

1989

The Parliament of the Commonwealth of Australia

**CO-OPERATIVE SCHEME LEGISLATION
AMENDMENT BILL 1989**

EXPLANATORY MEMORANDUM

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

CO-OPERATIVE SCHEME LEGISLATION AMENDMENT BILL 1989

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ABBREVIATIONS

The following abbreviations are used in the Explanatory Memorandum:

CA - Companies Act 1981 (Cth) as subsequently amended

CASA - Companies (Acquisition of Shares) Act 1980 (Cth) as subsequently amended

ED - Exposure draft of Companies Amendment Bill 1988 (share buy-backs and other legislative proposals)

NCSC - National Companies and Securities Commission

The Bill - Co-operative Scheme Legislation Amendment Bill 1989

SIA - Securities Industry Act 1980 (Cth) as subsequently amended

FIA - Futures Industry Act 1986 (Cth)

NGF - National Guarantee Fund

C&S Interpretation - Companies and Securities Act (Interpretation and Miscellaneous Provisions) Act 1980 as subsequently amended

The Ministerial - The Ministerial Council for Companies Council and Securities

CSLRC - The Companies and Securities Law Review Committee

INTRODUCTION

Future legislative program

The purpose of this explanatory memorandum is to explain the contents of the Co-operative Scheme Legislation Amendment Bill 1989 ('the Bill'), which makes various amendments to the Commonwealth Acts under the co-operative companies and securities scheme.

2. The explanatory memorandum also explains the contents of the Companies (Fees: Taxation Component) Bill 1989, the Companies (Acquisition of Shares - Fees: Taxation Component) Bill 1989, the Securities Industry (Fees: Taxation Component) Bill 1989 and the Futures Industry (Fees: Taxation component) Bill 1989.

3. The amendments in the Co-operative Scheme Legislation Amendment Bill will automatically amend the various Codes applying in each State and the Northern Territory by virtue of the Companies (Application of Laws) Acts of the respective States and the Northern Territory.

4. These Bills have been approved by the Ministerial Council for Companies and Securities. In the event of the Commonwealth Parliament not enacting the Co-operative Scheme Legislation Amendment Bill within six months of its approval by the Ministerial Council, each State has the right to take action separately to implement the decision of the Ministerial Council with regard to the Bill (see Formal Agreement cl.44).

5. These proposals are currently being treated separately from the Commonwealth Government's proposals to replace the co-operative scheme with a regime based on Commonwealth laws on the basis that co-operative scheme legislation will be superseded upon enactment and proclamation of the Commonwealth legislation currently before the Commonwealth Parliament. For its part, the Commonwealth will use the amendments in the Bill, which are not as yet included in the Corporations Bill 1988, as a basis for amendments to be moved to the Corporations Bill 1988.

Explanatory memorandum

6. The remainder of this explanatory memorandum:
- (a) contains a brief outline of the significant proposals contained in the Bills; and
 - (b) deals sequentially with the content of each clause of the Bills.

CO-OPERATIVE SCHEME LEGISLATION AMENDMENT BILL 1989

COMPANIES (FEES : TAXATION COMPONENT) BILL 1989 COMPANIES (ACQUISITION OF SHARES - FEES : TAXATION COMPONENT) BILL 1989

SECURITIES INDUSTRY (FEES : TAXATION COMPONENT) BILL 1989

FUTURES INDUSTRY (FEES : TAXATION COMPONENT) BILL 1989

Brief outline of changes

7. A brief outline of the significant new proposals is set out below:

(a) Share buy-backs

It is proposed to introduce a 'self-purchase' or 'buy-back' power for companies. The key elements of the proposal are -

- Regulation of indirect buy-back transactions over a 10% cross-shareholding threshold which amount to an 'unacceptable acquisition scheme' according to certain criteria.
- Self-purchase of both fully-paid and partly-paid shares will be permitted.
- The financial assistance validation procedure will be retained other than for the purpose of avoiding the buy-back requirements.
- Subsidiary companies will continue to be prohibited from purchasing shares in their holding companies (CA s.36 unchanged).
- A company will be required to derive its self-purchase capacity from its constituent documents.
- Public company buy-backs will be limited to 10% in 12 months.
- Public companies may repurchase shares within the 10% limit by on-market purchases, pari passu proportional offers or selective offers.
- Selective buy-backs will be subjected to a 75% approval of shareholders requirement and must be preceded by an expert's report which concludes that the price is fair and reasonable.
- Shareholder approval, other than for selective buy-backs, will not be necessary for either public or proprietary company buy-backs under 10%.
- A company's self-purchase capacity will be subject to a 'sunset' provision so that the power will need to be renewed every 3 years by special resolution of shareholders.
- Bought back shares must be cancelled and all rights attaching to self-purchased shares will be extinguished.
- The effect of the solvency declaration will be to make directors personally liable if the company becomes insolvent within 12 months of a self-purchase transaction.

(b) FAST Pilot Scheme and other changes to make share transfer and registration more efficient

The Bill also provides legislative support for the pilot testing of the Australian Stock Exchange Ltd's proposed scheme for a flexible accelerated security transfer system (FAST) which is designed to reduce delays in the transfer and registration of marketable securities. This is achieved by conferring on the NCSC a power to vary, modify, or exempt from, the security transfer provisions in CA.

As a complementary measure to expedite the share transfer process, transferors' signatures on security transfer forms have been deleted. Consequential changes have been made to the broker warranty and indemnity provisions and to the National Guarantee Fund provisions of SIA to ensure that brokers are fully liable for unauthorised transfers and that access to the NGF is available in respect of any losses arising from such transfers.

(c) Licensing of Participants in the Securities and Futures Industries

It is proposed, in accordance with earlier NCSC proposals, to discontinue licensing of representatives of securities dealers and advisers and of futures brokers and advisers. This will be replaced with a system where brokers and advisers are made more fully liable for the conduct of their respective representatives, in addition to their being responsible for their training, education and supervision. This liability will extend to actions which are outside the scope of their authority, as is the case with insurance agents under the Insurance (Agents and Brokers) Act 1989 (Cth). where a representative acts on behalf of a number of principals, and the principal for whom the representative acted on a particular occasion cannot be identified, all the principals will be jointly and severally liable.

Securities dealers and advisers and futures brokers and advisers will continue to require a licence. The Bill proposes that, where a broker or adviser who should hold a licence is not licensed, that person will not be able to recover commission under any arrangement with a client. It also provides an ability for clients to rescind any agreements made with such brokers, provided third party rights are not adversely affected.

(d) Computerisation

The Bill contains amendments to sections 31 and 263 of: CA that are intended to facilitate the computerisation of the Corporate Affairs Commissions (CRCs).

The proposed amendments to CA section 31 limit a person's rights to inspect original documents where the Commission can provide that information by means of computer print-out or visual display. A proposed section 31A, dealing with a person's rights to inspect registers, is also included.

The proposed amendment to section 263 will require a company to complete and lodge with the Commission an annual return that is served on the company by the Commission.

(e) Funding of the NCSC

Part 9 of the Bill also includes amendments to the Fees Acts for the Companies, Companies (Acquisition of Shares), Futures Industry and Securities Industry Codes to facilitate the introduction of the revised funding arrangements agreed by the Ministerial Council. In brief, these amendments confirm the power to prescribe a fee for the issue of computer-generated documents, widen the regulation-making powers to enable the prescription of the fees proposed by the NCSC for its revised funding arrangements, increase the limit on the size of fee that may be prescribed, and permit the Commission to charge a deposit where the fee cannot be ascertained at the time it is payable.

In conjunction with the amendments to the Fees Acts, a new Fees : Taxation Component Bill for each of the abovementioned Codes will ensure that there is power to impose fees that might contain an element of taxation.

FINANCIAL IMPACT STATEMENT

8.(a) Buy-backs

The proposals in the Bill relating to buy-backs have no cost implications for the Commonwealth's contribution to the co-operative companies and securities scheme. Share re-purchase will be a more cost efficient method of reducing a company's capital than the current CA s.123 procedure.

(b) FAST and Licensing

It is anticipated that the implementation of the pilot scheme for FAST will reduce business costs by minimising delays in the transfer and registration of securities. The proposal to eliminate the requirement for representatives of securities dealers or advisers or futures brokers or advisers to be licensed is deregulatory also, and will lead to some reduction in the cost of administering the NCSC and the CACs.

(c) Computerisation

Amendments to CA s.31 and the introduction of a new CA s.31A are intended to facilitate the ongoing computerisation of the CACs. The use of computer-generated documents to provide information and satisfy search

requests will enable more efficient use to be made of CAC staff. The business community will also benefit through the faster service which will be provided by the CACs. The benefits of these amendments have not been quantified.

(d) Annual Returns

The proposed amendments to CA s.263 (annual return requirements) are also intended to facilitate computerisation by requiring companies to complete and lodge an annual return served on them by the Commission. This amendment will enable the CACs to achieve in full the benefits originally envisaged when the revised form of annual return was introduced in 1986. There may, however, be some increased costs for these businesses which at present generate their own form of annual return rather than completing the returns served on them by the Commission. The cost to business on an Australia-wide basis, is estimated to be less than \$250,000.

(e) Co-operative Scheme Fees Acts and Fees : Taxation Component Acts

The amendments to the Co-operative Scheme Fees Acts and the proposed Fees : Taxation Component Acts are designed to facilitate the introduction of revised funding arrangements for the NCSC which is, in effect, a form of "user pays". The additional funding will be used to provide additional resources for the NCSC, thus enabling that body to perform its statutory functions in a more efficient manner. The cost to the business community, which will be paying the increased fees, is expected to be in the order of \$2 million in 7.989/90 and \$3-\$3.5 million in subsequent years.

CONTENTS OF THE CO-OPERATIVE SCHEME LEGISLATION AMENDMENT BILL

9. The Bill is divided into the following Parts:-

Part 1 - Preliminary

Part 2 - Amendments of Companies Act 1981: Computerised Registers

Part 3 - Amendment of Companies Act 1987: Share Buy-backs

Part 4 - Amendments of Companies Act 1981: On-market Share Buy-backs

Part 5 - Amendments of Companies Act 1981: Buy-backs of Prescribed Interests

Part 6 - Amendments of Companies Act 19131: Annual Returns

Part 7 - Pilot Scheme for the Flexible Accelerated Security Transfer System

Part 8 - Participants in the Securities and Futures Industries

Part 9 - Amendments of Co-operative Scheme Fees Acts

BILL PART 1 - PRELIMINARY

BILL : PART I : Introduction

10. Part 1 of the Bill (cls. 1-3) deals with various preliminary matters.

Cl. 1 : Short title

11. When enacted the Bill will be cited as the Co-operative Scheme Legislation Amendment Act 1989 (Bill cl.1).

Cl. 2 : Commencement

12. Cls. 1 and 2 of the Bill will come into operation on the day on which the Bill receives the Royal Assent.

13. Apart from Part 4, it is anticipated that the remainder of the provisions will be proclaimed to come into operation on the same day (Bill s-cl. 2(4)). Bill s-cl. 2(5) complies with new procedures which attempt to minimize delays in proclaiming provisions of Commonwealth Acts by requiring, as a general rule, that Acts that commence on proclamation should provide a specific date, or a specific period after Royal Assent (e.g. h months), at which time the Act commences, if it has not already commenced by proclamation.

14. Part 4, which provides for on-market share buy-backs, will be proclaimed to come into operation when the Ministerial Council considers that ASX listing rules have been drafted which adequately protect the interests of the relevant parties concerned with on-market share buy-backs (Bill s-cl. 2(3)).

Cl. 3 : Principal Act

15. A reference in the Bill to the "Principal Act" will be interpreted by referring to the Principal Act named in the heading to the Division in which the expression occurs, or otherwise to the heading to the Part in which the expression occurs (Bill cl. 3).

BILL PART 2 : AMENDMENTS OF COMPANIES ACT 1981 : COMPUTERISED REGISTERS

16. Background State and Territory Corporate Affairs Commissions are currently in the process of computerising their offices.

17. To date, sufficient information has been entered onto computer data bases to permit the preparation of partly-completed annual returns (for serving on companies for completion and lodgment) in most States and Territories and, in some States, the production of a computer-generated search document.

18. It is intended that the next step in the computerisation of CACs will be to use computer-generated documents, or the display of information on a visual display unit to satisfy most, if not all, company searches. Such documents or displays will replace the present procedures under which either microfiche or original documents are made available to people undertaking company searches.

19. It should be noted that the use of computer-generated documents or displays will not affect the present arrangements for the supply of certified copies of documents or certified extracts from documents.

Cl.4 : Registers

20. This clause will amend CA s.31 by inserting proposed s-secs.31(4A) and (4B).

21. Proposed CA s-sec.31(4A) provides that a person is not entitled to inspect the original of a document or certificate if the Commission keeps a record of the information in that document or certificate and that information can be provided to the person either in writing or by visual display. In practical terms, this means that if the Commission keeps information about a company on its computer system, a person is not entitled to see the original document or certificate from which the information was extracted if the Commission can provide that information by means of computer print-out or by displaying it on a visual display unit.

22. Proposed CA s-sec.31(4B) deals with the situation where a person requests a copy or extract from a document pursuant to para.31(2)(c) and the Commission keeps a record of the information set out in that document or certificate (e.g. by means of computer). If the Commission gives information in writing about or a document containing the contents of

- the whole of the document or certificate; or
- a part of the document or certificate,

then the Commission is considered to have given

- a copy of the document or certificate where the information provided contains the contents of the whole of the document or certificate; or
- an extract from the document where the information provided covers part of the document or certificate.

23. Proposed CA s-sec.31(4B) does not affect a person's right to obtain a certified copy or extract from a document or certificate (Bill cl.4).

Cl.5 : Obtaining information from certain registers

24. This clause will insert a new s.31A into CA.

25. The objective of proposed CA s.31A is to clarify the rights of a person to inspect registers maintained by the Commission. At present CA s-sec.31(1) provides that the Commission shall "keep such registers as it considers necessary in such form as it thinks fit". However, the Act does not expressly provide that a person may inspect or search those registers. (The Companies (Fees) Act 1981, nevertheless, provides power to prescribe a fee for the inspection or search of a register).

26. Proposed CA s-sec.31A(2) will enable a person to search a prescribed register (other than by computer), whilst proposed CA s-sec.31A(3) will enable a person to search a prescribed register by computer to obtain prescribed information. Proposed CA s-sec.31A(4) gives the Commission the authority to provide a person with prescribed information that has been extracted from a prescribed register by computer.

27. The proposed subsections have been drafted in terms of "prescribed registers" being searched to obtain "prescribed information". This approach has been adopted:

(a) in the case of "prescribed information" - to reflect the fact that the use of computers may, in the future, permit the presentation of information that cannot readily be provided at this point in time (e.g. a computer-generated search document for a company might also contain information about its subsidiary companies);

(b) in the case of "prescribed registers" - to reflect the fact that some registers maintained by the Commission contain information of a confidential nature and thus should not be made available to the public (Bill cl.5).

BILL PART 3 - AMENDMENTS OF COMPANIES ACT 1981 : SHARE BUY-BACKS

Cl.6 : Interpretation

28. It is proposed to amend CA s-sec.5(1) by inserting definitions of words and phrases used in the Bill. The definitions include the following -

"approving holding company"

29. This term is used in Bill cl.133HA which requires a company and, if it has a holding company or holding companies, those companies, to approve a buy-back which is an employee-share purchase by an ordinary resolution passed at a general meeting of the company or companies (Bill cl.6).

"participating employee"

30. This term is used in Bill cl.133HC which sets out the matters required to be included in a notice of resolution to approve a proposed purchase of employee-shares. The notice of resolution is required, amongst other things, to set out certain details in relation to the beneficial owner of the shares which are proposed to be purchased, with the purpose of establishing that person's credentials as a participating employee in relation to the corporation (Bill cl.6).

Cl.7 : Relevant interests in shares

31. Because the Bill will have the effect of extending the application of the relevant interest test to some of the new buy-back provisions, it is necessary to amend CA sub-para.8(1)(a) to widen the operation of CA s.8 (Bill cl. 7).

Cl.8 : Inclusion in official list

32. Bill cl.8 inserts new s.9A into the Principal Act to further define listed bodies, so that a body corporate whose name has been changed but whose previous name is still included in the official list, will fall within the definition of listed body in Bill cl.133BB (Bill cl.8).

Cl.9 : Substitution of headings

33. It is proposed to insert new headings in CA Division 3 as a consequence of the proposed insertion of new Division 3A which deals with share buy-backs (Bill cl.9).

Cl.10 : Issue of shares at Premium

34. It is proposed to insert a new paragraph in CA s.119 consequent upon proposed s.133PD which provides that money spent on buy-backs, where the amount paid for the shares exceeds the nominal value of the shares, shall be written off against any amounts standing to the credit of a share premium account before applying the distributable profits of the company (Bill cl.10).

Cl.11 : Insertion of Subdivision heading

35. It is proposed to insert in CA Division 3 a new subdivision heading - "Subdivision B - Class Rights" (Bill cl.11).

Cl.12 : Insertion of Subdivision heading

36. It is proposed to insert in CA Division 3 a new subdivision heading - "Subdivision C - Company Financing Dealings in its Shares, etc" (Bill cl.12).

Cl.13 : Company financing dealings in its shares etc.

37. Background CA para. 129(1)(a) reinforces the CA para. 129(1)(b) prohibition on the purchase by a company of its own shares by further prohibiting a company from giving financial assistance for the acquisition of its own shares. CA s-secs.129(8) and (9) set out several statutory exceptions to the CA s-sec.129(1) prohibition to conserve proper commercial transactions.

38. CA s-secs.12(10)-(15) set out a validation procedure for transactions which would otherwise breach the prohibition on a company giving financial assistance to others for the acquisition of its shares or shares in its holding company. The validation procedure mitigates the strict application of the CA para. 129(1)(a) prohibition in cases where the giving of financial assistance will not prejudice the company's financial position.

39. However, because CA para. 129(1)(b) strictly prohibits the purchase by a company of its own shares, companies have been increasingly resorting to the CA 129(10)-(15) validation procedure to achieve what is, in effect, a buy-back of shares. A practice of recent times has involved use of the financial assistance validation procedure to enable a company to give financial assistance to shareholders of the company's shares in return for the surrender of control over those shares.

Proposed Amendment

40. In contrast to the provision in the ED (ED para. 8(c)) which would have had the effect of dispensing with the validation procedure for financial assistance transactions altogether, it is now proposed to retain the CA s-sec.129(10) validation procedure for financial assistance transactions other than those which are designed to avoid the CA sub-para 129(1)(b) prohibition on share buy-backs (Bill para.13(d)).

Cl.14 : Consequences of company financing dealings in its shares etc.

41. Bill cl. 14 makes a consequential amendment to CA s.130 to preserve buy-back transactions carried out in accordance with proposed new Division 3A which lays down the ground rule; for buying back shares (Bill para. 14(a)).

Cl.15 : Insertion of Subdivision and heading

Subdivision D - Unacceptable Self-acquisition Schemes

42. Background The case of August Investments Pty Ltd v Poseidon and Samin Limited (19711 2 SASR 71 established that a company may, at least in certain circumstances, effectively purchase a proportion of its own shares by acquiring an interest in one or more of its non-subsidiary corporate shareholders (subject to the restriction now imposed by the Companies (Acquisition of Shares) Act 1980 which restricts the manner of effecting an acquisition that could increase a person's entitlement to voting shares beyond 20%). The net result of the Poseidon rule appears to be that a company can legitimately purchase its own shares indirectly even though it is prohibited from doing so directly.

43. For example, Company A (the purchasing company) which acquires a controlling interest in Company B (the 'interposed' Company A shareholder) which owns a significant parcel of shares in Company A, is not required to consult its shareholders in relation to its purchase of Company B shares even if one effect of the purchase is to lessen the value of remaining shareholdings. Nor is there any obligation to give creditors notice of the intended acquisition even though the rationale for the buy-back prohibition is based on the rule in Trevor v Whitworth (1887) 12 App Cas. 409 that creditors are entitled to assume that a company will maintain its capital. The creditors, in any case, would have no right to intervene.

44. Although one result of the introduction of a buy-back capacity for both public and proprietary companies should be a reduced incentive to resort to the use of non-subsidiary companies for buy-back purposes, the incentive may not be removed entirely. For example, if a company intends to defend itself against a takeover bid by directly purchasing its own shares, and subsequently cancelling those shares, it could be confronted with the unintended result of automatically increasing the bidder's stake in the company if the bidder is already a current shareholder. On the other hand, if it purchases its own shares indirectly it will be put in a stronger position vis-a-vis the bidder.

Proposed amendment

45. It is proposed to limit cross-shareholding arrangements constructed for the purpose of self-acquisition by applying a relevant interest test where a company's indirect ownership of its shares exceeds 10%. However, rather than imposing an outright prohibition, the NCSC will be given a discretionary power to intervene where it considers that a particular cross-shareholding amounts to an unacceptable self-acquisition scheme according to criteria set out in the Act (Bill cl. 10 -new s.130D).

46. The criteria will refer to such matters as to how many shares the scheme relates, the amount of consideration involved, the degree of disclosure made to shareholders, creditors and securities exchanges, consultation of shareholders and creditors and the takeover aspects of the scheme (Bill cl. 10 - new s.130C).

Proposed s.130A : Interpretation

47. Proposed s.130A widely defines certain words and phrases used in proposed Subdivision D.

Proposed s.130B : Self-acquisition scheme

48. Proposed s.130B describes a self-acquisition scheme in respect of which the Commission is empowered to make a declaration under proposed s.130D. The description is drawn in necessarily broad terms and revolves

around the purpose behind the scheme, whether it is the sole purpose or is one of a number of purposes. Proposed paras. 130B(1)(a) - (e) describe purpose in terms of acquiring control by various means over shares in a company.

49. It is also proposed to use s.9 of the Companies (Acquisition of Shares) Act 1980 to extend the meaning of Power and control by using the relevant interest concept for the purposes of defining what is a self-acquisition scheme.

50. Proposed s-sec. 130B(4) excludes transactions associated with buy-backs permitted by proposed new Division 3A from the definition of the self-acquisition schemes which will be subject to the Commission's declaratory powers under proposed ss.130D and 130E.

Proposed s.130C : Relevant matters affecting self-acquisition scheme

51. Proposed s.130C sets out the matters to which the Commission must have regard in considering whether it shall declare a self-acquisition scheme or a connected transaction to be, or form part of, an unacceptable self-acquisition scheme. The matters are those relevant to the self-purchase issue generally, such as disclosure of information to members and creditors and the opportunity for participation in the scheme by those members and creditors.

Proposed s.130D : Declaration by Commission

52. It is proposed to allow the Commission, after considering the matters listed in proposed s.130C, to declare a transaction to form part of an unacceptable self-acquisition scheme which it considers will materially prejudice the rights or interest of the company, its creditors or member or a class of its creditors or members. The Commission may only make a declaration where the relevant transaction crosses the 10% relevant interest threshold described in proposed para. 130D(1)(b).

53. Proposed s-sec.130D(2) gives the Commission 90 days in which to declare unacceptable a transaction already entered into. The Commission's declaratory powers in respect of proposed transactions are not subject to a time restriction for the reason that the rights and liabilities of parties are: not established until they have actually entered into the transaction.

Proposed s.130E : Commission may make interim orders

54. Once the Commission has made a declaration under proposed s.130D it may make one or more of the orders described in proposed paras. 130E(1)(a)-(g) which have the effect of restraining a person or the company from carrying out obligations under a self-acquisition scheme or connected transaction which has been declared unacceptable.

55. Proposed s-sec.130E(4) gives a right to appeal to the Court against an order of the Commission.

56. Proposed s-sec.130E(8) prevents the Commission from making an order where it has not given a person the subject of the order an opportunity to appear at a hearing before the Commission and to make submissions and to give evidence.

Proposed s.130F : Court may reverse Commission's declaration

57. It is proposed to allow the Court to reverse the Commission's declaration so that a transaction or proposed transaction is no longer declared to be part of an unacceptable self-acquisition scheme.

Proposes s.130G : Court may act on Commission's declaration

58. Proposed s.130G allows the Court to make wide ranging orders, after the Commission has made a declaration under proposed s.130D, on the application of the Commission, the company or a member or creditor of the company.

Proposed s.130H : Effect of Subdivision

59. Proposed s.130H simply ensures that the provisions of Subdivision D do not have the unintended effect of affecting the operation of the provisions of Subdivision C of this Bill or the provisions of CASA.

Insertion of Subdivision and heading

60. It is proposed to insert in CA Division 3 a new sub-division heading - "Subdivision E - Other".

CI 16 : Insertion of new Division

61. It is proposed to insert a new Division 3A, after CA Division 3, to deal with the proposed new share buy-back capacity (Bill cl.16). Proposed new Division 3A will contain the following provisions -

Proposed Division 3A - Permitted Buy-Backs of Shares
Subdivision A - How this Division works

Proposed s.133AA : Outline of structure

62. Proposed s.133AA explains how the proposed buy-back capacity exists alongside the CA s.129 prohibition on a company acquiring its own shares. The proposed provision is self-explanatory.

Subdivision B - Interpretation

Proposed s.133BA : Effect of Subdivision

63. Proposed s.133BA provides that the Subdivision B interpretation provisions apply only to Division 3A unless otherwise provided.

Proposed s.133BB : Interpretation

64. Proposed s.133BB defines certain words and definitions for the purposes of proposed new Division 3A which sets out the share buy-back procedure. Some of the terms defined are set out below with cross-references, as appropriate, to the substantive provisions in which the defined terms are employed.

'buy back'

65. The meaning of this term is found in proposed s.133BC which says that where a company buys shares it shall be taken to buy back the shares.

'buy-back'

66. The term 'buy-back' is descriptive of an acquisition by a company involving the buying back of shares as understood by proposed s.133BC.

'buy-back authorisation'

67. This term refers to the self-purchase capacity which must be contained in a company's constituent documents as required by proposed s.133DA.

'buy-back scheme'

68. A buy-back scheme will be one constituted by offers which fall within the limits set by proposed s.133FB.

'employee - shares purchase'

69. A buy-back which fits into this definition of employee-shares purchase must meet the requirements set out in proposed ss.133HA, 133HB and 133HC which primarily relate to consultation of shareholders.

'odd-lot purchase'

70. This term is defined to mean a buy-back by a listed body, where the number of shares acquired is an odd lot of shares in the body to distinguish it from both a buy-back scheme and an employee-shares purchase which attract the operation of other provisions of the Bill.

'offer period'

71. Proposed s.133QB determines the effect of supervening insolvency on a buy-back scheme (namely, declaring buy-back agreements to be void or deeming offers to buy-back shares to be withdrawn in certain circumstances) and uses the term "offer period" in pursuance of this result.

'solvency period'

72. A 'solvency period', being a term used in proposed Subdivision Q of Division 3A, will commence at the same time as the buy-back offer period, but will extend beyond the offer period to the time when purchase money is first paid to sellers in the buy-back scheme.

Proposed s.133BC : What constitutes buying back shares

73. Proposed s.133BC makes it clear that the use of the expression 'buy back the shares' in the Bill is a reference to a company buying shares in itself.

Proposed s.133BE : The 10% in 12 months limit

74. Proposed s.133BE sets out the formula to be applied when calculating what is 10% of a company's shares for the purposes of complying with the limit placed on the number of shares which may be bought back within a 12 month period.

Proposed s.133BF : Takeover aspects of Proposed resolution

75. The CSLRC Discussion Paper pointed to the experience of overseas jurisdictions which have had to introduce mechanisms to prevent the buy-back power being exercised by company management as a takeover defence strategy without the informed consent of shareholders.

76. To ensure effective shareholder participation, the exercise of the buy-back power requires shareholder approval by ordinary or special resolution and the notice of the proposed resolution will be required to inform the shareholders of the takeover aspects of the proposed purchase (for example proposed s-sec.133GD(4)).

77. Proposed s.133BF sets out the information which must be included in a notice of a proposed resolution to satisfy the requirement to set out the takeover aspects of the proposed resolution.

Proposed s.133BG : When directors presumed to be aware of proposed or actual takeover bid

78. Proposed s.133BG creates a presumption that directors were aware of a proposed or actual takeover bid in certain circumstances with the result that directors will not be able to avoid the notice requirements of proposed s.133BF and related provisions.

Proposed s.133BH : Solvency declaration

79. A prerequisite to the exercise of the buy-back power will be the signing of a solvency statement by all of the directors of the purchasing company. Proposed s.133BH sets out the matters which must be included in a solvency declaration required by proposed ss.133MA and 133MB.

80. Although all directors will be required to sign the statement personally, duly appointed alternate directors will qualify as personal signatories for the purposes of the solvency statement requirements.

81. Proposed paras.133BH(1)(d),(e) and (f) require the solvency statement to specify all current and proposed buy-back schemes in order to establish a nexus between the directors' knowledge of the facts and their personal liability which may arise on the event of the company's insolvency.

Proposed s.133BJ : Auditor's report on solvency declaration

82. Where an auditor's report is required by the Bill in relation to a proposed buy-back or proposed buy-back scheme, it must include a declaration of the kind described in proposed s.133BJ. The auditor may add further explanation or relevant information which does not contract the statement required by proposed s.133BJ.

Proposed s.133BK : When buy-back agreement is completed

83. Where all the consideration that is required by any agreement constituting a buy-back by a company has been provided, that agreement is taken to be completed by proposed s.133BK.

Proposed s.133BL : When shares are transferred

84. Proposed s.133BL provides that shares are taken to have been transferred, pursuant to an agreement, upon registration.

Proposed s.133BM : Classes of shares

85. Proposed s.133BM provides that, for the purposes of proposed new Division 3A, shares in a company will, unless they are divided into 2 or more classes, constitute a class of shares.

Subdivision C - Power to Buy Back Shares

Proposed s.133CA : Power to buy back shares

86. Proposed s.133CA empowers a company, through its directors, to buy back its ordinary shares subject to the conditions prescribed in proposed new Division 3A which essentially relate to disclosure, consultation of shareholders and creditors and equality of treatment as between shareholders - for example see proposed Subdivision G.

Proposed s.133CB : Completion of buy-back

87. Subject to proposed new Division 3A, proposed s.133CB ensures that shares purchased by a company pursuant to the buy-back provisions of the Bill can be transferred to the company.

Proposed s.133CC : Effect of Division

88. Proposed s.133CC confers independent operation on the buy-back provisions so that the self-purchase capacity is not re-defined by other legislative provisions other than those of proposed Division 3A, the constituent documents of a company, or the rules of a securities exchange or any agreement.

Proposed s.133CD : Other obligations and liabilities not affected

89. Proposed s.133CD preserves obligations and liabilities, including those arising under CA s.229, which arise otherwise than under proposed new Division 3A.

Subdivision D - Buy-back Authorisation in Articles

Proposed s.133DA : Articles to contain buy-back authorisation

90. Proposed s.133DA requires a company to derive its self-purchase capacity from its constituent documents which might grant the power either at the time of incorporation or later by amendment by special resolution. The function of this restriction on the grant of a self-purchase capacity is to enable shareholders to determine, in principle, whether the company will have a buy-back capacity.

Proposed s.133DB : Inclusion, effect and renewal of buy-back authorisation

91. The effect of proposed s.133DB will be to cause a company's self-purchase power to lapse every 3 years unless it is renewed by an amendment to the company's articles in the usual manner prescribed elsewhere in CA.

92. Proposed s.133DB reinforces the principle that shareholders should decide whether the company should have a buy-back capacity by ensuring that shareholders who have become members after incorporation, or since a renewal of the buy-back power, are consulted.

Subdivision EA - Buy-Backs by Public Companies

93. Proposed s.133EA confines public companies to a 10% in 12 month buy-back capacity except where the buy-back is an employee-share purchase or an odd-lot purchase.

Subdivision F - Buy-back Scheme

Proposed s.133FA : Shares and classes of shares

94. It is proposed to restrict buy-backs to the purchase of ordinary fully-paid or partly-paid shares of the company.

Proposed s.133FB : Buy-back scheme

95. It is proposed that share purchases pursuant to a buy-back scheme may only be made by way of written offers to all shareholders. Proposed s.sec.133FB(11) further requires that an offer made pursuant to a buy-back scheme will be on a proportional basis (see CASA para.16(2)(a)).

Proposed s.133FC : Withdrawal or variation of buy-back offers

96. Proposed s.133FC requires Commission approval for the withdrawal or variation of a buy-back to ensure that the rights of all parties are given due consideration if a company intends to withdraw or vary a buy-back offer.

Proposed s.133FD : Avoiding odd lots

97. Proposed s.133FD deems odd lots of shares remaining after the acceptance of a buy-back offer to have been included in the offer and acceptance. The purpose of the provision is to avoid the creation of unmarketable parcels of shares which would otherwise be an unavoidable consequence of some offers.

Proposed s.133FE : Odd lots to be disregarded for purposes of 10% in 12 months limit

98. Where an odd lot has been deemed part of a buy-back scheme, the number of shares in that odd lot shall not be counted in calculating the 10% in 12 months limit.

Subdivision G - Approval of Buy-back Schemes by Ordinary Resolution

Proposed s.133GA : When approval required

99. The Bill allows the management of a company to use its own discretion in exercising the buy-back power up to a 10% in 12 months limit. If that limit is exceeded by proprietary companies which are permitted to go beyond 10%, or at least one of the company's directors is aware of the matters detailed in proposed sub-paras.133GA(b)(i) and (ii) relating to a takeover bid, then proposed s.133GA requires shareholders to be consulted and any further buy-back offers to be approved by ordinary resolution of the company.

Proposed s.133GB : Buy-back offers made under a resolution

100. If the Bill requires particular buy-back offers to be made under a resolution of the company, the resolution must satisfy proposed s.133GB.

Proposed s.133GC : Resolution to approve proposed buy-back scheme

101. So that members may make a fully informed decision where exercise of the buy-back power requires the prior consent of shareholders, proposed s.133GC sets out matters which must be included in a notice of the meeting to vote on a resolution to approve a proposed buy-back scheme and matters that the resolution must specify. One of the matters which the resolution must specify is the price to be paid for the shares the subject of the proposed buy-back scheme although proposed s-secs.133GC(3) and (4) allow that price to be specified to be somewhere in a range between a specified minimum and maximum amount and to be determined by the directors, or the price may be determined by the directors in another manner specified in the resolution.

Proposed s.133GD : Notice of resolution to approve proposed buy-back scheme

102. Proposed s.133GC requires the matters specified in proposed s.133GA to be included in a notice of resolution to approve a proposed buy-back scheme. Those matters include a copy of the solvency declaration by the directors (proposed s-sec.133GD(6)) and the takeover aspects of the proposed resolution (proposed s-sec.133GD(4)).

Subdivision H - Employee-shares Purchases

Proposed s.133HA : Approval by ordinary resolution

103. Proposed s.133HA requires the prior consent of the shareholders of a company, and of its holding company, by ordinary resolution to a buy-back which is an employee-shares purchase. The agreement to purchase the shares must be in accordance with the resolution(s), which in turn must comply with proposed s.133HB.

Proposed s.133HB : Resolution to approve Proposed employee-shares-purchase

104. Proposed s.133HB requires that a resolution to approve an employee-shares purchase must be preceded by a notice which complies with proposed s.133HB, must set out the consideration to be provided for the purchase or the manner in which it is to be determined by the directors and, must not be voted on by a party to the agreement or a person associated with such a party.

Proposed s.133HC : Notice of resolution to approve proposed employee-shares purchase

105. Proposed s.133HC sets out the information which should be given to shareholders in the notice of resolution required by proposed s.133HB.

Subdivision J - Selective Share Buy-Backs

Proposed s.133JA : Approval, by special resolution passed by special majority, of selective buy-back by public company

106. Proposed s.133JA will allow a public company to selectively buy back shares where -

- (a) a special resolution is passed by 75% of shareholders voting in person or by proxy;
- (b) vendor shareholders and their associates are excluded from voting;
- (c) notice is given in the manner required by proposed para 133JA(e); and
- (d) an expert's report is obtained as required by proposed para 133JA(f).

Proposed s.133JB : Approval by special resolution where elective buy-back by proprietary company exceeds 10% in 12 months limit

107. It is proposed to allow proprietary companies to selectively self-purchase so long as the purchasing company complies with certain prescribed conditions. Proposed s.133JB requires selective buy-backs to be approved by special resolution of the company preceded by a notice of resolution complying with the requirements of proposed Subdivision K.

108. Proposed para.133JB(c) disqualifies a party to the purchase agreement, or a person associated with such a person, from voting on the special resolution to approve the selective buy-back.

Subdivision K - Notice of Resolution to Approve

Proposed Selective Buy-Back

Proposed s.133KA : Notice must comply with Subdivision

109. Proposed s.133KA requires a notice of resolution to approve a selective buy-back to comply with proposed Subdivision K.

Proposed s.133KB : Contents of resolution and proposed agreement

110. Proposed s.133KB requires the notice of resolution to set out the text of the proposed resolution and a summary of all the material terms of the proposed selective self-purchase contract.

Proposed s.133KC : Availability of agreement for inspection

111. Proposed s.133KC ensures that shareholders entitled to vote on the special resolution to approve a selective self-purchase can inspect the relevant contract both at the company's registered office at least 14 days before the date of the relevant meeting and at the meeting itself.

Proposed s.133KD : Valuation of non-cash consideration

112. Where the consideration provided by the company is in a non-cash form or contains a non-cash element or alternative,, proposed s.133KD requires the notice of resolution to set out the particulars of the non-cash consideration and a copy of a statement by directors as to its equivalent cash value.

Proposed s.133KE : Expert's opinion about whether consideration fair and reasonable

113. Proposed s.133KE sets out the matters upon which an expert's opinion must be sought when a public company proposes to selectively purchase shares.

Proposed s.133KF : Matters affecting expert's objectivity

114. Proposed s.133KF requires an expert's report to disclose any interest that the expert may have in the relevant share buy-back proposal.

Proposed s.133KG : Expert's consent

115. Proposed s.133KG requires the expert's consent to the manner in which his or her report is set out in the notice required by proposed para. s.133JA(e), before that notice is sent.

Proposed s.133KH : Reasons for buy-back

116. Proposed s.133KH requires the notice of resolution to set out the directors' reasons for proposing the buy-back, together with the takeover aspects of the proposed resolution.

Proposed s.133KJ : Solvency aspects

117. Proposed s.133KJ requires the notice of resolution to include the opinion of the directors on the effect of the buy-back on the company's state of affairs as well as a copy of a solvency declaration by the directors that relates to the proposed buy-back. The notice will also need to specify how many partly-paid shares are proposed to be bought-back and the amount of capital which remains unpaid in relation to those shares.

Proposed s.133KK : Directors' interests

118. Proposed s.133KK ensures that each of the directors has disclosed any interest in the proposed buy-back in the notice of resolution including any declaration made in accordance with CA s.228 which requires directors to declare any interest in a contract or proposed contract with the company.

Proposed s.133KL : Effect on control of company

119. Proposed s.133KL further requires the notice of resolution to set out what the directors consider will be the likely effect on the control of the company if the proposed buy-back is made.

Proposed s.133KM : Other relevant information

120. Proposed s.133KM ensures that all relevant information is included in the notice of resolution.

Proposed s.133KN : Notices to be the same

121. Proposed s.133KN ensures that a person entitled to receive a notice under s.133KA will receive the same notice as other persons so entitled.

Subdivision L - Creditors may Object to Proposed Buy-backs

Proposed s.133LA : Advertising proposed buy-backs

122. Proposed s.133LA requires certain buy-back proposals to be advertised to give creditors notice of the company's intention to self-purchase and access to the information necessary to form a decision on whether to exercise rights under proposed s.133LD (proposed s.133LD will allow creditors to apply to the Court for an order prohibiting the making of buy-back offers or the entering into a buy-back agreement).

123. The categories of buy-back proposals which are required to be advertised under proposed s.133LA are offers by public companies and selective buy-backs by proprietary companies. The advertisement will be required to notify creditors that certain information relating to the proposed buy-back, specified in proposed s-sec.133JA(3), will be available for inspection, free of charge, at the company's registered office.

Proposed s.133LB : Content of advertisement

124. Proposed s.133LB sets out the details in relation to the consideration to be provided for the proposed buy-back of shares, which are required to be included in a notice published in accordance with proposed s.133LC.

Proposed s.133LC : Newspapers in which advertisement to be published

125. The advertisement of proposed buy-backs required by proposed s.133LA will be required by proposed s.133LC to be published in a national newspaper and a daily newspaper in each State or Territory in which the company carries on business.

Proposed s.133LD : Creditor may apply to Court

126. Proposed s.133LD puts in place a protective mechanism for creditors who might be adversely affected by a buy-back scheme which would seriously reduce the company's margin of financial viability. Under this provision a creditor would be able to apply to the Supreme Court, within 21 days of the advertisement of a buy-back proposal, to seek an order prohibiting the making of the buy-back offers or the entering into of a buy-back agreement.

Proposed s.133LE : How application to be dealt with

127. Proposed s.133LE sets out the grounds on which the Court may decide to prohibit a company from proceeding with a proposed buy-back of shares.

Proposed s.133LF : Buy-backs not to Proceed while application pending

128. Proposed s.133LF provides that the period of time during which a proposed buy-back of shares was delayed due to the Court proceeding under proposed s.133LD shall not count in determining whether the requirements of proposed s-sec.133LA(2) and para.133LA(3)(b) have been complied with.

Proposed s.133LG : Company to comply with order of Court

129. It is proposed that a company will be prevented from proceeding with a buy-back scheme or other buy-back, if to do so would contravene an order in force under proposed s.133LE.

Subdivision M - Solvency Requirements

Proposed s.133MA : Solvency requirements for buy-back scheme

130. Proposed s.133MA requires a solvency declaration by the company's directors in relation to a pari passu self-purchase as well as an auditor's report. Proprietary companies will not: be required to have an auditor's report if the buy-back does not exceed the 10% in 12 months limit.

131. Proposed s.133MA also requires a solvency declaration to have been signed by directors within 2 months of the buy-back offer. The reason for this requirement is to ensure that directors' liability connected to the solvency declaration does not arise as a result of a solvency declaration made without advantage of the knowledge of relevant facts which may have occurred between the giving of notice of intention to propose a resolution to approve a buy-back scheme (see proposed s.133GA) and the making of the buy-back offer.

Proposed s.133MB : Solvency requirements for other buy-backs

132. Proposed s.133MB imposes similar solvency requirements to proposed s.133MA to buy-backs not made under a buy-back scheme.

Proposed s.133MC : Copy of solvency declaration and auditor's report to be lodged with Commission

133. Proposed s.133MC requires solvency declarations and auditor's reports required by the Bill to be lodged with the Commission within certain time periods (the maximum permissible being 7 days).

Proposed s.133MD : Revocation of solvency declaration

134. A solvency declaration will be capable of revocation by a director or the directors in the manner provided by proposed s.133MD.

Proposed s.133ME : Solvency requirements for completion of buy-back under buy-back scheme

135. Proposed s.133ME delays settlement of any of the buy-back agreements comprising a buy-back scheme until the offer period has ended. This provision is intended to ensure equality of treatment for all shareholders, which would not be guaranteed in the event of intervening insolvency where some shareholders had already been paid for the shares sold to the company.

Proposed s.133MF : Company not to register certain transfers during solvency Period

136. Proposed s.133MF logically extends proposed s.133ME, so that a company shall be prohibited from becoming the registered owner of shares which are part of a buy-back scheme until the offer period of that buy-back scheme has ended and the company has provided consideration. This provision is intended to prevent a company from circumventing proposed s.133ME by registering a transfer of shares, thereby creating a debt in favour of a particular shareholder.

Subdivision N - Share Buy-backs and other Securities Issues

Proposed s.133NA : Buy-back consideration not to consist of other securities in the company

137. It is proposed to prohibit the use of a company's securities as consideration for buy-backs.

Proposed s.133NB : No buy-backs during rights issue or placement

138. Proposed s.133NB, as a measure against market manipulation, prevents a company from buying back shares during or within 3 months after the last day of a rights issue or a placement of shares.

Proposed s.133NC : No rights issue or Placement during offer period or within 3 months after buy-back

139. Proposed s.133NC expands the principle applied by proposed s.133NB to rights issues or placements during the buy-back offer period or within 3 months after a buy-back.

Subdivision P - Effect of Buy-Back on Shares

Proposed s.133PA : Rights attaching to bought back shares

140. Proposed s.133PA suspends all rights attached to bought back shares as soon as the buy-back agreement is entered into and until the shares are transferred to the purchasing company.

Proposed s.133PB : Company not to sell bought back shares

141. Proposed s.133PB prohibits a company from selling shares it has bought back.

Proposed s.133PC : Cancellation of shares after transfer to company

142. Proposed s.133PC automatically cancels bought back shares and extinguishes all rights attaching to those shares upon registration of the transfer of the shares or options to the purchasing company.

Proposed s.133PD : Accounting for money spent on buy-back where amount exceeds nominal value of shares

143. Proposed s.133PD provides that the buy-back acquisition premium cost to the company should be applied by writing off that acquisition premium first against the share premium account (if any) and then against distributable profits (if any) of the company.

Subdivision Q - Effect of Insolvency

Proposed s.1330A : Buy-back offer by externally-administered company void

144. Proposed s.133QA declares void any offer under a buy-back scheme made by an externally-administered company, which is a company -

- (a) in respect of which a provisional liquidator has been appointed and not since removed;
- (b) that is being wound up; or
- (c) that is under official management.

Proposed s.1339B : Effect of supervening insolvency on buy-back scheme

145. The effect of proposed s.133QB would be to declare a binding buy-back agreement void or deem an offer to buy back shares to be withdrawn if -

- (a) any requirements in respect of a solvency declaration and an auditor's report have not been met by the end of the offer period; or
- (b) a solvency declaration is revoked before any consideration for the shares bought under a buy-back scheme has been paid; or
- (c) before any consideration has been paid in relation to the buy-back scheme -
 - (a) a provisional liquidator of the company is appointed;
 - (b) a Court makes an order for the winding up of the company;
 - (c) the company resolves that it be wound up; or
 - (d) the company is placed under official management.

Proposed s.1330C : Directors to indemnify insolvent company where consideration provided or partly-paid shares acquired under buy-back agreements

146. Proposed s.133QC imposes personal liability on directors who have signed a solvency declaration so that each director: will be liable jointly and severally to compensate the company for the total funds (as well as the value of any non-cash consideration) expended on self-purchases in the 12 months prior to insolvency as well as the unpaid amounts on bought-back partly-paid shares (whether or not there is a causal link between the self-purchase and the insolvency subject to proposed s.133QD).

147. Directors will be relieved of personal liability under proposed s-sec.133QC(5) wherever they can establish that at the time of making the relevant declaration, they had reasonable grounds for the solvency opinion.

Proposed s.133QD : Relief from liability under section 1330QD

148. Proposed s.133QD gives further relief to directors from personal liability under proposed s.133QC where it can be established that the director acted honestly at all times and, having regard to all the circumstances of the case, ought fairly to be excused in relation to the liability.

Subdivision R - Rights of Unpaid Sellers

Proposed s.133RA : Specific Performance of buy-back agreements

149. Proposed s.133RA allows a buy-back agreement to be enforced by a Court order for specific performance against a solvent company.

Proposed s.133RB : Buy-back agreement unenforceable while company insolvent

150. Proposed s.133RB will prevent buy-back agreements being enforced against an insolvent company and the onus of establishing that an agreement is unenforceable will lie with the company.

Proposed s.133RC : Unpaid seller may prove in winding up of company

151. Proposed s.133RC would allow a vendor shareholder to claim a debt in a winding up of the purchasing company which arose out of a buy-back agreement.

Proposed s.133RD : Ranking of seller's claim in winding up

152. Proposed s.133RD provides that a vendor shareholder's claim allowed by proposed s.133RC shall rank after all other claims in the winding up of the purchasing company except other sellers' claims, other sums due to members and claims arising out of the adjustments of rights as between contributories.

Subdivision S - Certificates and Declarations of Compliance

153. Background The CSLRC considered whether irregular (i.e. in breach of procedural requirements) self-purchase transactions should be void, voidable or valid and concluded that all completed transactions made on the basis of irregular authorisations should be valid. The Committee cited concern about possible detriment to bona fide vendors and undue market uncertainty in support of its conclusion.

154. However, such an approach could be seen to be favouring vendor shareholders over creditors and would also limit the remedies to those seeking damages as a result of the irregularly authorised but valid transaction. It would be difficult to restore the parties to their pre-transaction status because the bought back shares are subject to cancellation and company funds have been depleted as a result of the share re-purchase. Consequently, this Bill applies CA s.130 to irregularly authorised transactions with the result that those transactions will be voidable at the option of the company.

Proposed Amendment

155. To mitigate the harshness of CA s.130 bona fide shareholders will be immune to orders for compensation under CA s-sec.130(4) if the agreement or transaction was entered into on reliance of a duly signed certificate of compliance. This proposed amendment would mirror the present protective mechanism in CA s-sec.130(6) in respect of persons receiving financial assistance from a company for the purposes of buying shares in that company.

Proposed s.133SA : Certificate of compliance

156. It is proposed that a compliance certificate to be made and given in accordance with the provisions of Subdivision S will remove a person's liability under CA s-sec.130(4), except where that person was aware before making the agreement or entering into the transaction that the buy-back had not satisfied all the conditions of proposed new Division 3A.

Proposed s.133SB : Presumptions about certain matters

157. Proposed s.133SB establishes several presumptions in relation to certificates of compliance.

Proposed s.133SC : Who must sign compliance certificate

158. The compliance certificate must be signed by at least 2 directors of the company, or a director and a secretary of the company.

Propose s.133SD : Offences relating to compliance certificates: buy-back schemes

159. Proposed s.133SD prohibits a compliance certificate being given in respect of only a proportion of offers under a buy-back scheme.

160. Where a compliance certificate accompanies an offer which if accepted will contravene CA s.129, proposed s-sec.133SD(2) will also be contravened with the result that each officer of the defaulting company will be guilty of an offence unless a defence can be established under proposed s-sec.133SD(4).

Proposed s.133SE : Offences relating to compliance certificates : other buy-backs

161. Proposed s.133SE creates an offence, of the kind created by proposed s.133SD, in respect of compliance certificates given in relation to other buy-backs which contravene CA s.129.

Proposed s.133SF : Declaration by Court of substantial compliance

162. Proposed s.133SF allows the Court to declare, upon application by a party to an agreement or proposed agreement constituting a buy-back, that a condition of proposed new Division 3A has been satisfied.

Subdivision T - Notifying Commission and Securities Exchanges about Buy-backs

Proposed s.133TA : Company to notify Commission of buy-backs

163. To assist in maintaining a fully informed market, proposed s.133TA requires certain information to be notified to the Commission.

Proposed s.133TB : Listed company to notify securities exchange of buy-backs

164. Proposed s.133TB further requires listed bodies to provide to the relevant securities exchange a copy of the notice required by proposed s.133TA to be lodged by them with the Commission.

Subdivision U - Listed Company to Notify Member About Share Cancellations

Proposed s.133UA : Notifying member whose shares were cancelled

165. Proposed s.133UA ensures that members who have sold back shares to a company are notified that those shares were cancelled immediately after the shares had been transferred to the company, by force of proposed s-sec.133PC(1).

Proposed s.133UB : Notifying members generally

166. Proposed s.133UB ensures that all members of a listed company are aware of completed buy-back schemes which result in a 5% or more reduction of the company's share capital. Shareholders will need to be aware of completed buy-backs which could result in an automatic upwards adjustment of their percentage shareholding entitlement thereby having implications for their obligations under the CA substantial shareholdings provisions.

Subdivision V - Register of Buy-backs

Proposed s.133VA : Company to keep register

167. In order that shareholders may have access to relevant information, proposed s.133VA requires the purchasing company to establish a register for the purposes of new Division 3A containing the information set out below.

Proposed s.133VB : Particulars of buy-back schemes

168. Proposed s.133VB requires a purchasing company to enter on its buy-back register details of buy-back offers made pursuant to a buy-back scheme and subsequent purchases.

Proposed s.133VC : Particulars of other buy-backs

169. Where a buy-back is made other than pursuant to a buy-back scheme proposed s.133VC requires the purchasing company to enter certain information in its buy-back register.

Proposed s.133VD : Alteration of register where buy-back does. not Proceed

170. Proposed s.133VD requires a company to ensure the accuracy of its buy-back register by removing entries which relate to buy-back offers or agreements which have been withdrawn or have become void.

Proposed s.133VE : Entries in register after cancellation of shares

171. Proposed s.133VE requires a purchasing company to amend its buy-back register to show that particular bought-back shares have been cancelled.

Proposed s.133VF : Inspection and copies of register

172. Proposed s.133VF allows company buy-back registers to be inspected by members and creditors of the company and by any other person on payment of an amount not exceeding a prescribed amount.

Cl.17 : Proofs of debts

173. Bill Cl.17 makes an amendment to CA s.438 consequential upon proposed s.133RD which ranks a seller's claim arising from a debt due from a buy-back agreement.

BILL PART 4 - AMENDMENTS OF COMPANIES ACT 1981 : ON-MARKET SHARE BUY-BACKS

174. The amendments proposed in this Part will allow public companies another method of buying back shares within the 10% in 12 months annual limit.

Cl.18 : Interpretation

175. On-market purchase' will be defined by proposed s.133BD (Bill cl.18).

Cl.19 : Insertion of new s.133BD - On-market purchase

176. Bill cl.19 inserts new s.133BD which defines an on-market buy-back of shares. Proposed s.sec. 133BD(2) has the effect of preventing on-market buy-backs by transactions, which would, pursuant to the business or listing rules of the relevant securities exchange, be described as 'special'. These transactions are more commonly referred to as 'special crossings' (Bill cl.19).

Cl.20 : Approval by special resolution passed by special majority of off-market selective buy-back by public company

177. Bill cl.20 inserts a reference to on-market purchase in Bill cl.133JA so that section recognizes that on-market buy-backs are sanctioned by the Act. It is necessary to amend proposed new s.133JA in this way as it will come into operation before the 'on-market' provisions, which will be proclaimed at a later date (see Bill s-cl.2(4)) (Bill cl.20).

Cl.21 : Advertising Proposed buy-backs

178. Bill Cl.21 inserts a reference to on-market purchase in Bill cl.133LA so that the Bill's advertising requirements will not apply to on-market purchases. The Bill is amended in this way for the same reasons given in relation to Bill cl.20 (Bill cl.21).