claims by the Exchange for losses incurred in operating its securities lending scheme, where those losses arise as a result of the operation of the transfer delivery service. In most, if not in all cases, securities loans under the securities lending scheme proposed by the Exchange will be made and returned through the transfer delivery service. The problem (described above in relation to sales and purchases) which arises because of random matching within the transfer delivery service may also arise in relation to a securities loan or a loan return.

#### Proposed Section 954W.- Interpretation

162. This proposed section includes the definition of "claim", "claimable obligation", "discharge", "loan obligation" and "sale obligation". It also provides a cross-reference to the definition of "guaranteed transfer delivery service arrangement" in section 954X.

163. A "claimable obligation" is defined as:

(a) an obligation of the seller to transfer securities under a reportable transaction for the purposes of Division 6, which is a sale of securities by a person or partnership to a person or partnership, and the parties to the transaction

were member organisations of the same participating exchange on the day the transaction was entered into; or

(b) an obligation under a guaranteed securities loan; or

(c) an obligation to transfer a net number of securities as ascertained under the business rules of a participating exchange.

164. The term "discharge" in the case of a sale obligation is defined to mean the discharge of the whole of the obligation. In the case of other obligations, it is defined to mean the discharge of the whole or a part of the obligation.

165. A "guaranteed transfer delivery service arrangement" has the *meaning* set out in proposed section 954X.

166. The term "loan obligation" is defined to be the obligation of the lender or borrower under a guaranteed securities loan to transfer securities.

167. The term "sale obligation" is defined as the obligation of the seller to transfer securities defined in paragraph (a) of the definition of "claimable obligation".

#### Proposed Section 954X - Interpretation - guaranteed transfer delivery service arrangement and related concepts

168. Central to the Division is the definition of "guaranteed transfer delivery service arrangement". This term is defined as an arrangement entered into by a participating exchange, its clearing nominee and a number of member *organisations* under which a party to the arrangement (other than the clearing nominee) may bring about the transfer of securities by transferring them to the clearing nominee and the clearing nominee *transferring* equivalent securities to the other dealer. The arrangement must be of a kind that, according to the "business rules" of the participating exchange is to be guaranteed under this Division.

169. The clearing nominee referred to in proposed paragraph 954X(1)(a) is the clearing nominee for the arrangement (proposed subsection 954X(2)).

#### Proposed Section 954Y - Claims in respect of default by clearing nominee

170. The section applies where a party to a guaranteed transfer delivery service arrangement who is obliged to transfer securities to or as directed by another party under a claimable obligation, elects to transfer the securities by means of the arrangement. If, in these circumstances, the

clearing nominee purports to transfer securities of a particular kind and number to, or as directed by, the transferee and the purported transfer out of the clearing nominee is ineffective to transfer those securities (subsection 954Z(1)) then the transferee or the participating exchange may make a claim in respect of the clearing nominee's default. What constitutes a transfer is described in proposed section 924.

171. Subsection 954Y(1) further requires for a claim to be made that:

- in relation to a sale obligation, the transferee must have paid or be ready willing and able to pay the consideration for the purchase to the transferor (proposed paragraph 954Y(1)(e));
- in relation to a loan obligation, the transferor must have transferred securities to the clearing nominee for the purpose of discharging the loan obligation, and the transferee must have paid, or be ready willing and able to pay to the transferor or as directed by the transferor, all amounts required to discharge the obligation under the guaranteed securities loan.

172. If the participating exchange has not transferred to the transferee securities of the kind and number which would remedy the default by the clearing nominee, the transferee will have a right to claim in respect of the clearing nominee's default in these circumstances (proposed subsection 954Y(2)).

173. However, if the participating exchange remedies the default of the clearing nominee by supplying equivalent securities to the transferee, then the **participating exchange** may make a claim against the National Guarantee Fund and is subrogated to all the rights and remedies of the transferee in relation to the purported transfer of securities by the clearing nominee (proposed paragraphs 954Y (3)(c) and (d)). The transferee is not entitled to claim if the participating exchange has remedied the default (proposed paragraph 954Y(3)(e)).

174. If the participating exchange is the transferee and it has obtained equivalent securities to remedy the default, the participating exchange may make a claim against the Fund (paragraphs 954Y(3)(a) and (d)).

175. Whether or not the participating exchange has remedied the default, the requirement for a connection with the

jurisdiction specified in proposed section 954ZC must be fulfilled.

176. As in other Divisions, a claimant may make a single claim in respect of 2 or more defaults (subsection 954Y(4)) but the SEGC is to treat the claim as if it were a single claim in respect of each of the defaults to which it relates (subsection 954Y(5)).

177. Entitlement to make a claim is not affected by a broker ceasing to be a member organisation of the participating exchange after the obligation to deliver securities as described in paragraph (c) of the definition of "claimable obligation" arose (subsection 954Y(6)).

#### Proposed Section 954Z - How and when claim to be made

178. The proposed section is comparable to subsections 954(4) and (5) in Division 6 (Contract guarantees), and proposed sections 954F in Division 6A (Securities loans guarantees) and 954Q in Division 6B (Claims in respect of net obligations).

179. It provides that a claim must be in writing and served on the SEGC within 6 months after the claimant became entitled to make the claim (subsection 954Z(1)). Unless the Board of the SEGC otherwise determines, a claim made later will be barred (subsection 954Z(2)).

#### Proposed Section 954ZA - How claim under subsection 954Y(2) is to be satisfied

180. The proposed section provides that the SEGC must allow a claim under proposed subsection 954Y(2) (ie a default by the clearing nominee which the participating exchange has not remedied) if the Board is satisfied that:

- the claimant is entitled to make the claim (proposed paragraph 954ZA(1)(a)) and
- the claimant has paid the transferor or SEGC the consideration (in the case of a sale obligation) or all amounts required to be paid to discharge the obligation (in the case of a loan obligation) (proposed paragraphs 954ZA(1)(b) and (c)).

181. A claim in respect of the same default must not already have been allowed in another jurisdiction (section 954ZD).

182. The primary obligation on the SEGC if it allows a claim is to transfer to, or as directed by, the claimant equivalent securities (proposed subsection 954ZA(2)).

183. If the Board is satisfied that the claimant has obtain equivalent securities for the purpose of putting itself in the position it would have been but for the default, the SEGC must pay the claimant's reasonable costs of obtaining those securities (subsection 9542A(3)).

184. However, if the claimant has not obtained equivalent securities as described in proposed subsection 954zA(3) and the Board is satisfied that it is not reasonably practicable to obtain equivalent securities within the "pre-cash settlement period" (defined in subsection 954ZA(5)), the SEGC must instead pay to the claimant the actual pecuniary loss suffered by the claimant in respect of the clearing nominee's default (subsection 954ZA(4)).

Proposed Section 954ZB - How claim under subsection 954Y(3) to be satisfied

185. Provided that the SEGC has not allowed a claim for the same default in another jurisdiction (section 954ZD) the SEGC must allow a claim under proposed subsection 954Y(3) (ie a claim by the participating exchange which has remedied the clearing nominee's default) if it is satisfied that:

- the claimant is entitled to make the claim (subsection 954ZB(1));
- in relation to a sale obligation, the transferee has paid the consideration for the purchase to the transferor;
- in relation to a loan obligation, where the transferor elected to use the guaranteed transfer delivery service arrangement for the purpose of wholly discharging the obligation or undischarged part of the obligation, the transferee must have paid to the transferor all amounts required to be paid under the guaranteed securities loan;
- the claimant has paid or transferred to the SEGC any money or property (which then forms part of the Fund (subsection 954ZB(3))} it has obtained because of the right of subrogation.

186. If the SEGC allows the claim the SEGC must pay the claimant's reasonable costs of obtaining equivalent securities (subsection 9542D(2)).

Proposed Section 954ZC - Nexus with this jurisdiction

187. This new provision is comparable to section 961A (Division 7 - Unauthorised transfer), section 966A (Division 8 - Claims in respect of insolvent members) and proposed

sections 954J (Division 6A - Securities loans guarantees) and 954U (Division 6B - Claims in respect of net obligations).

188. So as to provide an appropriate jurisdictional nexus, this proposed section provides that a person or partnership may not make a claim under subsection 454Y(2) or (3) unless the person or partnership was carrying on a securities business in the jurisdiction on the day of the purported transfer or if the person or partnership was not so carrying on such a business (in any jurisdiction), the last securities business that the person or partnership carried on before the day on which the purported transfer was made was carried on in the jurisdiction (paragraph 454ZC(b)).

189. In the case of the participating exchange, the exchange must have carried on a business in the jurisdiction on the day of the purported transfer (proposed paragraph 954zC(a)).

#### Proposed Section 954zD - Preventing double recovery

190. This proposed section is comparable to subsection 954(2A) (Division 6 - Contract guarantees), section 961B (Division 7 - Unauthorised transfers), section 965 (Division S - Claims in respect of insolvent members) and proposed sections 954K (Division 6A - Securities loans guarantees) and 954V (Division 6B - Claims in respect of net obligations).

191. This proposed section would prevent double recovery under more than one Law. It provides that if the SEGC has allowed a claim under section 954Y of the Law of this or another jurisdiction, it must not allow a claim under the corresponding section of the Corporations Law of this jurisdiction (proposed section 954ZD).

#### Section 955 - Interpretation

#### Section 956 - Unauthorised execution of transfer of securities

192. The definition of "securities" is omitted from the interpretation provision at the beginning of Division 7 (unauthorised transfer). This amendment is consequential upon the insertion of the definition of "marketable securities" in section 920. References in subsection 955(2) and section 956 to securities are replaced by references to marketable securities.

#### Proposed Section 959 How and when claim may be made

##### Background

193. Section 959 (in Division 7 - unauthorised transfer) now provides that a claim must be in writing and served on the

SEGC *within* 6 months after the day on which the claimant first became aware that the claimant had suffered loss as a result of the unauthorised execution. The SEGC has requested that a more definite limit be put on the time in which a claimant may make a claim to allow the claim process to be brought to a definitive close. However, those who have suffered loss through an unauthorised execution of a transfer of securities may not become aware of this for some time after the transfer.

#### Proposed Amendment

194. The proposed amendment is to repeal the section and substitute a new section 959.

195. Proposed subsection 959(4) allows the SEGC to publish in each State and Territory in a daily newspaper circulating in that State or Territory, a notice that is in a prescribed form and naming a particular dealer.

196. The notice may require that all claims in respect of unauthorised executions by the dealer during the period specified in proposed subsection (5), must be served on the SEGC before a day specified in the notice in accordance with proposed subsection (6).

197. Proposed subsection (5) requires that the period to *which* the notice relates must start and end before the first day on which the notice is published (or if each publication of the notice occurs on the same day, the period must start and end before that day.)

198. Proposed subsection 959(6) provides that the last application day before which claims must be served, must be at least 3 months after the last day on which the notice is published (or if each publication of the notice occurs on the same day, the last application day must be at least 3 months after that day).

199. When the SEGC has published such a notice, claims must be served on it within the time specified in the notice (proposed subparagraph 959(1)(b)(i)) but if no notice is published, the claim must be served on the SEGC within 6 months after the day on which the claimant first became aware that he or she had suffered loss as a result of the unauthorised execution proposed (sub paragraph 959(1)(b)(ii)).

200. As in the present section 959, proposed section 959 requires that the claim be in writing (proposed paragraph 959(1)(a)) and provides that unless the Board otherwise determines, a claim not served within the time limits is barred (proposed subsection 959(2)).



201. As in the comparable provision (subsection 969(9) under Division 8 - (Claims in respect of insolvent members), the BEGC, members of its Board and employees will have qualified privilege in respect of the publication of a notice under proposed subsection {4} (proposed subsection 959(7)). Where the Law provides that a person has qualified privilege in respect of, for example, a notice, the person has qualified privilege in a proceeding for defamation or is not, in the absence of malice, liable to an action for defamation, in respect of that notice (subsection 89(1)). "Malice" includes ill-will or any other improper motive (subsection 89(2)).

#### Section 961A - Nexus between dealer and this jurisdiction

##### Background

202. Section 961A (in Division 7 - Unauthorised transfer) deals with claims made under sections 957 and 958. So as to provide an appropriate jurisdictional nexus, it provides that a claim may not be made under sections 957 or 958 of the Law of a jurisdiction unless on the day of the unauthorised execution the dealer was carrying on a securities business in the jurisdiction or if the dealer was not so carrying on such a business on the day, the last securities business that the dealer carried on before that day was carried on in that jurisdiction.

203. The amendment is technical. It inserts in paragraph 961A(b) a requirement that the dealer was not carrying on a securities business in any other jurisdiction on the day of the unauthorised execution. If the dealer had been carrying on a securities business in any other jurisdiction, the claim would be considered under the Law of that jurisdiction. The amendment makes this provision consistent with the nexus provisions in proposed Divisions 6A, 6B and 6C and the proposed amendment to section 966A.

#### Section 966A - No claim unless nexus between dealer and this jurisdiction

##### Background

204. This section requires an appropriate nexus between the dealer and this jurisdiction to enable a claim to be made under the Law of that jurisdiction in respect of property entrusted to or received by a dealer who subsequently became insolvent (Division 8).

205. So as to provide an appropriate jurisdictional nexus, it provides that a claim cannot be made under Division 8 of the Law of a jurisdiction unless on the day the dealer became insolvent the dealer was carrying on a securities business in

that jurisdiction or if the dealer was not so carrying on such a business on the day, the last securities business that the dealer carried on before that day was carried on in that jurisdiction.

#### Proposed amendment

206. The amendment is technical. It inserts in paragraph 966A(b) a requirement that the dealer was not carrying on a securities business in any other jurisdiction on the day of the unauthorised execution. If the dealer had been carrying on a securities business in any other jurisdiction, the claim would be considered under the Law of that jurisdiction. The amendment makes this provision consistent with the nexus provisions in proposed Divisions 6A, 6B and 6C and mirrors the proposed amendment to section 961A.

#### Division 9 of Part 7.10 (Heading)

207. The heading of this Division is to be changed from "Claims under Division 6, 7 and 8" to "General provisions relating to claims".

#### Section 972 - Interest

##### Background

208. Interest at 5% per annum or such other rate as is prescribed is payable on the value of a claim under Division 6, 7 and 8 from the day it arose until the claim is paid or would have been paid had the Fund been sufficient (subsection 972(1)). Interest is not payable on costs and disbursements incidental to the claim. The definition of claim in subsection 920 (1) is to be amended to mean a claim under Divisions 6, 6A, 6B, 6C, 7 or 8.

##### Proposed Amendment

209. The proposed amendment would allow the SEGC to determine for the purposes of subsection 972(1) a rate of interest payable on claims under Divisions 6, 6A, 6B, 6C or 8, within a specified range. The upper limit would be the rate at the time of making the determination fixed in the Rules of Court of the Federal Court of Australia for the purposes of section 52 of the Federal Court of Australia Act 1976, (interest on a judgment). Order 35 rule 8 of the Federal Court Rules now provides that the interest on a judgment debt is 17% per annum. The lower limit would be 5% per annum. (Proposed paragraph 972 (1A)(b)).

210. The SEGC would be required to publish a notice of the rate it has determined in the Gazette (subsection 972(1B)).

Proposed Section 972A - Discretion to pay amounts not received etc. because of failure to transfer securities

Background

211. It is possible that a claimant under Divisions 6, 6A, 6B or 6C may have suffered not only an immediate loss as a result of the default of the other party but, after the default, may have failed to receive an amount that would have been paid or property that would have been transferred to the claimant as holder of the securities, had the default not occurred.

Proposed Amendment

212. Proposed section 972A applies if the Board is satisfied that a person or partnership (the defaulter) has failed to discharge an obligation to transfer securities to another person or partnership (the entitled entity).

213. The Board must also be satisfied that:

- the entitled entity has made a claim in respect of that failure and has received securities or money in satisfaction of the claim; or
- the entitled entity would have been entitled to make a claim but for the fact that a participating exchange remedied the default; or
- where the entitled entity is a participating exchange it would have been entitled to make a claim under proposed Division 6C had it not obtained replacement securities.

214. In these circumstances, if the Board is satisfied that had the defaulter transferred the securities when due, an amount would have been paid, or property would have been transferred to the entitled entity as the holder of the securities but the entitled entity has not received and is not entitled to receive that amount or property (or the equivalent thereof), and,

- where the entitled entity has been paid a compensatory amount out of the Fund this amount does not compensate it for the loss of that amount or property,
- then the SEGC may pay to the entitled entity an amount equal to that amount or property (or equal to the amount the Board considers to be the value of the property).

Section 973 - Application of Fund in respect of certain claims

Background

215. Paragraph 973(1)(a) empowers the SEGC to buy securities for the purpose of complying with certain provisions *which* require it to supply settlement documents or securities.

#### Proposed Amendment

216. The proposed amendment inserts additional references to proposed Divisions 6A, 6B and 6C in paragraph 973(I)(a).

217. The amendment also omits subsection 973(3) and substitutes a new subsection 973(3). The proposed subsection requires the SEGC to sell any securities purchased in relation to a claim as soon as practicable after making a decision to satisfy the claim by paying an amount to the claimant instead. The proposed subsection generally follows the current subsection but refers to the list of provisions in paragraph 973(1)(a) rather than listing them. A new subsection 973(4) ensures that "securities" in this section includes non-money security benefits (security benefits are defined in proposed section 954A).

#### Proposed Section 973A - Claimant may be required to exercise right of set-off

##### Background

218. It is possible that a person claiming in respect of a defaulting dealer also has an obligation to that broker eg the claimant may be both a seller to the defaulting dealer and a buyer from that dealer, and may not have paid to the dealer the consideration for the purchase.

219. It would be inappropriate for the SEGC to be obliged to pay the full amount of the claim with respect to the sale to the defaulting dealer and pay no regard to the obligation of the claimant to that dealer.

##### Proposed Amendment

220. Proposed section 973A empowers the SEGC to refuse to allow a claim until the claimant has exercised a right to set-off the whole or part of a liability of the claimant to the defaulter against the liability of the defaulter to the claimant. That right may be under an agreement or otherwise.

#### Proposed Section 973B - Effect of set-off on claim

221. Proposed section 9738 assists in working out the obligations of the SEGC in respect of a claim when the defaulter's liability to the claimant has been reduced by exercise of a right of set-off or the operation of an

agreement which provides for automatic set-off of liabilities.

222. In these circumstances proposed section 973B envisages 5 situations and sets out the effect on the obligations of the SEGC in each. They are:

- if the SEGC proposes to satisfy the claim by paying an amount, and
  - o the set-off reduction consists of money (subsection 973B(2));
  - o the set-off reduction consists of securities (subsection 973B(3)):
- if the SEGC proposes to satisfy the claim by transferring securities of a particular kind, and
  - o the set-off reduction consists of securities of that kind (subsection 973B(4)); or
  - o the set-off reduction consists of securities that are not of that kind (subsection 973B(5)); or
  - o the set-off reduction consists of money (subsection 973B(6)).

223. In each case, in general terms, the SEGC is required to reduce the amount of the payment or the number of securities by the amount or value of the set-off reduction.

224. In proposed paragraphs 973B(3)(c) and 973B(5)(c), the Board is required to work out the value of the securities which constitute the set-off reduction. If the value or number (in the case of paragraph 973B(6)(c)) cannot be determined by agreement, it is to be determined by arbitration (section 977).

225. The term "set-off reduction" is defined in subsection 973B(7).

#### Section 977 - Arbitration of amount of cash settlement of certain claims

##### Background

226. Paragraph 977{1}(a) provides that where certain sections of the Law require the SEGC to pay a person the amount that was the actual pecuniary loss in respect of a particular matter but the SEGC and the person cannot agree on the amount,

then the amount is to be determined by arbitration in accordance with section 977.

#### Proposed Amendment

227. The proposed amendments to subsection 977(1) are designed to include references to the provisions in proposed Divisions 6A, 6B and 6C which empower the Hoard to pay an amount rather than supply return documents or replacement securities. The term "a cash settlement provision" is introduced into paragraph 977(1)(a). The term "cash settlement provision" is defined in proposed subsection 977(7) as being section 953, subsection 954G(3) or (4), 954A(2), 954R{2}, 954S(3) or (4), 9542A(3) or (4) or 9542B(2), section 960 or subsection 964(1) or (2).

228. A further proposed amendment will add subsection 977(1A) which requires that a dispute regarding the value or number of securities in calculating the effect of set-off (proposed section 973B) be determined by arbitration.

#### Section 979 - Power of Board to require Production of securities etc.

##### Background

229. This section empowers the SEGC to require the production of documents necessary to establish a claim or to exercise its subrogation rights. This extends to enabling criminal proceedings to be taken against a person. Failure to comply with a requirement to produce may lead to disallowance of a claim.

230. Proposed sections 973A, as described above, entitles the SEGC to refuse a claim until the claimant has exercised a right to set-off. Proposed section 973B assists in working out the obligations of the SEGC where a right to set-off is exercised. The SEGC therefore needs to know whether there is a right of set-off, whether it has been exercised and the amount and nature of any set-off reduction.

#### Proposed Amendment

231. The proposed amendment inserts subsection 979(1A) which empowers the Board for the purpose of the set-off provisions (proposed sections 473A and 973B) to require a person to give the SEGC specified information relating to the existence or exercise of rights of set-off. Failure to comply will entitle the SEGC to disallow the claim (subsection 979(2)).

#### Section 980 - Subrogation of SEGC to Claimant's Rights etc,

## Background

232. Section 980 provides, inter alia, that the SEGC is subrogated to the claimant's rights after allowing claims under particular listed sections. Thus subsection 980(1) refers to various claims under Division 6.

## Proposed Amendment

233. The proposed amendment inserts new subsections (1A) to (1E) after subsection 980(1). The new subsections give the SEGC particular rights of subrogation after allowing claims under proposed Division 6A (securities loans guarantees), subsection 954N(1) (in respect of failure to pay net amount in respect of transactions), proposed subsections 954P(2), (3) or (4) (in respect of failure to transfer net number of securities in respect of transactions), or proposed subsections 954Y(2) or (3) (in respect of a default by the clearing nominee in connection with the transfer delivery service).

234. A proposed amendment inserts references to Divisions 6A, 6B and 6C in subsection 980(5) which provides that except as provided in that section nothing in Part 7.10 affects a right or remedy that a claimant has against a person other than SEGC.

## Section 483 - Installment Payments

### Background

235. Subsection 483(2) defines "claim" for the purposes of subsection 483(1).

### Proposed Amendment

236. The proposed amendment inserts references to Divisions 6A, 6B and 6C in the definition of "claim".

## Proposed Section 983A - Power of Commission to modify effect of claims Divisions

### Background

237. This is a new section which is comparable to section 1084 (which relates to Divisions 2 to 6 of Part 7.12 - Offering Securities for Subscription or Purchase) and section 1113 (which relates to Divisions 1-3 of Part 7.13 - Transfer of Marketable Securities).

238. The Exchange and other participants in the settlement process are working to develop a system of electronic

settlement in which title to securities will be delivered against cleared funds in a computerised settlement clearing house. The precise details of the system are not yet finalised.

239. Inevitably changes to the law will become necessary before the new system can be implemented, even on a trial basis. The Commission has the discretion to modify the statutory provisions with respect to title to and transfer of securities (section 1113). The NCSC used its equivalent discretion to assist in the introduction of the pilot program of the FAST System.

240. There is at present no discretionary power to modify the National Guarantee Fund provisions. It is very likely, however, that modifications will be needed to adapt the language of Part 7.10 to the new electronic circumstances of clearing and settlement.

#### Proposed Amendment

241. Proposed section 983A would do this by empowering the Commission to declare that the provisions of a claims Division (defined in subsection 983A(6) as Divisions 6, 6A, 6B, 6C, 7 or 8) are to have effect in relation to particular transactions or class of transactions either generally or as otherwise provided as if specified modifications were made to the provisions (subsection 983A(1)). A declaration may relate to transactions entered into before or after the making of the declaration (subsection 983A(2)). The declaration must be gazetted (subsection 983A(4)).



## **SCHEDULE 2 - AMENDMENTS OF THE CORPORATIONS LAW RELATING TO FUNDRAISING**

### Introduction

242. Schedule 2 comprises a number of amendments to the fundraising provisions of the Law. These amendments are designed to clarify aspects of the operation of the Law which have given rise to concern since the Law commenced operation on 1 January. They are essentially technical in nature, and do not alter the general thrust of the Government's fundraising reforms.

243. The major amendments deal with:

(a) the application of the fundraising provisions to prospectuses for secondary sales;

(b) the application of the prospectus provisions to trading of securities on the stock exchange;

(c) the operation of the various defences from civil liability in respect of misstatements in prospectuses; and

(d) the obligation to keep books of accounts in relation to unit trusts, and other prescribed interest schemes.

(a) Application of prospectus provisions to secondary sales

244. The prospectus provisions of the Law are largely based on provisions which intended only to apply to primary offers of securities and secondary offers which are in the nature of a primary offer. Broadly speaking, a primary offer of securities involves an offer by a body corporate to issue new securities in itself. A secondary offer of securities involves an offer of existing (already issued) securities by a third party. It is now generally accepted that the many of the prospectus provisions and in particular section 1018(1) apply to secondary transactions. This result has been reinforced by various amendments made to section 1018 in the course of the passage of the Corporations Bill 1988 through Parliament and in particular the introduction of secondary trading exemptions for listed securities in subsection 1018(2) & (5).

245. Given the history of the fundraising provisions, some of them do not apply sufficiently clearly in regulating secondary offers of securities. These amendments are intended to clarify the application of the fundraising provisions to secondary sales of securities.

(b) Stock Market Trading

246. There has been some concern that, notwithstanding the specific exemptions, the prospectus provisions could apply to the trading of securities on the stock exchange. In particular, it has been argued that section 1030 which deems documents offering securities which have been issued for the purpose of onsale to be a prospectus, could apply to offers made on the Stock Exchange Automated Trading System (SEATS). Amendments are proposed in this Bill to make it clear that a prospectus is not required for on-market offers of listed securities.

(c) Defences in relation to prospectus liability

247. A number of potential technical difficulties with the operation of the defences against civil liability in connection with false or misleading statements in, or omissions from prospectuses have been identified since the commencement of the Law. The Bill contains amendments aimed at overcoming these difficulties.

(d) Keeping of accounts for unit trusts

248. There has been some concern that a minor drafting change to subparagraph 1069(1)(e)(iii) in the Corporations Law, on one view, apparently now precludes trustees or representatives for prescribed interest arrangements from discharging their obligations to keep proper books of accounts by causing the management company to keep those accounts. Prior to 1 January 1991, it was the usual practice for trustees to do so. Pending the outcome of the present review of the regulation of prescribed interests and similar collective investment schemes being conducted by the Australian Law Reform Commission and the Companies and Securities Advisory Committee, an amendment is proposed which will make it clear that trustees are able to continue to cause the management company to keep the books of account.

Section 9-- Dictionary

Definition of "minimum subscription"

249. The definition of "minimum subscription" is to be amended to remove references to "offer to the public" test by omitting from the definition the words "to the public" and "or for which the public are invited to subscribe".

Insertion of new definitions

250. Four new terms are to be introduced into section 9:

- "excluded prospectus" is defined to mean a prospectus in relation to a primary offer or invitation for securities which is an excluded offer or excluded invitation.
- "primary prospectus" is to be defined to mean a written notice or other instrument inviting applications to subscribe for securities or offering securities for subscription and includes a document that is taken because of paragraph 1030(1)(a) to be a primary prospectus.
- "secondary prospectus" is to be defined to mean a written notice or other instrument inviting offers to buy securities or offering securities for purchase but excludes a document that is taken because of paragraph 1030(1){a) to be a primary prospectus in relation to the securities.
- "seller" is to be defined to mean the person inviting offers to buy securities, or offering securities for purchase.

251. The above definitions are consequential upon amendments to the prospectus provisions in Part 7.12 of the Law which are designed to clarify the application of those provisions to the secondary sale of securities of a corporation and miscellaneous technical amendments.

#### Section 96 - Statement in a prospectus

252. This provision is to be repealed. There is a view that the provision enables the type of information required to be included in prospectuses by virtue of section 1022 of the Law to be simply incorporated by reference. Recently the ASC announced that it was of the view that the scope of section 96 was no greater than that of the previous corresponding provisions, namely subsections 107(4) and 108(2) of the Companies Act and Codes. Those were confined in their application to the determination of liability in respect of untrue statements in a prospectus.

253. Provision has been made along the lines of section 96 in proposed section 994 (see below) which is limited in its application to the prospectus liability provisions in Part 7.11 of the Law.

#### Section 244- Statutory meeting and statutory report

254. Section 244 requires the holding of a meeting of shareholders for various purposes, after a company's initial issue of shares pursuant to a prospectus. As a result of the broad definition of prospectus in section 9, section 244 appears to apply in respect to the first document offering or inviting applications for shares in a company irrespective of

whether that document was required to be lodged or registered under Pt.7.12 Div.2 of the Law. In contrast the corresponding provisions in section 239 of the Companies Act and Codes only applied in relation to the first prospectus which made offers to the public. The proposed amendment has the effect limiting section 244 to prospectuses regulated under Pt.7.12 Div.2 of the Law.

#### Proposed section 994 - Interpretation - Statement in a Prospectus

255. This proposed provision to be contained in new Division 1 of Part 7.11, is based upon section 96 which is to be repealed (see above). For the purposes of determining civil or criminal liability in respect of a prospectus under Part 7.11 of the Law, a statement shall be taken to be in a prospectus if it is contained in a report or memorandum that appears on the face of, or is issued with, the prospectus or is incorporated by reference in it.

#### Section 1006 - Civil liability for false or misleading statement in or omission from prospectus.

##### Subsection 1006(2)

256. This subsection is to be amended to apply only to persons -against whom an action may be brought for the purposes of an action under section 1005 in respect of the issue of a primary prospectus (as opposed to a secondary prospectus - see next paragraph) in respect of which there is a material statement that is false or misleading or from which there is a material omission.

##### Paragraph 1006(2)(e)

257. This provision, as it is currently worded, appears to impose liability on experts (as defined in section 9) whose statements appear in prospectuses, irrespective of whether they have given consent under section 1032 of the Law to the issue of the prospectus.

258. Paragraph 1006(2)(e) is to be amended so that it only applies to experts who have given such consent.

##### Proposed subsection 1006(2A)

259. This proposed new subsection is based on subsection 1006(2). Like subsection 1006(2), it will apply for the purposes of identifying persons who are civilly liable for a prospectus which has a material misstatement or omission. However, while subsection 1006(2) applies in respect of primary prospectuses, this proposed subsection will apply in

respect of secondary prospectuses. Under it, actions may be brought against the following persons:

- the seller;
- if the seller is a corporation, a person who was a director of the corporation at the time of the issue of the prospectus;
- experts;
- a person named with his or her consent in the prospectus as an auditor, banker, solicitor, stockbroker, sharebroker or underwriter of the seller or for or in relation to the sale of securities; and
- other persons named with their consent in the prospectus as having performed a function in a professional, advisory or other capacity not mentioned above.

#### Sections 1007 to 1011

##### Introduction

260. These sections set out defences for the persons named in section 1006 as being civilly liable in respect of false or misleading statements in, or omissions from, a prospectus. A number of amendments are to be made to the sections, mainly to effect two purposes:

- to extend the sections to persons named in proposed subsection 1006(2A) in respect of secondary prospectuses; and
- to extend certain defences which extend only to false or misleading statements in a prospectus, to also cover omissions from a prospectus.

##### Section 1007 - No liability to person with knowledge of matter

261. Section 1007 is to be amended to include a reference to proposed new section 1006(2A) the effect of which will be that a person referred to in that subsection will not be liable if the person who suffered loss or damage knew that the statement was false or misleading or was aware of the omitted matter.

##### Section 1008 - Directors not liable in certain circumstances

262. Section 1008 provides specific defences for directors who would otherwise be liable under section 1005.

### Subsection 1008(1)

263. Subsection 1008(1) is to be replaced by a new subsection which has the effect of:

- extending the defences to persons who are directors of a seller corporation at the time of the issue of a secondary prospectus (persons referred to in paragraph 1006(2A)(b); and
- to limit the application of the defences set out in section 1008 to actions under section 1005 in respect of a materially false or misleading statement in, or a material omission from a prospectus. The defences which relate to lack of knowledge of the issue of a prospectus or the false or misleading nature of the prospectus would not be appropriate in relation to other breaches of section 1005, *which* deals with any contravention of Part 7.11 or 7.12.

### Subsection 1008(2)

264. Subsection 1008(2) is to be amended to clarify that the defence contained therein applies only to a person referred to in paragraph 1006(2)(c) of the Law, i.e., a person who authorised or caused himself or herself to be named and is named in a primary prospectus as a director or as having agreed to become a director either immediately or after an interval of time. The defence, *which* relates to the withdrawal before the issue of the prospectus of a consent to become a director, can have no sensible application to persons who are, directors at the time of issue (persons referred to in paragraph 1006(2)(b)).

### Subsections 1008(4) and (5)

265. The defences set out in subsections 1008(4) and (5) are to be expanded to include defences for the purposes of an action under section 1005 in respect of a material omission from a prospectus. Currently, those defences apply only in respect of false or misleading statements, and do not apply in relation to omissions (cf. subsection 1006(1)).

266. Subsection 1008(4) is to be amended to include the defence that after the issue of the prospectus and before any allotment, issue or sale under the prospectus, the person on becoming aware of any omission from the prospectus withdrew the person's consent to the issue of the prospectus and gave reasonable public notice and explanation of that withdrawal.

267. Subsection 1008(5) is to be omitted. A comparable set of defences for directors which also apply in respect of

omissions from prospectuses will be provided in proposed section 1008A (see below).

Proposed section 1008A - Directors not liable where they have reasonable grounds for believing prospectus to be correct.

268. As noted above existing subsection 1008(5) does not provide defences for directors in respect of omissions from prospectuses. In addition, it is arguable that in order to avoid liability under that provision in respect of any particular false or misleading statement it is necessary to make out the relevant defence in respect of every false or misleading statement in the prospectus. Proposed section 1008A overcomes both these difficulties.

269. Proposed subsection 1008A(1) is based on subsection 1008(1) but expressly provides that the defences in section 1008A apply in respect of omissions. It is also applicable to directors of a corporation which has issued a secondary prospectus.

270. Proposed subsection 1008A(2) is based on existing paragraph 1008(5)(b). It provides a defence for directors in respect of defective statements (either false or misleading statements or omissions) made by or contained in reports of experts. The elements required to be proved in existing subparagraphs 1008(5)(b){ii} are clarified in proposed paragraph 1008A(2)(d).

271. Proposed subsection 1008A(3) is based on existing paragraph 1008(5)(c). It provides a defence for directors in respect of defective statements made by an official person or is contained in a copy of or extract from a public official document.

272. Proposed subsection 1008A(4) is based on existing paragraph 1008(5)(a). It provides a defence for directors in respect of defective statements in prospectuses other than those relating to experts, official persons and public official documents dealt with in proposed subsections 1008A(2) and {3}.

Section 1009 - Liability of experts

273. Section 1009 sets out defences for persons referred to in paragraphs 1006(2)(e),(g) and (h). It is to be amended as a consequence of the introduction of a regime for secondary prospectuses and to make miscellaneous technical corrections.

Subsection 1009(1)

274. Subsection 1009(1) currently defines "expert" for the purposes of section 1009 as including persons referred to in paragraphs 1006(2)(g) and (h). The subsection is to be repealed in consequence of other amendments proposed to be made to section 1009.

#### Subsection 1009(2)

275. Subsection 1009(2) limits the liability of persons referred to in paragraph 1006(2)(e), (g) or (h) in an action under section 1005 in respect of the issue of a primary prospectus to matters relating to their areas of special expertise. This subsection is to be amended to include equivalent persons, referred to in proposed paragraphs 1006(2A)(c), (e) or (f) in respect of secondary prospectuses.

#### Paragraph 1009(2)(a)

276. Section 1006(2){e} effectively imposes liability on an expert, not only when the prospectus contains a statement made by them but also when it contains a statement based on a statement made by them. Paragraph 1009(2)(a) appears to have the effect of excluding all liability for the latter kind of statement. It is to be amended so that 'experts' will also be liable for materially false or misleading statements in statements based on their statements.

#### Proposed Paragraph 1009(2)(ba)

277. This proposed provision will make a person with special expertise liable in respect of an omission of any material matter from a statement in a prospectus purporting to be made by the person as an expert or based on a statement made by the person as an expert. The proposed paragraph will complement paragraph 1009(2)(b), which deals generally with omissions of any material matter for which the person is responsible as an expert.

#### Paragraph 1009(2)(b)

278. This provision is to be amended to make a person referred to in paragraph 1006(2)(e), (g) or (h) or proposed paragraph 1006(2A)(c), (e) or (f) liable in respect of any omission (other than that stipulated in paragraph 1009(2)(ba)) from the prospectus of any material matter for which the person is responsible in the person's relevant capacity or purported capacity.

#### Subsection 1009(3)

279. Subsection 1009(3) is to be amended to also include a reference to persons referred to in proposed paragraph



1006(2A)(c). Further, the defences available are to apply not only in respect of a false or misleading statement in, but also in respect of an omission from a prospectus.

#### Subsection 1009(9)

280. Subsection 1009(4) will be amended to also provide the defences available under that subsection to persons referred to in proposed paragraph 1006(2A)(e) or (f). Further, the defences in section 1009 will apply not only in respect of a false or misleading statement in, but also in respect of an omission from, a prospectus.

#### Section 1010 - Liability of persons named in Prospectus etc.

281. Subsections 1010(1) and (2) are amended to provide that the defence in section 1010 applies in relation to the persons referred to in proposed paragraphs 1006(2A)(d), (e) and (f).

#### Section 1011 - No liability for mistake etc. if reasonable Precautions taken

282. Subsection 1011(1) is to be amended to also provide the defences available under that subsection to persons referred to in proposed paragraph 1006(2A)(d) (stockbrokers, sharebrokers and underwriters in respect of a secondary prospectus).

#### Section 1018 - Prospectus in relation to securities

##### Subsection 1018(1)

283. Subsection 1018(1) is to be amended to prohibit the issue or allotment of securities unless the prospectus provisions have been complied with. This amendment is intended to prevent avoidance of the prospectus provisions by techniques which involve an issue of securities without an offer or invitation regulated under subsection 1018(1) being made. The regulations made under paragraphs 66(2)(n) will be appropriately augmented at the time this amendment takes effect.

##### Paragraph 1018(5)(b)

284. At present no listing rules have been prescribed for the purposes of subsection 1018(5)(b)(i) and (ii). This has resulted in concern that the exemption in subsection 1018(5) is as a result generally unavailable. The provision is to be amended, for the purposes of dispelling such doubt, to make it clear that the exemption for listed securities provided by

subsection 1018(5) is available even if no listing rules have been prescribed for that provision.

#### Proposed subsection 1018(7A)

285. The grandfather exemption in subsection 1018(2) is only available where securities have been continuously "listed for quotation" since immediately before the commencement of the Law. One point of uncertainty is whether it is available in relation to securities of a class which immediately before that commencement 'or at some stage since' was or has been temporarily suspended from quotation.

286. In order to clarify this situation, proposed subsection 1018(7A) is being inserted which will provide that for the purposes of subsection 1018(2), issued securities are not to be regarded as not being a class of continuously listed securities merely because at any stage prior to the relevant offer or invitation, the quotation of the securities was temporarily suspended. However, the exemption will not be available if the corporation is removed from the official list of a stock exchange and later readmitted to that list.

#### Section 1020.- Forms of application for securities to be attached to prospectus

287. Section 1020 currently provides that a person must not issue a form of application for securities of a corporation unless the form is attached to a prospectus and a copy of both the form and the prospectus have been lodged with the ASC. The provision currently applies to primary offers only.

288. The section is to be amended so that it will also apply to secondary trading of securities for which a form of offer to buy will be required.

#### Section 1021 - Specific provisions applicable to all prospectuses

289. Section 1021 prescribes content requirements applicable to all prospectuses.

#### Subsection 1021(5)

290. Subsection 1021(5) currently provides that a prospectus must contain a statement that no securities will be allotted or issued on the basis of the prospectus later than 6 months after the date of issue of the prospectus. The provision currently applies to primary offers only.

291. The subsection will be amended so that the life of the prospectus specified therein will apply to both primary and secondary prospectuses.

Subsection 1021(6)

292. Subsection 1021(6), which requires a prospectus to contain particulars of the interests of certain persons involved with the promotion or formation of a company, is to be amended so as to specify that that provision will apply only in respect of a primary prospectus.

Proposed subsection 1021(6A)

293. Proposed subsection 1021(6A) will provide that, in relation to a secondary prospectus, where the seller is not a corporation, the secondary prospectus must include an address in Australia for the purposes of proposed section 1029A (see below).

Subsection 1021(8)

294. The subsection is to be amended to extend the list of classes of prospectuses in respect of which the Corporations Regulations might prescribe additional content requirements, to include both primary and secondary prospectuses.

Subsection 1021(9)

295. It is proposed to repeal this subsection which is to be replaced by proposed section 1022A (see below).

Subsection 1021(13)

296. Subsection 1021(13) currently provides that a prospectus must be signed by every director and every person who is named in it as a proposed director, or by a person who is authorised to sign on their behalf.

297. The subsection is to be amended to specify that the requirement specified therein will apply to a primary prospectus only. The equivalent provision in respect of secondary prospectus will be proposed subsection 1021(13A).

Proposed subsection 1021(13A)

298. Proposed subsection 1021(13A) will require a seller of securities of a corporation to sign the secondary prospectus in relation to which the securities are offered for purchase or for which invitations for offers to buy the securities are made.

## Section 1022 - General Provisions applicable to all

### Prospectuses

299. Section 1022 requires specific information to be included in a prospectus and requires the prospectus to contain such information as investors and their professional advisers would reasonably require and reasonably expect to find in a prospectus for the purpose of making an informed investment decision.

300. Subsection 1022(2) provides a guide to the preparers of a prospectus about the information which should be included. They should include all relevant information which is known to them, or of the advisers involved in compiling the prospectus, or which is reasonable for any of those persons to obtain. In nominating the relevant persons, the section currently refers to those listed in subsection 1006(2), Clearly a person making a secondary offer could not be expected to have or necessarily be able to obtain information known to the directors of the corporation which issued the securities. Consistent with the proposed amendment to confine the application of subsection 1006(2) to primary prospectuses, paragraph 1022(2)(a) is to be confined to such prospectuses.

301. Proposed paragraph 1022(2)(ba) will require the inclusion in a secondary prospectus of such information as is known to persons referred to in proposed paragraph 1006(2A)(a) to (f).

### Proposed section 1022A - Conditions requiring waiver of requirement etc. void

302. This proposed provision is based upon subsection 1021(9), which will be repealed. Subsection 1021{9}, which repeats subsection 98(6) of the Companies Act 1981, renders void any condition binding an applicant for securities to waive compliance with, among other things, any of the prospectus content rules. Under the Law, those rules appear in two sections, namely sections 1021 and 1022. However, subsection 1021(9) only applies in relation to the largely formal prospectus content requirements set out in section 1021 and not the more substantive requirements set out in section 1022. It is proposed to remedy this situation by repealing subsection 1021(9) and enacting a provision which will apply to both sections 1021 and 1022 in respect of both primary and secondary prospectuses.

### Sections 1023 - Special provisions applicable to prospectuses in relation to debentures

303. Section 1023 requires, among other things, a corporation which issues debentures to give a written acknowledgement of indebtedness within 2 months to investors. It will be amended so that it applies only in relation to a primary prospectus in relation to debentures of a corporation.

#### Section 1024 - Supplementary Prospectuses

304. Section 1024 requires the lodgement of a supplementary prospectus with the ASC where, during the lifetime of a prospectus that has been lodged with the ASC, there is a significant change affecting any matter that should be included in the prospectus. The supplementary prospectus is to contain particulars of the change or new matter.

#### Paragraph 1024(1)(b)

305. As currently worded, paragraph 1024(1)(b) seems to be confined in its operation to primary offers. It is proposed to amend the paragraph so that it also extends to secondary offers.

#### Subsection 1024(3) and Paragraph 1024(4)(a)

306. Subsections 1024(3) and (4) provide for the situation where the person who lodged the prospectus is not aware of a significant change affecting any matter required under subsection 1022{1} to be included in the prospectus or a significant new matter arises, the inclusion of information in respect of which would have been required had it arisen when the prospectus was being prepared. In such a case, a person who is named in the prospectus or otherwise authorises or causes the issue of the prospectus, and is aware of the change or new matter, is required to give notice of the change or new matter to the person who lodged the prospectus.

307. By including cross-references to the persons referred to in proposed subsection 1006(2A), the proposed amendments will extend these requirements to secondary prospectuses.

#### Subsection 1024(7)

308. This subsection lists those references in the Law to a 'prospectus' which are to be deemed to include a reference to a secondary prospectus. The subsection will be amended to omit the reference to section 96, which is to be repealed, and to insert references to proposed new sections 994 and 1029A and subsection 1021(13A).

#### Section 1025 -.Certain notices etc not to be published

Section -1926 - Certain reports referring to debentures not to be published

309. Sections 1025 and 1026 regulate the publication of advertisements and other reports in respect of offers of securities. It is proposed that they be amended to make it clear that they only apply in relation to primary offers of securities. Secondary offers of securities are to be regulated by proposed section 1027A (see below).

Proposed section 1027A - Application of sections 1025, 1026 and 1027 to sales of securities

310. Proposed section 1027A facilitates the regulation of advertising and the publication of other reports in respect of secondary offers of securities. As presently drafted, the provision enables the making of regulations to modifying the effect of sections 1025 and 1027 to apply in relation to such offers.

311. Comments on what regulations should be made for the purposes of this provision or whether some other approach should be adopted for regulating advertising or reports in connection with secondary offers would be particularly welcome.

Section 1029 - Documents to be kept by corporations

312. Section 1029 currently requires certain documents in respect of which a prospectus has been lodged with the ASC, to be kept by a corporation at the registered office of the corporation in Australia for a period of at least 6 months after lodgement of the prospectus.

313. Section 1029 will be amended so that it applies only to a corporation in respect of which a primary prospectus has been lodged with the ASC. Proposed section 1029A will address the equivalent matters concerning secondary prospectuses.

Proposed section 1029A - Secondary prospectuses - documents to be kept

314. This proposed section is based on section 1029 of the Law. It will provide that the seller in relation to a secondary prospectus must cause a verified true copy of any consent required in respect of the issue of the prospectus and a verified true copy of, or statement concerning every material contract (if any) referred to in the prospectus to be deposited at the relevant address within 7 days after lodgement of the prospectus with the ASC (proposed subsection 1029A(1)). The copies of the documents so deposited must be kept at the relevant address for a minimum of 6 months after

lodgement of the prospectus, during which time they may be inspected free of charge (proposed subsection 1029A{2}).

315. The relevant address, where the seller is a corporation, is the registered office of the corporation and, in any other case, is the address specified in the prospectus (proposed subsection 1029(3)).

Section 1030 - Document containing offer of securities for sale deemed to be a Prospectus

Subsection 1030(1) and paragraph 1030(1)(a)

316. Subsection 1030(1) provides that where a corporation allots or issues securities to a person for the purpose of them being offered for sale, any document by which the sale is made is deemed to be a prospectus. The proposed amendment to paragraph 1030(1)(a) will have the effect that, where subsection 1030(1) operates on a document, the document will be deemed to be a primary prospectus.

317. The subsection will also be amended to specify that section 1030 will be subject to proposed subsection 1030(1A) (see below), which will exclude screen trading on SEATS (Stock Exchange Automated Trading System) from the operation of section 1030.

Proposed subsection 1030(1A)

318. In view of the extended definition of 'document' in section 9 of the Law, there is some concern that transactions on SEATS could be subject to section 1030. In order to avoid any doubt, section 1030 is to be amended to make clear that it does not apply in relation to an offer for sale or an invitation to make an offer to buy, if the offer or invitation is made or issued at an official meeting of a stock exchange, in the ordinary course of trading on the stock market of that stock exchange. However, section 1030 will continue to apply to off market transactions in listed securities such transactions include those that, when reported to the relevant stock exchange, are, under the business rules or listing rules of that stock exchange, described as 'special'.

Subsection 1030(7)

319. The proposed amendment to this subsection is consequential upon the inclusion of proposed subsection 1030(1A).

Section 1031 - Allotment or issue of securities where Prospectus indicates application for quotation on stock market

## Background

320. As it is currently worded, section 1031 only applies to a prospectus for a primary offer. Section 1031 provides that any allotment or issue of securities will be void and any application moneys must be repaid if the prospectus indicates that an application has been, or is proposed to be made, for listing of the securities, and the listing is not achieved within the specified time.

## Proposed amendments

321. The section will be amended so that it has a corresponding effect in relation to a prospectus for a secondary sale, except that:

- the liability to repay money under subsection 1031(2) if an application for listing is not made to, or granted by, the exchange within the prescribed time limits, will be imposed on the seller (and where the seller is a corporation, the seller and its directors);
- subsection 1031(6) will apply in respect of the seller and will require the seller to keep all application moneys in a separate bank account, pending the decision of the stock exchange on whether to quote the relevant securities; and
- subsections 1031(7) (as is to be amended) and (8) should continue to apply to directors of the corporation which originally issued the securities

## Subsection 1031(11)

323. A new term, "responsible person", will be included in subsection 1031(11). In relation to a primary prospectus, the term "responsible person" means the corporation and in relation to a secondary prospectus the term means the seller.

## Section 1033 - Order to stop issue of securities

324. Section 1033 enables the ASC to make orders stopping the issue of securities to which a prospectus relates in the circumstances stipulated in subsection 1033(2). While an order is in force, Part 7.12 Division 2 applies as if the prospectus had not been lodged and no one is entitled to lodge a further prospectus in relation to the securities other than a supplementary prospectus under section 1024 (subsection 1033(7)).

325. Subsection 1033(1) and paragraph 1033(7)(b) are to be amended so that section 1033 applies to both primary and secondary prospectuses. In the case of a secondary



prospectus, a seller will be able to lodge a further secondary prospectus provided the seller is not an associate of the seller in relation to the original secondary prospectus.

#### Section 1035 - Prohibition of allotment unless minimum subscription received

##### Subsection 1035(1)

326. The proposed amendment is consequent upon the introduction of proposed subsection 1035(1).

##### Proposed subsection 1035(1A)

327. Section 1035 prohibits the allotment of securities unless the minimum subscription has been reached. The previous corresponding provisions in subsections 110(1) to (4) of the Companies Act and Codes only applied where shares had been offered to the public. The proposed amendment will bring section 1035 broadly into line by effect providing that it does not apply in relation to excluded issues, offers and invitations.

#### Section 1036 - Repayment of subscriptions

328. The proposed amendment is consequential upon the introduction of subsection 1035(1A).

#### Section 1038 Restrictions on varying contracts referred to in prospectus

329. This section provides that the terms of a contract referred to in a prospectus cannot be varied before the statutory meeting unless the variation is made subject to the approval of the statutory meeting. The corresponding provisions in section 112 of the Companies Act and Codes only applied in relation to prospectuses which made offers to the public.

330. The provision is to be amended so that it will apply only to primary prospectuses other than those relating to excluded offers or invitations.

#### Section 1039 - Certain conditions void

331. Section 1039 provides that any condition which attempts to have the effect of waiving compliance with any requirement of Part 7.12 Division 3 is void.

332. The section is to be amended so that it applies to both applicants for, and buyers, of securities of a corporation.

#### Section 1040 - Securities not to be allotted or issued after 6 months

333. Section 1040 provides that the allotment or issue of securities must not be made more than 6 months after the issue of the relevant prospectus. It currently applies to primary sales only. The corresponding provisions in subsection 110(12) of the Companies Act and Codes only applied in relation to prospectuses for offers to the public.

334. Section 1040 is to be amended to make the provision also applicable to secondary sales. This will be achieved by specifying that the prospectus referred to in current section 1040 is to be a primary prospectus and by inserting a new subsection (proposed subsection 1040(2)) which will prohibit the seller in relation to a secondary prospectus from selling securities on the basis of the prospectus unless not more than 6 months has elapsed since the issue of the prospectus referred to therein.

335. In addition, the proposed amendment will have the effect of ensuring that section 1040 does not apply to excluded issues, offers and invitations.

#### Section 1041 - Validity of allotment or issue of securities

336. Section 1041 provides that an allotment or issue of securities of a corporation is not void or voidable merely because it occurred more than 6 months after the issue of the relevant prospectus. The provision as currently worded does not apply to secondary sales.

337. The provision is to be amended so that it will also apply to secondary sales of securities.

#### Section 1042 - Liability of directors for loss or damage

338. Section 1042 currently provides that a director of a corporation who knowingly contravenes a provision of Part 7.12 Division 3 will be liable (which liability is not dependent upon a conviction of an offence in respect of the contravention) to compensate the corporation and any person to whom an allotment has been made in contravention of Division 3 for any loss, damage or costs that the corporation or the person has suffered or incurred because of the allotment.

339. As section 1042 provides a more limited right to compensation than does section 1005, it is considered that civil liability for contravention of Part 7.12 Division 3 should be regulated by section 1005 in respect of both primary and secondary transactions. Accordingly, it is proposed to repeal section 1042.

## Section 1043 - Application moneys to be held in trust

390. Subsection 1043(1) provides that all moneys received from an applicant for securities of a corporation pursuant to a prospectus must be held in trust until the securities have been allotted to that applicant. The corresponding provisions in subsection 111 of the Companies Act and Codes only applied in relations to offers of securities to the public.

341. Subsection 1043(1) is to be amended so that it applies only in relation to primary offers other than excluded offers.

## Section 1066 - Approved deeds

### Paragraph 1066(1)(a)

342. Paragraph 1066(1)(a) provides that a deed is an approved deed if approval has been granted to it under the Corporations Law or a corresponding previous law. The amendment proposed to paragraph 1066(1)(a) is to make clear that, where approval has been given to a deed, it remains an approved deed only if the approval has not been revoked (cf paragraph 1066(1)(b)).

### Subsection 1066(2)

343. Subsection 1066(2) was originally introduced to make it clear that the management company could comply with a buy-back covenant contained in a deed which ceased to be an approved deed without contravening subsection 1065(1) which prohibits the issues, offers or invitations in respect of prescribed interests without an approved deed. As it stands s.1006(2) has given rise to some concern about the extent of obligation on the management company to comply with covenants other than the buy-back covenant after a deed has ceased to be an approved deed.

344. Subsection 1066(2) is to be omitted and replaced by a new subsection which will make it clear that a management company is able to comply with a buy-back covenant in such circumstances without contravening subsection 1065(1) without giving rise to any implication that compliance with other covenants is optional. It should be noted that by subsection 1073(1A) failure to comply with any covenant in a deed is a contravention of the Law.

### Subparagraph 1069(1)(e)(iii) and Paragraph 1069(1)(f)

#### Background

345. By subparagraph 1069(1)(e)(iii) of the Law, trust deeds for prescribed interests are required to contain a covenant

binding the trustee or representative 'to keep proper books of account in relation to those prescribed interests'. The previous corresponding provisions, subparagraph 168(1)(c)(ii) of the Companies Act and Codes, bound the trustee or representative to 'keep or cause to be kept proper books of account'. Prior to 1 January 1991, it had been the practice for trustees to cause the management company to keep the books of account. The change of wording has given rise to a suggestion that trustees must now keep the accounts themselves. Such a view of the Law has been adopted by the ASC which has, exercised its discretionary powers under subsection 1069(3) of the Law to grant trustee's relief from this perceived obligation until 31 December 1991.

346. Earlier this year, the Attorney-General asked the Australian Law Reform Commission and the Companies and Securities Advisory Committee to review the regulation of prescribed interests and other collective investment schemes. The terms of reference included consideration of what should be the powers, duties and responsibilities of managers and trustees. The Commission and the Committee are to report by 1 November 1991.

#### Proposed amendment

347. It would clearly be undesirable for trustees to be required to assume the account keeping role from 1 January 1992, which is likely to involve considerable expense while the long term position is under review. Pending the outcome of the review, the proposed amendment will make it clear that the trustee will be able to continue to discharge their obligation to keep proper books of accounts by causing the management company to do so. It should be noted that where such arrangements are made, trustees are, as a matter of trust law obliged to properly supervise the management company in discharging this function.

348. For similar reasons, paragraph 1069(1)(f) will be brought into line with paragraph 168(1)(ca) of the Companies Act and Codes.

#### Section 1073 - Consequences of contravention

##### Subsection 1073(1A)

349. This subsection provides that a person must not contravene a covenant contained, or taken to be contained in a deed that is or has at any time been, an approved deed.

350. Section 1073(1A) only applies in relation to deeds which are or at any time have been an approved deed. Subsection 1069(7) deems the covenants in subsection 1069(1) to be

contained in deeds which have never been approved deeds. Further, by subsection 1069(8), those covenants are deemed to be given by a deed where no deed exists and Part 7.12 Division 5 or a corresponding previous law was contravened as a result.

351. Subsection 1073(1A) is to be amended to apply in relation to the circumstances to which subsections 1069(7) and {8} apply.

#### Subsection 1073(2)

352. Subsection 1073(2) provides that where there is an offer or invitation in respect of prescribed interests in contravention of a provision of the Law, then any resulting contract is voidable at the option of a party other than the management company. There has been concern that the avoidance of a contract may, especially where the contravention of the Law is minor, may be a disproportionate result. The proposed amendment to section 1073 seeks to ameliorate this result by providing a mechanism for the Court to affirm a voidable contract in certain appropriate cases.

353. Subsection 1073(2) is to be amended to require any avoidance of the contract to be made by notice in writing to the management company.

#### Proposed subsections 1073(3) and (4)

354. Proposed subsection 1073(3) provides that where such a notice is received the obligations of the parties under the contract are suspended:

- for 21 days; and
- during any period while the issue of whether the contract should be affirmed under proposed section 1073A is before the Court.

355. Proposed subsection 1073(4) provides that a notice under subsection 1073{2} avoiding a contract takes effect 21 days or where an application has been made to the Court - after that application has been finally determined.

#### Proposed section 1073A - Court may affirm voidable contract where breach is not material

356. Proposed section 1073A enables the Court to declare a notice under subsection 1073(2) avoiding a contract to be of no effect where the contravention of the Law was a minor or insubstantial breach of the prospectus provisions which did not, or is unlikely to, materially prejudice the person who

gave the notice and in the circumstances it is just and equitable to do so.

357. Applications must be made under proposed section 1073A within 21 days of receiving a notice under subsection 1073(2) or within a longer period allowed by the Court.

Section 1079 - Restriction on written invitation or offers in respect of securities

Section 1080 - Particulars to be included in statement

358. Sections 1074 provides that subject to certain circumstances, a person must not issue written invitations to buy securities nor written offers for purchase of securities to persons other than persons whose ordinary business is the buying or selling of securities unless the invitation or offer is accompanied by a statement in writing which complies with the section. Section 1080 specifies the contents of the statement referred to in section 1079.

359. Sections 1079 and 1080 were originally intended to provide an alternative regime for regulating secondary offers of securities. However, as the proposed amendments will provide for such regulation, the need for sections 1079 and 1080 will be negated. These sections are therefore to be repealed.

### **SCHEDULE 3 - AMENDMENTS OF THE CORPORATIONS LAW RELATING TO REGISTRATION NUMBERS OF COMPANIES AND REGISTRABLE BODIES**

360. The purpose of the Australian Company Number (ACN) and Australian Registrable Body Number (ARBN) is to provide a simple way of assisting persons dealing with companies, foreign companies or registrable companies to identify those bodies. The ACN and the ARBN are a unique nine digit identifying number for each Australian company, foreign company and other registrable body.

361. A moratorium on the use of an ACN Or ARBN currently applies to the requirement for companies, foreign companies and other registrable bodies to display their ACN or ARBN on public documents or eligible negotiable instruments under subsections 219(3) and 362(4) of the Corporations Law. However, companies and bodies are still required to display their ACN or ARBN on their common seal and any document that is required by the Law to be lodged with the ASC. This moratorium expires on 31 December 1991.

362. The amendments proposed to the ACN and ARBN provisions are:

- cash register receipts produced by an electronic machine and which set out information which is stored in the machine will not be required to contain the ACN or ARHN of the company or body issuing the receipt;
- alternative abbreviations for ACN and ARBN (without full stops) will be available for use by companies and bodies in all official documents;
- the definition of 'public document' has been redrafted to clarify that, other than official documents of a company, the requirement for an ACN or
- ARBN to appear on company documents will only apply to documents that are signed or issued in the course of, or for the purposes of, a particular transaction or dealing. An advertising document issued by a company or on behalf of a company which is not also used as a document for undertaking some form of transaction or is not required by law to be published will not be required to contain the company's ACN or ARBN;
- the ASC will be empowered to exempt companies or bodies that operate in transportation of persons or goods from being required to place an ACN or ARBN on documents that are used in connection with transportation where it is necessary or desirable in the interests of promoting or

maintaining consistency in international practice relating to the form, content or use of transport documents.

#### Section 9 - Dictionary

363. The definition of "public document" is omitted and a new definition is substituted.

364. The purpose of this amendment is to clarify which company documents of a company and a registrable body are required to contain an ACN or an ARBN. The Law requires that a company set out its ACN immediately after its name on its common seal and on every public document and negotiable instrument of the company that is signed, issued or published (section 219). A similar provision applies to registrable bodies (section 362).

365. Paragraph (a) of the new definition makes it clear that a document prepared by a company or published or issued on behalf of company which is lodged, or required to be lodged with the ASC by the Law or the ASC Law, or is signed, issued or published by a company, for the purposes of the Law, the ASC Law or any other Australian Law will be required to contain an ACN.

366. Paragraph (b) of the new definition focuses the requirements for the ACN to those documents of a company which are used in the course of, or for the purposes of, a particular transaction or dealing. In effect any advertising which is not required by paragraph (a) or (c) of the new definition will not be required to contain the ACN of the company unless it is used in the course of a particular transaction.

367. Paragraph (c) of the new definition repeats the categories of documents that will be regarded as official business documents of a company and which will be required to contain an ACN.

368. Section 9 is amended by the inclusion of a definition of 'abbreviation' as a consequence to proposed section 99A.

#### Proposed section 99A - Abbreviations containing full stops

369. This proposed provision is an interpretative provision to take account of the introduction of an alternative for various abbreviations used in the Corporations Law,

#### Section 102A - Application not to be granted under applications also made under corresponding laws



370. This section provides that applications for registration by registrable Australian bodies or foreign companies are not to be made unless it is under the Corporations Law of each jurisdiction. An application for an exemption to the ASC in relation to transport documents will be required to comply with this section. This will not result in any practical inconvenience as an application can be made under the Law of each jurisdiction by expressing it to be made under "the Corporations Law" in which case it will be taken to be made under the Law of each jurisdiction.

Subsection 219(3) - Publication of company's name and registration number

371. This is a consequential amendment for the introduction of proposed Division 2 of Part 4.2.

Subsection 362(4) - Publication of name, etc.

372. This is a consequential amendment for the introduction of proposed Division 2 of Part 4.2.

Paragraph 362(4)(b)

373. This is a minor correction to the wording of the section.

PART 4.2 NAMES AND REGISTRATION NUMBERS

374. Insert Division 2 - Exemptions from requirements to publish registration members

Proposed section 383B - Machine-produced receipts

375. This provision exempts company receipts, which are produced by an electronic cash register or other device and which set out information which is stored in the device, from the requirement for the ACN of the company to appear on the receipt. The amendment will also exempt registrable bodies from having to include their ARBN on similar receipts.

376. The purpose of this amendment is to meet the concerns of many businesses who pointed out that having to alter cash register equipment or computer software to include the ACN would in many cases be very expensive and perhaps impossible without replacement of the registers.

377. It should be noted, however, that all companies are still required to place their name on all receipts issued by the company.

Proposed section 383C - Transport documents

378. The purpose of this provision is to facilitate the use of internationally recognised transport documents by companies operating in Australia,

379. A company or a group of companies will be able to apply to the ASC for an exemption from the requirement to include an ACN or ARBN on documents issued by the company or body, proposed subsection 383C(1),

380. The ASC must be satisfied that such an exemption is necessary or desirable in the interests of promoting or maintaining consistency in international practices relating to the form, content or use of transport documents, proposed subsection 383C(2).

381. Proposed subsection 383(3) sets out the requirements for such an application.

382. Proposed subsection 383(4) is a constitutional provision.

383. The ASC is empowered to ask for further information in relation to an application (proposed subsection 383C(5)) and to give an exemption subject to specified conditions. The ASC will be able to specify conditions that are necessary or desirable to ensure that the registration number of a body can easily be found out by persons to whom the company issues or publishes documents (proposed subsection 383C(6)). Proposed subsection 383C(7) gives an example of the principle by stating that a company could be required to publicly disclose its ACN at the place where the specific documents which are exempted are issued.

384. Proposed subsections 383C(9) and (10) provides for the enforcement of these provisions.

385. The ASC is empowered to revoke an exemption (proposed subsection 383C(10)) and the exemption is to take effect either on the date of application or the publication of the exemption in the Gazette whichever happens later (proposed subsection 383C(11)).

386. Subsection 383C(12) defines various terms used in the provision.

### Schedule 3 - Penalties

387. Schedule 3 which sets out the penalties applying to a contravention of the Law is amended by inclusion of a penalty for breach of proposed section 383C. The penalty for a breach of proposed section 383C is to be a penalty of \$1,000 or imprisonment for 3 months. This is the same penalty that applies to other ACN and ARBN provisions.

SCHEDULE 4 - MISCELLANEOUS SUBSTANTIVE AND TECHNICAL  
AMENDMENTS

Section 9 (paragraph (a) of the definition of "clients'  
segregated account")

388. The proposed amendment to the definition of "clients' segregated account" clarifies that the account can be maintained, whether in Australia or elsewhere with an Australian bank.

Section 85A

389. This amendment substitutes "Law" for "law".

Paragraph 224(1)(d)

390. Paragraph 224(1)(d) is to be amended to remove an erroneous reference to subsection 229(2). The paragraph as amended reflects paragraph 221(1)(d) of the corporations Act 1981, and will ensure that, where a director is prohibited from taking part in the management of a body corporate because of having been convicted of a particular, offence (as enumerated in subsection 229(3)), that director's office is also thereby vacated.

Subsection 240(4)

391. Subsection 240(4) is to be amended to provide that a company's secretaries need not all be Australian residents, but that a company must have at least one secretary who is resident in Australia. The provision as amended will reflect subsection 236(4) of the Companies Act 1981.

Paragraph 318(2)(d)

392. The proposed amendment to paragraph 318(2)(b) is to correct a typographical error, so that the provision will henceforth refer as intended to the defrauding of "members or creditors", rather than as at present "members of creditors".

Section 369

393. The proposed amendment omitting the word "company" from the section reflects the fact that bodies corporate may be duly incorporated with limited liability or no liability under Australian laws which are not "Australian company laws" - for example, co-operatives legislation. As a result of this amendment, such bodies will be able to give notice of the fact of their limited liability or no liability status by the inclusion of the relevant words at the end of their names, as they are generally required to do by the legislation under

which they are incorporated. The other amendment to this section merely corrects a grammatical error.

Section 874 Court may freeze certain bank accounts of dealers and former dealers

394. The proposed amendment to paragraph 874(1)(b) makes it clear that the provision applies where there has been a failure to comply with Part 7.6 or a corresponding previous law under previous corresponding law.

395. The proposed amendment to subsection 874(3) ensures that the Court has power to freeze accounts held with an Australian bank abroad.

Proposed Section 955A - Extended application of Division to non-marketable securities

396. Proposed section 955A is a consequential amendment resulting from the insertion of proposed section 1113A.

397. Where a declaration has been made under proposed subsection 1113A{1} in relation to a non-marketable security (that is a security that is not a marketable right or a marketable security within the meaning of section 1097) Division 7 of Part 7.10 will apply to that non-marketable security by virtue of proposed section 955A, as if it were a marketable security.

398. Proposed section 955A will also provide that the Commission may modify the operation of Division 7 of Part 7.10 in relation to such non-marketable securities.

399. Subsection 995(4) provides that nothing in Part 7.11 or 7.12 limits the generality of subsection (1). This should read subsection (2). The amendment corrects this reference. Subsection (1) was omitted by the Corporations Legislation Amendment Act 1990.

Section 1030 - Document containing offer of securities for sale deemed to be prospectus

400. Subsection 1030(3) is to be amended to correct a reference in that provision to "Act" so that the amended reference will read "Law".

Proposed Section 1113A - Power of Commission to extend application of Division 3

401. Proposed section 113A will empower the Commission to declare in writing that Division 3 of Part 7.13 applies to particular securities (as defined in section 92) or a class of

securities that are neither marketable rights nor marketable securities within the meaning of section 1097.

402. The securities which may be the subject of a declaration will thereby obtain the benefits of Division 3 of Part 7.13 which contains provisions designed to facilitate the processing of marketable securities and rights to marketable securities.

403. Given the development of increasingly sophisticated securities, it is considered that such a provision is necessary to allow the Australian financial markets to keep abreast of developments. Given the inherent delays in the legislative process, it is felt that it is desirable that proposed section 1113A be used to facilitate the marketing of new products where appropriate to ensure that Australian markets remain competitive. The ASC is considered to be an appropriate body for determining whether a particular security should gain the benefits of Division 3 of Part 7.10. In particular the ASC is in the best position to determine whether the consumer and the market are adequately protected if a particular security is to be the subject of a declaration.

404. In addition, by virtue of proposed section 955A, Division 7 of Part 7.10 will apply to those securities. This Division deals with claims on the NGF by owners of securities or by transferees who have suffered loss arising from unauthorised execution of transfers of those securities by transferor dealers.

#### Section 1224 - Power of Court to restrain dealings with futures broker's accounts

##### Paragraph 1224(1)(c)

405. The proposed amendment makes the wording of this provision relating to clients' segregated accounts consistent with that used in section 9 (the definition) and section 1209.

##### Subsection 1224(1)

406. The definition of a segregated client's account in section 9 and the provisions of section 1209 envisage that a futures broker can open such an account with an Australian bank abroad. The proposed amendment ensures that the Court has power to restrain dealings with such accounts even if not held in Australia.

**SCHEDULE 5 - COMMENCEMENT AND APPLICATION OF CHANGES TO  
CORPORATIONS LAW RESULTING FROM THIS ACT**

A Division is inserted into Part 9.10. which provides transitional provisions in relation to certain amendments contained in the Bill.

Section 1365 Commencement of certain changes

This new provision provides for certain changes to the Law contained in the Hill will, when enacted, be taken to have commenced on 1 January 1991.

Section 1366 - Application of certain changes

This new provision applies in relation to claims relating to unauthorised transfers which occurred before the commencement of the changes to the National Guarantee Fund provisions and in relation to a prospectus issued before the commencement of the changes to the prospectus provisions contained in this Bill.