

**COLLECTIVE INVESTMENTS**

**Proposed Amendments to the  
Corporations Law for the Regulation of  
Collective Investment Schemes**

**COMMENTARY**

**December 1995**

**Business Law Division  
The Attorney-General's Legal Practice**

## PART C - COMMENTARY

### Definitions relevant to collective investment schemes

Section 9 of the Law is to be amended to include a number of definitions which are relevant to the proposed regime for the regulation of collective investment schemes. They are: 'collective investment scheme'; 'custodian'; 'franchise'; 'interest in a collective investment scheme'; 'registered scheme'; 'responsible entity'; and 'scheme property'. Additionally, the section 9 definition of 'member', 'constitution' and 'officer' are to be amended to reflect the requirements of proposed Chapter 5C.

The central definition is that of 'collective investment scheme'.

Collective investment schemes are currently regulated under the 'prescribed interest' provisions of the Law. The complex and seemingly all embracing definition of 'prescribed interest' has been widely criticised because of its lack of precision.

The definition of a 'collective investment scheme', to be inserted in section 9, will provide greater certainty and guidance as to what investment arrangements are to be regulated under the Law. The definition sets out the key elements of a collective investment scheme for the purposes of the Law.

The essential features of a scheme are that:

- (i) persons contribute money or money's worth to acquire interests in the scheme - incorporating a purposive element in the definition
- (ii) contributions are pooled or used together in a common enterprise to produce financial or other benefits to members; and
- (iii) the members do not have day to day control over the operation of the scheme although they may be consulted.

Notably, the term 'used together in a common enterprise' may include arrangements described as enterprise or agricultural schemes. The concept of a 'common enterprise' has been judicially considered on a number of occasions and continues to be relevant for the purposes of this definition.

The definition of collective investment scheme expressly includes time-sharing schemes as defined in section 9 of the Law.

#### *Statutory exclusions*

Existing exclusions from the prescribed interest arrangements are either specifically excluded from or do not come within the terms of the definition of collective investment scheme.

Schemes and arrangements specifically excluded from the definition are: statutory funds under the *Life Insurance Act 1995*; funds regulated under the *Superannuation Industry (Supervision) Act 1993*; schemes involving the issue of debentures or convertible notes by a body corporate; schemes operating as Australian banks in the ordinary course-of banking business; bodies corporate; exempt Western Australian schemes; retirement village schemes; franchises; barter schemes; and, schemes or arrangements in which all the members are bodies corporate that are related to each other and to the body corporate that promotes the scheme or arrangement.

There is also provision for the regulations to declare that certain kinds of schemes or arrangements are not collective investments schemes for the purposes of the Law.

## **PART 5C.1 REGISTRATION OF COLLECTIVE INVESTMENT SCHEMES**

### **When a collective investment scheme must be registered**

Any investment scheme or arrangement satisfying the section 9 definition of a collective investment scheme may be registered with the ASC.

A collective investment scheme with more than 15 members or which has been promoted by a person who is in the business of promoting such schemes, or is an associate of the promoter, is required to be registered (Bill subsection 601ED(1) and (2)). Interests in collective investment schemes are securities and are subject to the operation of section 995 of the Law even where a scheme is not required to be registered.

Investment schemes in which only excluded issues are made will not be required to comply with the requirements of the collective investments chapter. Additionally, subsections 66(2) and (3) will be amended to extend the exemptions in relation to collective investment schemes. A prospectus will not be required in relation to schemes which are not registered and not required to be registered, and the exclusion from the prospectus requirements for limited offers invitations or issues of securities will be extended to registered schemes (Bill Schedule 1, items 1 to 4).

#### *15 person threshold*

Where a number of collective investment schemes are closely related, the ASC may determine that each of the schemes is required to be registered where the total number of members of all schemes exceeds 15 (Bill subsection 601ED(3)). A recent example of an arrangement involving three trusts, where the Court found there to be but one scheme was the decision of the Supreme Court of South Australia in *Australian Securities Commission v Su* 17 ACSR 94.

For the purposes of determining whether the 15 member threshold is satisfied the holders of a joint interest in a scheme are to be counted as one member. However, where an interest is held by a trustee for beneficiaries who are presently entitled to a share of income of the trust estate or who individually, or together with other beneficiaries, are in a position to control the trustee, those beneficiaries are individually counted as members of the scheme rather than the trustee (Bill subsection 601ED(4)).

Bill subsection 601ED will not apply to trusts arising in the course of the administration of the deceased estate of a member of a collective investment scheme. Persons who will benefit from the administration of a deceased estate only have an equitable right to have the estate administered properly and do not have any beneficial interest in the assets being administered.

The Law will include a general prohibition against persons operating unregistered collective investment schemes which are required to be registered (Bill subsection 601ED(5)). Persons acting as the agent or employee of another person, or who are taking steps to wind up a scheme or remedy a defect which resulted in the scheme's deregistration, will be taken not to be operating a scheme (Bill subsection 601ED(6)).

### **Applying for registration**

An application must be lodged with the ASC in order to register a collective investment scheme (Bill subsection 601EA(1)).

The registration application must be lodged with the ASC, together with a copy of the scheme's constitution and the scheme's compliance plan, and include details identifying the proposed:

- scheme responsible entity
- scheme custodian; and

- auditor of the scheme compliance plan (Bill subsection 601EA(2) and (3)).

### *Registration*

The ASC must register a scheme within 14 days where:

- the application complies with the requirements of Bill section 601EA
- the responsible entity is a public company and holds a dealers licence authorising it to operate a collective investment scheme (Bill section 601FA)
- the scheme's constitution meets the requirements of Bill section 601GA
- the scheme's compliance plan meets the requirements of Bill sections 601HA and 601HC and arrangements are in place that satisfy Bill section 601HG in relation to the audit of compliance with the plan
- the custodial arrangements for scheme assets satisfy the requirements of Bill section 601JA. That is, the custodian is a public company approved by the ASC and all scheme property is vested in the custodian or its agents.

On registration, the ASC will allocate a scheme identifying number which must appear on all correspondence in relation to the scheme which is subsequently lodged with the ASC by the responsible entity (Bill sections 601EB(2) and 601EC).

Any change of the record of registration must be notified by the responsible entity to the ASC (see Bill subsections 601FL(2), 601FM(2), 601FP(3), 601FQ(4), and sections 601HH and 601JG). Modifications to the constitution or the compliance plan must be lodged with the ASC within 14 days (Bill subsections 601GC(2) and 601HE(4)).

The record of registration will be accessible to the public by searching the ASC ASCOT database.

## **PART 5C.2 THE RESPONSIBLE ENTITY**

### **DIVISION 1 - RESPONSIBILITIES AND POWERS**

The responsible entity of a scheme must be a public company that holds a dealers licence authorising it to operate a collective investment scheme (Bill section 601FA; Bill Schedule 1, item 52)).

The ASC will administer the licensing of a responsible entity under the current provisions of Part 7.3 of the Law. For instance:

- an application for a licence will be required to be made in accordance with section 782 and when granting a licence the ASC must consider matters such as the good fame and character and educational qualifications and experience of the officers of the responsible entity, as set out in section 784
- the ASC may impose conditions and restrictions on the licence in accordance with section 786
- a responsible entity will be required to notify the ASC of a breach of a condition of the licence in accordance with section 787
- the ASC will be able to revoke a responsible entity's licence without a hearing in limited circumstances, revoke a responsible entity's licence with a hearing in a broader range of circumstances, and suspend a responsible entity's licence (Division 5 of Part 7.3).

Proposed section 825A will give the ASC power to revoke a responsible entity's licence if it is satisfied that the members of the scheme have suffered or are likely to suffer loss or damage

because of a contravention of the Law (Bill Schedule 1, item 54). Where the ASC takes this action it would also take steps for a temporary responsible entity to be appointed to the scheme (Bill section 601FN). Where a responsible entity is operating a number of schemes, the provision is sufficiently flexible to allow the ASC to amend the licence in relation to, for instance, one scheme only.

### **Responsible entity to operate scheme**

The responsible entity is to perform the functions conferred on it by the scheme's constitution and the Law.

The responsible entity will not be precluded from engaging an agent, or otherwise engaging a person, to do anything that it is authorised to do in connection with the scheme. The responsible entity will be liable to the members for any losses that an agent causes to the scheme even though the agent acted fraudulently or outside the scope of his or her actual or apparent authority (Bill section 601FB).

The effect of this provision is to place the onus upon the responsible entity to recover any losses suffered by a scheme as a result of the conduct of persons engaged by the responsible entity in relation to the scheme.

It should be noted that section 6 of the *Corporations ([name of State]) Act* which preserves the operation of earlier State/Northern Territory laws only applies where there is no direct inconsistency with the Corporations Law. If there is any inconsistency (express or implied), the Corporations Law will override the earlier legislation.

Section 6 operates only to prevent the Corporations Law from overriding earlier legislation on the ground of indirect inconsistency i.e. on the ground that, although the two laws could operate concurrently, the Corporations Law is intended to "cover the field" and so be incompatible with the other legislation operating at all in that "field". Bill section 601FB, which in effect provides that the responsible entity is liable to members for any act or omission in relation to the affairs of the scheme will, where the scheme is structured as a trust, override inconsistent provisions of State/Territory trustee legislation.

### **Duties of responsible entity**

The responsible entity of a collective investment scheme will be subject to extensive statutory duties (Bill section 601FC). The statutory provisions will reflect the duties currently imposed on the management company and trustee under the covenant provisions of Division 5 of Part 7.12 of the Law, and also the fundamental duties of a fiduciary. These include the duties: to act honestly; to exercise the appropriate degree of skill, care and diligence; to act in the best interests of the members; to not make improper use of scheme information; and to treat members of the same class equally and all members fairly.

A number of the statutory duties reflect the specific nature of the relationship between the responsible entity and the members of a scheme. The responsible entity must ensure that all payments out of scheme property are made in accordance with the scheme's constitution, including the payment of fees out of scheme property for the operation of the scheme.

The responsible entity will be required to ensure that it transfers any scheme property, including money, to the custodian as soon as practicable. The value of scheme property is to be adequately monitored by the responsible entity. The responsible entity must comply with the scheme's compliance plan.

The responsible entity will be under a duty to report to the ASC any breach of the Corporations Law that relates to the scheme. Additionally, the Bill will provide that a breach of a duty placed upon the responsible entity by the scheme's constitution will be a breach of a statutory duty.

The above duties imposed upon the responsible entity will be civil penalty provisions (Part 9.4B of the Law). The civil penalty provisions will also apply to a number of the duties of officers of responsible entities and are discussed below.

The responsible entity and its officers must take all reasonable steps to assist the ASC in its surveillance of collective investment schemes under Bill section 601FF

Members of the scheme will be given standing against the responsible entity for breaches of the above duties (Bill section 601NA).

### **Duties of officers of responsible entity**

The term 'officer' in relation to the responsible entity of a registered scheme will be defined in section 9. It is defined to mean a person who is a director, secretary or executive officer of the company that is the responsible entity (Item 3 - Definitions relevant to collective investment schemes).

The duties of officers of a responsible entity will reflect, in part, the duties owed by the responsible entity. These include the duties: to act honestly; to exercise the appropriate degree of skill, care and diligence; to act in the best interests of the members; and to not make improper use of their position or scheme information to gain an advantage for themselves or other persons, or to cause a detriment to scheme members.

A further duty imposed upon officers of the responsible entity is to take all reasonable steps to ensure that the responsible entity complies with the Corporations Law, the scheme's constitution, any conditions imposed on its dealers licence and the scheme's compliance plan (Bill section 601FD). These duties will be subject to the civil penalty provisions of the Law.

### **Duties of employees of responsible entity**

The Law will provide that an employee of the responsible entity of a registered scheme must not make improper use of their position or scheme information to gain an improper advantage for themselves or other persons, or to cause a detriment to scheme members (Bill section 601FE).

### **Acquisition of interests in scheme by responsible entity**

A responsible entity may only acquire an interest in a scheme under its control for the same consideration that would apply if it were any other person acquiring the interest and on terms that do not disadvantage other members (Bill section 601FG). The holding of interests in the scheme by the responsible entity is subject to the restriction on voting those interests in proposed section 252V which appears in the Second Corporate Law Simplification Bill (Released June 1995). This is subject to the civil penalty provisions.

### **Liquidator of the responsible entity entitled to exercise indemnity rights**

If the responsible entity of a registered scheme is under external administration, a provision in the scheme's constitution, or another instrument, which would seek to deny any right of indemnity the company may have from scheme property is void against the liquidator or administrator of the company. Only the liquidator or administrator of the responsible entity can exercise that right of indemnity (Bill section 601FH).

## **DIVISION 2 - CHANGING THE RESPONSIBLE ENTITY**

Any purported change of a scheme's responsible entity is ineffective unless the ASC record of scheme registration is changed (Bill section 601FJ).

### **Retirement of responsible entity**

A responsible entity that wishes to retire will be required to call a meeting of the members to enable the members to vote on an extraordinary resolution to choose another company to be the responsible entity of the scheme (Bill subsection 601FL(1)).

The requirements for meetings of members of collective investment schemes are set out in Part 2G.4 of Chapter 2G of the Second Corporate Law Simplification Bill. The term 'extraordinary resolution' is proposed to be inserted in section 9 of the Law by that Bill. Such a resolution must be passed by at least 50% of the total value of votes that may be cast by members (whether present or not) on the resolution.

If the members choose a new responsible entity at the meeting, the retiring responsible entity must, by written notice, request the ASC to remove its name from the scheme's record of registration and have the new responsible entity's name entered in its place. If the retiring responsible entity does not lodge the notice a member may do so (Bill subsection 601FL(2)).

If the members fail to choose a new responsible entity the current responsible entity may apply to the court for a temporary responsible entity to be appointed (Bill subsection 601FL(3)).

### **Removal of responsible entity by members**

Members who hold at least 5% of the value of the votes that may be cast on a resolution at a meeting or who total 200 in number may call a meeting in accordance with Division 1 of Part 2G.4 of the Second Corporate Law Simplification Bill to change the responsible entity. In order to change the responsible entity members will have to pass an extraordinary resolution to firstly remove the current entity and then another resolution to choose a new responsible entity (Bill subsection 601FM(1)).

The ASC must be notified of results of any proposed changes brought about by resolutions at a meeting of members and the ASC scheme register must be amended to give effect to the changes (Bill subsection 601FM(2)).

### **Temporary responsible entity**

The ASC may apply to the Court for the appointment of a temporary responsible entity where a scheme does not have a responsible entity (Bill section 601FN). The Court may appoint a temporary responsible entity where it is satisfied that such an appointment is in the best interests of the members of the scheme. It may also make any other orders that it considers necessary (Bill section 601FP).

The temporary responsible entity will be required to take steps to either ensure that a new responsible entity is appointed by the members or, if this fails to occur, to apply to the Court to have the scheme wound up. A members' meeting must be called within 3 months of the appointment of the temporary responsible entity, and further meetings may be called within that time or such other time as the Court permits.

The temporary responsible entity may apply to the Court to have the scheme wound up where no company satisfying the requirements of Bill section 601FA is chosen to be appointed as the scheme's responsible entity. The ASC or the members may also apply to the Court to have the scheme wound up if a new responsible entity is not appointed (Bill section 601FQ).

## **DIVISION 3 - CONSEQUENCES OF CHANGE OF RESPONSIBLE ENTITY**

On a change of responsible entity, the former responsible entity must give the new responsible entity any books in relation to the scheme which are required under the Law, and to give reasonable assistance to facilitate the change of responsible entity (Bill section 601FR).

Where a new responsible entity is appointed it will assume all the rights, obligations, and liabilities that were vested in the former responsible entity other than any right to indemnification held by the former entity or any liability for which the former entity would not have been indemnified out of scheme property (Bill section 601FS). The purpose of the section is to ensure that the former entity has the right to be reimbursed for expenses properly outlaid or liabilities properly incurred on behalf of the scheme.

In keeping with the principle that the new responsible entity will assume the role of the former responsible entity, the Bill provides that any document to which the former responsible entity was a party shall be read as if the new responsible entity was the party to that document where the document is capable of having effect after the change (Bill section 601FT).

### **PART 5C.3 THE CONSTITUTION**

Unlike the existing prescribed interest provisions of Division 5 of Part 7.12 of the Law, the Bill does not prescribe the legal form of a scheme's constitution. However, whatever the form of the constitution, it must be legally binding as between the responsible entity and the members of the scheme (Bill section 601GB).

The Bill will require the constitution to make adequate provision for a limited number of matters (Bill section 601GA). A scheme's constitution will be able to include other matters not inconsistent with the statutory requirements. The constitution must adequately provide for:

- the consideration to be paid to acquire an interest in the scheme. This would cover the basis for determining the consideration
- the investment powers of the responsible entity in relation to the scheme property. Since scheme property will be required to be vested in a custodian, any powers of the responsible entity to deal with the scheme property will actually be powers to direct the custodian in relation to the scheme property
- the procedures for handling complaints made by members in relation to the scheme
- the winding up of the scheme (Part 5C.10).

If the responsible entity is to have rights to be paid fees or indemnified out of scheme property, or power to borrow or raise money for the purpose of the scheme, those rights and that power must be specified in the scheme constitution. The right of payment or indemnification is only exercisable in relation to the proper performance of the duties of the responsible entity.

Where members have rights to withdraw from the scheme, the constitution must address the method for exercising those rights and for calculating the withdrawal value of the members' interests. These provisions must be consistent with the requirements of Part 5C.7. That Part restricts the ability of a responsible entity to offer withdrawal rights to members on the basis of the liquidity of the scheme (Bill section 601LA).

Whether the provisions in the constitution which deal with these matters will be 'adequate' will depend on the nature of the scheme. The ASC must not register a scheme if the constitution does not comply with Part 5C.3 (Bill paragraph 601EB(1)(c)) and it may deregister a scheme if it appears that the constitution does not comply with this Part (Bill paragraph 601QB(1)(b)).

## **Changing the constitution**

The constitution may only be amended with the approval of a special resolution passed at a meeting of members. Similarly, the constitution can only be replaced with a new constitution with the approval of a meeting of members (Bill section 601GC).

The voting requirements of a special resolution and the requirements for calling a meeting of members are contained in the Second Corporate Law Simplification Bill. The term 'special resolution' is proposed to be inserted in section 9 of the Law by that Bill. Such a resolution must be passed by at least 75% of votes cast by members entitled to vote on the resolution.

As the provisions are currently drafted a members' meeting would be required for the purpose of passing a resolution amending the scheme's constitution. Consideration is being given in the context of the Second Corporate Law Simplification Bill to enabling a resolution to be put to members without calling a meeting, along the lines of the 'flying minute' procedure for proprietary companies in section 249A of that Bill (Schedule 1, item 47).

A copy of an amendment to the constitution or of a replacement constitution must be lodged with the ASC within 14 days of the members meeting passing the resolution. The responsible entity will also be required to provide a copy of the constitution to a member within 7 days of the member requesting a copy.

## **PART 5C.4 THE COMPLIANCE PLAN**

A scheme's compliance plan is the document that sets out the measures that the responsible entity will apply in operating the scheme to ensure compliance with the Law and the scheme's constitution. The compliance plan is a process driven document which sets out the various checks and balances in place to ensure that the scheme is operated in accordance with the requirements of the scheme's constitution and the requirements of the Law.

The responsible entity has a duty to ensure that the compliance plan meets the requirements of Bill section 601HA (Bill paragraph 601FC(1)(t)) and to comply with the compliance plan (Bill paragraph 601FC(1)(g)). The ASC will be able to deregister a scheme if it appears that the compliance plan no longer complies with the requirements of Part 5C.4 (Bill paragraph 601QB(1)(c)).

### **Contents of the compliance plan**

Bill subsection 601HA(1) sets out the minimum contents requirements of a compliance plan. A responsible entity will be required to have in place arrangements to ensure that the operation of the scheme complies with the Law and the scheme constitution.

The compliance plan will be required to contain:

- arrangements for vesting scheme property in the custodian. Each collective investment scheme will be required to have a custodian for the purpose of holding scheme property (Bill Part 5C.5)
- arrangements for the custodian to fulfil certain duties. For example, a responsible entity has a duty to give scheme property to the custodian as soon as practicable after receiving it (Bill paragraph 601FC(1)(h)). It would be expected that the compliance plan outline arrangements for compliance with this duty and may, for example, outline any compliance functions which the custodian is engaged to perform
- if the scheme is required to have a compliance committee, arrangements for the proper operation of the compliance committee. The compliance plan must detail arrangements for:

- the membership of the committee. Bill section 601KB sets out requirements for the membership of the committee
- the regularity with which the committee meets
- the ability of the committee to report and make recommendations to the directors of the responsible entity
- access of the committee to accounting records of the scheme, to scheme auditors and to information relevant to compliance matters.
- arrangements for the valuation of scheme property. The responsible entity will be under a duty to ensure that scheme property is valued at regular intervals having regard to the nature of the property (Bill paragraph 601FC(1)(i))
  - arrangements for auditing the compliance plan. The auditor of the compliance plan must conduct an annual audit of the plan (Bill section 601HG). Any change of the compliance plan auditor must be notified to the ASC (Bill section 601HH)
  - arrangements for keeping records of the scheme's operations. This may include arrangements for ensuring the safety and integrity of records of the scheme's property and of members entitlements.

The ASC may require the compliance plan to contain other matters, whether at the time of registration or at any other time (Bill subsection 601HA(2)) and may direct the responsible entity to give it information about measures contained in the plan (Bill section 601HD). Such a direction may include, for example, a request for details of computer systems and information storage procedures, manuals which demonstrate internal accounting systems procedures or evidence of custodial arrangements.

A compliance plan may incorporate by reference, details of another compliance plan where the respective schemes have a common responsible entity (Bill section 601HB). The ASC may require the lodgement of a consolidated or full text compliance plan (Bill section 601HF). The compliance plan must be signed by the directors of the responsible entity (Bill section 601HC).

### **Changing the compliance plan**

The Bill contains a number of provisions aimed at ensuring that the compliance plan is current at all times. For example:

the ASC will be able to direct a responsible entity to amend the compliance plan (Bill section 601HE). Before giving a direction to amend the compliance plan, the ASC must give the responsible entity an opportunity to appear before it and make submissions on the proposed direction

the responsible entity must lodge with the ASC a copy of any amendment to the compliance plan or a replacement compliance plan within 14 days of the amendment or replacement (Bill subsection 601HE(4))

the responsible entity must engage an auditor to conduct an annual audit of the compliance plan and state whether, in the auditor's opinion, the responsible entity has complied with the scheme's compliance plan and the plan continues to meet the requirements of the Law (Bill section 601HG).

The auditor of the compliance plan must be a registered company auditor and must not be an associate of the responsible entity or custodian or the auditor of the responsible entity. The auditor of the compliance plan is to have access to books of the scheme and assistance from the officers of the responsible entity (Bill subsections 601HG(3) and (4)). This is consistent with

similar access provisions for auditors of financial statements (see section 315 of the Second Corporate Law Simplification Bill).

The certificate of the auditor of the compliance plan must be lodged with the ASC together with the scheme's financial statements and reports. This is either 3 months or 4 months after the financial year depending on whether or not the scheme is a disclosing entity (see sections 292 and 321 of the Second Corporate Law Simplification Bill).

## **PART 5C.5 THE CUSTODIAN**

This Part sets out the responsible entity's duties in relation to the custodian, the requirement for ASC approval of a custodian and the functions and responsibilities of a custodian.

### **Duties of the responsible entity relating to custodian**

A responsible entity is to ensure that a public company, approved by the ASC, is engaged as the scheme's custodian and that all scheme property is vested in the custodian or agents of the custodian (Bill section 601JA).

Other provisions in the Bill complement these requirements. For example, the responsible entity is under a duty to ensure that property is given to the custodian as soon as practicable (Bill paragraph 601FC(1)(h)) and the compliance plan must contain arrangements to ensure property is vested in the custodian (Bill paragraph 601HA(1)(a)).

It is envisaged that generally the custodian will be engaged as an agent of the responsible entity. Scheme property may be vested in a subcustodian being an agent of the custodian provided the agent is not the responsible entity or an associate of the responsible entity (Bill subsection 601JA(2)). The term 'associate' is defined in Division 2 of Part 1.2 of the Law.

### **ASC's approval of appointment**

The approval of a custodian will involve considerations of solvency, qualifications and honesty, similar to the licensing of a body corporate under Part 7.3 of the Law. The ASC must approve a company as the custodian if:

- it is not an externally administered body corporate
- it is not an 'associate' of the responsible entity, except where the responsible entity satisfies a \$5 million net tangible asset threshold - where a responsible entity has net tangible assets of at least \$5 million, it will be able to engage a related party custodian. A related party custodian will still be required to be approved by the ASC and satisfy the other criteria for approval
- the ASC is satisfied that the company has the capacity to perform the functions of a custodian efficiently and honestly.

For the purpose of considering a company's capacity to perform the duties of custodian efficiently and honestly, the ASC may have regard to the repute of officers of the custodian in relation to the company's performance of custodial functions (Bill subsection 601JB(2)). The ASC may consider whether an officer has been convicted of serious fraud, is of good fame and character, and will perform their duties efficiently and honestly. These criteria are not exhaustive and the ASC may have regard to other matters that it considers relevant.

These requirements are modelled on subsection 784(4) of the Law which requires the ASC to consider certain matters in relation to officers of a body corporate seeking a licence under Part 7.3 of the Law. Unlike section 784 which uses the words 'efficiently, honestly and fairly', the Bill uses the words 'efficiently and honestly'. Because a custodian (and its officers) will not be required to

perform any supervisory or decision making functions, a requirement that it perform duties 'fairly' is unnecessary.

A custodian must not only satisfy these requirements when it is approved by the ASC, but must continue to satisfy them. If the ASC has reason to believe the custodian has failed to meet these requirements it can revoke the custodian's approval (Bill subsection 601JB(3)).

### **Functions of a custodian**

A custodian must be vested with the property of the scheme and act in accordance with the directions of the responsible entity (Bill subsection 601JC(1)). A custodian may be engaged to perform other functions (Bill section 601JC(2)). Engagement to perform other functions in relation to the operation of the scheme is a matter for agreement between a custodian and the responsible entity.

Where a custodian suspects the responsible entity will breach or has breached the Law, it has a duty to report the matter to the directors of the responsible entity and to the members of the scheme's compliance committee, if one is required (Bill section 601JD). This is not a positive duty to inquire, or to supervise the actions of the responsible entity. It is a duty which will only arise where a custodian forms an opinion in the usual course of performing its custodial duties.

The custodian may also give a notice to the ASC of a contravention, or likely contravention, of the Law by the responsible entity (Bill subsection 601JD(2)). If the custodian reports to the responsible entity, the compliance committee or the ASC, it will have statutory qualified privilege (Bill section 601JE). This is consistent with the extension of qualified privilege to other persons who report to the ASC under the Corporations Law. For example, auditors (sections 863 and 1289), stock exchanges (section 779H) and futures exchanges (section 1222).

### **Custodian to indemnify responsible entity**

The custodian will be liable to indemnify the responsible entity for any loss or damage that the responsible entity suffers as a result of the custodian's wrong doing unless it was acting on the direction of the responsible entity (Bill section 601JF). A custodian will not be liable for any act or default of the responsible entity.

### **Action on change of custodian**

The removal of a custodian will be governed primarily by the terms of its engagement by the responsible entity. When a custodian is changed, however, the ASC must be notified of the new custodian for the purpose of amending the record of registration of the scheme (Bill section 601JG). Any proposed custodian must be approved by the ASC (Bill paragraph 601JA(1)(b)).

## **PART 5C.6 THE COMPLIANCE COMMITTEE**

### **When is a compliance committee required?**

Where at least half of the total number of directors of the responsible entity are 'external' directors, it is not necessary for the responsible entity to establish a compliance committee for the operation of a registered scheme (Bill subsection 601KA(1)). The criteria for qualifying as an external director are set out at Bill subsection 601KA(2).

The responsible entity is otherwise required to establish and maintain a compliance committee for each scheme that it operates. Generally, a responsible entity will know if it has to establish a compliance committee before registration of a scheme. However, where there is a change in the directors of the responsible entity and it is required under the Law to establish a compliance

committee it must do so within 14 days of the change or such longer period as the ASC allows (Bill subsections 601KA(3) and (4)).

### *External directors*

To be an external director, a director must not:

- be, or have been in the previous 2 years, an employee of the responsible entity, or a related body corporate
- be, or have been in the previous 2 years, an executive officer of a related body corporate of the responsible entity
- be, or have been in the previous 2 years, substantially involved in business dealings or in a professional relationship with the responsible entity or a related body corporate
- be, or have been in the previous 2 years, a member of a partnership that is substantially involved in business dealings or a professional relationship with the responsible entity or a related body corporate
- have any material interest in the responsible entity or a related body corporate or be an immediate family member of such a person.

Item 95 of Schedule 1 provides, as a transitional measure, that a person who was an officer or employee of the management company or trustee of a prescribed interest scheme regulated under Division 5 of Part 7.12 of the Law will not be taken to have been substantially involved in business dealings, or in a professional capacity, with the responsible entity where the management company or the trustee has not become the responsible entity. A 'related body corporate' is defined by section 50 of the Law and would, for example, include a holding company of the responsible entity or a subsidiary of the responsible entity.

### **Membership of the compliance committee**

A compliance committee must consist of at least 3 members and a majority of the members must be persons who are not directors of the responsible entity (or a related body corporate) and who otherwise satisfy the requirements of an external director (Bill section 601KB).

### **Functions of compliance committee**

The compliance committee must monitor the operation of the scheme and the adequacy of the compliance plan (Bill section 601KC). Even where a responsible entity is not required to have a compliance committee, directors of the responsible entity would need to monitor the operation of the scheme and the adequacy of the compliance plan in order to satisfy their duty under Bill paragraph 601FD(1)(f).

Where any non compliance with the Law or deficiency in the compliance plan is detected the compliance committee is required to report to the responsible entity. Where the compliance committee forms the view that the responsible entity does not propose to take action to remedy the defect it should make a report to the ASC (Bill section 601KC). It should be noted that the responsible entity is under a duty to report to the ASC any breach of the Law that relates to the scheme as soon as practicable after it becomes aware of the breach (Bill paragraph 601FC(1)(k)).

### **Duties of members**

A member of the compliance committee will have the following statutory duties:

- to act honestly when performing their functions as a member of the committee
- to perform their functions as a member of the committee with the degree of care and diligence that a reasonable person in the member's position would exercise

- not to make use of their position as a member of the committee, or information acquired by virtue of their position as a member of the committee, to personally gain an improper advantage or to gain an improper advantage for another person, or to cause detriment to the members of the scheme (Bill section 601KD).

To a certain extent these duties mirror the duties imposed on officers of the responsible entity. A breach of any of the above duties is subject to the civil penalty provisions (Part 9.4B of the Law).

A member of the compliance committee must also take all reasonable steps to assist the ASC in carrying out a surveillance check under Bill section 601FF (Bill subsection 601KD(2)). Members of the committee will have qualified privilege in relation to a statement made to the responsible entity or the ASC on behalf of the committee (Bill section 601KE).

### **When can responsible entity indemnify members of compliance committee?**

The Bill will prohibit, subject to exceptions, a responsible entity or a related body corporate indemnifying, or paying insurance premiums for, a member of the compliance committee in respect of liability incurred as a member of the committee (Bill sections 601KF and 601KG).

The prohibitions are based on sections 241 and 241A of the Law and similar exclusions are provided in relation to liability for cost and expenses incurred in defending legal proceedings.

### **Proceedings of compliance committee**

Subject to the requirements of the compliance plan, the regulation of proceedings at a compliance committee meeting is to be determined by the committee itself. Meetings may be held by using any available technology where agreed to by members of the committee.

The Law will require that:

- the committee must keep minutes of its meetings (Bill paragraph 601KH(2)(a))
- the committee must keep records of its reports and recommendations (Bill paragraph 601KH(2)(b))
- if a committee member has a pecuniary interest in a matter being considered or to be considered, the member must disclose the interest to the committee where their interest may conflict with the proper performance of their duties (Bill section 601KJ).

## **PART 5C.7 MEMBERS' RIGHTS TO WITHDRAW FROM A SCHEME**

A member's right to withdraw will be set out in the scheme's constitution (Bill subsection 601GA(4)). The Law will regulate the procedure for withdrawals only in so far as it creates a distinction between liquid and non-liquid schemes.

### *Schemes which are liquid*

Withdrawal from a liquid scheme may be offered at any time. The withdrawal must be made pursuant to the provisions in the scheme's constitution and must be fair to all members (Bill section 601LA and paragraph 601FC(1)(d)).

A scheme will be a liquid scheme if all the scheme's property consists of liquid assets. Liquid assets are defined to be:

- money on account or on deposit with a bank, building society or other financial institution
- bank accepted bills

- marketable securities. Marketable securities include debentures, stocks, shares, bonds, or share options of a Government, a body corporate, an association or society (section 9 of the Law)
- property of a prescribed kind.

The assets must also be able to be realised within the period of notice which an investor must give in order to withdraw their investment (the withdrawal period).

### **Non-liquid schemes - offers**

A scheme which is not liquid may offer members the opportunity to withdraw from the scheme on a periodic basis consistent with the requirements of Bill section 601LB. The withdrawal must also be pursuant to the provisions in the scheme's constitution and be fair to all members.

Before making a withdrawal offer, the responsible entity must identify the liquid assets of the scheme which are available to meet any withdrawal requests which result from the offer. To make a withdrawal offer, the responsible entity must either give a copy of the offer, in writing, to all members of the scheme or to all members of a class of members of the scheme or follow the procedure for giving notice to members set out in the scheme constitution (Bill subsection 601LB(2)). A copy of the withdrawal offer must also be given to the ASC.

The withdrawal offer must specify:

- the value of liquid assets identified for withdrawal
- the method by which withdrawal requests will be met if those liquid assets are not sufficient to meet all withdrawal requests
- the period during which the withdrawal offer will remain open. This period must be at least 21 days (Bill subsection 601LB(3)).

A responsible entity of a scheme which is not liquid can only have one withdrawal offer open at any time for a particular class of members (Bill section 601LC).

The responsible entity cannot satisfy any of the withdrawal requests until the withdrawal offer period has closed. When a withdrawal offer closes, the responsible entity must satisfy withdrawal requests made in response to the offer within 21 days. If the value of withdrawal requests exceed the amount identified as being available for withdrawal, the requests must be met on a pro rata basis in accordance with the formula set out in Bill section 601LD.

The responsible entity can cancel a withdrawal offer before it closes if either:

- the notice contains a material error, or
- it is in the best interests of members to cancel the offer. For example, where the value of liquid assets available for withdrawal has unexpectedly declined or where the liquid assets available for withdrawal have ceased to be liquid assets.

The responsible entity must notify the members and the ASC of the cancellation of the withdrawal offer (Bill section 601LE).

## **PART 5C.8 RELATED PARTY TRANSACTIONS**

The related party transaction provisions in Part 3.2A have been applied with modifications to registered collective investment schemes. The application of Part 3.2A to registered collective investment schemes is only a temporary measure. The Corporations Law Simplification Task Force will review the related party transaction provisions, including the application to registered collective investment schemes, in Stage 3 of the Simplification program.

The related party transaction provisions were included in the Law by the *Corporate Law Reform Act 1992*. The provisions were included to protect shareholders of public companies against the possibility that the value of their investment would be eroded by a related party arranging for the company to enter into a transaction which gives a benefit to the related party. The provisions do not prevent full value commercial transactions with related parties, only transactions with the potential to adversely affect shareholders' interests.

Part 3.2A has been applied with modification to registered collective investment schemes for the purpose of prohibiting a responsible entity from providing a financial benefit to a related party that could diminish or endanger scheme property (Bill sections 601MA and 601MB). The basic prohibition in section 243H is subject to the exceptions in Divisions 4 and 5 (Bill section 601MC).

Sections 243L, 243M and 243ZF of the Law are disapplied in relation to collective investment schemes. In relation to sections 243L and 243M, scheme members would not benefit from a responsible entity providing advances from scheme assets to directors of the responsible entity, or from the responsible entity transferring scheme property to a closely held subsidiary. Section 243ZF is disapplied because section 252V of Division 4 of Part 2G.4 provides that a responsible entity and its associates are not allowed to vote at a members' meeting if they have an interest in the resolution or matter other than as a member (Bill section 601MD).

Section 243ZB is applied as if references to subsection 243ZF(1) were to section 252V (Bill section 601ME).

## **PART 5C.9 EFFECT OF CONTRAVENTIONS - CIVIL LIABILITY AND VOIDABLE CONTRACTS**

### **Civil liability of responsible entity to members**

Bill section 601NA provides scheme members with a statutory right of action against the responsible entity for loss or damage suffered as a result of a contravention of a provision of Chapter 5C. The action must be begun within 6 years of the cause of action arising and does not affect any liability of the responsible entity or another person under the Law or any other law.

The right to bring a statutory action does not extend to actions against other persons involved in the operation of the scheme (such as custodians, directors and compliance committee members). A member's right to bring an action against these persons will depend on the general law and will not be set out in the Corporations Law. This will preserve the concept of a single responsible entity responsible to members for the operation of a scheme.

### **Voidable contracts where subscription offers and invitations contravene this Law**

The Corporations Law currently provides that where an offer of, or an invitation to subscribe for, a prescribed interest is made in contravention of the Law, a contract entered into by an investor as a result of the offer or invitation is voidable at the option of the investor (subsection 1073(2)). The investor must give written notice to the management company and the management company can apply to the Court within 21 days for an order declaring the notice to be ineffective and affirming the contract where the breach is immaterial (section 1073A).

Subsection 1073(2) was introduced into the Law to overcome the decision in *Hurst v West Corp Ltd* (1988) 12 NSWLR 394. That case was based on the Companies Code, which required an offer of (prescribed) interests to be made pursuant to a prospectus and only where an approved deed was in force. The New South Wales Supreme Court held that an offer of interests made in contravention of the Code was unenforceable on the basis of illegality.

Bill section 601NB makes contracts entered into voidable where an interest is offered in a scheme which is operated in contravention of Bill subsection 601ED(5) or in contravention of Part 7.12 of the Law. In effect, Bill section 601NB reproduces subsections 1073(2) to (4) and section 1073A.

## **PART 5C.10 WINDING UP**

A scheme's constitution may provide for the winding up of a scheme at a specified time or on the happening of a specified event. An attempt by a responsible entity to entrench itself as the responsible entity of a scheme by providing in the constitution that the scheme be wound up if a particular company ceases to be the responsible entity is to be of no effect (Bill section 601PA).

Members of a scheme can call a members' meeting under Division 1 of Part 2.G4 to consider and vote on an extraordinary resolution directing the responsible entity to wind up the scheme (Bill section 601PB). An extraordinary resolution is a resolution that is passed by at least 50% of the total value of the votes that may be cast by members (whether present or not) on the resolution ( see item 3 of Schedule 2 of the Second Corporate Law Simplification Bill).

Where a scheme's purpose has been accomplished or cannot be accomplished a responsible entity can take the steps set out in Bill section 601PC to wind up the scheme. Bill subsection 601PC(2) requires that a notice be provided to members and the ASC explaining the proposal to wind up the scheme. The notice must inform members of their rights to call a meeting under Division 1 of Part 2G.4, and must inform the members that if no meeting is called within 28 days of the notice being provided then the responsible entity may wind up the scheme.

### **Winding up ordered by the Court**

The responsible entity, a director of the responsible entity, a member of the scheme or the ASC may apply to the Court to have a scheme wound up where it is just and equitable to do so. A creditor may make an application for a scheme to be wound up but only on the grounds that a court order against the responsible entity in relation to the scheme has been unsatisfied (Bill section 601PD).

### **Responsibility for the winding up/ Other orders about winding up**

The responsible entity is to wind up the scheme in accordance with the scheme's constitution and any orders made by the Court if:

- a time, circumstances or event specified in the scheme's constitution as requiring the winding up of the scheme has occurred
- the members have passed an extraordinary resolution directing the responsible entity to wind up the scheme
- the court has directed that the scheme be wound up
- the responsible entity has been removed by members and no new responsible entity appointed (Bill section 601PE).

The Court may, on application of the responsible entity, a director of the responsible entity, a member of the scheme or the ASC, appoint a person to wind up the scheme. The Court may make other such orders as it sees fit (Bill section 601PF).

Any unclaimed money or property remaining on the completion of the winding up of the scheme must be paid or transferred to the ASC to be dealt with under Part 9.7 of the Law (Bill section 601PG).

## **PART 5C.11 DEREGISTRATION**

### **Deregistration - voluntary**

The responsible entity can apply for deregistration if:

- the number of members of the scheme falls below the 15 member threshold of Bill section 601ED and all members of the scheme consent to the deregistration
- the scheme was registered, although not required to be registered, and all members of the scheme consent to the deregistration
- the scheme ceases to be a collective investment scheme as defined (Bill section 601QA).

The consent of all members is considered necessary because on deregistration most of the requirements of Chapter 5C will cease to apply to the scheme. Some members may only have agreed to join the scheme because of these requirements.

### **Deregistration by the ASC**

The ASC may deregister a scheme if.

- the scheme's responsible entity, constitution, compliance plan or custodian no longer satisfies the requirements of the Chapter. This will give the ASC the power to deregister a scheme which is not being operated in accordance with the Chapter (Bill paragraphs 601QB(1)(a) to (d)). If a responsible entity continues to operate a scheme after deregistration, it will be in breach of Bill section 601ED and liable for a penalty of 200 penalty units or imprisonment for 5 years or both penalty and imprisonment
- the scheme is at least 6 months late lodging its annual return with the ASC and has not lodged any documents for at least 18 months and the ASC has no reason to believe that the scheme is being operated (Bill paragraph 601QB(1)(e))
- the scheme has been wound up (Bill paragraph 601QB(1)(f)).

The ASC will be required to give 2 months notice of the intended deregistration on its database and by publication in the Commonwealth of Australia *Gazette*. The ASC will also be required to give notice to the responsible entity of the scheme and to any person who is winding up the scheme (Bill subsection 601QB(2)).

The most important consequence of deregistration is that the scheme will no longer be a registered scheme. Since the majority of the provisions of Chapter 5C only apply to a registered scheme, the scheme will not need to comply with those provisions after deregistration.

Deregistration will not affect any underlying legal relationships between persons involved in the operation of the scheme and scheme members.

### **Reinstatement**

The ASC may reinstate the registration of a scheme if satisfied that it should not have been deregistered or the defect which resulted in the deregistration of the scheme has been remedied (Bill subsection 601QC(1)).

Bill subsection 601QC(2) enables a person aggrieved by the deregistration or a person winding up the scheme to apply to the Court for an order that the ASC reinstate the registration of the scheme. The Court will be able to make any ancillary orders which it considers just for putting the scheme and any other person in the same position, as far as possible, as if the scheme had not been deregistered (Bill subsection 601QC(3)).

Bill subsection 601QC(4) will require the ASC to give notice of any reinstatement in the Commonwealth of Australia *Gazette* and to any applicant for the reinstatement.

## **PART 5C.12 EXEMPTIONS AND MODIFICATIONS**

Bill sections 601RA and 601RB provide for the ASC to make specific exemption orders and class orders relieving a scheme or persons from compliance with the requirements of the Chapter.

Bill section 601RC also provides that the operation of the Chapter may be modified by regulation.

## **SCHEDULE 1**

### **TRANSITIONAL ARRANGEMENTS AND CONSEQUENTIAL AMENDMENTS**

#### **Commencement of Chapter 5C**

All collective investment schemes that commence operation after the commencement of Chapter 5C will be required to be registered pursuant to the Chapter.

Existing prescribed interest schemes will have a period of 2 years to become registered as a collective investment scheme under Chapter 5C. Until an existing prescribed interest scheme is registered under Chapter 5C, the Law relating to prescribed interests will continue to apply to it (Schedule 1, item 85).

The ASC will be able to extend the 2 year period in relation to individual prescribed interest schemes where the scheme is to be wound up within a fixed period and the ASC considers it would be otherwise unreasonable for the scheme to be registered under Chapter 5C (Schedule 1, item 85). This would generally apply to fixed term schemes which are not issuing any further interests.

#### **Conversion to a single responsible entity**

An existing trustee or representative may retire from office by giving a notice of retirement to the management company and the ASC. Similarly, an existing management company may retire by giving a notice of retirement to the trustee or representative and the ASC. Where both parties give a retirement notice at the same time, the notice of the management company is ineffective (Schedule 1, item 86).

A retirement notice can only be given within the first year after the commencement of Chapter 5C. This will ensure that the party receiving the notice will have sufficient time to register the prescribed interest scheme under Chapter 5C within the 2 year period set by the Bill. A retirement notice, once given, cannot be revoked.

Where the trustee or representative or the management company receives a retirement notice, it must decide to either:

- undertake to register the prescribed interest scheme under Chapter 5C and become the responsible entity of the scheme, or
- retire from office (Schedule 1, item 87). If it decides to retire it must convene a meeting of unit holders to choose a proposed responsible entity which will register the prescribed interest scheme under the new regime.

The meeting may also determine to wind up the scheme. The ASC must be notified of the outcome of the meeting.

Any notice to retire is ineffective until the scheme is registered under Part 5C.1. This will ensure that the existing trustee or representative and the management company continue to manage the scheme until a responsible entity is in place to operate the scheme and the scheme is registered under Part 5C.1.

A body receiving a notice must make a decision within 2 months and must notify the ASC of its decision.

### **Consequences of converting to Chapter 5C**

The Bill will give a body, which is proposing to register a prescribed interest scheme and become its responsible entity, a number of powers designed to facilitate the conversion of the scheme to Chapter 5C. These include the power to:

- lodge a registration application
- do all things necessary for the purpose of the registration application. For example, this would include arrangements to have a custodian in place, to have a compliance plan prepared and to constitute a compliance committee if one is required
- modify the scheme's deed so that it will meet the requirements of Chapter 5C for a constitution of a collective investment scheme. The body must lodge a copy of the modifications with the ASC. The body does not have to call a meeting of prescribed interest holders to ratify the modifications unless requested to do so by the ASC (Schedule 1, item 91).

When the scheme is registered, the Bill will facilitate the transfer of rights, obligations and liabilities from the former trustee or representative and management company to the new responsible entity (Schedule 1, item 93).

### **Schemes which do not convert**

The Bill does not explicitly address the consequences of a prescribed interest scheme which fails to convert to Chapter 5C within the 2 year period allowed by the Bill. An existing prescribed interest scheme which does not register under Chapter 5C within the 2 year period and continues to operate will be operating in contravention of Chapter 5C. The ASC will be able to take the necessary action to prosecute the scheme operators.

### **Other matters**

#### *Auditing requirements*

It should be noted that Division 1 of Part 3.7 of the Law will set out the requirements for the auditor of a registered scheme's financial records (see item 50 of Schedule 1 of the Bill). The auditor of the scheme's financial records may be the same as the auditor of the compliance plan but may not be the auditor of the responsible entity or an associate of the responsible entity (Bill section 601HG).

#### *Civil penalty provisions*

The duties of a responsible entity and the officers of a responsible entity will be subject to the civil penalty provisions by amending section 1317DA of the Law (Bill Schedule 1, items 58 to 80).

Part 9.413 of the Law provides for criminal and civil consequences of contravening a civil penalty provision. These consequences may include:

- an order that the person pay to the Commonwealth a pecuniary penalty of up to \$200,000 (paragraph 1317EA(3)(b) - Bill Schedule 1, item 59)

- a criminal conviction if the requisite criminal intent can be proved (section 1317FA). The maximum penalty is \$200,000 or imprisonment for 5 years for an individual, and \$1,000,000 for a company
- an order for payment of compensation to the responsible entity where it suffers loss or damage as a result of the act or omission (sections 1317HA and HB)
- liability to pay to the responsible entity any profit made as a result of the contravention (section 1317HD).

Where the ASC suspects or believes a person can give information relevant to a civil penalty contravention, it can require the person to give all reasonable assistance in relation to any proceedings (section 1317EH).

## **SCHEDULE 2**

### **AMENDMENTS OF THE AUSTRALIAN SECURITIES COMMISSION ACT 1989**

The ASC is to be empowered to check the operations of a responsible entity to ensure compliance with the scheme's constitution, compliance plan and the Law (Bill section 601FF). Part 3 of the ASC Act is to be amended so that the investigation and information gathering powers of the ASC are expressly applied to collective investment schemes.

The general power of the ASC to investigate a suspected breach of the Law concerning the management of the affairs of a body corporate or involving fraud or dishonesty which relates to a body corporate, securities or futures contracts is to apply in relation to a registered scheme (Bill Schedule 2, items 1 and 2).

The ASC may inspect books required to be kept under a national scheme law in the exercise of its powers or functions under the law or to ensure compliance with the law or in the course of an investigation (sections 28 and 29 of the ASC Act). This will automatically apply in relation to the proposed ASC power to check a responsible entity's compliance with a registered scheme's constitution, compliance plan and the Law. The inspection of books which relate to the affairs of a body corporate (section 30 of the ASC Act) is to be extended to require the responsible entity or custodian (or 'eligible person' in relation to the responsible entity or custodian - see definition in section 5 of the ASC Act) in relation to a collective investment scheme to produce to the ASC specified books on written request (Bill Schedule 2, item 4).

Section 33 of the ASC Act, which allows the ASC to require the production of books in a person's possession and which relate to the affairs of a body corporate, is also to be extended to the affairs of a registered collective investment scheme (Bill Schedule 2, item 5).

Bill Schedule 2, item 6 will insert section 39A into Division 3 of Part 3 of the ASC Act. Where the ASC has in its possession books in relation to a registered scheme, section 39A will enable the ASC to provide to a person a copy of a book subject to such conditions as it determines. The provision is essentially intended to apply where litigation in relation to the operation of a scheme is contemplated.

#### **Enforceable Undertakings**

Bill Schedule 2, item 7 will insert PART 3A- ENFORCEABLE UNDERTAKINGS IN RELATION TO REGISTERED SCHEMES into the ASC Act. Part 3A will enable the ASC to accept enforceable undertakings from a responsible entity in relation to any matter concerning a registered scheme.

The provision is modelled on section 87B of the Trade Practices Act 1974 which enables the Australian Competition and Consumer Commission to enter into enforceable undertakings. The

ASC Act currently contains a similar provision in section 201A, which enables the Corporations and Securities Panel to enter into enforceable undertakings.

Where a responsible entity breaches a term of an undertaking, the ASC may apply to the Court for an order:

- directing the responsible entity to comply with that term of the undertaking
- directing the responsible entity to pay to the custodian any financial benefit that the person has obtained as a result of the breach
- directing the responsible entity to compensate any other person who has suffered loss or damage as a result of the breach
- for any order the Court thinks appropriate.

#### *Record of undertakings*

The ASC must keep a record of undertakings. To the extent that an undertaking is confidential, access by persons other than the responsible entity may be withheld. Confidential information may include information that is commercial in confidence, personal details of an individual, or information the disclosure of which would be against the public interest.