

Corporate Law Economic Reform Program

Policy Reforms

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CORPORATE LAW ECONOMIC REFORM PROGRAM

The Corporate Law Economic Reform Program (CLERP) is a comprehensive initiative to improve Australia's business and company regulation as part of the Coalition Government's drive to promote business, economic development and employment. CLERP was announced by the Treasurer in March 1997 and is aimed at reforming key areas of corporate and business regulation.

Comprehensive policy proposals were released on each of the key areas during 1997, which were developed in close consultation with the business community. This paper draws together the policy reforms which have been adopted by the Government as a result of the CLERP papers. Legislation to implement these reforms will now be released for public exposure prior to introduction into Parliament.

The new policy framework which has been developed by the Government under CLERP will contribute to the efficiency of the economy, while maintaining investor protection and market integrity.

The Treasurer and the Parliamentary Secretary to the Treasurer, Senator the Hon. Ian Campbell MP have consulted widely with business and consumer groups to ensure that the reformed Corporations Law will be relevant, cost effective and provide appropriate protection for investors. To assist the Government, the Business Regulation Advisory Group was established consisting of representatives from key business groups. The Government has greatly appreciated the contribution of all groups that have participated so actively in the reform program.

The Government's policy reforms will implement wide ranging changes to key areas of business and financial market regulation including:

- Making access to capital easier for small business by introducing a range of measures to assist small and medium sized enterprises including enabling companies to raise up to \$5 million using an Offer Information Statement, up to \$2 million from 20 private investors and amounts of less than \$500,000 from individual 'business angels' without a prospectus;*
- A new business judgment rule to provide more certainty for directors and new shareholders' rights to take action on behalf of companies;*
- Providing a greater commercial and international focus to the making of accounting standards which will ensure that financial reporting standards are more relevant to business;*
- Improving takeovers regulation to promote a more competitive market for corporate control including the introduction of a follow-on rule and enhancing the role of the Takeovers Panel;*
- Adapting regulation to facilitate the more widespread use of electronic commerce; and*

Continued

- *Building a world-class, leading edge regulatory structure for financial markets and products including more consistent and comparable regulation for securities, futures, derivatives, superannuation, general and life insurance and deposit accounts.*

This Program of reforms will ensure that Australia's corporate laws meet the challenges of the present and future market place in a forward thinking, responsible and innovative way. They are designed to encourage free enterprise for the benefit of all Australians.

KEY FEATURES OF THE REFORM AGENDA

FACILITATING CORPORATE FUNDRAISING

Improving Disclosure

A range of measures will be implemented to facilitate raising investment capital and reduce the high costs of fundraising faced by Australian companies. Under the capital raising system in Australia and major overseas markets, fundraisers must disclose to prospective investors all material information about the product on offer. It has become clear that reform is desirable as, although the principle is sound in theory, in practice it places prohibitive costs on fundraisers.

Prospectuses are often too long and complicated and can obscure information of interest to investors. While most investors read prospectuses in some detail, they can have difficulty fully understanding them as a result of their length and complexity. Issuers frequently complain that they are forced to burden prospectuses with unnecessary information and that prospectus costs are too high.

The following reforms will increase the efficient operation of fundraising rules and reduce costs to business:

- (a) introducing short form prospectuses for retail investors with technical information contained in separate documents which will be available on request;
- (b) permitting investors in certain industries to be provided with a short *profile statement* containing key information rather than the full prospectus; and
- (c) allowing companies to issue prospectuses in electronic form and distribute them through the Internet or other media.

It is also clear that uncertainty over liability for the content of prospectuses has added to the complexity and expense of fundraising and has detracted from the prime function of disclosing relevant information to investors. Currently, directors, professional advisers and others are liable to investors for misleading statements contained in a prospectus under both the Corporations Law and the Trade Practices Act, with different requirements applying under each regime. The Government will clarify the potential liability of these parties for prospectus content by providing that their liability will be governed solely under the Corporations Law. Due diligence defences will be made available in all cases of fundraising in the financial sector where there is a positive duty to disclose information.

Facilitating Fundraising by Small and Medium Sized Enterprises

The cost of preparing and lodging a prospectus can be excessive in light of the amount of capital which small and medium sized enterprises (SMEs) seek to raise. This acts as a significant impediment to SMEs seeking public funding and, when passed on through the offer price, may make an investment unattractive. A range of measures will be adopted to facilitate fundraising by these SMEs while maintaining investor protection.

A new fundraising mechanism will allow an SME to raise a total of up to \$5 million through the use of offer information statements (OIS). In an OIS, a corporation will state the purpose for which the funds are required, include a copy of its audited accounts and disclose material information which it already knows. However, the corporation will not need to undertake due diligence inquiries or commission experts. Investors will be warned of the risks of investing without a prospectus and the desirability of obtaining professional advice. The normal liability rules will be modified to take account of the reduced disclosure.

In addition, a prospectus will not be required if a person makes personal offers that result in securities being issued to 20 or fewer persons in a 1 year period, with no more than \$2 million being raised. This will reduce the costs faced by SMEs when making small scale offerings without exposing investors to unnecessary risks.

To facilitate SME fundraising, a corporation will be able to raise funds from sophisticated investors without preparing a prospectus in a wider range of circumstances. The current exemption from the prospectus requirements only applies where a person invests \$500,000 or more. This is not a practical or rational test of an investors' experience, sophistication or capacity to assess risk. The exemption restricts the ability of 'business angels' to invest in SMEs, unless they are willing to invest amounts of \$500,000 or more. The sophisticated investor category will be expanded to include a person with net assets of \$2.5 million or whose gross income in the previous 2 years was at least \$250,000 per annum. Corporations will also be able to raise funds from an investor who a licensed securities dealer considers to be 'sophisticated' because of their previous investment experience.

IMPROVING CORPORATE GOVERNANCE

Clarifying Directors' Duties

Effective corporate decision-making is hampered by legal uncertainties arising from the potential liabilities of directors for their actions. A business judgment rule will be introduced to provide directors with a safe harbour from personal liability in relation to honest, informed and rational business judgments. The rule will apply where an officer makes an informed decision in good faith, without a material personal interest in the subject matter of the decision and rationally believes that the decision is in the best interest of the company.

The objective of the rule is to protect the authority of directors in the exercise of their duties of management. It is not designed to, and will not, insulate them from liability

for negligent, ill informed or fraudulent decisions. The rule will not lead to any reduction in the level of accountability of directors, but will ensure that they are not liable for decisions made in good faith and with due care.

Directors will benefit from the certainty that the rule provides in terms of their liability as they will be encouraged to take advantage of business opportunities and not behave in an unnecessarily risk averse manner.

To reflect modern business practices, directors will, where appropriate, be able to delegate functions to, and rely on advice and information provided by, other persons. The availability of an indemnity for legal actions and directors' liabilities in corporate groups will also be clarified.

A breach of a duty of care and diligence by a director will only give rise to civil sanctions and will no longer provide a basis for criminal liability under the Corporations Law. However, a breach of the duty to act honestly will continue to attract criminal liability.

Greater Accountability to Shareholders

A statutory derivative action will be introduced to enhance shareholders' rights to pursue an action where the company is unable or unwilling to do so.

This new right of action will provide an incentive for management to exercise powers appropriately and for the benefit of shareholders. Safeguards will be introduced to ensure that company management is not undermined by unjustified or vexatious litigation. The court will need to be satisfied that proceedings brought on behalf of a company are appropriate. There must be a serious case to be tried, the applicant must be acting in good faith and the action must be in the best interests of the company. Where the disputed matter concerns an arms-length contract between the company and a third party and there is no apparent conflict of interest by directors, the court will take this into account in deciding whether to permit a shareholder to take an action in the company's name. The courts will be given a broad discretion to make orders in relation to costs.

MAKING ACCOUNTING STANDARDS MORE USEFUL FOR BUSINESS

Financial reporting requirements can play an important role in Australian companies' ability to compete effectively and efficiently. Business users believe that many of our existing accounting standards do not reflect modern business practices as they are too prescriptive, overly technical and impose excessive and unnecessary costs on business.

Accounting standards that are responsive to the needs of both the Australian business community and investors will be developed, thus ensuring that Australia maintains an informed and efficient capital market.

To bring a business focus to the standard setting process, an advisory body, the Financial Reporting Council (FRC), will be established with membership drawn from

peak professional and business organisations. The FRC will have broad oversight of the Australian accounting standard setting process. It will report to the Minister and provide advice on the effectiveness of accounting standards. As a result, the accounting standard setting process will become more responsive to the needs of preparers and users of financial statements.

A key role of the FRC will be to ensure that the AASB is committed to, and works towards, adoption of IASC standards having regard to what is taking place in major capital raising economies.

The FRC will report to the Government on the acceptance of international accounting standards in overseas capital markets, on the progress made by the International Accounting Standards Committee (IASC) on developing a core set of international standards and on the International Organisation of Securities Commission's (IOSCOs) acceptance of those standards.

STREAMLINING TAKEOVER RULES

Mandatory Bid

To facilitate a more competitive market for corporate control, a bidder will be able to exceed the takeover threshold (more than 20 per cent of the total voting rights in a company) before being obliged to make a general takeover offer. To take advantage of this rule, certain conditions that reflect the equal opportunity principle underlying the takeover provisions must be met. These conditions include:

- the bidder must start from below the 20 per cent threshold with only 1 acquisition being allowed before the mandatory bid requirement is triggered;
- the bidder must disclose to the selling shareholder that the mandatory bid requirement will be triggered by an agreement to sell;
- a bid for all the outstanding shares in the target must be announced immediately following the pre-bid agreement;
- the bid must be for an amount at least equivalent to the highest price paid by the bidder in the last 4 months; and
- target shareholders must be provided with an independent expert's report.

In addition, a bidder must not exercise control of the target until the mandatory bid is made; the bidder must demonstrate in their statement that they have the capacity to pay for the full bid to minimise credit risk; the bid must be for cash only and be unconditional; and no shares may be issued for a certain period after the announcement of a takeover without shareholder approval.

Compulsory Acquisitions

Changes will be made to the rules governing compulsory acquisitions for shareholders who hold an overwhelming interest in a company, allowing a more efficient use of investment capital.

Takeovers Panel

To address concerns that litigation and the courts are being used to delay and frustrate legitimate takeover activity, the existing takeovers panel will be reconstituted and replace the courts and the Administrative Appeals Tribunal (AAT) as the primary forum for resolving takeover matters. The Panel will retain its existing jurisdiction to enforce compliance with the spirit of the Law. All interested parties will be able to bring matters before the Panel, not just the Australian Securities and Investments Commission (ASIC). The courts will only be able to grant an injunction delaying or stopping a takeover bid on the application of the ASIC. The Panel will be given jurisdiction to review ASIC decisions on exemptions from the takeover rules given to corporations.

Listed Managed Investments

Investors will have the benefit of the takeover rules applying to listed managed investment schemes.

ELECTRONIC COMMERCE

The Corporations Law will be amended to:

- focus on the information that needs to be given to the ASIC and be made available to the public, rather than on its format or the physical media in which it is stored;
- give the ASIC greater flexibility to receive documents and requests for service in electronic form; and
- facilitate electronic communication between companies and their members, the ASIC and its clients, and the retention of company records in electronic form.

The current fee collection structure will be amended to ensure that the means and timing of fee collection accommodates the use of communications technology.

Legislative recognition will be given to financial market netting practices. This will resolve the current legal uncertainties about whether contractual provisions should be allowed to operate notwithstanding the insolvency of a party to a netting contract. This initiative will reduce transaction costs and foster more efficient commercial practices in financial markets.

STREAMLINING REGULATION OF FINANCIAL MARKETS AND PRODUCTS

The regulatory regime for financial markets and products needs to be flexible and provide an efficient regulatory framework which will permit market participants to meet challenges presented by technological developments, innovation and integration with world markets.

Legislation will be developed to:

- provide comparable regulation of all financial products, including securities, derivatives, superannuation, life and general insurance and bank-deposits;
- provide for a general disclosure standard to assist investors to make comparisons across all financial products;
- licence all financial intermediaries and impose statutory obligations on these parties designed to protect retail clients; and
- provide appropriate mechanisms for responsibility for, and accountability of, the regulatory framework for financial markets to the market conduct regulator and the Government.

REFORM AGENDA

The Government's complete set of policy reforms is as follows.

FUNDRAISING REFORMS

Reform No. 1 — General Disclosure Test

Prospectuses will disclose what investors and their professional advisers will reasonably require and expect to find in order to make an informed investment decision.

Reform No. 2 — Shorter Prospectuses

Prospectuses will be shorter and more useful to retail investors. Issuers will be able to provide retail investors with information which will assist them, without unnecessary details. Additional information, which may primarily be of interest to professional analysts and advisers, can be mentioned in the prospectus and made available free of charge to those who request it.

Reform No. 3 — Profile Statements

Capital raising using documents other than prospectuses will be facilitated where appropriate. The ASIC will be empowered to authorise the use, in suitable industries, of profile statements containing key information. The prospectus will be available on request for investors requiring more information.

Reform No. 4 — Comprehensibility

The use of plain English will be encouraged but will not be mandatory; issuers will be free to determine the optimal means of communicating their offers.

Reform No. 5 — Forward-looking Statements

Profit forecasts and other forward-looking statements will be required to be based on reasonable grounds but the maker of the statement will not bear the onus of proof.

Reform No. 6 — Rights Issues

Prospectuses will continue to be required for rights issues but will be limited to information about the transaction and other information not already disclosed to the market.

Reform No. 7 — Advertising of Securities which are not Traded on the Australian Stock Exchange

Issuers of securities which are not traded on the ASX will be free to advertise basic information identifying the offer before the prospectus is available. They will not be able to advertise further until the prospectus is available.

Reform No. 8 — Advertising of Securities which are Traded on the Australian Stock Exchange

Issuers of securities which are already traded on the ASX will be able to advertise (without restrictions) before the prospectus is available. The advertisements will include a statement that a prospectus will be made available when the securities are offered and that anyone wanting to acquire the securities will need to complete the application form provided with the prospectus.

Reform No. 9 — Pathfinder Prospectuses

Issuers will be able to distribute pathfinder prospectuses (ie draft prospectuses sent to the non-retail market, normally to assist with pricing).

Reform No. 10 — Image Advertising

The advertising restrictions will not inhibit the promotion of a corporation's products or services in the ordinary course of trade. The Law will clearly identify the circumstances in which image advertising will be unlawful as a result of its indirect promotion of an issue of securities.

Reform No. 11 — Overlap between the Trade Practices Act and the Corporations Law

The liability rules for securities dealings will be contained in the Corporations Law. Section 52 and associated consumer protection provisions of the Trade Practices Act (and the Fair Trading legislation of the States and Territories) will not apply to dealings in securities.

Reform No. 12 — Persons Liable for all Statements in a Prospectus

The corporation, its directors and the underwriters of an issue will be liable to investors for misleading statements in a prospectus (subject to the uniform defence described below).

Reform No. 13 — Promoters

The persons liable under the Corporations Law for a misleading prospectus will not include promoters or persons who 'authorise or cause the issue of' the prospectus, unless they are liable as directors or in some other capacity.

Reform No. 14 — Professional Advisers and Experts

Professional advisers and experts will be liable to investors only for misleading statements attributed to them in the prospectus (subject to the uniform defence described below). Issuers will be required to obtain the consent of professional advisers and experts before attributing statements to them in the prospectus.

Reform No. 15 — Uniform Defence

A defence will be available to the corporation, directors, underwriters, experts and advisers where they prove that they made such inquiries (if any) as were reasonable, took reasonable care and it was reasonable for them to have believed that the prospectus was not misleading. They will be entitled to rely upon other persons (such as professional advisers and experts) where that is reasonable.

Reform No. 16 — Fundraising up to \$5 Million under an Offer Information Statement

A corporation will be able to raise up to \$5 million based on an OIS, without preparing a prospectus. In an OIS, the corporation will state what the funds are required for and disclose material information already known to it, but the corporation will not need to undertake due diligence inquiries or commission experts. The OIS will warn investors of the risks of investing without a prospectus and the desirability of obtaining professional investment advice. The OIS will also include audited accounts. The liability and other rules applicable to prospectuses will apply to an OIS subject to appropriate modifications to account for the reduced disclosure. A corporation will only be able to raise a maximum of \$5 million during its life using an OIS.

Reform No. 17 — Fundraising by Personal Offers

A corporation will not need to prepare a prospectus or OIS to raise up to \$2 million each year from 20 or fewer persons who have indicated their interest in offers of that kind or who are likely to be interested in the offer as a result of previous contact or a

professional or other connection with the person making the offer. While the number of subscribers will be limited to 20, they could be drawn from a larger pool of persons to whom offers are made.

Reform No. 18 — Sophisticated Investors

Issuers will be free to raise funds from sophisticated investors without preparing a prospectus or OIS. Sophisticated investors are those:

- who are investing at least \$500,000 in the issue;
- who have net assets of \$2.5 million;
- whose gross income in the previous 2 years was at least \$250,000 per annum; or
- who a licensed securities dealer considers to be ‘sophisticated’ because of their previous investment experience.

Reform No. 19 — Electronic Commerce

Issuers will be able to issue prospectuses in electronic form and distribute them through the Internet or other media.

Reform No. 20 — Registration

Prospectuses will no longer need to be registered by the ASIC, but subscriptions will not be allowed until 14 days after lodgment with the ASIC.

Reform No. 21 — Governmental Immunity

Federal and, subject to their agreement, State and Territory government business enterprises will be subject to the fundraising provisions, except in relation to issuing government guaranteed securities.

DIRECTORS' DUTIES AND CORPORATE GOVERNANCE REFORMS

Reform No. 22 — A Statutory Business Judgement Rule and a Statutory Derivative Action will be Introduced into the Corporations Law

As a means of facilitating decision-making by directors and promoting investor confidence, the Corporations Law will be amended to provide both a statutory form of:

- business judgement rule which will offer directors a *safe harbour* from personal liability for breaches of the duty of care and diligence in relation to honest, informed and rational business judgements; and
- derivative action to enable shareholders or directors of a company to bring an action on behalf of the company, for a wrong done to the company where the company is unwilling or unable to do so.

Reform No. 23 — Amendments will be made to the Corporations Law to Clarify Certain Aspects of Directors' Obligations

To provide directors and officers with greater certainty regarding key aspects of their duties to the company, the following amendments to the Corporations Law will be made.

The existing duty to exercise care and diligence in subsection 232(4) will be amended to make it clear that the standard of care required by the duty must be assessed by reference to the particular circumstances of the officer concerned. Under the revised provision, a director or other officer of a corporation will be required to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person will exercise if they:

- were a director or officer of a corporation in the corporation's circumstances;
- occupied the office and had the same responsibilities within that corporation as the director or officer; and
- had the director or other officer's experience.

The Law will expressly recognise the oversight role played by directors and their reliance on delegates to manage their company's day-to-day affairs. Accordingly, to provide certainty to directors regarding the extent of their ability to delegate functions and to rely on the advice of experts when making decisions, amendments will be made to the Corporations Law along the lines of sections 130 and 138 of the *New Zealand Companies Act 1993*.

The existing duty in subsection 232(2) to act *honestly* will be reformulated to capture the fiduciary principles that a director or other officer of a corporation must exercise their powers and discharge their duties:

- in good faith in the best interests of the corporation; and
- for a proper purpose.

Breach of the duty to act honestly will continue to have both criminal and civil consequences.

The Law will be amended so that a breach of the duty of care and diligence in subsection 232(4) will only give rise to civil sanctions and will no longer provide a basis for an offence under section 1317FA. Under subsection 1317FA(1) of the Corporations Law, a breach of the duty of care and diligence in subsection 232(4) undertaken with a dishonest intent currently amounts to an offence punishable by a maximum fine of \$200,000 or 5 years imprisonment, or both. However, the concept of negligence is inconsistent with dishonesty, in that dishonesty suggests an active awareness of wrongdoing rather than a failure to exercise sufficient care and diligence.

Reform No. 24 — Clarification of Liability of Directors in Situations of Conflict of Interest

The duty of directors in situations of conflict of interest will be clarified to permit directors who serve on wholly or partly owned subsidiaries to take into account the interest raised by the nominating company in certain circumstances.

Reform No. 25 — A Company's Ability to Indemnify Officers for Legal Expenses will be Clarified

The Law will be amended to confine the matters for which a company or related body corporate may not give an indemnity for legal expenses to legal expenses incurred:

- in defending or resisting a proceeding in which the person is found to have a liability for which the company may not indemnify the person;
- in defending or resisting criminal proceedings in which the person is found guilty;
- in defending or resisting proceedings brought by the ASIC or a liquidator for a court order if the grounds for making the order are found by the court to have been established; or
- in connection with proceedings for relief to the person under the Corporations Law in which the Court denies the relief.

Reform No. 26 — The Desirability of a Standard Form of Due Diligence Defence for Directors will be Pursued with State and Territory Governments

The Government will pursue with State and Territory Governments a review of legislation which imposes strict liability on directors for breaches committed by their company.

As part of the review, consideration will be given to the desirability of developing a standard, or model, *due diligence* defence for directors in respect of liabilities arising under statutes other than the Corporations Law.

Reform No. 27 — Corporate Governance Practices by Australian Companies will be Continuously Monitored

The establishment and maintenance of effective corporate governance practices by Australian companies is essential to Australia's international competitiveness and economic growth.

Corporate Governance Practices will, as far as practicable, be continuously monitored by the ASX, relevant Industry and Professional Bodies who promote Best Practice, Investors and Government to maintain investor confidence in Australia's Capital Markets. The Government will not impose additional mandatory legislative requirements unless there is a failure of the current requirements or these regulatory mechanisms.

ACCOUNTING STANDARDS REFORMS

Reform No. 28 — Role of Accounting Standards

In designing accounting standards, the standard setter will seek to ensure that the standards lead to the production of relevant, reliable, and comparable financial information for the users of financial statements.

A cost/benefit analysis will be undertaken by the standard setter in the development of each accounting standard. In undertaking the cost/benefit analysis, consideration will be given to whether the standard is suitable for all entities required by legislation to prepare financial statements in accordance with accounting standards, or whether the standard will only apply to a specific class of entity.

It will be made clear in legislation that accounting standards should be interpreted having regard to their objectives and purposes.

Reform No. 29 — Harmonisation with International Standards

The ultimate objective for the setting of accounting standards in Australia will be the production of high quality accounting standards that facilitate Australian business by leading to lower costs of capital and enabling Australian companies to compete on an equal footing overseas, while also maintaining investor confidence.

In the immediate future, Australia will continue to harmonise its standards with IASC standards so that compliance with Australian standards will automatically result in compliance with IASC Standards — this will not lead to a diminution in quality of Australian standards, but rather make Australian standards more internationally recognisable, so that Australia's capital market is not out of step with major overseas capital markets.

A prime focus of the Australian Accounting Standards Board (AASB) will be to influence the development of high quality and relevant IASC accounting standards with the objective that these will be adopted internationally for domestic purposes, especially within the major economies where capital raising takes place.

A key role of the FRC will be to ensure that the AASB is committed to, and works towards, adoption of IASC standards having regard to what is taking place in the major capital raising economies.

The FRC will report to the Government on progress made by the IASC towards completion of the core set of standards and the likelihood of endorsement of those standards by the IOSCO by 31 December 1998. The timing of adoption of the IASC standards will be determined following a report from the FRC on the acceptance of the IASC standards in overseas markets, on the progress that the IASC is making on developing a core set of standards and IOSCO's acceptance of those standards.

Australia will encourage the IASC in its restructuring to ensure greater representation on its constituent bodies by national standard setting bodies.

Reform No. 30 — Institutional Arrangements for Standard Setting in Australia

Advisory Group

To facilitate greater stakeholder involvement in the standard setting process, an advisory group, the FRC, will be established with responsibility to provide broad oversight of the process and maintain the momentum towards the development and adoption of internationally accepted standards.

Membership of the FRC will be representative of the following key interest groups who will have the authority to nominate their representatives on the FRC:

- users/analysts of financial statements;
- preparers of financial statements;
- governments/public sector;
- the professional accounting bodies; and
- the ASX and ASIC.

The Treasurer will identify bodies to be represented on the FRC and appoint persons to sit on the FRC from nominated representatives.

The Treasurer will appoint the Chairman of the FRC, with the Deputy Chairman being appointed by the FRC itself.

The FRC will:

- appoint the members (other than the Chairman) of the AASB;
- approve the priorities and business plan of the AASB and monitor compliance with them;
- oversee the provision of administrative and research/technical support for the AASB;
- set broad strategic direction and provide feedback to the AASB on the general policies it will be pursuing, including advice in broad terms on issues of public concern or controversy;
- make recommendations about, and oversee, the consultative arrangements of the AASB;
- oversee the funding arrangements of the AASB and approve its budget; and
- review the performance of the AASB and Urgent Issues Group (UIG) and provide a public report annually on the operation of the FRC, AASB and UIG.

New Standard Setting Body

The AASB will be established under legislation and have the powers of a body corporate.

The functions of the AASB will be to prepare, approve and issue accounting standards for private and public sector entities required to prepare financial statements in accordance with accounting standards.

The FRC will determine the precise size and make-up of the AASB in light of moves to harmonise with and eventually adopt IASC standards.

Members of the AASB will be appointed on the basis of ability, in particular, their experience in, or knowledge of, accounting, finance, business or government. Members will not sit on the AASB as representatives of any particular constituency to ensure the AASB's independence.

Initially, and subject to the views of the FRC, the AASB will desirably consist of 6 part-time members, together with a part-time Deputy Chairman and full-time Chairman (8 in total). The Chairman will be appointed by the Treasurer with the remaining members appointed by the FRC.

Project Advisory Panels of experts on particular subjects being considered by the AASB will be used as sounding boards from the early stages and throughout the development of particular standards to facilitate stakeholder involvement in the making of accounting standards.

The UIG will continue its present functions, but with a revised structure so that it shares a common chairman with the AASB and reports directly to the AASB in relation to its decisions. Members of the UIG will be appointed by the FRC.

Meetings of the AASB and UIG will be held in public. Voting in the AASB will be by way of a simple majority and the existing voting procedures for the UIG will be retained.

Reform No. 31 — Secretariat and Research Support

A dedicated full-time secretariat, engaged by, and directly accountable to, the AASB will be established to provide core administrative and research support.

The specific arrangements regarding secretariat and research support for the AASB will be determined and re-assessed periodically by the FRC, particularly in light of Australia's move towards adoption of IASC standards.

The AASB will have a dedicated Secretary/Director who will be directly responsible for the provision of the administrative support to the FRC and AASB. The Secretary/Director will also oversee the provision of research/technical support to the AASB, the UIG and any other subcommittees or consultative groups established in respect of particular projects.

The AASB will have the flexibility to augment this support by contracting with outside providers as appropriate.

Reform No. 32 — Funding

In recognition of the importance to Australia of having high quality accounting standards that are recognised internationally, the Government is committed to ensuring that the AASB is adequately funded. This will enable the AASB to provide high level input to the development of IASC standards, and domestic standards where necessary, and to promote acceptance of those standards in major overseas capital markets.

To provide ongoing certainty regarding funding of the accounting standard setting process, increased stakeholder commitment to it and a greater spreading of the cost burden amongst beneficiaries, funding totalling approximately \$10 million over the next 3 years will be provided by government and the private sector.

The total amount of funding that will be allocated to accounting standard setting will be periodically reviewed by the FRC.

Reform No. 33 — Legal Backing

The AASB will not make determinations regarding which types of entities will comply with accounting standards, this being a matter for the legislation governing those bodies or industries. However, this will not preclude the AASB from prescribing different standards for different entities as considered appropriate.

The ASIC will continue to monitor compliance with accounting standards and take appropriate enforcement action when necessary.

At a more general level, the FRC will monitor the operation of accounting standards to assess their continued relevance and to determine whether they are still achieving their objectives.

Reform No. 34 — Public Sector Accounting

Subject to the agreement of the accounting bodies and State and Territory governments, the AASB will have responsibility for making accounting standards in respect of public sector, non-corporate and non-profit entities.

Public sector interests will be represented on the FRC.

Whilst members of the AASB will not necessarily be drawn from the public sector, at least some of the members on the AASB will have particular expertise in relation to the public sector.

It will be left to each government (Commonwealth, State or Territory) to determine the legal effect of accounting standards made by the AASB in respect of public sector entities falling under their responsibility.

The FRC will consider the desirability of retaining specific consultative arrangements for the AASB in respect of public sector issues.

Reform No. 35 — Other Issues

The AASB will give a high priority to addressing the outstanding issues in the conceptual framework for general purpose financial reporting.

The possibility of developing a generic Financial Reporting Act will be explored with State and Territory Governments.

Australia will promote moves internationally to introduce market value accounting and work towards addressing fundamental issues such as measurement.

The AASB will give priority to considering the introduction of risk accounting in the accounting framework to provide a dynamic measure of an entity's financial condition.

TAKEOVER REFORMS

Reform No. 36 — Equal Opportunity

The equal opportunity principle will be retained. This will ensure that all shareholders of a target company have reasonable and equal opportunities to participate in any benefits under a change in corporate control.

Reform No. 37 — Mandatory Bid Rule

Changes in corporate control will be facilitated by allowing an acquisition which will exceed the statutory 20 per cent threshold provided that the acquisition is immediately followed by the announcement of a full takeover bid. This will provide market participants with an additional mechanism to acquire and relinquish corporate control.

Reform No. 38 — Contents of Mandatory Bid Rule

The following conditions will apply to mandatory bids:

- the bidder must start from below the 20 per cent threshold (that is, before the acquisition that triggers the mandatory bid requirement);
- only 1 acquisition will be allowed before the requirement is triggered;
- the bidder must disclose to the selling shareholder that the mandatory bid requirement will be triggered by an agreement to sell;
- a bid for all the outstanding shares in the target must be announced immediately following the pre-bid agreement which takes the bidder above the 20 per cent threshold, with the announcement including the terms of the pre-bid agreement;
- a person under an obligation to make a mandatory bid could be relieved from that obligation in exceptional circumstances by the ASIC;
- the bidder must not exercise control of the target until the mandatory bid is made;
- the bidder must demonstrate in the bidder's statement that they have the capacity to pay for the full bid, to minimise credit risk;
- the bid must be for an amount at least equivalent to the highest price paid by the bidder in the last 4 months;
- the bid must be for cash only;
- the bid must be unconditional unless approved by the ASIC;
- an independent expert's report must be sent with the statement by the target company in response to the bid;
- no shares may be issued for a certain period after the announcement of a takeover without shareholder approval;
- if the mandatory bid is not made, it will be an offence and the shares sold into the bid would either be returned to the vendor or automatically vested in the regulator for sale; and

- the mandatory bid provisions will be reviewed after 2 years.

Reform No. 39 — Compulsory Acquisitions of all Securities in the Relevant Class

The current law allows compulsory acquisition of minority interests in certain circumstances. This will be expanded to facilitate the acquisition of the outstanding securities in a class by any person who already holds 90 per cent of the class. If 10 per cent by value of the minority security holders dissent, the acquisition will only be able to proceed with court approval of the fairness of the price.

Existing compulsory acquisition rules and procedures will be streamlined by:

- enabling takeover bids and post-bid compulsory acquisitions to be made for all classes of securities; and
- providing that post-bid compulsory acquisitions can proceed if the bid is accepted by the holders of 75 per cent of the outstanding securities (rather than by 75 per cent of the number of holders as currently required).

Reform No. 40 — Compulsory Acquisitions of all Securities in the Company

The current law in relation to compulsory acquisition of minority interests will be expanded to facilitate the acquisition of 100 per cent of the shares and any securities convertible into shares of a company by any person holding at least 90 per cent by value of those shares and securities, provided that they also hold at least 90 per cent of the voting rights of the company. If 10 per cent by value of the minority security holders of any class dissent, the acquisition of that class will only be able to proceed with court approval of the fairness of the price.

Reform No. 41 — Dispute Resolution

A reconstituted Panel will take the place of the courts as the primary forum for resolving takeover disputes under the Corporations Law, with the exception of civil claims after the takeover has occurred and criminal prosecutions. All interested parties will be able to bring matters before the Panel, not just the ASIC. The Panel will be able to make orders where there is a breach of the spirit of the takeover rules, and will have the power to review ASIC exemption and modification decisions relating to takeovers on their merits (replacing the current jurisdiction of the AAT). Panel decisions will be subject to limited review of questions of law by the courts. The courts will only be able to grant an injunction having the effect of delaying or stopping a takeover bid on the application of the ASIC.

Reform No. 42 — Takeovers of Listed Managed Investment Schemes

The takeover provisions of the Corporations Law, including the provisions on compulsory acquisitions and disclosure of substantial holdings, will apply to listed

managed investment schemes subject to appropriate modifications. This will override any inconsistent takeover rules contained in the ASX Listing Rules or existing trust deeds.

Reform No. 43 — Removing Listed Scheme Managers

To be consistent with the ASX Listing Rules, the legislation will make it clear that the manager of a listed managed investment scheme is able to be replaced on the same basis as company directors, namely by a simple majority of unit holders who vote at a duly convened meeting (whether in person or by proxy).

Reform No. 44 — Schemes of Arrangement

The current approach to takeovers by scheme of arrangement will be retained. This will continue to allow schemes to be used to transfer control of a 'target' company to a 'bidder' company (by cancelling all of the shares in the target other than those held by the bidder), subject to the operation of the scheme provisions.

Reform No. 45 — Governmental Immunity

Federal and, subject to their agreement, State and Territory government business enterprises will be subject to the takeover provisions.

ELECTRONIC COMMERCE REFORMS

Reform No. 46 — Enforcement Issues Raised for the Australian Securities and Investment Commission with the Advent of Globalisation and New Technologies

The ASIC will continue its vigilance in relation to the regulatory concerns posed by developments in electronic communication and commerce, and maintain an active enforcement strategy to deal with those concerns.

It will also continue its participation in the work of the IOSCO, which is addressing enforcement challenges and opportunities arising from the increasing use of the Internet.

Reform No. 47 — Enhanced Flexibility for the Electronic Lodgment and Inspection of Information under the Corporations Law

The provisions of the Corporations Law providing for the lodgment and inspection of documents with the ASIC will be amended to ensure that they are flexible enough to accommodate changes in communications technology so as to allow electronic as well as paper-based methods to be used.

The Corporations Law will focus on the information that must be lodged or may be inspected with the ASIC, rather than on its format or the physical media in which it is stored. The Law will specify the information the ASIC will obtain and permit to be inspected, while practical matters of detail, such as the methods of communication which may be used for that purpose, will be set out in regulations or in rules determined by the ASIC.

Reform No. 48 — New Arrangements for Collection of Fees by the ASIC

The ASIC will be given greater flexibility to receive documents and requests for service in electronic form.

As a result, the current fee collection structure will also be amended to ensure that the means and timing of fee collection accommodates those electronic commerce methods.

Reform No. 49 — Recognition of Electronic Communication Methods in the Corporations Law

To facilitate electronic communication between companies and their members, as well as the retention of company records in electronic form, the Corporations Law will be amended to recognise electronic communication methods, thereby providing a more modern and technologically-neutral legislative framework.

Reform No. 50 — Recognition of Close-Out and Market Netting Arrangements

Under the current contract-based close-out and market netting arrangements, there are some legal uncertainties about whether contractual provisions will be allowed to operate notwithstanding the insolvency of a party to the netting contract. This uncertainty has the potential to affect the international competitiveness of Australian financial institutions.

To overcome these uncertainties, the Government will develop legislation, along the lines recommended by the CASAC Netting Sub-Committee, to provide a more certain and robust legal framework for close-out and market netting arrangements. This legislation will ensure that these netting arrangements will operate notwithstanding the insolvency of a party to the arrangements.

Reform No. 51 — Electronic Settlement of Transactions in Commonwealth Government Securities

The *Commonwealth Inscribed Stock Act 1911* and Regulations will be amended to enable the electronic transfer of the direct beneficial and legal interests in Commonwealth Government securities (CGS). This will enable transactions in CGS to be settled electronically, as well as through existing paper based means.

FINANCIAL MARKETS AND INVESTMENT PRODUCTS REFORMS

Reform No. 52 — Harmonised Regulation of Financial Products

A more efficient and flexible regime for financial markets and financial products will be achieved by developing an integrated regulatory framework for financial products. The new regulatory regime will provide consistent regulation of functionally similar markets and products.

Financial products will include all securities, futures and other derivatives as well as foreign exchange, superannuation, general and life insurance and deposit accounts.

The existing diverse regulatory arrangements for financial markets and financial products under the Corporations Law, the Insurance (Agents and Brokers) Act, the Insurance Contracts Act, the Banking Act, the Superannuation Industry (Supervision) Act, the Retirement Savings Accounts Act and various industry codes will be harmonised.

Reform No. 53 — New Regulatory Framework

Persons will be prohibited from conducting a market in financial products or providing financial intermediary services unless they hold an appropriately endorsed financial markets licence. The financial markets licence will have 3 categories:

- a licence to operate a market facility;
- a licence to operate a clearing and settlement facility; and
- a licence to provide financial intermediary services.

The criteria to be satisfied in order to obtain a licence will be broadly stated and flexible to accommodate different market structures, financial products and financial intermediary services. The way in which these legislative requirements will be satisfied will vary according to the nature of the services provided by the licensee.

Reform No. 54 — Market Facilities

A licence to operate a market will be required if a person proposes to provide a market facility:

- where financial instruments are regularly traded or information is provided about the prices at which persons may expect to trade financial instruments; and
- which involves multiple buyers and sellers.

The criteria to be satisfied to obtain a licence to conduct a market facility will be that the market operator must:

- have adequate arrangements for the supervision of the market;
- have and maintain sufficient resources to conduct the market and carry out supervisory functions;

- have adequate rules or procedures for the operation of the market, including access to market facilities, the recording and disclosure of transactions effected on the market and procedures for dealing with complaints;
- have adequate arrangements for the clearing and settlement of transactions; and
- have adequate protection for retail investors.

The legislation will set out the ongoing obligations which will be imposed on a market operator to ensure that the objectives of market regulation are satisfied on a continuing basis.

Reform No. 55 — Clearing and Settlement Facilities

A licence to operate a clearing and settlement facility will be required where the clearing and settlement services are not conducted by a licensed market operator.

The criteria to be satisfied to obtain a licence to operate a clearing and settlement facility will be that the facility provider must:

- have adequate rules or procedures for the operation of the facility;
- have adequate arrangements for the supervision of the facility; and
- have and maintain sufficient resources to conduct the facility and perform supervisory functions.

The legislation will impose ongoing obligations on clearing and settlement facility providers to ensure that the objectives of market regulation are satisfied on a continuing basis.

Reform No. 56 — Financial Intermediaries

A single licensing regime will be introduced for financial market intermediaries.

The criteria to be satisfied to obtain a financial intermediary's licence will be that the intermediary must:

- have adequate financial resources for the performance of the proposed activities; and
- have the competence, skills and experience to provide the relevant services.

Conditions will be imposed on a financial intermediary's licence to ensure that the objectives of market regulation are satisfied on a continuing basis.

Reform No. 57 — Conduct of Financial Intermediary's Business

Statutory obligations will be imposed on intermediaries in relation to their dealings with retail clients including requirements relating to:

- risk disclosure;

- confirmation documentation and periodic statements;
- accounts and record keeping;
- benefits disclosure;
- pressure sales;
- the suitability of personal product recommendations; and
- complaints and dispute resolution.

Reform No. 58 — Disclosure

It is highly desirable that a consistent and comparable disclosure regime for all financial instruments be developed.

All financial instruments, other than securities which are subject to the prospectus provisions, will be subject to a requirement to disclose all relevant information to permit clients to make informed decisions about such instruments. The disclosure document must address specific issues in order to increase comparability across similar financial products. Promoters or issuers of financial products will be required to disclose to clients the fundamental terms and obligations attaching to a financial product as well as the risks involved with the product and all fees, commissions and charges.

The fundraising provisions will apply to specified financial instruments (shares, debentures, managed investments). The development of profile statements under the Corporations Law will assist clients to compare securities and other financial instruments.

Reform No. 59 — Market Misconduct

The market misconduct provisions of the Corporations Law, which include insider trading and market manipulation, will be harmonised for all markets where financial instruments are regularly traded by multiple buyers and sellers.

Rules relating to misconduct by financial intermediaries, including breaches of licence conditions, will be harmonised and enforced by the ASIC.

Reform No. 60 — Regulatory Responsibility

The Minister will be responsible for licensing markets and licensing clearing and settlement facilities, as well as considering amendments to market rules. The Minister will be able to delegate the exercise of those functions to the ASIC.

The ASIC will administer the licensing regime for financial intermediaries.

BUSINESS REGULATION ADVISORY GROUP

Mrs Catherine Walter	(Chairman) Australian Institute of Company Directors
Mr Peter Barnett	Business Council of Australia
Mr Leigh Hall	Australian Investment Managers' Association
Mr Rohan Jeffs	Australian Chamber of Commerce and Industry
Mr Jeffrey Lucy	Accounting bodies
Mr John Murray	Small Business Coalition
Mr Robert Nottle	Australian Stock Exchange
Mr Malcolm Starr	Sydney Futures Exchange
Mr Les Taylor	Australian Corporate Lawyers Association