

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CORPORATE LAW REFORM BILL 1993

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,  
the Honourable Michael Lavarch MT)

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# CORPORATE LAW REFORM BILL 1993

## OUTLINE

**1. The Corporate Law Reform Bill (No. 2) 1992 (the 1992 Bill), which proposed an enhanced statutory disclosure system, was introduced into the Senate on 26 November 1992 in order to obtain public comment. Additional prospectus reforms were released for public comment in January 1993 with a view to including them in the 1992 Bill.**

**2. In the light of public comment, a new Bill, the Corporate Law Reform Bill 1993, has been developed to replace the 1992 Bill.**

**3. The Corporate Law Reform Bill 1993 (the Bill) amends the Corporations Law to:**

- introduce a new concept of a disclosing entity whose securities are of interest to investors;**
- require continuous disclosure by disclosing entities of material information concerning their position;**
- introduce measures designed to facilitate improved enforcement of Listing Rules of the Australian Stock Exchange (ASX) and co-operation between the ASX and the Australian Securities Commission (ASC);**
- require a new system for half-year reports by disclosing entities;**
- require a new system for annual reporting for disclosing entities which are non-companies;**
- enable accounting standards to be made by the Australian Accounting Standards Board (AASB) and applied in respect of new and existing reporting requirements for prescribed interests that are enhanced disclosure securities (ED securities);**
- streamline the prospectus provisions for disclosing entities which satisfy certain criteria concerning their disclosure of information;**

- modify the supplementary prospectus provisions;
- change the law about incorporating documents by reference in a prospectus;
- relax the present restrictions on companies indemnifying and insuring their officers and auditors; and
- facilitate of the use of printouts from the ASC national database as evidence in court proceedings.

4. The Bill will ensure that enhanced disclosure obligations will apply to entities in which members of the public invest (disclosing entities) to enable informed decisions to be made about the allocation of investment funds.

5. Listed entities will continue to disclose information to the ASX in accordance with its Listing Rules. The Bill will oblige a listed entity to inform the ASX, in accordance with the continuous disclosure requirements of the ASX Listing Rules, about any matter necessary to prevent investors being misled or deceived in a material manner. (The ASX will also be obliged to provide the ASC with a copy of the material it releases to the market to facilitate any enforcement action by the ASC and to enable public access to the information through the ASC's database.)

6. Most unlisted entities whose securities are traded or offered for sale are already required to disclose material information in supplementary prospectuses. For those not subject to these requirements, the Bill will require them to lodge with the ASC, as soon as practicable, information likely to have a material effect on the price or value of the entities' securities.

7. Intentional, reckless and negligent failures to disclose material information will result in civil liability to investors who thereby suffer loss. New criminal sanctions will apply to intentional or reckless failures to disclose material information to the ASX or the ASC as required.

8. The Bill also contains measures designed 'to facilitate improved enforcement of ASX Listing Rules as well as requiring domestic futures exchanges and their clearing houses to notify the ASC about serious contraventions of their business rules.

## FINANCIAL IMPACT STATEMENT

10. Funding for the enhanced corporate disclosure scheme proposed under the Corporate Law Reform Bill (No. 2) 1992 was approved in 1992. (Additional expenditure of \$3.2 million over 4 years was announced at that time.) No additional funds are required.

11. While the scope of the entities and the nature of the information disclosed under the 1993 Bill will be largely the same as under the 1992 Bill, the 1993 Bill will require notification to the ASC in a different manner from that originally contemplated. Disclosure by listed entities will now be made to the ASX, with the ASX providing a copy to the ASC of material which the ASX released to the market. Continuous disclosure by non-listed entities and the making of half-year reports will not be substantially altered from proposals included in the 1992 Bill. As a result, the ASC will be processing a similar amount of information as under the previous scheme.

12. The enhanced corporate disclosure scheme has been designed in such a way as to minimise compliance costs to disclosing entities, while at the same time ensuring the objectives of disclosure are achieved. No significant additional costs should result for listed entities which ensure that material information is disclosed to the ASX on a timely basis. They will continue to disclose information to the ASX under its Listing Rules. Unlisted entities whose securities are sold or traded, including regulated prescribed interest schemes, should also not incur significant additional costs. This is because disclosure by non-listed disclosing entities will not be required where the information is required to be disclosed in accordance with the prospectus requirements. In most cases, the prospectus requirements will require unlisted entities to disclose material information in a prospectus and material changes or material new matters in a supplementary prospectus.

13. Some costs can be expected in ensuring compliance with the requirement to disclose, in a timely manner, ongoing material information, especially where entities do not presently have reporting systems in place to make this disclosure. Some additional costs can also be expected for entities in complying with the new periodic reporting requirements, in particular, for half-year reporting.

## ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

AASB	- Australian Accounting Standards Board
ACLR	- Australian Company Law Reports
ASC	- Australian Securities Commission
ASC Act	- Australian Securities Commission Act 1989
ASX	- Australian Stock Exchange
CASAC	- Companies and Securities Advisory Committee
CLR	- Commonwealth Law Reports
Ch	- Chancery Division Reports (UK)
CSLRC	- Companies and Securities Law Review Committee
SFE	- Sydney Futures Exchange
the Bill, the 1993 Bill	- Corporate Law Reform Bill 1993
the 1992 Bill	- Corporate Law Reform Bill (No. 2) 1992



## SUMMARY OF MAIN FEATURES OF THE BILL

### Disclosing Entities.

**15. The enhanced disclosure obligations under the Bill will effectively apply to the following entities (referred to as "disclosing entities"):**

- **listed entities and listed prescribed interest schemes;**
- **entities and prescribed interest schemes which raise funds pursuant to a prospectus (including borrowing corporations);**
- **entities and prescribed interest schemes which offer securities other than debentures as consideration for an acquisition of shares in a target company under a takeover scheme; and**
- **entities whose securities are issued under a compromise or scheme of arrangement.**

**16. A body or prescribed interest scheme will cease to be a disclosing entity if, following the issue of securities pursuant to a prospectus, takeover scheme, compromise or scheme of arrangement, the number of shareholders or prescribed interest holders is less than 100. The requirement for a minimum of 100 shareholders, together with the scope of application described in paragraph 15, means that in practice small business will not be affected by the disclosure obligations.**

**17. The following entities will be exempt from the enhanced disclosure obligations:**

- **a public authority of a State or Territory or an instrumentality or agency of the Crown in right of a State or Territory; and**
- **a public authority of the Commonwealth or an instrumentality or agency of the Crown in right of the Commonwealth the relevant traded debt securities of which are guaranteed by the Government of the Commonwealth.**

Corporations Regulations will also be able to modify any or all of the disclosure obligations.

### Continuous Disclosure Requirements.

19. Item 92 of Schedule 1 to the Bill implements the continuous disclosure obligations which form a central part of the enhanced corporate disclosure scheme contained in the Bill. A listed entity which intentionally or recklessly contravenes the continuous disclosure requirements of the ASX Listing Rules (in particular Listing Rule 3A(1)) by failing to provide the ASX with information which, if generally available, would be likely to have a material effect on the price or value of the entity's securities, will be guilty of a criminal offence. Such an entity will also be civilly liable to any person who suffered loss or damage as a result of intentional, reckless or negligent non-disclosure of material information by the entity.

20. Most unlisted entities whose securities are traded or offered for sale are already required to disclose material information in prospectuses. For those not subject to these requirements, the Bill will introduce a continuous disclosure requirement as there is no securities exchange to regulate the markets on which unlisted entities trade. It will be a criminal offence if such entities intentionally or recklessly fail to lodge with the ASC, as soon as practicable, information of which the entities are aware and which, if generally available, would be likely to have a material effect on the price or value of the entities' securities. Such entities will also be civilly liable to a person who suffers loss or damage by reason of an intentional, reckless or negligent failure to notify the ASC of material information on a continuous basis.

21. So far as listed entities are concerned, the ASX has agreed to look at Listing Rule 3A(1) and amend it if necessary in light of the legislative backing proposed. The ASX recognises that it may be necessary to deal, in particular, with the right to withhold confidential material, a matter for which Listing Rule 3A(1) does not presently expressly provide.

22. Section 1005 of the Law will impose liability not only on a person undertaking conduct prohibited by the new continuous disclosure

Corporations Act and section 42 of the *Corporations Act 1989*.) It seems reasonably clear that, as interpreted by the High Court in recent cases, the use in the Corporations Law of the concept of being "knowingly concerned" imports a requirement for actual knowledge of the contravention (*Yorke v Lucas* (1985) 158 CLR 661; *Edwards v The Queen* (1992) 173 CLR 653).

23. Having regard to the role of the ASX (together with the ASC) in the enforcement of ASX Listing Rules, it is proposed that the ASX should not have to give an undertaking as to damages when seeking a Court order in relation to a breach of its Rules (see item 109 of Schedule 1 to the Bill). In addition, the protection of qualified privilege will be expressly conferred on securities exchanges, including the ASX, where they publish information provided to them under a disclosure regime (whether legislative or pursuant to their rules) or as part of their general functions of supervising listed entities. This will remove any doubts about whether such protection exists at common law (see item 91 of Schedule 1 to the Bill).

24. To facilitate co-operation between domestic securities and futures exchanges, it is proposed that the ASC should be permitted to provide confidential information to securities and futures exchanges and their clearing houses, subject to appropriate safeguards regarding the use of the information disclosed (see Schedule 6 to the Bill). To ensure the necessary information flow between the ASC and the ASX, a statutory obligation will be introduced to require securities exchanges to notify the ASC as soon as practicable of serious contraventions of listing or business rules or the Law. A similar obligation will apply to futures exchanges (see items 87 and 110 of Schedule 1 to the Bill).

25. Amendments are also proposed to enable a Court to make an order giving directions concerning compliance with or enforcement of the rules to the directors of a listed entity (see item 107 of Schedule I to the Bill).

### Periodic Reporting

26. As a result of items 27 to 86 of Schedule 1 to the Bill, disclosing entities will be required to prepare half-year accounts (consolidated if a company or non-company disclosing entity is a chief entity) as well as:

- in the case of a company or non-company - a statement as to

- in the case of a company or non-company - a report which specifies the names of the directors of the entity and contains a review of operations and particulars of any significant changes in the entity's affairs during the half-year financial period; and
- in the case of a prescribed interest scheme - a report which contains a review of operations and particulars of any significant changes in the scheme's affairs during the half-year financial period.

27. Disclosing entities will have the option to determine in respect of half-year financial statements whether the auditor provides:

- an audit report along the same lines as is required in relation to a company's annual financial statements and records; or
- a review report stating whether the auditor is aware of anything to indicate that the financial statements do not comply with relevant requirements.

28. Non-companies which are disclosing entities will, in addition to the half-year financial reporting obligations outlined above, be required to prepare and to have audited annual financial statements, substantially in accordance with the requirements for a company's annual financial statements.

29. Similar half-year and annual financial reporting requirements will apply in respect of prescribed interest schemes as apply in respect of other disclosing entities, with the responsibilities, based on the present position, as follows:

- the trustee or representative of the prescribed interest scheme will be required to prepare or cause to be prepared the half-year (and annual) financial statements and to ensure that they are subject to an audit or a review report; and
- the management company of the prescribed interest scheme will be required to lodge the half-year (and annual) financial statements with the ASC.

30. Disclosing entities will be required:

- to lodge annual financial statements with the ASC within 90 days of the end of the financial year.

31. Breach of the requirements for the preparation, audit or review, and lodgment of half-year financial statements will be an offence, in the same way as is a breach of the annual financial reporting requirements in the Corporations Law.

32. The AASB will have its power to make accounting standards extended to apply to:

- half-year financial statements in respect of all disclosing entities; and
- annual financial statements in respect of disclosing entities which are non-companies and prescribed interest schemes.

33. Disclosing entities will be required to comply with new accounting standards in the same manner as presently applies in respect of "annual" standards for companies.

#### Prospectus reforms,

34. Under item 94 of Schedule I to the Bill, relief will be granted from the prospectus provisions in relation to securities of an entity which has been a disclosing entity for 12 months prior to an offer of securities and 'which has not had the benefit of exemptions from the enhanced disclosure requirements. Instead of lodging a full prospectus, such an entity will have the option of lodging a more limited prospectus containing only transaction specific information - rather than information about the entity itself which should already be known to the market through the enhanced disclosure requirements. It will be relevant principally for rights issues and offers under employee share plans.

35. In addition to providing the terms and conditions of the offer, this more limited prospectus is to include such information as investors and their advisers would reasonably require and reasonably expect to find in the document for the purpose of making an informed assessment of the effect of

37. Schedule 2 to the Bill contains amendments designed to improve and streamline the operation of the prospectus provisions of the Corporations Law. It makes significant changes to the disclosure requirements for secondary trading. Under the Bill, secondary trading in unquoted securities will generally occur on the basis of a notice, rather than a prospectus, containing basic information about the securities being offered for sale and about the issuer. A person wishing to sell 30% of the voting shares in an unlisted company will, however, be required to prepare a prospectus-like document, given the magnitude of such a sale and the ability of such a person to provide detailed information in a prospectus.

38. The Bill amends the law relating to supplementary prospectuses and provides for replacement prospectuses as an alternative to supplementary prospectuses. Supplementary or replacement prospectuses will be required to be lodged as soon as practicable after the issuer of the original prospectus became aware of the need to correct material omissions or material statements that were false or misleading. A supplementary prospectus will also be expressly permitted when it is realised later that a matter in existence at the time of the issue of the prospectus requires some form of amendment.

39. In light of improvements to the supplementary prospectus provisions, which should ensure that prospectuses are kept up-to-date, the present 6 month life of all prospectuses will be increased to 12 months. Under the Bill, applicants who apply for securities on the basis of an out-of-date prospectus will be given a reasonable opportunity to receive a refund.

40. Entities will also be able to incorporate a document or part of a document by reference into a prospectus provided the document was lodged with the ASC (including documents lodged first with the ASX and given by the ASX to the ASC),

## Other amendments

42. Schedule 4 to the Bill amends the Corporations Law to facilitate the use, as evidence in court proceedings, of information in the national companies database kept by the ASC.

43. Schedule 5 to the Bill amends the Corporations Law to deal with transitional matters.

44. Schedule 6 amends the *Australian Securities Commission Act 1989* (ASC Act) to:

- provide for the disclosure of confidential information by the ASC to bodies that conduct stock markets, futures markets or clearing houses; and
- require the responsible Minister (the Attorney-General) to request the advice of CASAC about how effectively the continuous disclosure and related enforcement provisions are operating 18 months after their commencement. (CASAC is to provide its advice within 6 months of the request.)

## **CLAUSE-BY-**

### **CLAUSE COMMENTARY**

#### **PART 1- PRELIMINARY**

##### **Clause 1- Short title,**

**45. This clause provides for the Bill, upon enactment, to be known as the *Corporate Law Reform Act 1993*.**

##### **Clause 2 - Commencement**

**46. Subclause 2(1) provides that the following provisions of the Bill will commence on the day the Bill receives the Royal Assent:**

- **Part 1 of the Bill, entitled "Preliminary" (comprising clauses I and 2);**
- **Part 2 of the Bill, entitled "Amendments of the Corporations Law" (comprising clauses 3 to 9), which explains the amendments made by the Bill; and**
- **Schedule 5 to the Bill, entitled "Amendment of the Corporations Law relating to application of changes made by this Act", which deals with transitional and application provisions.**

**47. Subclause 2(2) provides that, subject to subclause (3), the remaining provisions of the Bill will commence upon Proclamation. This will enable Corporations Regulations to be made where necessary or appropriate. The time provided will also enable bodies affected by the enhanced disclosure and other requirements in the Bill to prepare for their commencement.**

**48. Subclause 2(3) ensures, however, that all the remaining provisions will commence within 6 months of Royal Assent.**



### **Clause 3 - Meaning of "Corporations Law"**

**50. This clause is self-explanatory.**

### **Clause 4 - Schedule 1 - amendments relating to enhanced disclosure**

**51. Clause 4 indicates the contents of Schedule 1 to the Bill. The main amendments made by Schedule 1 deal with:**

- **the disclosing entities to which the proposed enhanced disclosure requirements will apply (item 26);**
- **half-year reporting requirements (items 27 to 86);**
- **continuous disclosure requirements (item 92); and**
- **prospectus requirements in relation to securities of certain disclosing entities which are quoted on a securities exchange (item 94).**

### **Clause 5 - Schedule 2 - amendments relating to fundraising**

**52. Clause 5 indicates the contents of Schedule 2 to the Bill. The main amendments made by Schedule 2 deal with:**

- **disclosure requirements for secondary trading (see, in particular, items 28 and 60);**
- **requirements about supplementary prospectuses (item 41, proposed sections 1023A to 1024E); and**
- **incorporation of documents by reference in a prospectus (item 41, proposed section 1024F).**

### **Clause 6 - Schedule 3 - amendments relating to indemnifying or insuring an officer or auditor of a company**

**53. Clause 6 indicates that Schedule 3 to the Bill relaxes the**

Clause 7 - Schedule 4 - amendment relating to [use. in court proceedings. of information from Commission's national database](#)

54. Clause 7 indicates that Schedule 4 to the Bill amends the Corporations Law to facilitate the use, as evidence in court proceedings, of information in the national companies database kept by the ASC.

Clause 8 - Schedule 5 - amendment relating to application of changes made by this Act

55. Clause 8 indicates that Schedule 5 to the Bill amends the Corporations Law to deal with transitional matters.

**PART 3 - AMENDMENTS OF THE AUSTRALIAN SECURITIES COMMISSION ACT 1989**

56. Part 3 of the Bill describes the contents of Schedule 6 to the Bill, which contains the substantive amendments of the ASC Act.

Clause 9 - Schedule 6 - amendments relating to disclosure of information and advice about operation of certain provisions

57. Clause 9 indicates that Schedule 6 amends the ASC Act to:

- provide for the disclosure of confidential information by the ASC to bodies that conduct stock markets, futures markets or clearing houses; and
- require the responsible Minister (the Attorney-General) to request the advice of CASAC about how effectively the continuous disclosure and related enforcement provisions are operating.

## **SCHEDULE I**

### **AMENDMENTS OF THE CORPORATIONS LAW RELATING TO ENHANCED DISCLOSURE**

#### **PART 1- GENERAL**

##### **Item 1- Amendment of section 9 (definition of "board")**

**58. This amendment is consequential upon amendments made in Schedule 1 to the Bill to the definition of "body", which will be defined to include a body corporate (item 9) and to section 60 of the Law (items 15 to 21).**

##### **Item 2 - Amendment of section 9 (definition of "class").**

**59. This amendment is consequential upon the amendment to section 57 of the Law, relating to classes of shares and prescribed interests (item 13 of Schedule 1 to the Bill).**

##### **Item 3 - Amendment of section 9 (definition of "company")**

**60. This amendment is consequential upon the amendment to the definition of "financial year" (item 22 of Schedule 1 to the Bill).**

##### **Item 4 - Amendment of section 9 (definition of**

**"consolidated accounts") Item 5 - Amendment**

**of section 9 (definition of "debenture") Item 6 -**

**Amendment of section 9 (definition of "financial  
statements")**

**61. These amendments are consequential upon the amendment to the definition of "body", which will be defined to include a**

Item 8 - Amendment of section 9 (definition of "share"),

63. This amendment is consequential upon the amendment in Schedule 1 to the Bill to the definition of "body", which will be defined to include a body corporate (item 9).

Item 9 - Amendment of section 9 (definitions of "accounts". "applicable accounting standard". "body". "deadline" and "financial year")

64. Item 9 in Schedule 1 to the Bill amends existing definitions. An explanation of the amended definitions is set out below.

"accounts"

65. This expression will, in addition to its existing meaning, be defined to mean, for the purposes of Part 1.2 and Division 11 of Part 3.6, the profit and loss account and the balance-sheet of the undertaking to which prescribed interests relate, as well as statements, reports and notes, other than a trustee's report or an auditor's report, attached to, or intended to be read with, that profit and loss account or balance-sheet.

"applicable accounting standard"

66. This expression will, in addition to its existing meaning, be defined to mean, in relation to the accounts of an accounting period of the undertaking to which prescribed interests relate, an accounting standard that applies to the accounting period and is relevant to the accounts.

"body,

67. The word "body" is presently defined in section 9 of the Corporations Law to include a society or association. The

"financial year"

70. This expression will have the meaning set out in proposed section 70A of the Corporations Law (item 22 of Schedule 1 to the Bill).

Item 10 - Other amendments of section 9

71. Item 10 of Schedule 1 to the Bill inserts a number of new definitions into the Corporations Law. These are:

- "accounting period", which will have the meaning set out in proposed subsections 50A(1) to (4) inclusive (item 11);
- "audited or reviewed in accordance with the Law", which will have the meaning set out in proposed section 53AAA (item 12);
- "disclosing entity", which will have the meaning set out in proposed section 111 AC (item 26);
- "ED securities", which refers to enhanced disclosure securities and will have the meaning set out in proposed section 111 AD (item 26);
- "half-year", which will have the meaning set out in proposed subsection 50A(5) (item 11);
- "listed disclosing entity", which will have the meaning set out in proposed subsection 111 AL(1) (item 26);
- "quoted ED securities", which will have the meaning set out in proposed section 111 AM (item 26);
- "undertaking" (see below); and
- "unlisted disclosing entity", which will have the meaning

73. A key example of the use of the word "undertaking" is the definition of "disclosing entity". If prescribed interests or units of prescribed interests are ED securities in relation to an undertaking then the undertaking will be a disclosing entity (proposed subsection 111 AC(2)).

Item 11- Insertion of new section 50A - Accounting periods and half-years

74. In Part 3.6 of the Corporations Law, the expression "financial year" will, in most instances, be replaced by the expression "accounting period". This is being done so that the existing requirements of that Part will contain the requirements for accounts in respect of both a financial year and a half-year (i.e. the first six months of a financial

year).

75. "Accounting period" will be defined to mean:

- the financial year of a company (including a company that is a disclosing entity);
- the financial year of all non-companies and undertakings that are disclosing entities at both the end of that year and 90 days after the end of that year (at which time annual financial statements have to be lodged with the ASC - see proposed sections 58C and 317A); and
- the first 6 months of the financial year of all companies, non-companies and undertakings that are disclosing entities at both the end of that period and 75 days after the end of that period - also referred to as a "half-year" - at which time half-year financial statements have to be lodged with the ASC - see proposed sections 58C and 317A.

76. Consequential amendments are proposed to the definitions of "consolidated accounts" and "financial statements" and to a number of other provisions in the Corporations Law (see Parts 2 to 4 of Schedule 1 to the Bill - items 114 to 116).

Item 12 - Insertion of new section 53AA - Audited or reviewed in accordance with this Law

77. Item 12 of Schedule 1 to the Bill inserts a new provision, proposed section 53AAA of the Corporations Law, which will provide that accounts or financial statements are taken to be audited or reviewed when the requirements of Division 2 of Part 3.7 have been complied with.

### Item 13 - Amendment of section 57 - Classes of shares or prescribed interests

78. Section 57 of the Corporations Law provides that the shares in a body corporate, if not divided into 2 or more classes, constitute a class. It is proposed to amend section 57 to provide that if the prescribed interests to which an undertaking relates are not divided into 2 or more classes, they constitute a class.

### Item 14 - Insertion of new section 58C - Deadline after an accounting period

79. Item 14 of Schedule 1 to the Bill will insert a new provision, proposed section 58C of the Corporations Law, which explains the meaning of "deadline" in respect of an "accounting period" of a body or an undertaking to which prescribed interests relate. For all companies that are not disclosing entities, "deadline" will have the same meaning as the existing definition (which is contained in section 9 of the Corporations Law). For disclosing entities, the expression will mean the time when financial statements have to be lodged with the ASC.

80. Where a company is not a disclosing entity, the expression "deadline" will indicate the length of time prior to the date of a company's annual general meeting that the company's financial statements and directors' report must be completed. The periods of time., which will be the same as under the existing definition, are:

- where the meeting is held before the end of the period in which section 245 of the Corporations Law requires the annual general meeting to be held and notice of the meeting is sent out at least 14 days before the end of that period:
  - if there is at least 14 days notice of the meeting - the 14th day before the date of the meeting (proposed paragraph 58C(3)(c)); or
  - if there is less than 14 days notice of the meeting - the time when the notice of the meeting is sent out (proposed paragraph 58C(3)(d)); and
- in any other case - the 14th day before the end of the period in which the meeting is required to be held (proposed subsection 58C(2)).

81. Where a body or undertaking is a disclosing entity at the end of an accounting period, "deadline" will be defined to mean 90 days after the end of a period that is a financial year and 75 days after the end of a period that is a half-year (proposed subsection 58C(4)).

## Items 15 to 21 - Amendments of section 60 - Directors

82. The amendments made by items 15, 19 and 20(a) in Schedule 1 to the Bill are consequential upon the proposed definition of "body" (item 9) which will include a body corporate. The amendments made by items 16 and 20(b) will cover bodies which are formed, rather than incorporated, outside Australia. The amendments made by items 17 and 18 relate to the omission of paragraph 60(1)(d). As this paragraph refers to close corporations, a concept which will not be pursued, the opportunity has been taken to remove the paragraph.

83. Item 21 inserts a new subsection 60(3) of the Corporations Law. It provides that if there are no positions of director (by whatever name called) in relation to a body, a person who has control, or shares control, over the general conduct of the affairs of the body, will be taken to be a director of the body for the purposes of the Law.

## Item 22 - Insertion of new section 70A - Financial years of bodies, other entities and prescribed interest undertakings

84. New section 70A replaces the existing definition of "financial year" in section 9 of the Corporations Law (which has been omitted by item 9 of Schedule 1 to the Bill). The new definition is based on the existing definition, but makes the following modifications:

- the term "body" (now defined in item 9 to include a body corporate) is used instead of the term "body corporate" ;
- a note relating to paragraph (a) has been inserted (the substance of which is presently dealt with in paragraph (a) of the definition of "financial year");
- a new provision (subsection 70A(3)) has been included which provides, in effect, that a financial year of an undertaking to which prescribed interests relate is:
  - in the case of prescribed interest scheme which is not governed by a deed - 30 June; or
  - otherwise, 30 June or such other day as the deed governing the scheme provides (cf. existing paragraph (h) of the definition of "financial year"); and



- proposed subsection 70A(4) provides that a reference to a profit and loss account in proposed section 70A does not include a reference to a profit and loss account for a half-year of a disclosing entity.

#### Item 23 - Amendment of section 83 - Officers. and other persons. in default

85. Subsection 83(2) of the Corporations Law provides that a secretary of a body corporate shall, unless the contrary is proved, be deemed to be knowingly concerned in and party to a contravention by the body of:

- a provision of section 217 of the Corporations Law, which requires a company to have a registered office in Australia and to keep it open for a specified period each business day; and
- a provision of section 242 (requiring a company to lodge details of its directors, principal executive officers and secretaries) or section 335 (requiring the lodgment of annual returns) of the Corporations Law.

86. It is proposed to extend the operation of subsection 83(2) to the lodgment of accounts and other documents by companies that are disclosing entities under proposed section 317A of the Corporations Law.

#### Items 24 and 25 - Amendments of section 92 - Securities

87. The proposed amendments of the definition of "securities" in section 92 of the Corporations Law which are effected by items 24 and 25 are consequential upon the amendment of the definition of "body" proposed by item 9 of Schedule 1 to the Bill. (The definition of "body" will include a body corporate.)

#### Item 26 - Insertion of new Part 1.2A - Disclosing entities

##### Proposed section 111 AA (Division 1 of new Part 1.2A) - Object of Part

88. Proposed section 111 AA identifies the objects of proposed new Part 1.2A as being:

- to define "disclosing entity" and other related key terms in Division 2;
- to outline the significance of being a disclosing entity in Division 3 - in particular, a disclosing entity will be subject to half-year reporting and continuous disclosure obligations and will be entitled to prospectus relief under proposed section 1022AA (item 94); and

- to provide for exemptions from, and modifications of, certain disclosure obligations imposed on disclosing entities in Division 4.

Proposed Division 2 of new  
Part 1.2A - Definitions  
Proposed section 111 AB -  
Terms defined in Division

89. Proposed section 111 AB indicates where key definitions relevant to disclosing entities may be found.

Proposed section 111 AC - Disclosing entity

90. If securities of a body (except prescribed interests and units of prescribed interests) are ED securities then the body will be a disclosing entity. If prescribed interests or units of prescribed interests are ED securities, the undertaking to which the interests relate will be a disclosing entity.

91. The terms "body" and "undertaking" are defined in items 9 and 10 of Schedule 1 to the Bill.

Proposed section 111 AD - ED securities

92. Proposed sections 111 AE, 111 AF, 111 AG and 111 AI of the Corporations Law set out the circumstances in which securities in a class of securities of a body, or securities in a class of securities which are made available in relation to an undertaking in the case of prescribed interests, will be taken to be ED securities. If any of these circumstances are satisfied, the body or undertaking will be a disclosing entity for the purposes of the Bill. For the purposes of these provisions, a class of shares, debentures, or prescribed interests will be taken to include units of shares, debentures or prescribed interests in that class.

93. Under proposed section 111 AJ, there will be a capacity to declare specified securities of bodies not to be ED securities with the result that those bodies will not be disclosing entities in respect of those securities.

Proposed section 111 AE - Securities quoted on a stock market

94. Securities in a class of securities of a body will be ED securities, and the body or undertaking in relation to which they are issued or made available will be a disclosing entity, if securities in that class are quoted on a stock market of a securities exchange. As a result of subsection 92(2) of the Law, as proposed to be amended, securities of a body will include prescribed interests made available by the body. The expression

"securities exchange" in this context will include the ASX and its subsidiaries as well as approved securities organisations. (There is capacity to exempt securities of bodies traded by approved securities organisations under proposed section 111AJ.) Exempt stock markets, being private markets operating subject to Ministerial approval and subject to any condition imposed, will not be covered.

95. Securities of a body will not be ED securities if:

- the body is a public authority, instrumentality or agency of the Commonwealth, the only securities of the body that are quoted are debentures and the repayment of principal, and the payment of interest, in respect of those debentures is guaranteed by the Commonwealth (e.g. Treasury bonds and bonds issued by the Australian Industry Development Corporation); or
- the securities are securities of a public authority, instrumentality or agency of a State or Territory.

96. If securities of a body are suspended from quotation on the ASX, proposed section 111 AE will not apply, but the ASX Listing Rules will continue to apply to the body unless it has been delisted. Furthermore, the body may remain a disclosing entity by virtue of other provisions e.g. if it has issued securities pursuant to a prospectus and has 100 or more holders of those securities.

Proposed section 111 AF - Securities to which a lodged or deemed prospectus relates

97. Subject to paragraph 100 below, shares in a class of shares in a body, or prescribed interests in a class of prescribed interests of an undertaking, will be ED securities, and the body or undertaking in relation to which they are issued or made available will be a disclosing entity, if a primary prospectus in relation to shares or prescribed interests in that class has been lodged with the ASC under Part 7.12 of the Corporations Law or with the former National Companies and Securities Commission under the previous Companies Codes. (As a result of subsection 92(2) of the Law, as proposed to be amended, securities of a body will include prescribed interests made available by the body.)

98. Under section 1030 of the Corporations Law, which is based on section 104 of the previous Companies Codes, where a corporation allots or issues securities to a person for the purpose of all or any of them being offered for sale, any document by which the offer for sale is made is deemed to be a prospectus issued by the corporation. Subject to paragraph 100 below, securities to which section 1030

applies, or the former section 104 applied, will be ED securities and the corporation which allots or issues them will be a disclosing entity.

99. Debentures to which a lodged or deemed prospectus relates are dealt with in proposed section 111 AI.

100. Proposed section 111AF will not apply where:

- no securities are issued pursuant to a prospectus (because, for example, the prospectus has been withdrawn);
- after an issue of securities pursuant to the prospectus, there are less than 100 holders of securities in the class of securities offered pursuant to the prospectus - proposed section 111 AH defines the circumstances in which a person will be taken to hold securities for the purposes of this provision; or
- after an issue of securities pursuant to the prospectus, the number of holders of securities in the class of securities issued pursuant to the prospectus has fallen below 100.

101. **In** the case of a prospectus where the application period remains open for 12 months and does not close earlier, it will not be necessary to wait until the end of the application period to determine whether or not the issuer is a disclosing entity. As soon as 100 or more persons are issued with securities pursuant to the prospectus, the issuer will become a disclosing entity and be subject to the continuous and periodic disclosure requirements.

102. If a body or undertaking ceases to be a disclosing entity because of the operation of proposed section 111 AF, it will not become a disclosing entity again merely because at some later time there were 100 or more shareholders or prescribed interest holders. However, if such a body or undertaking subsequently meets any of the criteria of the sections in proposed Division 2 of Part 1.2A, for example by issuing a prospectus, it will again become a disclosing entity.

Proposed section 111 AG - Securities issued as consideration for an acquisition under a takeover scheme or Part 5.1 compromise or arrangement

103. Under proposed subsection 111 AG(1), securities other than debentures - which are covered by proposed section 111 AI - in a class of securities of a body will be ED securities, and the body or undertaking which issues them or makes them available will be a disclosing entity, if securities in that class have been issued by the

applies, or the former section 104 applied, will be ED securities and the corporation which allots or issues them will be a disclosing entity.

99. Debentures to which a lodged or deemed prospectus relates are dealt with in proposed section 111 AI.

100. Proposed section 111 AF will not apply where:

- no securities are issued pursuant to a prospectus (because, for example, the prospectus has been withdrawn);
- after an issue of securities pursuant to the prospectus, there are less than 100 holders of securities in the class of securities offered pursuant to the prospectus - proposed section 111 AH defines the circumstances in which a person will be taken to hold securities for the purposes of this provision; or
- after an issue of securities pursuant to the prospectus, the number of holders of securities in the class of securities issued pursuant to the prospectus has fallen below 100.

101. In the case of a prospectus where the application period remains open for 12 months and does not close earlier, it will not be necessary to wait until the end of the application period to determine whether or not the issuer is a disclosing entity. As soon as 100 or more persons are issued with securities pursuant to the prospectus, the issuer will become a disclosing entity and be subject to the continuous and periodic disclosure requirements.

102. If a body or undertaking ceases to be a disclosing entity because of the operation of proposed section 111AF, it will not become a disclosing entity again merely because at some later time there were 100 or more shareholders or prescribed interest holders. However, if such a body or undertaking subsequently meets any of the criteria of the sections in proposed Division 2 of Part 1.2A, for example by issuing a prospectus, it will again become a disclosing entity.

Proposed section 11 IAG - Securities issued as consideration for an acquisition under a takeover scheme or Part 5.1 compromise or arrangement

103. Under proposed subsection 111 AG(1), securities other than debentures - which are covered by proposed section 111AI - in a class of securities of a body will be ED securities, and the body or undertaking which issues them or makes them available will be a disclosing entity, if securities in that class have been issued by the

"securities exchange" in this context will include the ASX and its subsidiaries as well as approved securities organisations. (There is capacity to exempt securities of bodies traded by approved securities organisations under proposed section 111AJ.) Exempt stock markets, being private markets operating subject to Ministerial approval and subject to any condition imposed, will not be covered.

95. Securities of a body will not be ED securities if:

- the body is a public authority, instrumentality or agency of the Commonwealth, the only securities of the body that are quoted are debentures and the repayment of principal, and the payment of interest, in respect of those debentures is guaranteed by the Commonwealth (e.g. Treasury bonds and bonds issued by the Australian Industry Development Corporation); or
- the securities are securities of a public authority, instrumentality or agency of a State or Territory.

96. If securities of a body are suspended from quotation on the ASX, proposed section 111 AE will not apply, but the ASX Listing Rules will continue to apply to the body unless it has been delisted. Furthermore, the body may remain a disclosing entity by virtue of other provisions e.g. if it has issued securities pursuant to a prospectus and has 100 or more holders of those securities.

Proposed section 111 AF - Securities to which a lodged or deemed prospectus relates

97. Subject to paragraph 100 below, shares in a class of shares in a body, or prescribed interests in a class of prescribed interests of an undertaking, will be ED securities, and the body or undertaking in relation to which they are issued or made available will be a disclosing entity, if a primary prospectus in relation to shares or prescribed interests in that class has been lodged with the ASC under Part 7.12 of the Corporations Law or with the former National Companies and Securities Commission under the previous Companies Codes. (As a result of subsection 92(2) of the Law, as proposed to be amended, securities of a body will include prescribed interests made available by the body.)

98. Under section 1030 of the Corporations Law, which is based on section 104 of the previous Companies Codes, where a corporation allots or issues securities to a person for the purpose of all or any of them being offered for sale, any document by which the offer for sale is made is deemed to be a prospectus issued by the corporation. Subject to paragraph 100 below, securities to which section 1030

"securities exchange" in this context will include the ASX and its subsidiaries as well as approved securities organisations. (There is capacity to exempt securities of bodies traded by approved securities organisations under proposed section 111AJ.) Exempt stock markets, being private markets operating subject to Ministerial approval and subject to any condition imposed, will not be covered.

95. Securities of a body will not be ED securities if:

- the body is a public authority, instrumentality or agency of the Commonwealth, the only securities of the body that are quoted are debentures and the repayment of principal, and the payment of interest, in respect of those debentures is guaranteed by the Commonwealth (e.g. Treasury bonds and bonds issued by the Australian Industry Development Corporation); or
- the securities are securities of a public authority, instrumentality or agency of a State or Territory.

96. If securities of a body are suspended from quotation on the ASX, proposed section 111 AE will not apply, but the ASX Listing Rules will continue to apply to the body unless it has been delisted. Furthermore, the body may remain a disclosing entity by virtue of other provisions e.g. if it has issued securities pursuant to a prospectus and has 100 or more holders of those securities.

Proposed section 111AF- Securities to which a lodged or deemed prospectus relates

97. Subject to paragraph 100 below, shares in a class of shares in a body, or prescribed interests in a class of

applies, or the former section 104 applied, will be ED securities and the corporation which allots or issues them will be a disclosing entity.

99. Debentures to which a lodged or deemed prospectus relates are dealt with in proposed section 111 AI.

100. Proposed section 111 AF will not apply where:

- no securities are issued pursuant to a prospectus (because, for example, the prospectus has been withdrawn);
- after an issue of securities pursuant to the prospectus, there are less than 100 holders of securities in the class of securities offered pursuant to the prospectus - proposed section 111 AH defines the circumstances in which a person will be taken to hold securities for the purposes of this provision; or
- after an issue of securities pursuant to the prospectus, the number of holders of securities in the class of securities issued pursuant to the prospectus has fallen below 100.

101. In the case of a prospectus where the application period remains open for 12 months and does not close earlier, it will not be necessary to wait until the end of the application period to determine whether or not the issuer is a disclosing entity. As soon as 100 or more persons are issued with securities pursuant to the prospectus, the issuer will become a disclosing entity and be subject to the continuous and periodic disclosure requirements.

102. If a body or undertaking ceases to be a disclosing entity because of the operation of proposed section 111 AF, it will not become a disclosing entity again merely because at some later time there were 100 or more shareholders or prescribed



body as consideration for the acquisition of shares under a takeover scheme as defined in section 603 of the Corporations Law or under previous corresponding Companies (Acquisition of Shares) Codes. (As a result of subsection 92(2) of the Law, as proposed to be amended, securities of a body will include prescribed interests made available by the body.)

104. Proposed subsection 111 AG(1) will not apply where:

- no securities are issued pursuant to the takeover scheme (because, for example, the takeover bid has been withdrawn);
- after an issue of securities pursuant to the takeover scheme, there are less than 100 holders of securities in the class of securities issued pursuant to the takeover scheme - proposed section 111AH defines the circumstances in which a person will be taken to hold securities for the purposes of this provision; or
- after an issue of securities pursuant to the takeover scheme, the number of holders of securities in the class of securities issued pursuant to the takeover scheme has fallen below 100.

105. Under proposed subsection 111 AG(2), securities in a class of securities of a body will be ED securities, and the body or undertaking in relation to which they are issued or made available will be a disclosing entity, if:

- securities in that class have been issued as consideration for the acquisition or cancellation of securities of another body under a compromise or arrangement

- after that issue, the number of holders of securities in the class of securities issued pursuant to the compromise or arrangement has not fallen below 100.

106. If as a result of the operation of section 111AG a body or undertaking ceases to be a disclosing entity, it will not become a disclosing entity again merely because at some later time there were 100 or more shareholders or prescribed interest holders. However, if such a body or undertaking subsequently meets any of the criteria of the sections in proposed Division 2 of Part 1.2A, for example by issuing a prospectus, it will again become a disclosing entity.

Proposed section 111 AH - When a person holds securities for the purposes of sections 111 AF and 111 AG

107. For the purposes of proposed sections 111AF (Securities to which a lodged or deemed prospectus relates) and 111AG (Securities issued as consideration for an acquisition under a takeover or Part 5.1 compromise or arrangement), a person will be taken to hold securities if, and only if:

- the person is registered as the holder of the securities in a register relating to:
  - company members (section 209 of the Corporations Law);
  - persons granted options to take up unissued shares in a company (section 215 of the Law);
  - debenture holders (section 1047 of the Law);

1052 requires the appointment of such a trustee (if, for example, the previous trustee has retired or been removed but a new trustee has not yet been appointed).

**Proposed section 111 AJ - Regulations may declare securities not to be ED securities,**

110. Under proposed section 111 AJ, there will be a capacity for certain securities of a body to be declared not to be ED securities with the result that the body will not be a disclosing entity with respect to the declared securities. As a result of section 109ZBA of the Corporations Law, there will also be the capacity to declare specified classes of securities of bodies not to be ED securities. Any Corporations Regulations which are made will have effect accordingly, despite anything else in proposed Division 2 of Part 1.2A.

**Proposed section 111 AK - ED securities of a disclosing entity**

111. Proposed section 111 AK makes the connection between the expressions "ED securities" and "disclosing entity". If securities of a body (except prescribed interests and units of prescribed interests) are ED securities then the body will be a disclosing entity and, for the purposes of the Corporations Law, the ED securities will be ED securities of the body. If prescribed interests or units of prescribed interests are ED securities, the undertaking to which the interests relate, will be a disclosing entity. Prescribed interests made available by a disclosing entity will be ED securities of the entity (see definition of "of", in relation to securities, in section 9 of the Corporations Law).

**Proposed section 111 AL - Listed or unlisted disclosing entity**

112. For the purposes of the Corporations Law, a disclosing entity will be a listed disclosing entity if all or any ED securities of the entity are quoted ED securities. Securities will be quoted ED securities if, because of section 111 AE, they are in a class of securities that is quoted on a stock market of a securities exchange.

113. For the purposes of the Law, a disclosing entity that is not a listed disclosing entity will be called an "unlisted disclosing entity".

**Proposed section 111 AM - Quoted ED securities**

114. For the purposes of the Corporations Law, ED securities will be "quoted ED securities" if they are ED securities because of proposed section 111 AE.

## Proposed Division 3 of Part 1.2A - Significance of being a disclosing entity

### Proposed section 111AN - Division contains outline of significance of being a disclosing entity

115. Proposed Division 3 of Part 1.2A of the Corporations Law outlines the significance for the Law of an entity being a disclosing entity.

### Proposed section 111 AO - Accounting requirements

116. A disclosing entity has both half-year and financial year accounting periods and is required by Part 3.6 of the Law, as proposed to be amended, to prepare accounts in respect of both periods. Proposed subsections 50A(2), (4) and (5) of the Corporations Law indicate the circumstances in which the first 6 months of a financial year will be an accounting period and a half-year of a disclosing entity.

117. If a disclosing entity is a company, it will be required to comply with the accounting requirements of Part 3.6 of the Law (other than proposed Divisions 10 and 11), as proposed to be amended by items 27 to 71 of Schedule I to the Bill. Companies that are not disclosing entities continue to be required to comply with Part 3.6 (other than proposed Divisions 10 and 11), but these companies will only have financial year, and not half-year, accounting periods.

118. If a disclosing entity is not a company, it will be required to comply with proposed Division 10 of Part 3.6. If a disclosing entity is an undertaking to which prescribed interests relate, the entity will be required to comply with proposed Division 11 of Part 3.6 (see item 72 of Schedule 1).

### Proposed section 111 AP - Continuous disclosure requirements

119. A disclosing entity will be subject to the continuous disclosure requirements of proposed sections 1001A and **1001B** (see item 92 of Schedule 1 to the Bill).

120. Proposed section 1001 A requires listed disclosing entities to comply with the continuous disclosure requirements of the ASX Listing Rules (as opposed to the periodic reporting requirements of those Rules).

121. Proposed section 1001B requires unlisted disclosing entities to lodge with the ASC on a continuous basis documents containing information of material matters likely to affect the value of the entities' securities.

## Proposed section 111 AO - Prospectus relief

122. Proposed section 1022AA (see item 94 of Schedule 1 to the Bill) will apply (subject to certain qualifications) to prospectuses for quoted ED securities of disclosing entities. A listed disclosing entity which satisfies the requirements of proposed section 1022AA will be entitled to limit the contents of a prospectus (but will still be able to issue a more comprehensive prospectus pursuant to existing section 1022 should it wish to do so).

## Proposed Division 4 of Part 1.2A - Exemptions and

## modifications Proposed section 111 AR - Meaning of "disclosing

entity provisions" 123. The term "disclosing entity

provisions" will mean:

- Parts 3.6 and 3.7 of the Corporations Law, dealing with accounts and audit, as they apply to companies that are disclosing entities;
- Parts 3.6 and 3.7 of the Law, and section 287 (enabling the AASB to require that a copy of financial statements be given to it) as they apply to non-companies that are disclosing entities (as a result of proposed section 323A to be inserted by item 72 of Schedule I to the Bill);
- proposed Division 11 of Part 3.6, dealing with accounts in relation to disclosing entities that are prescribed interest undertakings (as a result of proposed sections 323B-323L to be inserted by item 72 of Schedule 1);
- the continuous disclosure requirements of proposed sections 1001 A and 1001 B (item 92 of Schedule 1); and
- proposed paragraph 1069(1)(ea) (item 99 of Schedule 1 to the Bill) and (f) (as proposed to be amended by items 100 and 101 of Schedule 1) as they apply to deeds relating to prescribed interests that are ED securities.

### Proposed section 111 AS - Exemptions by regulations

125. There will be a capacity to exempt specified persons under the Corporations Regulations from all or specified disclosing entity provisions (see proposed section 111 AR). This could be done either generally or as otherwise specified, and either unconditionally or subject to specified conditions. There will also be a capacity for the exemption to relate to specified securities. (By virtue of section 109ZBA of the Law, the exemptions could relate to specified classes of persons and could apply in respect of specified classes of securities.)

126. This provision would enable an exemption to be made from the disclosing entity provisions for foreign companies (or a class of foreign companies, such as exempt foreign companies under ASX Listing Rule 1 B).

127. Under proposed section 111 AJ there will also be a capacity for specified securities or specified classes of securities of a body to be declared not to be ED securities, with the result that the body will not be a disclosing entity with respect to the declared securities.

### Proposed section 111 AT - Exemption by the Commission

128. In addition to the power to exempt by Corporations Regulations under proposed section 111 AS, the ASC will be able, under proposed section 111 AT, to exempt specified persons (or specified classes of persons - see section 109ZBA of the Law) from all or any of the disclosing entity provisions referred to in proposed section 111 AR. The exemptions will be able to be of general or specific application and either conditional or unconditional.

129. An ASC exemption under proposed section 111 AT may relate to specified securities. Under proposed section 111 AJ, the Corporations Regulations could specify that securities or specified classes of securities of a body are not to be ED securities, with the result that the body will not be a disclosing entity with respect to the declared securities.

130. As with existing section 1084 of the Law, no criteria are provided to govern the exercise of the ASC's discretion under proposed section 111 AT. However, it may be appropriate for the ASC to have regard to the following factors in exercising a power under the proposed section:

- the need to balance the benefits of disclosure against the costs of complying with disclosure requirements; and
- the desirability of facilitating, subject to appropriate safeguards, dealings in Australia in securities of foreign companies.

131. A copy of any exemption which the ASC publishes under proposed section 111 AT must be published in the *Commonwealth of Australia Gazette*.  
Proposed section 111AU - Enforcing conditions of exemptions

132. It will be an offence for a person to intentionally or recklessly contravene a condition to which an exemption under proposed sections 111AS or 111 AT is subject. In the case of a natural person, the maximum penalty for such a contravention will be \$20,000 or imprisonment for 5 years, or both. In the case of a body corporate, the maximum penalty will be \$100,000 (see item 113(a) of Schedule 1 to the Bill and section 1312 of the Corporations Law). If a person does contravene such a condition, the Court will be able, on the application of the ASC, to order the person to comply.

Proposed section 111 AV - Modifications by regulations

133. There will also be capacity for the Corporations Regulations to modify all or specified disclosing entity provisions referred to in proposed section 111 AR. For example, it may be necessary to make Corporations Regulations to enable confidential information to be excluded from disclosure under the proposed continuous disclosure requirements. In the case of listed entities, the ASX is, however, considering the possibility of amending Listing Rule 3A(1), relating to continuous disclosure, to include the right to withhold confidential material - a matter presently not expressly provided for in that Rule.

134. A modification made under proposed section 111 AV will also be able to relate to specified securities or, as a result of section 109ZBA of the Law, to specified classes of securities.

Proposed section 111 AW - Exemptions and modifications have effect

135. Exemptions and modifications made under proposed Division 4 of Part 1.2A will have effect accordingly.

**Proposed section 111 AX - Effect of Division,**

136. Nothing in proposed Division 4 limits, or is limited by, any other exemption power such as:

- section 313 of the Corporations Law, which allows the ASC to make orders relieving a person from the requirements as to accounts, audit or directors' reports under Division 6 of Part 3.6 of the Law; or
- section 1084, which allows the ASC to exempt a person from the provisions of the Corporations Law relating to prospectuses, restrictions on allotment and variation of contracts, debentures, prescribed interests and the hawking of securities.

**Items 27 and 28 - Proposed amendment of section 284 - Application of accounting standards: general**

137. Items 27 and 28 of Schedule 1 to the Bill will amend section 284 of the Corporations Law by omitting the existing subsections (1) and (3) and inserting a new subsection (3).

138. Proposed subsection 284(3) will provide that the application of an accounting standard made by the AASB can be limited to "specified bodies or undertakings". The effect of this amendment, together with other changes to Parts 3.6 and 3.7, is that by virtue of section 32 of the *Corporations Act 1989*, accounting standards may be made by the AASB for annual financial statements for disclosing entities that are not companies and for half-year accounts for all disclosing entities. (Section 32 provides that the AASB may make accounting standards for the purposes of Parts 3.6 and 3.7.)

**Items 29 to 33 - Proposed amendment of section 285 - Application of accounting standards: accounting periods**

139. Items 29 to 32 of Schedule 1 to the Bill will amend section 285 of the Corporations Law by changing:

- "financial year of a body corporate" to "accounting period of a body or undertaking";



- the need to balance the benefits of disclosure against the costs of complying with disclosure requirements; and
- the desirability of facilitating, subject to appropriate safeguards, dealings in Australia in securities of foreign companies.

131. A copy of any exemption which the ASC publishes under proposed section 111 AT must be published in the *Commonwealth of Australia Gazette*.  
Proposed section 111AU - Enforcing conditions of exemptions

132. It will be an offence for a person to intentionally or recklessly contravene a condition to which an exemption under proposed sections 111AS or 111 AT is subject. In the case of a natural person, the maximum penalty for such a contravention will be \$20,000 or imprisonment for 5 years, or both. In the case of a body corporate, the maximum penalty will be \$100,000 (see item 113(a) of Schedule 1 to the Bill and section 1312 of the Corporations Law). If a person does contravene such a condition, the Court will be able, on the application of the ASC, to order the person to comply.

Proposed section 111 AV - Modifications by regulations

133. There will also be capacity for the Corporations Regulations to modify all or specified disclosing entity provisions referred to in proposed section 111 AR. For example, it may be necessary to make Corporations Regulations to enable confidential information to be excluded from disclosure under the proposed continuous disclosure requirements. In the case of listed entities, the ASX is, however, considering the possibility of amending Listing Rule 3A(l), relating to continuous disclosure, to include the right to withhold confidential material - a matter presently not expressly provided for in that Rule.

134. A modification made under proposed section 111 AV will also be able to relate to specified securities or, as a result of section 109ZBA of the Law, to specified classes of securities.

Proposed section 111AW - Exemptions and modifications have effect

135. Exemptions and modifications made under proposed Division 4 of Part 1.2A will have effect accordingly.

## **Proposed section 111 AX - Effect of Division**

136. Nothing in proposed Division 4 limits, or is limited by, any other exemption power such as:

- section 313 of the Corporations Law, which allows the ASC to make orders relieving a person from the requirements as to accounts, audit or directors' reports under Division 6 of Part 3.6 of the Law; or
- section 1084, which allows the ASC to exempt a person from the provisions of the Corporations Law relating to prospectuses, restrictions on allotment and variation of contracts, debentures, prescribed interests and the hawking of securities.

## **Items 27 and 28 - Proposed amendment of section 284 - Application of accounting standards: general**

137. Items 27 and 28 of Schedule 1 to the Bill will amend section 284 of the Corporations Law by omitting the existing subsections (1) and (3) and inserting a new subsection (3).

138. Proposed subsection 284(3) will provide that the application of an accounting standard made by the AASB can be limited to "specified bodies or undertakings". The effect of this amendment, together with other changes to Parts 3.6 and 3.7, is that by virtue of section 32 of the *Corporations Act 1989*, accounting standards may be made by the AASB for annual financial statements for disclosing entities that are not companies and for half-year accounts for all disclosing entities. (Section 32 provides that the AASB may make accounting standards for the purposes of Parts 3.6 and 3.7.)

## **Items 29 to 33 - Proposed amendment of section 285 - Application of accounting standards: accounting periods**

139. Items 29 to 32 of Schedule 1 to the Bill will amend section 285 of the Corporations Law by changing:

- "financial year of a body corporate" to "accounting period of a body or undertaking";

- "a company's directors" to "a body or undertaking"; and
- "financial year of the company shall apply to that financial year" to "accounting period of the body or undertaking is to apply to that accounting period".

140. In addition, item 33 will insert a new provision, proposed subsection 285(3A), which indicates who may make an election about the use of certain accounting standards under subsection 285(3) - the directors of a company or non-company (see section 60 of the Law as proposed to be amended by items 15 to 21) and the trustee or representative of an undertaking.

141. The effect of these amendments will be to make an accounting standard applicable to all accounting periods of a body or undertaking that end after the commencement of the standard. (Under subsection 285(1), the AASB may, however, limit the application of an accounting standard to either financial year or half-year accounting periods.)

#### Item 34 - (Insertion of new section)

Proposed section 285A - Accounting standards to be made for the purposes of this Part and Part 3.7,

142. Item 34 of Schedule 1 to the Bill will insert a new provision, proposed section 285A, which will make it clear that the AASB only has power under the Corporations Law to make accounting standards for the purposes of Parts 3.6 and 3.7. That is, the power does not apply in respect of entities or in respect of periods not relevant for the requirements of Parts 3.6 and 3.7 of the Law.

#### Item 35 - Proposed amendment of section 289 - Accounting records

143. ' Item 35 of Schedule 1 to the Bill will amend subparagraph 289(1)(b)(ii) by inserting the words "or reviewed" after "audited". The effect of the amendment will be to require companies to keep such accounting records as will enable the preparation of true and fair accounts that can be either audited or reviewed.

#### Item 36 - Proposed amendment of section 292 - Profit and loss account

144. Item 36 of Schedule 1 to the Bill will amend section 292 of the Corporations Law to make it subject to proposed section 293A. The way in which proposed

### Item 37 - Proposed amendment of section 293 - Balance-sheet

145. Item 37 of Schedule 1 to the Bill will amend section 293 of the Corporations Law to make it subject to proposed section 293A. The way in which proposed section 293A will affect this section is explained at item 38 of Schedule 1.

### Item 38 - (Insertion of new section),

#### Proposed section 293A - Sections 292 and 293 do not apply to half-year of chief entity

146. Item 38 of Schedule I to the Bill will insert a new provision, proposed section 293A. This provision sets out circumstances in which a company that is a disclosing entity does not have to comply with the requirements of sections 292 and 293 of the Corporations Law.

147. Proposed subsection 293A(1) provides that a company, which is a disclosing entity at the end of a half-year and also a chief entity of an economic entity, is relieved of the requirement to prepare a profit and loss account and balance-sheet for that period under sections 292 and 293 of the Corporations Law (i.e. its own financial statements). In these circumstances, the company will only be required to prepare a consolidated profit and loss account and a consolidated balance-sheet in accordance with the requirements of Division 4A of Part 3.6 of the Corporations Law. The practical effect of this requirement is that the half-year financial statements lodged with the ASC by a disclosing entity will be in a similar format (i.e. financial statements of the company for a company that is not a chief entity or consolidated financial statements for a company that is a chief entity) to those currently required to be provided to the ASX by listed corporations.

148. Subsections 294(2) to (4) of the Corporations Law require the directors of a company to make appropriate inquiries about bad and doubtful debts, the value of current assets and the value of non-current assets before preparing a profit and loss account and balance-sheet in accordance with sections 292 and 293 respectively. As a disclosing entity that is a chief entity will not be required to prepare separate half-year financial statements of its own (proposed subsection 293A(1)) it will be required by proposed subsection 293A(2) to apply the requirements of subsections 294(2) to (4) (subject to any modifications that may be prescribed by the Corporations Regulations) to the consolidated profit and loss account and

### Item 39 - Proposed amendment of subsections 294A(1) and 294B(1)

149. Subsection 294A(1) of the Corporations Law provides that the Corporations Regulations may define the expression "entity", "parent entity", "economic entity", or "reporting entity", for the purposes of the accounting and audit requirements of Parts 3.6 or 3.7 of the Law as they apply in relation to prescribed financial years of a company. The amendment which item 39 of Schedule 1 to the Bill makes to subsection 294A(1) will allow the Regulations to define these expressions in relation to prescribed accounting periods (see proposed section 50A) of a company. Parts 2 and 3 of Schedule 1 (items 114 and 115) will also change the reference to "a financial year" and "that financial year" in subsection 294A(3) to "an accounting period" and "that accounting period".

150. Subsection 294B(1) of the Law provides that the Corporations Regulations may make provision for determining whether or not an entity controls another entity for the purposes of the accounting or audit requirements of Parts 3.6 or 3.7 of the Law as they apply in relation to prescribed financial years of a company. The amendment which item 39 of Schedule 1 makes to subsection 294B(1) will allow the Corporations Regulations to determine whether or not an entity controls another entity for the purposes of Parts 3.6 or 3.7 as they apply in relation to prescribed accounting periods of a company. Parts 2 and 3 of Schedule 1 (items 114 and 115) will also change the references to "a financial year" and "that financial year" in subsection 294B(3) to "an accounting period" and "that accounting period".

### Item 40 - Proposed amendment of section 295B - Consolidated balance-sheet

151. Section 295B of the Law provides that the company's directors must cause to be made out, before the deadline after a financial year, a consolidated balance-sheet, as at the year's end, that gives a true and fair view of the state of affairs, as at the year's end, of the economic entity constituted by the company and the entities that it controls at the year's end. Item 40 of Schedule 1 to the Bill will replace references in section 295B to "year's end" to "period's end" and Part 3 of Schedule 1 (item 115) will replace the reference to "that financial year" to "that accounting period".

### Items 41 and 42 - Proposed amendment of section 296 - Audit of financial statements

financial statements audited or reviewed in accordance with Part 3.7 of the Corporations Law.

153. In addition, item 42 of Schedule 1 will amend subsection 296(2) of the Law to require a review report by an auditor to be attached to the half-year financial statements to which the review relates.

Items 43 to 47 - Proposed amendments of section 300 - Inclusion of comparative amounts for items required by accounting standards

154. Items 43 and 45 of Schedule 1 to the Bill will amend section 300 of the Corporations Law by changing "current year amount" and "year" to "current period amount" and "period" respectively. Item 44 of Schedule 1 will substitute a new provision for the existing paragraph 300(1)(b) and items 46 and 47 will make consequential amendments.

155. These amendments will enable accounting standards to require a company's financial statements for a previous accounting period (see proposed section 50A) to specify an amount that, within the meaning of the applicable accounting standard, is a corresponding amount in relation to the current period amount. This will allow accounting standards to specify whatever corresponding amounts may be desirable. For example, under this provision accounting standards would be able to require previous full year comparative amounts to be disclosed in half-year accounts.

Items 48 to 50 - Proposed amendments of section 301 - Statement to be attached to accounts

156. Item 48 of Schedule I to the Bill will insert a new subsection 301(1A) which will provide that section 301 will apply to a company and an accounting period unless the accounting period is a half-year and the company is a chief entity (in which case proposed section 293A will apply). Item 49 is a consequential amendment. Item 50 will amend paragraph 301(9)(c) by inserting "or reviewed" after "audited".

157. These amendments will alter the requirement for the section 301 statement by the directors of an exempt proprietary company (to indicate whether the company kept accounting records that could be audited) to take account of the new concept

- to comply with section 301 (which requires directors of an exempt proprietary company to state whether the company kept accounting records that could be audited); or
- to comply with that section and section 302 (which requires a directors' statement in respect of consolidated accounts of a company and the entities it controls).

159. As a result of item 51 in Part 1 of Schedule 1 and items 114 and 116 in Part 2 of Schedule 1 to the Bill, the directors of a company will be required to comply with section 301, section 302 or sections 301 or 302, as the case requires, in relation to an accounting period (see proposed section 50A).

Items 52 to 55 - Proposed amendments of section 304 - Report on company that is not a chief entity

160. Items 52 to 55 of Schedule 1 to the Bill will make a series of amendments of section 304 of the Corporations Law, which sets out the matters to be dealt with in the directors' report of a company that is not a chief entity. The proposed amendments will reorder some subsections so that the requirements applicable to the directors' report for a half-year period can be readily identified.

161. Under the amendments, the directors of a company that is a disclosing entity, but not a chief entity, will be required to prepare a half-year directors' report containing:

- names of directors in office (subsection (3));
- a review of the company's operations during the period and the results of those operations (proposed subsection (3A) - currently subsection (8)); and
- particulars of any significant change in the company's state of affairs that occurred during the period (proposed subsection (3B) - currently subsection (9)).

162. It should be noted that the amendments will not affect the requirements for a directors' report in respect of a financial year. Those requirements (and the exemptions given to certain companies) will be unchanged by virtue of proposed

Items 56 to 62 - Proposed amendments of section 305 - Report on company that is a chief entity

163. Items 56 to 61 of Schedule 1 to the Bill will make a series of amendments to section 305 of the Corporations Law, which sets out the matters to be dealt with in the directors' report of a company that is a chief entity. The proposed amendments will be along similar lines to those proposed for section 304.

164. In addition, item 62 of Schedule 1 will add a proposed subsection 305(12) which provides that, where a company did not control a particular entity throughout an accounting period, the report will not have to deal with the entity in respect of that part of the period when it was not controlled.

Items 63 and 64 - Proposed amendments of section 306 - Report may omit prejudicial, information

165. Items 63 and 64 of Schedule I to the Bill will amend section 306 of the Corporations Law by changing the test under which information required to be included in a directors' report under subsections 304(11) or 305(11) may be omitted. The existing test, which permits information to be omitted if, in the directors' opinion, it would prejudice the company's interests, will become one which permits information to be omitted if the directors believe, on reasonable grounds, that its disclosure would be likely to result in unreasonable prejudice to the company.

166. The amendment will require directors to give more careful consideration to whether they can omit information from the directors' report.

Items 65 and 66 - Proposed amendments of section 308 - Additional requirements for financial year reports - options

167. Items 65 and 66 of Schedule 1 to the Bill will amend subsections 308(1) and (2) **to provide that the information about** options only has to be included in the directors' report where the report is in respect of an accounting period that is a financial year.

Item 67 - Proposed amendment of section 309 - Benefits under contracts with directors



Item 68 - Proposed amendment of section 312 - Directors of chief entity to obtain all necessary information,

169. Subject to subsection 312(3), the directors of a company that is a chief entity in relation to a particular accounting period (see proposed section 50A) must not cause consolidated accounts, directors' statements or directors' reports to be made out unless they have sufficient information about each entity that the company controlled during all or part of, or at the end of, the accounting period (see items 68 and 116 of Schedule 1 to the Bill). The reporting officers of an entity that a company controlled during all or part of, or at the end of, a particular accounting period of the company must, at the request of the directors of the company, supply to the company all the information required by the directors for the preparation of the consolidated accounts, directors' statement and directors' report.

Item 69 - Proposed amendment of section 313 - Relief from requirements as to accounts and reports

170. As a result of the amendment proposed by item 69 of Schedule 1 to the Bill, a company's directors will be able to apply to the ASC for an order relieving them, relieving the company, or relieving the company auditor (if any) from compliance with specified requirements of the Law relating to, or to the audit or review of, accounts or consolidated accounts or to directors' reports.

171. As a result of the amendment proposed to be made to subsection 313(4) by item 114 of Schedule 1, the ASC will be able to require directors applying for relief to supply such information relating to the operations of the company, of any related body corporate, or of any entity that the company controls, or has controlled, during an accounting period (see proposed section 50A) of the company, as the ASC thinks necessary for the purpose of determining the application.

Item 70 - Proposed amendment of section 317 - Commission may require company to lodge accounts etc.

172. Item 70 of Schedule 1 to the Bill will amend the definition of "financial year" in subsection 317(1) by changing "audited under this Part" to "audited or reviewed in accordance with this Law". The amendment will not affect the operation of the section, which will continue to apply only to exempt proprietary companies that have not appointed an auditor.

**Item 71 - Proposed insertion of new section 317A - Lodgment of accounts etc. by companies that are disclosing entities**

173. Item 71 of Schedule 1 to the Bill will insert a new provision, proposed section 317A, containing the requirements for the lodgment of accounts and reports by companies that are disclosing entities.

174. Under proposed subsection 317A(1), such a company will be required in respect of an accounting period to lodge the financial statements, the directors' statement under Division 5, the directors' report and the auditor's report. The documents must be lodged no later than 90 days after the end of a financial year and no later than 75 days after the end of a half-year.

175. Proposed subsection 317A(2) will provide that, where the company was a borrowing corporation at the end of an accounting period, the financial statements and reports listed in proposed subsection 317A(1) must also be given to the trustee for the debenture holders.

**Item 72 - Proposed insertion of new Divisions 10 and 11**

176. Item 72 of Schedule 1 to the Bill will insert two new Divisions in Part 3.6 of the Corporations Law. Proposed Division 10 will set out the requirements for disclosing entities that are neither companies nor undertakings (non-companies), while proposed Division 11 will set out the requirements for disclosing entities that are prescribed interest undertakings.

**Proposed Division 10 - Accounts of certain non-companies**

177. Proposed Division 10 will set out the requirements in respect of financial statements, directors' reports, the auditing of financial statements and the ability of the AASB to obtain financial statements, for disclosing entities that are non-companies. Non-companies, in this context, include:

- registrable Australian bodies (such as building societies, credit unions and co-operative societies) that have issued ED securities; and
- foreign companies (formed or incorporated outside Australia) that have ED securities listed on the ASX or have issued such securities

of disclosing entity (except to the extent that the provisions of Part 4.5 apply). It is believed that the number of bodies falling into this category will be relatively small. Section 313 will enable them to seek relief from the ASC, in respect of the accounts and audit provisions of Parts 3.6 and 3.7. In addition, there is scope under proposed section 111 AJ and proposed Division 4 of Part 1.2A of the Corporations Law (see item 26 of Schedule 1 to the Bill) for complete or partial exemption, should this be appropriate.

Proposed section 323A - Application of provisions to disclosing entities that are not companies or undertakings.

179. Proposed subsection 323A(1) will apply the following requirements of the Corporations Law to disclosing entities that are non-companies:

- Division 3 of Part 3.6 - Financial years of a company and the entities it controls;
- Division 4 of Part 3.6 - Accounts of a company;
- Division 4A of Part 3.6 - Consolidated accounts of a company and the entities it controls;
- Division 4B of Part 3.6 - Requirements for financial statements;
- Division 5 of Part 3.6 - Directors' statements;
- Division 6 of Part 3.6 - Directors' reports;
- Division 7 of Part 3.6 - Financial statements and directors' reports;
- Part 3.7 - Audit;
- section 287 - AASB may require copy of company's financial statements;
- the definitions of "applicable accounting standard", "consolidated accounts", and "financial statements", as proposed to be amended by items 4, 6, 9, 114 and 115 of Schedule 1; and

180. The provisions outlined in the previous paragraph will apply to non-companies that are disclosing entities as if references in those to companies provisions were references to such disclosing entities (proposed paragraph 323A(2)(b)). There will also be power to make Corporations Regulations to modify those provisions should it be necessary to facilitate the operation of the provisions (proposed paragraph 323A(2)(a)).

Proposed Division 11 - Accounts in relation to disclosing entities that are prescribed interest undertakings

181. This proposed Division will contain the accounting and reporting requirements for disclosing entities that are prescribed interest undertakings. The proposed provisions are based on the existing requirements for companies, but have been drafted so that they will not conflict with the covenants currently required to be included in trust deeds.

Proposed section 323B - Introduction,

182. Proposed section 323B will provide that Division 11 of Part 3.6 imposes obligations on the trustee or representative and the management company in relation to prescribed interests, in relation to an accounting period of an undertaking.

183. This Division maintains consistency with the present allocation of responsibilities of trustees and management companies in relation to prescribed interests. It is noted that the Government is presently considering these responsibilities as a result of the report by the Australian Law Reform Commission and CASAC entitled "Collective Investments: Other People's Money" (Report No. 65).

Proposed section 323C - Profit and loss account

184. Proposed section 323C will require the preparation of a profit and loss account for the undertaking before the deadline after an accounting period. This provision, which is based on section 292 of the Corporations Law, is consistent with the covenant to be included in a trust deed in accordance with subparagraph 1069(1)(f)(i) of the Law.

Proposed section 323D - Balance-sheet

included in a trust deed in accordance with proposed subparagraph 1069(1)(f)(ia) of the Law (see item 101 of Schedule 1 to the Bill).

Proposed section 323E - Accounts to comply with regulations,

186. Under proposed section 323E, the accounts for the undertaking will have to be prepared in accordance with any prescribed requirements that are relevant to them. This provision is based on section 297 of the Corporations Law.

187. A decision on what, if any, requirements should be prescribed has still not been made. If requirements are prescribed, they will take into account the requirements of the ASX in respect of trust deeds for unit trusts.

Proposed section 323F - Accounts to comply with applicable accounting standards

188. Under proposed section 323F, the accounts for the undertaking will have to be prepared in accordance with applicable accounting standards. This provision is based on subsection 298(1) of the Corporations Law.

189. Consistent with the present responsibility of the AASB in relation to annual financial statements, the making of accounting standards applicable to the undertaking is a matter for the AASB.

Proposed section 323G - Additional information to give a true and fair view

190. Where accounts prepared in accordance with prescribed requirements and applicable accounting standards do not give a true and fair view of the matters that have to be dealt with in those accounts, it will be necessary, under proposed section 323G, to add such additional information and explanations as will be necessary to ensure the accounts do give a true and fair view. This provision is based on subsection 299(1) of the Corporations Law.

Proposed section 323H - Audit or review of accounts

191. Under proposed section 323H, the accounts for the undertaking will have to be audited by a registered company auditor. The auditor's report will be required to state whether the accounts give a true and fair view of the matters with which they have to deal and whether they are drawn up in accordance with the Corporations Law and applicable accounting standards (proposed subsection

the covenant to be included in a trust deed in accordance with subparagraph 1069(1)(e)(iv) of the Law.

192. Proposed subsection 323H(2) provides that where the accounting period is a half-year, the auditor's report may be prepared on the basis of a review of the accounts, rather than an audit. Where the report is prepared on the basis of a review, the auditor will be required to state whether he or she is aware of any matters that suggest that the accounts do not give a true and fair view of the matters with which they have to deal or that they have not been drawn up in accordance with the Corporations Law and applicable accounting standards. Where any matters have come to the auditor's attention, the auditor is required to give details of the matters.

193. The requirement for a review of the accounts, as will be permitted under proposed subsection 323H(2), is based on the concept of review engagements outlined in the accounting profession's 1992 publication "Statement of Auditing Practice/Related Services AUP/RS1".

#### Proposed section 323J - Trustee's report for accounting period

194. Under proposed section 323J, it will be necessary for the trustee to prepare, or cause to be prepared, a report in respect of the accounting period to which the accounts relate setting out:

- a review of the operations of the undertaking during the period;
- the results of those operations; and
  
- particulars of any significant change in the state of affairs of the undertaking during the period.

#### Proposed section 323K - Lodging accounts etc.

195. Proposed subsection 323K(1) will require the profit and loss account, auditor's report and the trustee's report for each accounting period to be lodged with the ASC.

196. **In** the case of a financial year, the documents referred to in proposed subsection 323K(1) must be lodged with the management company return that has to be lodged in accordance with section 1071 of the Corporations Law (proposed

## Proposed section 323L - Regulations may make additional provision

197. Proposed section 323L provides that the Corporations Regulations may make provision for matters of a kind dealt with in section 287 (AASB may require copy of financial statements), in Divisions 2 to 8 of Part 3.6 (Accounting records, Financial years, Accounts, Consolidated accounts, Requirements for financial statements, Directors' statements, Directors' reports, Financial statements and directors' reports, and Inspection of records) and in Part 3.7 (Audit). The proposed section also provides that the Corporations Regulations may make provision for the lodging of documents and the sending of documents to holders of prescribed interests.

## Items 73 to 77- Proposed amendment of section 331 A - Auditor must report

198. Items 73 to 77 of Schedule 1 to the Bill will amend section 331A of the Corporations Law to reflect the changes in terminology used elsewhere in the amendments and to take account of the requirement for companies that are disclosing entities to have half-year financial statements.

199. The principal amendments that will be made to section 331 A are as follows:

- the requirement in subsection (1) that the auditor's report for a financial year is to be addressed to the company's members (item 73) will be included in, proposed subsection 331 A(1A) (item 75); and
- a new provision, proposed subsection 331A(3), will require that, where the company is a disclosing entity, the auditor must give his or her report to the directors of the company in time for them to comply with the lodgment requirements in proposed section 317A (item 77).

200. The non-inclusion of an express requirement that the auditor's report is to be addressed to a company's members is intended to reflect the fact that the auditor's report on half-year financial statements will not have to be circulated to the company's members (although it will have to be lodged with the ASC). By providing that the auditor's report on financial year statements is a report to

Item 78 - Proposed insertion of new section 1 AA - Requirements for auditor's report

201. Item 78 of Schedule 1 to the Bill will insert a new provision, proposed section 331 AA, dealing with the requirements for an auditor's report on financial statements.

202. Whilst the requirement for an audit of annual financial statements is maintained (proposed subsection 331 AA(1 )), proposed subsection 331 AA(2) provides that where the accounting period is a half-year, the auditor's report may be prepared on the basis of a review of the financial statements rather than an audit. Where the report is prepared on the basis of a review, the auditor will be required to state whether he or she is aware of any matters that suggest that the accounts do not give a true and fair view of the matters with which they have to deal or that they have not been drawn up in accordance with the Corporations Law and applicable accounting standards. Where any matters have come to the auditor's attention, the auditor is required to give details.

203. The requirement for a review of the accounts, as will be permitted under proposed subsection 331 AA(2), is based on the concept of review engagements outlined in the accounting profession's 1992 publication "Statement of Auditing Practice/Related Services AUP/RS1 ".

Item 79 - Proposed amendment of section 332(9) - Auditor may obtain information and attend company meetings, and must report certain breaches to Commission

204. Item 79 of Schedule 1 to the Bill will amend subsection 332(9), which requires the auditor of a company to report to the ASC any default by the company or its directors **in** complying with section 245 (holding of annual general meeting) or 316 (laying of documents before the annual general meeting). Consistent with the existing requirement of reporting matters detected during an audit, the auditor will, in future, have to report any matters detected during a review of financial statements.

Item 80 - Proposed insertion of new section 408C - Application of provisions by section 323A - certain disclosing entities that are prescribed corporations



**Items 81 to 83 - Proposed amendments of section 409 - Accounts, and directors' reports, of a prescribed corporation**

206. Items 81 to 83 of Schedule 1 to the Bill will amend section 409 of the Corporations Law to reflect the amendments of Chapter 3 of the Law. The Chapter 3 amendments will expand the application of financial reporting requirements to halfyear as well as annual accounts.

**Items 84 to 86 - Proposed amendments of section 409A - Consolidated accounts where the chief entity or a controlled entity is a prescribed corporation**

207. Items 84 to 86 of Schedule 1 to the Bill will amend the terminology of section 409A in line with other proposed changes. The items will extend the exceptions presently applicable under section 409A in respect of prescribed corporations' annual accounts to any half-year accounts which the banking and life insurance legislation may require.

**Item 87 - Proposed amendment of section 776 - Securities exchanges to provide assistance to Commission**

208. Item 87 of Schedule 1 to the Bill will impose two new obligations on the ASX to ensure the necessary information flow between the ASX and the ASC.

209. First, where the ASX believes a person has committed, is committing or is about to commit, a serious contravention of its Business Rules or Listing Rules, or the Corporations Law, the ASX will be required, as soon as practicable, to lodge with the ASC a statement setting out particulars of the contravention and its reasons (proposed subsection 776(2A)). Because of the sensitivity of such statements, they will form part of the ASC's database for the purposes of section 1274 of the Law which allows certain documents lodged with the ASC to be open to public inspection. The

subsection 776(2C)). This will enable certain information of a minor nature which the ASX generates itself and releases to the market not to be given to the ASC. Possible exclusions would be, for example, Stock Exchange Automated Trading System (SEATS) messages or voicemail announcements that a prospectus is about to be issued.

211. Proposed subsection 776(2B) will enable the ASX and the ASC to make mutually convenient arrangements for the relevant documents to be given to the ASC. In order to attract the operation of section 1274 of the Law and ensure that documents provided are contained on the ASC database and are open for public inspection, a document given to the ASC under proposed subsection 776(2B) will be treated as having been lodged with the ASC once it is in the possession of the ASC (see proposed items 111 and 112 of Schedule 1 to the Bill).

Items 88 and 89 - Proposed amendments of section 777 - Power of Court to order compliance with or enforcement of business rules or listing rules of securities exchange

212. Section 777 allows the Federal Court or a Supreme Court to order compliance with or enforcement of business rules or listing rules of a securities exchange. There is presently **doubt about** whether a Court can make an order requiring the directors of a listed body corporate to take reasonable steps to ensure that the body complies with the ASX Listing Rules: *Hillhouse v Gold Copper Exploration NL* (1988) 14 ACLR 423. To overcome this doubt, the amendment to section 777 in item 88 of Schedule 1 to the Bill will enable the Court to make an order directing the directors of a listed body corporate to procure compliance by the body with business rules or listing rules.

213. Item 89 of Schedule 1 inserts proposed subsection 777(3), modelled on existing subsection 777(2). This will have the effect of extending the operation of section 777 to all listed entities i.e. companies and unit trusts admitted to the Official List of the ASX. At present it could be argued that section 777 applies only to listed bodies corporate. In the case of unit trusts, an obligation under subsection 777(3) to comply with business rules or listing rules will be imposed on the management company, or an associate of the management company (such as a director or related body corporate) to the extent that the rules **purport** to apply to the management company or associate. This approach is consistent with the usual

**214. In *Robox Nominees Pty Ltd v Bell Resources (1986) 13 ACLR 475*** it was held that persons aggrieved by the failure of the ASX to enforce its Rules could not apply to the Court for an order unless they had suffered real commercial prejudice. To overcome this decision, proposed subsection 777(4) will provide that, if a body corporate fails to comply with or enforce provisions of the business rules or listing rules of a securities exchange, a person who holds securities of the body corporate that are quoted on a stock market of the exchange is taken to be a person aggrieved by the failure. Proposed subsection 777(5) provides that proposed subsection (4) does not limit the circumstances in which a person may be aggrieved by a failure for the purposes of subsection (1).

Items 90 and 91 - Proposed amendments of section 779 - Qualified Privilege

215. Item 90 of Schedule 1 to the Bill inserts additional definitions in subsection 779(1) of the Corporations Law. In particular, a definition of "delisting or suspension decision", which is relevant for the purposes of proposed subsection 779(8), will be inserted. It will be defined to mean a decision by a securities exchange whether to delist a listed entity or to suspend or stop quotation of securities. "Information" will be defined to mean oral or written information. "Listed entity" will be defined to mean an entity included in an official list of a securities exchange. "Rules" will be defined to mean the business or listing rules of a securities exchange.

216. Item 91 of Schedule 1 adds six new subsections to section 779 to extend the situations under the Corporations Law in which securities exchanges have the protection of qualified privilege. Securities exchanges already have qualified privilege expressly conferred upon them under the Corporations Law in certain circumstances. In particular, qualified privilege is provided in respect of disciplinary proceedings (section 779), publication of notices for claims against a fidelity fund (section 910), publication of a statement that a contract of insurance or indemnity applies in relation to a member of a securities exchange (section 917) and publication of documents prepared by an auditor (section 1289).

217. Qualified privilege provides protection from defamation in respect of statements made by a person who has the privilege, provided malicious publication is not involved.

218. It seems likely that securities exchanges would have the protection of

219. Proposed subsection 779(5) will confer qualified privilege on a securities exchange in respect of the publication of information, or a document, given to the exchange by a listed entity under the Corporations Law or pursuant to the rules of the exchange.

220. Proposed subsection 779(6) provides an exception to the qualified privilege conferred under proposed subsection 779(5) in a case where the Corporations Law or the rules of the exchange had authorised the entity to limit the purposes for which the information or document was given and the entity, when giving the information or document, so limited the purposes and the subsequent publication by the exchange was not solely for one or more of the limited purposes.

221. Proposed subsection 779(7) will confer qualified privilege on a securities exchange in respect of the publication of information **about a request** by the exchange to a listed entity for information in relation to compliance or non-compliance with the Corporations Law or the exchange's rules. Privilege will also be conferred under this subsection where the information or document was given to the exchange by a listed entity in response to such a request.

222. Proposed subsection 779(8) will ensure that a securities exchange has the protection of qualified privilege if it publishes a written or oral statement describing a delisting or suspension decision (as defined) or the reasons for, or action taken because of a delisting or suspension decision. Qualified privilege will also be available to an exchange under this subsection where it publishes an oral or written statement to the effect that the exchange is considering whether to make such a decision. Proposed paragraph 779(8)(c) will confer privilege in respect of the publication of information given, or a document prepared, given or produced, by a person, whether or not an officer of the exchange, in the course of, for the purpose of, or otherwise in connection with the exchange making a delisting or suspension decision.

223. Proposed subsection 779(9) will make it clear that an officer of a securities exchange has qualified privilege in respect of an act that is done in the course of performing functions or exercising powers as an officer of the exchange and in respect of which the exchange would have qualified privilege under proposed

Item 92 - Insertion of proposed sections 1001A and 1001B into Part 7.11  
(Continuous disclosure)

225. Item 92 of Schedule 1 to the Bill deals with continuous disclosure by listed and unlisted disclosing entities.

226. Unlike the continuous disclosure scheme recommended in the *CASAC Report on an Enhanced Statutory Disclosure System* of September 1991, listed disclosing entities will not be required to report matters of ongoing importance to the ASC. Rather, they will continue to report such matters to the ASX in accordance with the ASX Listing Rules.

227. Proposed section 1001A will apply to a listed disclosing entity if provisions of the listing rules of a securities exchange (in particular those of **the ASX**) **require the entity to notify the exchange of information about specified events** or matters as they arise for the purpose of the exchange releasing that information to the market (proposed subsection 1001 A(1)). **In** the case of the ASX, proposed section 1001A is intended to pick up the continuous disclosure requirements of the ASX Listing Rules, in particular Listing Rule 3A(1) which requires "immediate disclosure" of material information. (Nearly all documents lodged with the ASX pursuant to this and other continuous disclosure rules will be for the purpose of the ASX releasing that information to the market and will, in fact, be released by the ASX to the market. In exceptional cases, the ASX may not release information to the market which it considers to be defamatory or materially misleading.)

228. This requirement is not intended to cover the periodic reporting requirements of the ASX Listing Rules (such as those requiring half-year and quarterly reports). Nor is it intended to apply to draft documents lodged with the ASX for its perusal, documents seeking the opinion of the ASX or documents seeking a waiver of ASX Listing Rules. In this regard, however, it should be noted that under ASX Listing Rule 3J(10) the ASX may form the opinion that documents lodged with it and marked "not for public release" should be released to the public where the ASX has formed the opinion that the information should be released and has given notice to the company to that effect. **In** any event, the provision of such documents to the ASX will not satisfy an obligation to inform the ASX of material information pursuant to Listing Rule 3A(1) or any other rule dealing with disclosure to the market.

229. Under proposed subsections 1001A(2) and (3) a listed disclosing entity will be

price sensitive information i.e. information that is not generally available and that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity. (Proposed sections 1001C and **1001D** define when information will be taken to be generally available for the purposes of proposed section 1001A and when a reasonable person could be taken to expect information to have a material effect on the price or value of securities.) In the case of a natural person, the maximum penalty for such a contravention will be \$20,000 or imprisonment for 5 years, or both. In the case of a body corporate, the maximum penalty will be \$100,000 (see item 113(b) of Schedule 1 to the Bill and section 1312 of the Corporations Law).

230. The primary obligation to disclose will effectively be placed on the relevant body corporate. However, officers of disclosing entities (and other persons involved, such as expert advisers) would be criminally liable in relation to a contravention of the disclosure requirements in proposed section 1001A if, as contemplated by section 5 of the *Crimes Act 1914*, such a \_person aids or abets, or is in any way knowingly concerned in, the commission of any offence. In these circumstances, the person would be regarded as having committed the offence in section 1001A.

231. Under proposed subsection 1001A(2), a listed disclosing entity will be civilly liable if it contravenes the continuous disclosure rules of a securities exchange by intentionally, recklessly or negligently failing to notify the exchange of price sensitive information. As a result of existing section 1005, a person who suffers loss or damage by conduct of a listed disclosing entity that contravened proposed section 1001 A will be able to recover the amount of the loss or damage by action against the entity or against any person involved in the contravention (see existing section 79 of the Law), whether or not the entity or any person involved in the contravention has been convicted of an offence. The basis for liability for a person involved in the contravention is therefore similar to that which applies for criminal conduct. It should also be noted that section 50 of the ASC Act enables the ASC to institute proceedings on behalf of a person if that is in the public interest.

232. Existing section 762 of the Corporations Law will be relevant in establishing a listed disclosing entity's state of mind for the purposes of proposed section 1001A.

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232. Existing section 762 of the Corporations Law will be relevant in establishing a listed disclosing entity's state of mind for the purposes of proposed section 1001A.

234. Where a listed disclosing entity is an undertaking to which prescribed interests relate, the obligation of the entity not to contravene the continuous disclosure requirements of a securities exchange is imposed on the management company for the purposes of proposed section 1001 A (proposed subsection 1001 A(4)). This is consistent with the role which the management company has in managing the operation of a prescribed interest scheme on a day-to-day basis.

235. The ASX is considering the possibility of amending Listing Rule 3A(l), relating to continuous disclosure, to include the right to withhold confidential material - a matter presently not expressly provided for in that Rule. There would also be a capacity under proposed section 111 AV to make Corporations Regulations to enable confidential or unreasonably prejudicial information to be excluded from disclosure under proposed section 1001 A.

#### Proposed section 1001 B - Continuous disclosure - unlisted disclosing entities

236. **Proposed section 100113** will require an unlisted disclosing entity that becomes aware of price sensitive information to lodge a document containing the information with the ASC as soon as practicable. However, this requirement will not apply where the information is required to be included in a supplementary prospectus or a replacement prospectus in relation to the entity (proposed subsection 100113(l)).

237. The disclosure requirement will apply in practice only in limited circumstances. It will apply to an unlisted entity that has raised funds by way of a prospectus since the commencement of the former Companies Codes on 1 July 1982 (see proposed section 111 AF) but which does not have a current prospectus. It will also apply to an unlisted entity that does not have a current prospectus if:

- since the commencement of the former Companies (Acquisition of Shares) Codes on 1 July 1981 the entity issued its securities as consideration for the acquisition of shares under a takeover scheme (proposed subsection 111 AGM);
- since the commencement of the former Companies Codes on 1 July 1982, its securities have been issued as consideration for the acquisition or cancellation of securities of another body pursuant to a compromise or scheme of arrangement (proposed subsection



subscription or purchase, and section 1052 of the Law requires a trustee for debenture holders to be appointed.

238. Under proposed subsections 1001B(2) and (3) an unlisted disclosing entity will be guilty of a criminal offence if it intentionally or recklessly fails to notify the ASC as soon as practicable of price sensitive information of which it is aware i.e. information that is not generally available and that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity. (Proposed sections 1001C and 1001D define when information will be taken to be generally available for the purposes of proposed section 1001B and when a reasonable person could be taken to expect information to have a material effect on the price or value of securities.) In the case of a natural person, the maximum penalty for such a contravention will be \$20,000 or imprisonment for 5 years, or both. In the case of a body corporate, the maximum penalty will be \$100,000 (see item 113(b) of Schedule 1 to the Bill and section 1312 of the Corporations Law).

239. The reference in proposed subsection 1001 B(1) to the "value" of securities is intended to refer to the underlying value of the securities - not necessarily the value calculated by a formula specified for redemption purposes. Failure to disclose information which does not affect the redemption value of a security may not lead to loss by investors who redeem, but could nevertheless, depending on the nature of the information, have a longer term effect on the real value of the securities.

240. The position with civil and criminal liability for contravention's by an unlisted disclosing entity, and for its officers, is similar to that which applies for listed entities.

241. Accordingly, the primary obligation to disclose under proposed section 1001 B will effectively be placed on the relevant unlisted disclosing entity. However, officers of unlisted disclosing entities (and other persons involved, such as expert advisers) would be criminally liable in relation to a contravention of the disclosure requirements in proposed section 1001B if, as contemplated by section 5 of the *Crimes Act 1914*, such a person aids or abets, or is in any way knowingly concerned in, the commission of any offence. In these circumstances, the person would be regarded as having committed the

practicable of price sensitive information of which the entity is aware. As a result of existing section 1005, a person who suffers loss or damage by conduct of an unlisted disclosing entity that contravenes proposed section 100113 will be able to recover the amount of the loss or damage by action against the entity or against any person involved in the contravention (see existing section 79 of the Law), whether or not the entity or any person involved in the contravention has been convicted of an offence. The basis for liability for a person involved in the contravention is therefore similar to that which applies for criminal conduct. It should also be noted that section 50 of the ASC Act enables the ASC to institute proceedings on behalf of a person if that is in the public interest.

243. The civil and criminal liability provided for in proposed section 100113 will not affect any other liability under the Corporations Law (such as under section 995 or 999), under section 52 of the *Trade Practices Act 1974* or at common law.

244. As with listed entities, existing section 762 of the Corporations Law will be relevant in establishing an unlisted disclosing entity's state of mind for the purposes of proposed section 100113.

245. Again, as for listed entities, there will be a capacity under proposed section 111 AV to make Corporations Regulations to enable confidential or unreasonably prejudicial information to be excluded from disclosure under proposed section **100113 should this be necessary.**

246. The requirement under proposed subsection 1001B(1) for an unlisted disclosing entity to lodge a "document" with the ASC is wide enough to permit information to be lodged by electronic means (i.e. by computers "talking" to one another through a modem) - the definitions of "document" and "writing" in section 9 of the Law are based on similar provisions in section 25 of the *Acts Interpretation Act 1901*:. Proposed section 111AV would permit the making of Corporations Regulations, if necessary, setting out the procedures for sending, authenticating and acknowledging an electronic message and for recording the time information was sent.

247. As for listed entities, where an unlisted disclosing entity is an undertaking to which prescribed interests relate, the obligation of the entity not to contravene the continuous disclosure requirements of proposed section **1001B** is imposed on the management company (proposed subsection 1001B(4)). This is consistent with the

**Proposed section 1001C - Sections 1001A and 1001B-when information is generally available**

248. Proposed section 1001C is based on existing section 1002B of the Corporations Law, which is an interpretative provision for the purposes of the insider trading provisions. The proposed section sets out when information will be taken to be generally available for the purposes of proposed sections 1001A and 1001B.

249. Information will be generally available if:

- it consists of readily observable matter;
- without limiting the generality of the above:
  - it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of a kind whose price or value might be affected by the information; and
  - since it was so made known, a reasonable period for it to be disseminated among such persons has elapsed; or
- it consists of deductions, conclusions or inferences made or drawn from the above information.

250. It should be noted that, for the purposes of the insider trading provisions, "information" includes matters of supposition (see section 1002A of the Law). It is not appropriate that this definition applies for the purposes of proposed sections 1001A and 1001B. The ASX, for example, only wants information to be disclosed that is sufficiently certain and not matters of supposition.

**Proposed section 1001 D - Sections 1001 A and 1001 B - material effect on price or value**

**Item 93 - Proposed amendment of section 1022 - General provisions applicable to all prospectuses other than prospectuses to which section 1022AA applies**

252. Section 1022 of the Corporations Law sets out general content requirements presently applicable to all prospectuses. It is proposed that a prospectus relating to securities of certain listed disclosing entities will not have to comply with the requirements of section 1022, although the option to do so will remain (see item 94 of Schedule 1 to the Bill, inserting proposed section 1022AA of the Law). Item 93 of Schedule 1 is consequential upon the amendment proposed by item 94.

253. Under item 94 of Schedule 1 to the Bill, relief will be granted from the prospectus provisions in relation to securities of an entity which has been a disclosing entity for 12 months prior to an offer of securities and which has not had the benefit of exemptions from the enhanced disclosure requirements. Instead of lodging a full prospectus, such an entity will have the option of lodging a more limited prospectus containing only transaction specific information - rather than information about the entity itself which should already be known to the market through the enhanced disclosure requirements. It will be relevant principally for rights issues and offers under employee share plans.

**Item 94 - (Insertion of proposed section 1022AA)**

**Proposed section 1022AA - General provisions applicable to certain prospectuses for quoted ED securities**

254. In general terms, the relief intended to be provided by proposed section 1022AA of the Corporations Law is to have the effect of limiting the content requirement for prospectuses relating to primary offers of quoted securities of certain listed disclosing entities to transaction specific information. Information about the entity itself

lodging a more limited prospectus in relation to offers for subscription, or invitations to subscribe for, securities of the entity where:

- the securities are quoted ED securities - i.e. they are quoted on a stock market of a securities exchange (see proposed section 111 AM);
- the securities are in a class of securities that were quoted at all times in the past 12 months;
- no exemptions from, or modifications of, the disclosing entity provisions (see proposed section 111 AR) applied in relation to the entity at any time in the past 12 months;
- no relief from the accounting and audit provisions of the Law applied in relation to the entity at any time in the past 12 months by reason of the entity being an Australian bank or life insurance corporation (see Part 4.5 of the Law); and
- at the time of issue of the prospectus, no ASC notice is in force specifying a disclosing entity as one which has not complied with some or all of the provisions of Parts 3.6 and Part 3.7 (Accounting and audit requirements), the continuous disclosure provisions or the supplementary prospectus provisions in proposed sections 1023B and 1024.

256. The ASC will have the power, under section 1084 of the Corporations Law, to modify these proposed provisions in appropriate circumstances. This would enable an entity to be given the benefit of section 1022AA, for example, where quotation of the entity's securities had been temporarily suspended or there had been an exemption or modification from the disclosure requirements of the Corporations Law, but this did not result in a material adverse effect on the level of information available to the market.

257. **In** addition to the matters required by section 1021 of the Law, a section 1022AA prospectus is to include or to incorporate by reference (see proposed section 1024F):

- all such information as investors and their professional advisers would reasonably require, and reasonably expect to find in the prospectus, for the purpose of making an informed assessment of:
  - the effect of the offer or invitation on the disclosing entity; and
  - the rights attaching to the securities; and
- a statement explaining that the disclosing entity, as such an entity, is subject to regular reporting and disclosure obligations and advising that copies of documents lodged in relation to an entity may be obtained from, or inspected at, an office of the ASC.

258. Unless the most recent annual accounts and any subsequent half-year accounts or documents providing continuous disclosure information are in fact included in or attached to the prospectus or are incorporated in the prospectus by reference (see proposed section 1024F), the prospectus will be required to include a statement to the effect that those accounts and statements will be provided on request without charge and the issuer of the prospectus must comply with that statement (proposed subsections 1022AA(3) to (5) of the Law). If accounts or continuous disclosure notices are incorporated by reference they will, as a result of proposed section 1024F (see Schedule 2, item 41), be taken to be included in the prospectus and, as a result of sections 994 and 996 (as proposed to be amended by Schedule 2, items 12 and 13) and section 1005, criminal and civil liability will apply with respect to material misstatements in the accounts or disclosure documents or material omissions from them. If the accounts or disclosure documents are not included in or attached to the prospectus, civil and criminal sanctions may apply with respect to false or misleading statements in the documents.

259. There is no provision for "confidentiality" as an exemption from disclosure contained in section 1022 of the Corporations Law. It is proposed that the current position be preserved when an eligible disclosing entity is fundraising. Accordingly, a listed disclosing entity will be required to include in a section 1022AA prospectus confidential or prejudicial information:

such information contained in ASX Listing Rules or in the Corporations Regulations); and

- investors and their professional advisers would reasonably require the information, and would reasonably expect to find it in the prospectus, for the purposes of making an informed assessment of:
  - the assets and liabilities, financial position and prospects of the disclosing entity; and
  - the rights attaching to the securities (proposed subsection 1022AA(6) of the Law).

260. Proposed subsection 1022AA(6) is not intended to introduce due diligence requirements with the respect to the entire section 1022AA prospectus. It will, however, require a corporation to keep track of confidential information and go through a process of deciding whether or not such information has to be disclosed in a section 1022AA prospectus.

261. Proposed subsection 1022AA(6) will not create a right not to notify a securities exchange of information, or not to include information in a document, because of the confidential or prejudicial nature of the information (proposed subsection 1022AA(7) of the Law). Such a right will need to be found elsewhere.

262. The ASC will have the power to remove the relief proposed by section 1022AA of the Corporations Law in a particular case and require the entity to prepare a full prospectus in accordance with section 1022 of the Law if the ASC is satisfied that the entity has not complied with all its obligations relating to accounting and audit, continuous disclosure (including disclosure under a supplementary or replacement prospectus) during the preceding 12 months (proposed subsection 1022AA(8) of the Law). Where the ASC grants such relief, it will be required to cause a copy of the instrument it executes to be published in the *Commonwealth of Australia Gazette* (proposed subsection 1022AA(9)).

263. The information requirements referred to in proposed section 1022AA are intended to be minimum disclosure requirements. The provision will not preclude the issuer of the prospectus from including such additional information as the

distribution rights attaching to the securities or because different amounts have been paid up on the securities (proposed subsection 1022AA(10) - **cf. existing paragraph** 636(1)(b) of the Corporations Law).

265. It is not unusual for shares issued pursuant to a rights issue not to participate in the next dividend payment, but for them otherwise to be treated in the same way as the ordinary shares on issue. If the only difference is the temporary ranking of the shares for dividend purposes, it would not be desirable to preclude such shares from having the benefit of relief from the full prospectus provisions. Generally speaking, securities will be in a different class if there are any significant differences between the rights attaching to the securities. It is not clear from the case law, however, whether a temporary difference in dividend ranking will be enough to constitute different classes: see *Cumbrian Newspapers Group Ltd v Cumberland & Westmorland Herald Newspaper & Printing Co. Ltd* [ 1987] Ch I at 15, 22 per Scott J; *Clements Marshall Consolidated Ltd v ENT Ltd* (1988) 13 ACLR 90 at 93 per Neasey J and *TNT Australia Pty Ltd v Normandy Resources NL* (1989) 15 ACLR 99.

266. The amendment to be made by proposed subsection 1022AA(10) for the purposes of section 1022A is not intended to affect in any way the meaning of other references in the Corporations Law to a "class of securities" or a "class of shares".

#### Items 95 to 98 - Proposed amendments of section 1058 - Obligations of borrowing corporations

267. Section 1058 of the Corporations Law, containing requirements for borrowing and guarantor corporations, will be amended to reflect the fact that the substantive annual and half-year disclosure requirements for borrowing corporations will now be contained in Parts 3.6 and 3.7 of the Law.

268. The principal amendments that will be made to section 1058 by items 95 to 98 of Schedule 1 to the Bill are as follows:

- Subsection 1058(5), dealing with the annual and half-year accounting requirements for borrowing and guarantor corporations, will be replaced by a similarly worded provision dealing only with guarantor corporations;



containing new time limits for lodging documents and supplying them to the trustee for the debenture holders. The time limits will be the

-- same as those applicable to disclosing entities under Part 3.6 - within 90 days of the end of a financial year and within 75 days of the end of a half-year; and

- subsections 1058(12), (13), (18) and (19) will be omitted because the matters with which they deal will be dealt with in Parts 3.6 and 3.7.

**269.** The most significant consequence arising out of the proposed amendments

~ of subsections 1058(5) and (6) will be the form in which financial statements of borrowing corporations have to be prepared. Whilst a borrowing corporation that is not a chief entity will, for all purposes other than the audit of its half-year financial statements, be unaffected by the amendments, a borrowing corporation that is a chief entity will have its obligations changed as follows:

- the corporation will no longer have to prepare its own financial statements for a half-year period (although it will have to prepare such statements for a financial year) (proposed section 293A); and
- the corporation will have to prepare consolidated annual and half-year financial statements (subsection 1058(13), which is being omitted as part of these amendments, allowed the trustee to exempt a corporation from the requirement to prepare consolidated financial statements).

**270.** It is noted that, where an economic entity comprising a chief entity and the

entities it controls is identical to the group made up by a borrowing corporation and the guarantor corporations that are its subsidiaries, consolidated financial statements prepared for the purposes of Part 3.6 would also satisfy the requirements of subsection

Items 99 to 103 - Proposed amendments of section 1069 - Covenants to be included in deeds

**272. Proposed paragraph 1069(1)(ea) will require deeds to contain a covenant requiring compliance with Division 11 of Part 3.6 and any Corporations Regulations made for the purposes of proposed section 323L (item 99). Deeds in force when proposed subsection 1069(8A) commences will be taken to contain the covenant required by proposed paragraph 1069(1)(ea) (item 102).**

273. Item 100 will amend paragraph 1069(1)(f) by changing the covenant requiring the trustee to circulate certain specified documents to holders of prescribed interests from within "2 months" after the end of the financial year to within "the prescribed period". It is envisaged that, consistent with the position for other disclosing entities, where the prescribed interests to which the deed relates are ED securities, the period prescribed will be 90 days.

274. Item 101 will replace subparagraph 1069(1)(f)(i) with a new requirement under which holders of prescribed interests that are ED securities at the end of the financial year will receive a copy of the profit and loss account, balance-sheet and the trustee's report on the undertaking. Where prescribed interests are not ED securities, the holders of those interests will continue to receive the same documents as at present.

275. Item 103 provides that in section 1069 "financial year", in relation to a deed relating to prescribed interests, means a financial year of the undertaking to which the interests relate. By virtue of proposed subsection 70A(3) (item 22 of Schedule 1), where there is a deed in relation to prescribed interests, a financial year of an undertaking to which prescribed interests relate will be the period of 12 months that ends on 30 June or whatever other day is specified in the deed.

Items 104 and 105 - Proposed amendments of section 1071 - Returns and information relating to prescribed interests

276. Item 104 of Schedule 1 to the Bill will amend section 1071 of the Corporations Law by changing the requirement that the management company return must be lodged within 2 months after the end of the financial year applicable to the deed to a requirement for it to be lodged within the prescribed period. A similar amendment will be made in respect of the period in which a return has to be lodged where the deed ceases to be in force.

277. **It is** envisaged that, consistent with the position for other disclosing entities, where the prescribed interests to which the deed relates are **ED securities, the**

278. Item 105 of Schedule 1 provides that in section 1071 "financial year", in relation to a deed relating to prescribed interests, means a financial year of the undertaking to which the interests relate. By virtue of proposed subsection 70A(3) (item 22 of Schedule 1), where there is a deed in relation to prescribed interests, a financial year of an undertaking to which prescribed interests relate will be the period of 12 months that ends on 30 June or whatever other day is specified in the deed.

Items 106 to 109 - Proposed amendments of section 1114 - Power of Court to make certain orders

279. Section 1114 of the Corporations Law empowers the Federal Court and the Supreme Courts to make such orders as the Court thinks fit where, on the application of the ASC or a securities exchange, it appears to the Court that a person has contravened the business rules or listing rules of the securities exchange.

280. Unlike section 777 of the Law, which also empowers the Court to order compliance with or enforcement of business rules or listing rules of a securities exchange, a person aggrieved by a contravention of those rules has no right of action under section 1114. Item 106 of Schedule 1 to the Bill will amend section 1114 to allow a person aggrieved by an alleged contravention by another person of the business or listing rules of a securities exchange to apply to the Court for an appropriate order.

281. Consistent with the amendments proposed to be made to section 777 of the Law, item 108 of Schedule 1 will provide that, for the purposes of section 1114, if a body corporate contravenes the business or listing rules of a securities exchange, a person who holds securities of the body that are quoted on a stock market of the exchange is taken to be a person aggrieved by the contravention. However, this is not intended to limit the circumstances in which a person may be aggrieved by a contravention for the purposes of section 1114.

**282. There is presently doubt about whether a Court can make an order requiring** the directors of a listed body corporate to take reasonable steps to ensure that the body complies with the ASX Listing Rules: *Hillhouse v Gold Copper Exploration NL* (1988) 14 ACLR 423. **To overcome this doubt, proposed subparagraph 1114(l)(ca)(i) will enable the Court to make an order directing the directors of a listed body corporate to procure compliance** by the body with business rules or listing rules. This proposed amendment is also consistent with a

**283. Under section 1114 the Court may make such orders as it thinks fit,** although a number of specific types of orders are listed in that section, without limitation of the general power. Proposed subparagraph 1114(1)(ca)(ii) (based on existing section 1004 of the Corporations Law) will make it clear that the Court may order a person who has contravened the business rules or listing rules of a securities exchange or a person involved in the contravention (see section 79 of the Law) to disclose specified information or to publish corrective advertisements.

284. The ASX is presently required to give undertakings as to damages when seeking a Court order in relation to a breach of its Rules. The ASX has pointed to this requirement as a particular impediment to the ASX taking a more active enforcement role than is currently the case. Having regard to the co-regulatory role which the ASX has with the ASC in the enforcement of ASX Listing Rules, it is proposed that the ASX should be placed in the same position as the ASC and not have to give an undertaking as to damages in these circumstances (Schedule 1, item 109). (Doubts about the extent to which the ASX has qualified privilege in defamation actions will also be removed as a result of proposed amendments of section 779 of the Law - see Schedule 1, item 91).

Item 110 - Proposed amendment of section 1139 - Futures Exchanges lies and others to, assist Commission

285. Consistent with proposed section 776(2A) (item 87 of Schedule 1 to the Bill) requiring the ASX to notify the ASC of serious contraventions of its Rules or the Corporations Law, item 110 will also require the Sydney Futures Exchange (SFE) and other futures exchanges, a clearing house for a futures exchange and a futures association having the day-to-day responsibility for regulating the futures market (presently the SFE) to notify the ASC of serious contraventions of its business rules or the Law.

286. Where the SFE (or any other futures exchange), a clearing house for a futures exchange or a futures association believes a person has committed, is committing or is **about** to commit, a serious contravention of its business rules, or the Corporations Law, it will be required, as soon as practicable, to lodge with the ASC a statement setting out particulars of the contravention and its reasons (proposed subsection 1139(2A)). (In this regard it should be noted that a futures exchange and a clearing house for a futures exchange have a duty under existing

287. Because of the sensitivity of the statements lodged with the ASC pursuant to proposed subsection 1139, they will not form part of the ASC's database for the purposes of section 1274 of the Law which allows certain documents lodged with the ASC to be open to public inspection. The obligation under proposed subsection 1139(2A) will complement the memoranda of understanding which the ASX is negotiating with the SFE on surveillance and other matters and is in addition to the existing requirements in section 1221 for the SFE, other futures exchanges and clearing houses for a futures exchange to report to the ASC on matters likely adversely to affect the financial position of a futures broker.

#### Items 111 and 112 - Proposed amendments of section 1274 - Registers

288. Section 1274 of the Law provides that a person may inspect certain documents lodged with the ASC. Documents lodged with the ASC under a provision of Chapter 7, apart from prospectuses and other documents lodged with the ASC under Part 7.12 or 7.13, are not open to public inspection.

289. The effect of the amendments proposed by items 111 and 112 of Schedule I to the Bill will be to require information which the ASX has released to the market and given to the ASC under proposed section 776(2B) (item 87 of Schedule 1) to be incorporated into the ASC database and to be open for public inspection. Proposed subsection 776(2B) will enable the ASX and the ASC to make mutually convenient arrangements for the relevant information to be provided to the ASC. A document given to the ASC under proposed subsection 776(2B) will be treated as having been lodged with the ASC once it is in the possession of the ASC.

#### Item 113 - Proposed amendment of Schedule 3 to the Corporations Law - Penalties

290. Under proposed section **111AU** of the Law, it will be an offence for a person intentionally or recklessly to contravene a condition to which an exemption under proposed sections 111 AS or 111 AT is subject. In the case of a natural person, the maximum penalty for such a contravention will be \$20,000 or imprisonment for 5 years, or both. In the case of a body corporate, the maximum penalty will \$100,000 (see item 113(a) of Schedule I to the Bill and section 1312 of the Law).

291. Under proposed sections 1001A and 100113 it will be an offence for a disclosing entity knowingly or recklessly to contravene the continuous disclosure requirements of those sections. In the case of a natural person, the maximum penalty

## SCHEDULE 1, PARTS 2 TO 4

### Items 114 to 116 - Proposed consequential amendments changing references to financial years to references to accounting periods

292. Items 114 to 116 in Parts 2 to 4 of Schedule 1 to the Bill will amend expressions containing the words "financial year" by changing those words to "accounting period". Details of the expressions being amended and the provisions affected are contained at Annexure A to this explanatory memorandum. In addition, the index at the end of the Bill shows the existing accounts and audit provisions of the Law which are amended and the new sections which are inserted in the Law. The index shows the items in the Schedules which effect these changes.

293. As a result of these amendments, provisions that currently require the preparation of annual financial statements, the audit of those statements and the preparation of a directors' report in respect of the financial year to which the financial statements relate, will (except to the extent that they are modified by individual provisions of the Corporations Law) impose similar requirements in respect of a halfyear.

294. Where individual provisions are modified so that the half-year requirements are different to annual requirements, these changes are explained in the explanatory material for the items that make the modifications (see, for example, Schedule 1, items 38,52-62,65-67,73-78).

## SCHEDULE 2

### AMENDMENTS OF THE CORPORATIONS LAW RELATING TO FUNDRAISING

#### **PART 1- GENERAL**

Item 1- Proposed amendment of section 9 (definition of "**prospectus**")

295. Item 1 of Schedule 2 to the Bill will insert an additional Note to the definition of "prospectus" in section 9 of the Corporations Law. (Note 1 was inserted by the securities clearing house amendments made under the Corporate Law Reform Act 1992.) Proposed Note 2 to the definition of "prospectus" points out that some references to a prospectus include a supplementary prospectus (see proposed subsection 1024A(4), listing provisions where references to a prospectus include a supplementary prospectus) and an application form (see proposed subsection 1024G(6), listing provisions where references to a prospectus include a current application form setting out certain prospectus information). Proposed Note 2 also points out that a replacement prospectus is a prospectus in its own right (see proposed subsection 1024D(3)).

Item 2 - Proposed omission of the definitions of "primary prospectus", "secondary prospectus" and "seller"

296. As a consequence of proposed amendments abolishing the requirements for secondary trading prospectuses (see, in particular, items 28 and 60 of Schedule 2 to the Bill), item 2 will omit the definitions of "primary prospectus", "secondary prospectus" and "seller".

Item 3 - Proposed insertion of new definitions of "application period", "replacement prospectus" and "supplementary prospectus"

297. The expression "application period" is used in

- the issuer has reserved the right to close the offer period at an unspecified time before the closing date specified in the prospectus and the issuer has exercised that right.

298. If the terms of a prospectus do not limit the application period in any way, the application period will be 12 months. (In light of improvements to the supplementary prospectus provisions proposed to be made by the Bill, the present 6 month life of prospectuses will be increased to 12 months - see item 57 of Schedule 2 to the Bill.)

299. The terms "supplementary prospectus" and "replacement prospectus" will be defined by proposed subsections 1024A(1) and 1024B(1).

#### Items 4 to 6 - Proposed amendments of section 66 - Excluded issues, offers and invitations

300. Section 66 of the Corporations Law sets out various exclusions from the prospectus requirements (see also section 1017 of the Law). In describing particular excluded issues, paragraph 66(2)(f), sub-subparagraph 66(2)(g)(i)(B) and subparagraph 66(2)(m)(ii) of the Law require the attachment to prospectuses of forms of exercise where the prospectus has offered certain options for subscription. This is not appropriate because the form of exercise is not needed until after the option has been issued.

301. The current requirements in paragraphs 66(2)(f), (g) and (m) are also not consistent with existing practice where the form of exercise is printed on the back of the option certificate. Accordingly, items 4 to 6 of Schedule 2 will amend these requirements so that the excluded issue relates to the exercise of an option or the conversion of a note or interest, where the option, note or interest was issued under a prospectus, and there will be no requirement for a form of exercise to have been provided at the time of offer of the option, note or interest.

#### Items 7 and 8 - Proposed amendments of section 622 - Acquisitions pursuant to prospectus

302. The proposed amendments made by items 7 and 8 are consequential upon the proposed abolition of the requirements for secondary trading prospectuses (see, in particular, items 28 and 60 of Schedule 2 to the Bill) and proposed item 9 of



**Item 9 - Proposed insertion of new section 622A-Acquisitions where a section**

**1043B notice has been lodged**

303. Proposed section 622A is modelled on subsection 622(1) of the Law and is consequential upon the proposed abolition of the requirements for secondary trading prospectuses (see, in particular, items 28 and 60 of Schedule 2 to the Bill). Section 622 of the Law is presently under review by CASAC and the policy reflected both in section 622 and proposed section 622A may subsequently be altered.

304. The effect of proposed section 622A is that the restrictions on the acquisition of shares contained in section 615 of the Law will not apply in relation to an acquisition of unquoted shares in a company by purchase pursuant to an invitation to buy the shares or an offer to sell the shares if:

- the offer or invitation was issued or made to, or to persons including, all the members of the company;
- the seller has lodged an information memorandum or a prospectuslike document with the ASC under proposed section 1043B (see item 60 of Schedule 2); and
- if the prospectus-like document is required to be registered as a result of the Corporations Regulations applying various prospectus requirements to the document - the document has been registered.

**Items 10 to 12 - Proposed amendments of section 994 -**

**Interpretation - Statement in a prospectus**

305. Section 994 states the circumstances in which a statement is taken to be in a prospectus for the purposes of Part 7.11 of the Law. Section 1006 in Part 7.11 sets out the persons against whom a civil action may be brought for false or misleading

306. Paragraph 994(b) of the Law provides that, for the purposes of Part 7.11, a statement is taken to be in a prospectus if it is incorporated by reference in the prospectus, whether the reference occurs in the prospectus or in any other document. Item 12 of Schedule 2 will insert a Note at the end of section 994 to provide that the generality of paragraph 994(b) will not be limited by other proposed provisions which will state that a prospectus will be taken to include information in the following documents in certain circumstances:

- a supplementary prospectus (see proposed subsection 1024C(2));
- a document incorporated by reference under proposed subsection 1024F(1); and
- a current application form incorporating prospectus information under proposed subsection 1024G(3).

Item 13 - Proposed amendment of section 996 - Misstatement in. or omission from, lodged prospectus

307. Subsection 996(1) presently prohibits a person from authorising or causing the issue of a prospectus in relation to securities of a corporation in which there is a material misstatement or from which there is a material omission. Subsection 996(1 A) provides that the prohibition in subsection 996(1) does not apply in relation to a statement or omission that is material only in respect of an excluded offer or an excluded invitation (as set out in section 66 or in the Corporations Regulations).

308. There have been concerns about the operation of these provisions because of the wide definition of "prospectus" in section 9 of the Corporations Law. That definition covers written notices or other instruments which invite applications or offers, or which make offers, in relation to securities.

309. The proposed amendment of subsection 996(1) seeks to address these concerns by confining liability under section 996 to material misstatements or omissions in prospectuses which have been, or which are required to be, lodged with the ASC under Part 7.12. Material misstatements or omissions in other written notices or instruments relating to securities will be subject to civil liability under section 995.

invitations which is contained in a regulated prospectus will be subject to the terms of section 996.

Item 14 - Proposed amendment of section 999 - False or misleading statements in relation to securities

312. Section 999 creates a criminal offence with respect to false or misleading statements recklessly or negligently made which are likely to induce the sale or purchase of securities. As presently worded, this section applies only to statements which are made in connection with secondary transactions. The proposed amendment in item 14 of Schedule 2 to the Bill, which is based on an ASC recommendation, will extend the operation of section 999 to primary transactions as well.

Items 15 to 27 - Proposed amendments of sections 1006 to 1011 inclusive

- 313. The amendments proposed to the prospectus liability and defence provisions of sections 1006 to 1011 by items 15 to 27 of Schedule 2 to the Bill are \_\_ consequential upon other proposed amendments abolishing the requirements for secondary trading prospectuses (see, in particular, items 28 and 60 of Schedule 2).

Item 28 - Proposed amendment of section 1018 - Prospectus in relation to securities

\_ 314. Under the Corporations Law, a secondary prospectus is required for secondary offers of securities which are not quoted on the stock market of a stock exchange except when the offer is an excluded offer (see sections 1017 and 1018).

315. The Bill will make a significant change to the disclosure requirements for secondary trading, having regard to the existing insider trading provisions, prohibitions on misleading and deceptive conduct (including section 52 of the *Trade Practices Act 1974*), common law remedies and the proposed continuous

317. As a result of item 28 of Schedule 2 to the Bill, section 1018 will be amended so that it does not apply to offers for purchase or invitations to buy securities (i.e. secondary offers and invitations) whether or not the securities are quoted on a securities exchange. In future, it will only apply to offers for subscription of, or invitations to subscribe for, securities of a corporation (i.e. primary offers and invitations).

Item 29 - Proposed amendment of section 1020 - Forms of application for securities to be attached to prospectus

318. Section 1020 of the Corporations Law requires a form of application for securities to be attached to, or to accompany, a prospectus. As a result of proposed subsection 1024C(3), after a supplementary prospectus is lodged, every copy of the prospectus that is issued must be accompanied by a copy of the supplementary prospectus.

319. Item 29(a) of Schedule 2 to the Bill amends section 1020, consequential upon other proposed amendments abolishing the requirements for secondary trading prospectuses (see, in particular, items 28 and 60 of Schedule 2). Item 29(b) of Schedule 2 notes the effect of proposed subsection 1024C(3).

Items 30 to 37 - Proposed amendments of section 1021 - Specific provisions applicable to all prospectuses

320. Subsection 1021(5) of the Corporations Law provides that a prospectus must contain a statement that no securities will be allotted or issued, or sold, on the basis of the prospectus later than 6 months after the date of issue of the prospectus. In light of improvements to the supplementary prospectus provisions proposed to be **made by the Bill, which will ensure that prospectuses are kept up-to-date, the present 6 month life of prospectuses will be increased to 12 months** - see item 57

and amounts paid to, directors, proposed directors or experts involved in the promotion of corporations in the period of 2 years before the prospectus was lodged. -Ongoing benefits, even if conferred under a contract entered into more than 2 years

before the prospectus was lodged, will still be required to be disclosed under subsection 1021(6).

322. Benefits paid in circumstances unconnected with the promotion or formation of corporations or prescribed interest schemes which fall within the criteria set out in section 1022 will continue to require disclosure under that section.

323. The amendments proposed to be made to section 1021 by items 31 and 34 to 37 of Schedule 2 are consequential upon other proposed amendments abolishing the requirements for secondary trading prospectuses.

#### Items 38 to 40 - Proposed amendments of sections 1022 and 1022A,

324. The amendments proposed to be made to sections 1022 and 1022A by items 38 to 40 of Schedule 2 to the Bill are consequential upon other proposed amendments abolishing the requirements for secondary trading prospectuses (see, in particular, items 28 and 60 of Schedule 2).

#### Item 41 - Proposed repeal and substitution of section 1024 - Supplementary prospectuses

325. Item 41 of Schedule 2 to the Bill contains amendments of the supplementary prospectus provisions and gives effect to a number of recommendations of the Prospectus Law Reform Sub-Committee of CASAC - see proposed sections 1023A to 1024D.

326. Proposed section 1024E provides for refunds in certain cases where applications for securities have been made on out-of-date application forms. Proposed section 1024F deals with the inclusion of documents in prospectuses by reference. -section section 1024G allows prospectus information to be set out in an

of sections including proposed section 1023A which is based on subsection 1024(4) but expands on that provision.

328. Under proposed section 1023A, any director, expert or other person referred to in subsection 1006(2) (other than the issuer) will be required, to give a written notice during the application period in relation to the prospectus to the issuer of the prospectus as soon as practicable after becoming aware that:

- there is a material statement in the prospectus that is false or misleading;
- there is a material omission from the prospectus;
- there has been a significant change affecting a matter included in the prospectus; or
- a significant new matter has arisen which would have been required to have been included in the prospectus if it had arisen when the prospectus was prepared.

329. Failure to comply with this requirement will be an offence, attracting a maximum penalty of \$5,000 or imprisonment for 1 year, or both in the case of a natural person and a maximum penalty of \$25,000 in the case of a body corporate (see item 64 of Schedule 2 to the Bill, amending Schedule 3 to the Corporations Law, and section 1312 of the Corporations Law). Awareness in the case of a body corporate will be determined having regard to section 762 of the Corporations Law.

330. The term "significant" will not be defined and will bear its ordinary meaning. For the purposes of the requirements in proposed sections 1023A and 1024 to report significant changes or significant new matters, it is intended that "significant"

will mean:

- in relation to a section 1022 prospectus, significant for the purpose of making an informed assessment of the matters mentioned in subsection 1022(1) (cf. existing subsection 1024(2))

- Proposed Section 1023B - Correction of false or misleading statements etc. in prospectus by supplementary or replacement prospectus

331. Under proposed section 1023B, where an issuer of a prospectus becomes aware during the application period under the prospectus that it contains a material

- misstatement or material omission, the issuer must, as soon as practicable after becoming so aware, lodge a supplementary prospectus or a replacement prospectus

- consolidating earlier prospectuses (proposed subsections 1023B((1) and (2)).

Awareness in the case of a body corporate will be determined having regard to section

\_ 762 of the Corporations Law.

332. The requirement to lodge a supplementary or replacement prospectus "as - soon as practicable" reflects the view that it is not possible to specify an exact period

to suit all circumstances. The issuer will need adequate time to assess the need to \_ notify and, where appropriate, to perform adequate due diligence.

333. Failure to comply with the notification requirement will be an offence, \_ attracting a maximum penalty of \$20,000 or imprisonment for 5 years, or both in the

case of a natural person and \$100,000 in the case of a body corporate (see item 64 of -- Schedule 2 to the Bill, amending Schedule 3 to the Corporations Law, and section

1312 of the Corporations Law).

334. It will not be necessary to register a supplementary or replacement prospectus.

335. Information may be taken to be included in a prospectus in a number of ways. In particular:

- under proposed subsection 1024C(2), information in a supplementary prospectus lodged under proposed section 1023B will be taken, except in relation to things that happened before the supplementary

- under proposed section 1024G, information will be able to be set out either in a current application form or in the prospectus itself **in** certain circumstances. Under proposed subsection 1024G(3), information which has been set out in an application form will be taken to have been included in the prospectus while the form was current.

336. Regard will need to be had to these provisions when considering whether a prospectus contains a material statement that is false or misleading, or whether there is a material omission from the prospectus.

337. A supplementary prospectus will also be required to comply with proposed section 1024A and a replacement prospectus with proposed section 1024B.

Proposed Section 1024 - Changes or new matters that require the issue of supplementary or replacement prospectus

338. Under proposed section 1024, where an issuer of a prospectus becomes aware during the application period under a prospectus that:

- there has been a significant change affecting any matter that was included in the prospectus; or
- a significant new matter has arisen which would have been required to have been disclosed in a prospectus had it arisen when the prospectus was prepared;

the issuer must, as soon as practicable after becoming so aware, lodge a supplementary prospectus or a replacement prospectus containing particulars of the change or new matter (proposed subsections 1024((1) and (2)). Awareness in the case of a body corporate will be determined having regard to section 762 of the Corporations Law. Failure to comply with this requirement will be an offence, attracting a maximum penalty of \$20,000 or imprisonment for 5 years, or both in the case of a natural person and a maximum penalty of \$100,000 in the case of a body corporate (see proposed item 64 of Schedule 2 to the Bill, amending Schedule 3 to the Corporations Law, and section 1312 of the Corporations Law).



Proposed Section 1024A-General provisions about supplementary prospectuses

340. A supplementary prospectus will be able to do either or both of the following things in relation to a prospectus:

- correct a deficiency in the prospectus; or
- provide particulars about something that has occurred since the prospectus was prepared (proposed subsection 1024A(1)).

341. "Deficiency" is defined in proposed subsection 1024A(5) to include, but not to be limited to:

- a material statement in the prospectus that is false or misleading; or
- a material omission from the prospectus.

342. As a result of proposed subsection 1024A(1), a supplementary prospectus

- will be able to be used to notify both significant changes or new matters as well as changes or new matters which are not significant. As a result of proposed subsection
- 1024A(5), a supplementary prospectus will be able to be used to correct errors in a prospectus that are material as well as errors that are not material.
- 343. Nothing in proposed section 1024A is intended to limit the inclusion

of

other information in a supplementary prospectus or to prevent a supplementary prospectus being used in situations other than those contemplated by proposed sections 1023B and 1024.

344. As indicated in paragraph 335 above, information may be taken to be included in a prospectus in a number of ways.

345. Each page of a supplementary prospectus will be required to contain a bold type statement indicating that it is a supplementary prospectus that is to be read in conjunction with the prospectus it is correcting and, if other supplementary

- section 995 - which prohibits misleading or deceptive conduct in relation to dealings in securities;
- section 996 - which prohibits the issue of a prospectus containing material misstatements or material omissions;
- sections 1006 to 1012 - which deal with civil liability for material misstatements or material omissions, indemnities and with various defences to liability under section 1005;
- subsections 1021(2), (3), (4), (10), (13) and (14), dealing with type size, dating, signatures, certain defences available for failing to comply with the requirements of section 1021 and the requirement to state that the ASC takes no responsibility as to the contents of the prospectus;
- proposed section 1023A - dealing with the obligation to notify an issuer of a prospectus of false or misleading statements or changes;
- proposed section 1024F - dealing with inclusion of documents in prospectuses by reference;
- sections 1029 - dealing with documents required to be kept in respect of prospectuses;
- section 1031 - dealing with the allotment or issue of securities where the prospectus indicates an application for quotation on a stock market;
- section 1032 - dealing with the consent of an expert to the issue of a prospectus containing a statement by the expert; and
- section 1033 - dealing with the ASC's powers to make orders to stop the issue of securities

(proposed subsection 1024A(4) - based on present subsection 1024(7) - but note that a reference to a prospectus in section 1008A will now also include a reference to a supplementary prospectus).

Proposed Section 1024B - General provisions about replacement prospectuses

347. A replacement prospectus is a document the purpose of which is to replace a prospectus (including an earlier replacement prospectus). A replacement prospectus may also do either or both of the following things in relation to a prospectus:

- correct a deficiency in the prospectus; or
- provide particulars about something that has occurred since the prospectus was prepared (proposed subsection 1024B(1)).

348. "Deficiency" is defined in proposed subsection 1024B(4) to include, but not to be limited to:

- a material statement in the prospectus that is false or misleading; or
- a material omission from the prospectus.

349. A replacement prospectus must have the same wording as the prospectus which it is replacing except to the extent that it is correcting a deficiency in the prospectus being replaced or provides particulars about something that has occurred since that prospectus was issued (proposed subsection 1024B(3)). Accordingly, changes in colour or design of the prospectus would be permitted.

350. As a result of proposed subsection 1024B(1), a replacement prospectus will be able to be used to notify both significant changes or new matters, as well as changes or new matters which are not significant. As a result of proposed subsection 1024B(4), a replacement prospectus will be able to be used to correct errors in a

351. Nothing in proposed section 1024B is intended to limit the inclusion of other information in a replacement prospectus or to prevent a replacement prospectus being used in situations other than those contemplated by

### **Proposed Section 1024C - Consequences of lodging a supplementary prospectus**

**354. Information in a supplementary prospectus that has been lodged with the ASC will be taken, except in relation to things that happened before the supplementary prospectus was lodged, to be included in the original prospectus (proposed subsection 1024C(1) and (2)). Accordingly, a supplementary prospectus may be used to provide information that was required by section 1022 or 1022AA to be in the original prospectus. "The original prospectus" will be the prospectus which the supplementary prospectus is correcting, updating, or supplementing (proposed subsection 1024C(5)).**

**355. If a supplementary prospectus is lodged, every copy of the original prospectus that is issued afterwards will be required to be attached to, or accompanied by, a copy of the supplementary prospectus (proposed subsection 1024C(3) - based on present subsection 1024(6)). Failure to comply with this provision will be an offence, attracting a maximum penalty, in the case of a natural person, of \$20,000 or imprisonment for 5 years, or both or, in the case of a body corporate, \$100,000 (see item 64 of Schedule 2, amending Schedule 3 to the Corporations Law, and section 1312 of the Corporations Law).**

**356. If, however, contrary to proposed subsection 1024C(3), a copy of a supplementary prospectus does not accompany a copy of the original prospectus, the supplementary prospectus will not be taken to be included in the original prospectus for the purposes of a civil action under section 1005 for contravention of Part 7.11 or 7.12 (proposed subsection 1024C(4)).**

### **Proposed Section 1024D - Consequences of lodging a replacement prospectus**

**357. If a replacement prospectus is lodged with the ASC, copies of the prospectuses which it replaces must not be issued afterwards (proposed subsection 1024D(1) and (2)). Failure to comply with this provision will be an offence, attracting a maximum penalty, in the case of a natural person, of \$20,000 or imprisonment for 5 years, or both or, in the case of a body corporate, \$100,000 (see item 64 of Schedule 2 to the Bill, amending Schedule 3 to the Corporations Law, and section 1312 of the Corporations Law). A replacement prospectus that is lodged with the ASC will be taken to be a prospectus in its own right for the purposes of the Corporations Law, but will not have a life longer than the remainder of the life of the prospectus it is replacing (proposed subsection 1024D(3)). This will ensure that the life of the**

358. The parts of a replacement prospectus that are the same as parts of the prospectuses which it replaces will be taken to comply with the requirements of Division 2 of Part 7.12 to the extent that those parts complied with those requirements.

Proposed Section 1024E - Application made on out of date application form

359. Proposed section 1024E deals with cases where applications for securities are received from persons who have not been issued with particular supplementary or replacement prospectuses. For example, a person may have applied to an issuer for a copy of an original prospectus but not applied for securities on the basis of it for several months. By this time the prospectus may have become inaccurate because of significant changes or new matters reported upon in a supplementary prospectus of which the person was unaware.

360. Under the proposed section, a person who has applied for securities during the application period under a prospectus and has used an out of date application form (because, for example, a new application form has been issued in connection with a supplementary or replacement prospectus) will be afforded a reasonable opportunity to receive a refund. It is envisaged by issuers that an application form accompanying an original prospectus would be distinguished in some way from the application form accompanying a supplementary or replacement prospectus (e.g. by colour coding or by including a date of issue) to enable the issuer to know whether the application was being made on the basis of an up-to-date prospectus.

-- 361. Where an issuer receives an out-of-date application form during the application period under a prospectus, the issuer will have two options under proposed section 1024F which are to be exercised as soon as practicable after receiving the application:

- Option 1 -The issuer may provide the applicant with a current application form and relevant supplementary or replacement prospectuses and advise the applicant that the application form used was not current, that the issuer is treating the application as having  
— been withdrawn, and refunding application moneys together with interest (if any) that has accrued; and

the application form used to make the application was issued, give the applicant a reasonable opportunity to return the securities and obtain a refund of application moneys together with interest (if any) that has accrued.

362. For the purposes of Option 2, a material adverse change will occur in relation to securities if a change occurs, or a new matter arises, that is likely to have a material adverse effect on the value of the securities (proposed subsection 1024E(6) - this is an objective test).

363. The issuer will be able to cancel securities returned to it under Option 2. If the securities are shares, their cancellation will not be a reduction of share capital within the meaning of the Corporations Law (proposed subsection 1024E(7)).

364. Failure of an issuer to act in accordance with either Option 1 or 2 will be an offence (proposed subsection 1024E(8)), attracting a maximum penalty, in the case of a natural person, of \$2,500 or imprisonment for 6 months, or both or, in the case of a body corporate, \$12,500 (see item 64 of Schedule 2, amending Schedule 3 to the Corporations Law, and section 1312 of the Corporations Law).

365. Proposed section 1024E is not intended to limit any other right which a person may have to receive a refund or to take a civil action under section 1005 of the Law. Nor is it intended to limit the operation of the ASC's stop order powers under section 1033.

366. Furthermore, proposed section 1024E is not intended to affect the operation of regulation 7.12.15(6)(ba) of the Corporations Regulations so far as it applies to situations where no application form is received or the operation of section 1043 of the Corporations Law which requires application moneys to be held in trust prior to the issue of securities.

#### Proposed Section 1024F - Inclusion of documents in prospectuses by reference

367. Prospectus issuers will be able to incorporate a document or part of a document by reference in a prospectus (including, for example, half-year or

been lodged with the ASC as a result of proposed subsection 1274(2A));

- • the document was in existence at or before the lodgment of the prospectus - this will permit the prospectus and the document to be lodged with the ASC at the same time;
- a summary of the document, or the part of the document incorporated by reference, is included in the prospectus; and
- the prospectus states that the document, or the part of the document incorporated by reference, is available free of charge from the issuer of the prospectus during the application period under the prospectus.

368. It will be important to ensure that the summary required by proposed section 1024F is accurate and sufficient to indicate whether a person needs to obtain a copy of the document, or part of the document, being incorporated by reference.

369. Proposed section 1024F will operate so that the provisions of Parts 7.11 and 7.12 of the Corporations Law (other than section 1021) will apply to the prospectus as

- if the incorporated documents were actually included in it. In this regard, the following matters should be noted:

- section 1032 of the Corporations Law, when read with proposed section 1024F, will prohibit the incorporation by reference in a prospectus of a statement made by an expert or based on a statement made by an expert without the expert having given his or her consent under that provision;
- the details required under section 1021 of the Corporations Law must actually be stated in the prospectus;
- whether section 996 of the Corporations Law has been breached will be determined having regard to the information

Proposed Section 1024G - Prospectus referring to information set out in current form of application

370. Proposed section 1024G will allow debenture issuers to state in an application form accompanying a prospectus, rather than in the prospectus itself, the rate of interest payable on their debentures. Changes in interest rates will be able to be dealt with simply by updating the information in the application form rather than by updating the prospectus itself. The proposed amendment is, however, drafted in general terms and is not limited to this situation. There will be no limitation therefore on the type of information which may be included in an application form rather than in a prospectus.

371. Under proposed section 1024G, if information is to be included in a current application form accompanying the prospectus rather than the prospectus itself, the prospectus will need to state that specified information is to be set out in the application form. The application form will remain current until it is replaced with another application form that has been lodged with the ASC. While the application form is current, information in it will be taken to be included in the prospectus.

372. Each copy of the prospectus that is issued while the application form is current will be required to be accompanied by, or have attached to it, the current application form or a copy of it (proposed subsection 1024G(4)). Failure to comply with proposed subsection 102GH(4) will be an offence, attracting a maximum penalty, in the case of a natural person, of \$20,000 or imprisonment for 5 years, or both or, in the case of a body corporate, \$100,000 (see proposed item 64 of Schedule 2, amending Schedule 3 to the Corporations Law, and section 1312 of the Corporations Law). If, however, this requirement is contravened, information in the application form will not be taken to be included in the original prospectus for the purposes of a civil action under section 1005 for contravention of Part 7.11 or 7.12 (proposed subsection 1024G(5)).

373. Unless the context otherwise requires, a reference to a prospectus in any of the following provisions will include a reference to a current application form:

- section 994 - an interpretative provision dealing with the circumstances in which a statement is taken to be in a prospectus;



- **section 996 - which prohibits the issue of a prospectus containing material misstatements or material omissions;**
- **sections 1006 to 1012 - which deal with civil liability for material misstatements or material omissions, indemnities and with various defences to liability under section 1005;**
- **subsections 1021(2), (3), (4) and (10), dealing with type size, dating, and certain defences available for failing to comply with the requirements of section 1021;**
- **proposed section 1023A - dealing with the obligation to notify a person who lodged a prospectus of false or misleading statements or changes;**
- **proposed section 1024F - dealing with the inclusion of documents in prospectuses by reference;**
- **section 1029 - dealing with documents required to be kept in respect of prospectuses;**
- **section 1032 - dealing with the consent of an expert to the issue of a prospectus containing a statement by the expert; and**
- **section 1033 - dealing with the ASC's powers to make orders to stop the issue of securities**

**(proposed subsection 1024G(6)).**

**374. It will be an offence, attracting a maximum penalty, in the case of a natural person, of \$20,000 or imprisonment for 5 years, or both or, in the case of a body corporate, \$100,000 for an application form of a type dealt with in proposed section**

**- 1024G to be issued when it is no longer current (proposed subsection 1024G(7); item 64, amending Schedule 3 to the Corporations Law; and section 1312 of the Corporations Law).**

**375. The ASC will, as at present, be able to exercise its discretionary powers**

**Item 42 - Proposed repeal of section 1027A - Application of sections 1025, 1026 and 1027 to sales of securities**

376. Section 1027A of the Corporations Law allows Corporations Regulations to be made in relation to secondary trading. The proposed repeal of this provision by item 42 of Schedule 2 to the Bill is consequential upon other proposed amendments abolishing the requirements for secondary trading prospectuses (see, in particular, items 28 and 60 of Schedule 2).

**Item 4 - Proposed amendment of section 1029 - Documents to be kept**

377. Section 1029 of the Corporations Law requires a corporation in respect of whose securities a primary prospectus has been lodged to retain, for a period of at least 6 months after the lodgement of the prospectus, a copy of any consent required to the issue of the prospectus and of every material contract referred to in the prospectus.

378. In view of the improvements proposed to be made to the operation of the supplementary prospectus provisions, it is proposed that the life of a prospectus, which is presently restricted to 6 months by section 1040 of the Law, will be extended to 12 months.

379. The proposed amendment of section 1029 is consequential upon the proposed amendment of section 1040. The period for the purposes of section 1029 will be 12 months.

**Item 44 - Secondary prospectuses - documents to be kept**

380. Section 1029A of the Corporations Law requires a seller in relation to a secondary prospectus in relation to securities of a corporation to deposit at the registered office of the corporation or at some other address specified in the prospectus for a period of at least 6 months after the lodgement of the prospectus, a copy of any consent required to the issue of the prospectus and of every material contract referred to in the prospectus.

381. The proposed repeal of section 1029A by item 44 of Schedule 2 to the Bill is consequential upon other proposed amendments abolishing the requirements for secondary trading prospectuses (see, in particular, items 28 and 60 of Schedule 2).

**Items 45 to 56 - Proposed amendments of sections 1031, 1033 and 1039**

382. The amendments proposed to be made by items 45 to 56 of Schedule 2 to the Bill are consequential upon other proposed amendments abolishing the requirements for secondary trading prospectuses (see, in particular, items 28 and 60 of v Schedule 2) and upon proposed requirements for replacement prospectuses (see item 41 of Schedule 2).

**Item 57 and 58 - Proposed amendments of section 1040 - Securities not to be allotted or issued more than 12 months after issue of prospectus**

383. Section 1040 of the Corporations Law restricts the life of a prospectus to 6 months. The ASC has, however, exercised its discretionary power under section 1084 of the Corporations Law to permit prospectuses by some issuers (certain finance companies and cash management trusts) to be circulated for up to 12 months.

384. It would seem that there is little reason for retaining the 6 months restriction on the life of a prospectus relating to securities of a disclosing entity given the combined effect of the test under section 1022 of the Corporations Law, the supplementary prospectus requirements (as proposed to be amended) and the proposed enhanced disclosure requirements. An extension of the life of a prospectus relating to securities of a disclosing entity to 12 months would potentially result in significant cost savings. It is also worth noting that a 12 month life span for prospectuses is permitted under the Ontario Securities Act.

385. It is therefore proposed that the life of a prospectus will be extended to 12 months for all prospectuses (item 57 of Schedule 2 to the Bill). If it considered it desirable, the ASC would be able to exercise its discretionary powers under section 1084 in appropriate cases to extend the life of a prospectus beyond 12 months e.g. to accommodate unforeseen or timing problems in connection with the inclusion of the most up-to-date accounts in the prospectus.

386. The amendment proposed to be made by item 58 of Schedule 2 to the Bill is consequential upon other proposed amendments abolishing the requirements for secondary trading prospectuses (see, in particular, items 28 and 60 of Schedule 2)

Item 59 - Proposed amendments of section 1041 - Validity of allotment or issue of securities

387. Section 1041 of the Corporations Law provides that an allotment, issue or sale of securities of a corporation is not void or voidable merely because it took place more than 6 months after the issue of the relevant prospectus.

388. The amendment proposed to be made by item 59(a) of Schedule 2 to the Bill is consequential upon other proposed amendments abolishing the requirements for secondary trading prospectuses (see, in particular, items 28 and 60 of Schedule 2).

389. The amendment proposed to be made to section 1041 by item 59(b) of Schedule 2 is consequential upon the proposed amendment of section 1040 of the Law extending the life of all prospectuses to 12 months. Accordingly, the period for the purposes of section 1041 will also be 12 months.

Item 60 - Proposed insertion of new Division 3A of Part 7.12A - Secondary trading in unquoted securities

390. The Bill will make a significant change to the disclosure requirements for secondary trading having regard to the existing insider trading provisions, prohibitions on misleading and deceptive conduct (including section 52 of the *Trade Practices Act 1974*), common law remedies and the proposed continuous disclosure requirements which will provide for criminal liability for an intentional or reckless omission to disclose price sensitive information and civil liability for an intentional, reckless or negligent omission to disclose such information.

391. Under the Bill, instead of a prospectus, secondary trading in unquoted securities (i.e. securities which are not quoted on a stock market or a securities exchange) will generally occur on the basis of an information memorandum containing basic information about the securities being offered for sale and about the issuer. Those wishing to sell a 30% bloc of unquoted voting shares would, however, be required to prepare a prospectus-like document (see proposed sections 1043A to 1043D).

392. As a result of the proposed amendments of section 1018 (see item 28 of Schedule 2 to the Bill) there will be an unqualified exemption from the

- Proposed section 1043A - Exceptions

393. Proposed Division 3A, dealing with secondary trading in unquoted - securities (i.e. securities which are not quoted on a stock market of a securities

exchange) will not apply to:

- an excluded offer of securities for purchase or an excluded invitation to buy securities (see section 66 of the Corporations Law and regulations 7.12.05 and 7.12.06 of the Corporations Regulations which set out various categories of excluded offers and excluded

- invitations); or

- an offer or invitation to which subsection 1030(1) of the Law applies

— (i.e. where a corporation allots or issues securities for the purpose of any of them being offered for sale, any document by which the offer for sale is made is deemed to be a prospectus issued by the corporation).

Proposed section 1043B - Secondary trading in unquoted securities

- 394. A seller of unquoted securities (i.e. securities (including prescribed interests) that are not included in any class of securities that are quoted on a stock

— market of a securities exchange - see proposed subsection 1043B(4) and Corporations

Law s, 9, definition of "of" in relation to securities, and subsections 92(2) and 1064(1)) will not be able to offer the securities for purchase, or invite offers to buy the

- a notice under proposed section 1043C - where there is a proposed sale of 30% of voting shares in a company; or
- a notice under proposed section 1043D - which is for other sales.

—395. The offer or invitation, if in writing, will be required to be attached to

**396. Failure to comply with the requirements of proposed section 1043B** will be an offence, attracting a maximum penalty of \$2,500 or imprisonment for 6 months, or both, in the case of a natural person and a maximum penalty of \$12,500 in the case of a body corporate (see item 64(b) of Schedule 2 to the Bill, amending Schedule 3 to the Corporations Law, and section 1312 of the Corporations Law).

Proposed section 1043C - Notice required by subsection 1043B(1) - sale of 30% of voting shares in a company

397. A seller entitled (within the meaning of section 609 of the Law) to 30% of the unquoted voting shares in a company or to 30% of the unquoted voting shares in a class of voting shares in the company who is making an offer or invitation relating to those shares will be required to comply with the requirements of section 1043C (proposed subsection 1043C(1)). (As a result of proposed subsections 1043B(1) and (4), proposed section 1043C will only apply in relation to voting shares that are not included in any class of shares quoted on a stock market of a securities exchange.)

398. A notice under proposed section 1043C will be a prospectus-like document. Accordingly, the notice will be required to contain such information as investors and their professional advisers would reasonably require and reasonably expect to find in the notice, for the purposes of making an informed assessment of:

- the assets and liabilities, financial position, profits and losses, and prospects of the company; and
- the rights attaching to the shares

(proposed subsection 1043C(2), based on subsection 1022(1) of the Law).

399. Corporations Regulations will, however, be able to be made to limit the information required by proposed subsection 1043C(2) to be in the notice (proposed subsection 1043C(3)).

400. A section 1043C notice will be required to be signed by the seller, dated and be printed in a type size of 8 point Times or greater, unless the ASC has permitted a smaller type size (proposed subsection 1043C(4), based on subsection 1021(2))

\_accompanying the notice as if it were an offer or invitation in relation to which section 1018 required a prospectus to be lodged with the ASC:

- the provisions of Part 7.11, including provisions such as sections 995 and 996 which provide for civil and criminal liability in respect of misleading statements or material omissions from prospectuses;
- the provisions of Division 2 of Part 7.12 governing prospectuses;
- the provisions of Division 3 of Part 7.12, including section 1040 dealing with the life of a prospectus; and
- the provisions of the Corporations Regulations made for the purposes of any of the provisions referred to above

(proposed subsections 1043C(5) and (6)).

Proposed section 1043D - Notice required by subsection 1043B(1) - other sales

402. Proposed section 1043D will apply to the vast majority of secondary sales of unquoted securities. Those wishing to sell a 30% bloc of unquoted voting shares

\_ will, however, be required to prepare a prospectus-like document under proposed section 1043C.

403. A section 1043D notice will be required to contain such information as the Corporations Regulations require about:

- the securities to which the offer or invitation relates;
- the seller;
- the corporation which has issued the securities and its directors; and
- if the securities concerned are prescribed interests - the undertaking to which the prescribed interests relate and the trustee or representative in relation to the interests

(proposed subsection 1043D(2)).

**405. A section 1043C notice will be required to be signed by the seller, dated and printed in a type size of 8 point Times or greater, unless the ASC has permitted a smaller type size (proposed subsection 1043D(3), based on subsection 1021(2) of the Law).**

**406. A section 1043C notice will not be a prospectus for the purposes of the Corporations Law. Accordingly, section 996 of the Law, which provides for criminal liability with respect to material misstatements or material omissions from prospectuses, will not apply to a section 1043C notice. Section 999 of the Law will, however, apply to such a notice. Section 999 provides for criminal liability with respect to false or misleading statements, recklessly or negligently made, that are likely to induce the purchase of securities by other persons. Section 995 of the Law will also apply to a section 1043C notice. This provision which, in conjunction with section 1005 of the Law, provides for civil liability for misleading or deceptive conduct in connection with any dealing in securities will apply to such a notice. In addition, section 52 of the *Trade Practices Act 1974*, which provides for civil liability for misleading or deceptive conduct in trade or commerce, may provide a remedy.**

**Item 61 - Proposed amendment of section 1060 - Loans and deposits to be immediately repayable on certain events**

**407. The amendment proposed to be made by item 61 of Schedule 2 to the Bill is consequential upon other proposed amendments abolishing the requirements for secondary trading prospectuses (see, in particular, items 28 and 60 of Schedule 2).**

**Item 62 - Proposed amendment of section 1078 - Restriction on hawking securities**

**408. The effect of the amendment proposed to section 1078 of the Corporations Law by item 62 of Schedule 2 to the Bill is that the prohibition on the hawking of securities will not apply to offers (whether primary or secondary) of securities (whether listed, unlisted or foreign) made by a licensed dealer, by whatever means, to an existing client. The proposed amendment is based on a recommendation made by the Prospectus Law Reform Sub-Committee of CASAC. However, in light of a recommendation of the ASC, it goes further by removing the hawking prohibition in respect of offers by unlicensed dealers of unquoted securities and foreign securities. The essential aim of the prohibition in section 1078 should be to protect consumers from pressure sales. By removing the prohibition in situations where licensed**



409. Under the proposed amendment, the prohibition on the hawking of securities will not apply to invitations or offers made by a **licensed dealer to a person who has bought or sold securities through the dealer during the preceding 12 months**. The prohibition will also not apply to invitations or offers made to a person who has entered into a written agreement with the dealer under which the dealer may act for or

- advise the person in connection with securities, provided the agreement remains in force.

410. It will be open to the ASC, under section 786 of the Corporations Law, to impose such conditions as it sees fit on dealers which offer securities to clients in this \_ manner.

y Item 63 - Proposed amendment of section 1084 - Powers of Commission

411. Section 1084 of the Corporations Law empowers the ASC to grant ^ exemptions from, or modify the operation of, the fundraising provisions of the Law.

412. The amendment proposed to section 1084 by item 63 of Schedule 2 to the

\_ Bill will also empower the ASC to grant exemptions from, or modify the operation of, the provisions of proposed Division 3A of Part 7.12, dealing with secondary trading in

\_ unquoted securities (see item 60 of Schedule 2).

Item 64 - Proposed amendment of Schedule 3 - Penalties,

413. The proposed new penalties for proposed sections 1023A to 1024D of the

^ Corporations Law, dealing with supplementary and replacement prospectuses, are based on the penalties that apply at present to subsections 1024(1) and 1024(4) of the

upon other proposed amendments abolishing the requirements for secondary trading prospectuses (see, in particular, items 28 and 60 of Schedule 2).

415. Details of the expressions being amended and the provisions affected are contained at Annexure B to this explanatory memorandum. In addition, at the end of the Bill there is an index listing, amongst other things, the secondary trading provisions of the Law which are amended and the new sections which are inserted in the Law. The index shows the items in the Schedules which effect **these changes**.

## SCHEDULE 3

### AMENDMENTS OF THE CORPORATIONS LAW RELATING TO INDEMNIFYING OR INSURING AN OFFICER OR AUDITOR OF A COMPANY

#### Introduction

416. Schedule 3 to the Bill contains amendments of be made to the Corporations -Law to provide a new scheme dealing with insurance and indemnification of company officers and auditors in place of existing section 241.

417. Section 241 prohibits, in effect, a company from exempting its officers from, or providing insurance or indemnities in respect of, liabilities which they may

-incur in relation to the company. The provision has attracted extensive criticism, both because of doubts as to the scope of the prohibition and because its operation is inconsistent with appropriate commercial practices.

418. The former Companies and Securities Law Review Committee (CSLRC), which examined the operation of section 241, recommended in 1990 that the section be revised, essentially to enable a company to pay the premium for insurance held by

-its officers against liability arising out of conduct that did not involve dishonesty or a breach of their duty of good faith to the company. The Committee also recommended

-that the provision be clarified so that it only applied to payments made by or on behalf of the company and in respect of liability of officers to the company itself.

419. In February 1992, CASAC (the successor to the CSLRC) reviewed the CSLRC's report. While agreeing with many of the CSLRC's recommendations, it -differed on some important points of detail.

420. The reform of section 241 contained of Schedule 3 to the Bill addresses the issues raised in the CSLRC and CASAC reports and, in summary, will enable companies to provide insurance for their officers, except in cases where they have wilfully breached their duty to the company or gained an improper advantage. Companies will also be able to indemnify their officers in respect of

exemption, and new section 241A, which will deal with insurance. In addition, safeguards will be included to ensure disclosure of payments or agreements and, in limited circumstances, shareholder approval.

Item 1 - Proposed amendment of section 232A - Voting by interested director of public company

422. Item 1 of Schedule 3 to the Bill will add new subsection (2A) to section 232A of the Law (inserted by the *Corporate Law Reform Act 1992*), which prohibits a director of a public company who has a material interest in a matter that is being considered at a meeting of the company from being present and voting at the meeting in certain circumstances.

423. Proposed subsection 232A(2A) will make it clear that a director should not be taken to have an interest in a matter relating to an existing or proposed contract of insurance merely because the contract insures, or would insure, the director against a liability incurred by the director as an officer of the company or of a "related body corporate". (The term "related body corporate" is defined in section 9 of the Law.) All directors will normally have an interest in a decision by the company to take out an insurance policy for their benefit, especially where the directors' insurance is a component of a policy for the company's benefit. However, having regard to the nature of such contracts, it is not considered necessary or practical for directors to be prevented from participating in such a decision. Accordingly, proposed subsection 232A(2A) will enable directors to participate in decisions regarding insurance policies which provide them with cover.

424. It is noted that any insurance policy approved by the directors will be subject to the disclosure provisions in proposed section 309A and the requirement that any premiums paid constitute reasonable remuneration for the purposes of section 243K (or, if not reasonable, the matter be dealt with in accordance with Division 5 of Part 3.2A of the Law).

Items 2 to 4 - Proposed amendments of section 241 - Company not to indemnify officer or auditor

425. Item 2 of Schedule 3 to the Bill amends section 241 of the Law by

26. Proposed subsection 241(1) will prohibit a company, or a related body corporate, from indemnifying a person who is, or has been, an officer or auditor of a **company against liability incurred** by the person in that capacity. The subsection will also prohibit such a company from exempting the person from the liability.

27. Proposed subsection 241(1 A) will render any instrument or agreement, whether oral or in writing, void-insofar as it provides for a body corporate to indemnify or exempt a person in contravention of subsection 241(1).

28. Proposed subsection 241(2) will provide an exception to the prohibition in -proposed subsection 241(1) to enable an officer or auditor to be indemnified against a liability to another person (other than the company or a related body corporate) provided the liability does not arise out of conduct involving a lack of good faith.

29. The effect of these provisions is that a company would be able, for 'example, to indemnify a director in a situation where he or she was negligent and caused loss to a third party in his or her capacity as a director. However, if the director acted without good faith, the indemnity would not be permitted. If the liability of an officer or auditor arose from conduct which was dishonest or otherwise illegal, an agreement to indemnify would not be effective under common law principles.

430. Proposed subsection 241(3) re-enacts in substance existing subsection 241(2). That subsection provides an exception to the prohibition in subsection 241(1) \_o enable an officer or auditor to be indemnified against a liability for costs and expenses incurred in defending civil **or criminal**

provision is to ensure that the prohibition on indemnification in proposed subsection 241(1) cannot be circumvented by a company arranging payment of an indemnity via a third party.

Item 5 - Proposed insertion of new section 241A - Company not to pay insurance premiums in respect of certain liabilities of officer or auditor

433. Item 5 of Schedule 3 to the Bill will insert a new section 241A into the Corporations Law dealing with the payment of insurance premiums in respect of liabilities of officers or auditors.

434. Proposed subsection 241 A(1) will prohibit a company, or a related body corporate, from paying or agreeing to pay, a premium in respect of a contract which insures an officer (or former officer) or auditor of a company against a liability arising out of conduct involving a wilful breach of duty to the company or a contravention of subsections 232(5) or (6) of the Law. (Subsections 232(5) and (6) prohibit an officer or former officer from making improper use of inside information or position to obtain an advantage for that officer or another person.)

435. It is noted that this provision will not prohibit a third party from paying or agreeing to pay an insurance premium for an officer or auditor in the circumstances outlined in the subsection.

436. Proposed subsection 241A(2) will render void any contract of insurance insofar as it insures a person in contravention of proposed subsection 241A(1).

437. Proposed subsection 241A(3) will provide an exception to the prohibition in proposed subsection 241 A(1) to enable a company, or related company, to pay or agree to pay a premium in respect of a contract insuring an officer or auditor in respect of a liability for costs and expenses incurred by a person in defending civil or criminal proceedings. This exception applies whether or not the officer or auditor has successfully defended himself or herself in such proceedings. However, the exception does not apply to any substantive liability which may be incurred as a result of the proceedings.

438. Proposed subsection 241 A(4) provides that "officer" has the same

provided the liability does not arise out of conduct involving a iacX 01 r~vu...".k...

429. The effect of these provisions is that a company would be able, for example, to indemnify a director in a situation where he or she was negligent and caused loss to a third **party** in his or her capacity as a director. However, if the director acted without good faith, the indemnity would not be permitted. If the liability of an officer or auditor arose from conduct which was dishonest or otherwise

-- illegal, an agreement to indemnify would not be effective under common law principles.

430. Proposed subsection 241(3) re-enacts in substance existing subsection 241(2). That subsection provides an exception to the prohibition in subsection 241(1) to enable an officer or auditor to be indemnified against a liability for costs and expenses incurred in defending civil or criminal proceedings in which judgment is

given in **favour of the** officer or auditor or in which the officer or auditor is acquitted. The exception also applies in connection with an application, in relation to proceedings in which the Court grants relief to an officer or auditor under the Law (see section 1318 of the Corporations Law). However, the exception does not apply to any substantive liability which may be incurred as a result of the proceedings.

431. Item 3 of Schedule 3 to the Bill will amend the definition of "officer" in

w existing subsection 241(4) so that it does not include employees of a company. The effect of this amendment will be that companies will have no prohibition on

— indemnification in relation to their employees. This implements recommendations made in both the CSLRC and CASAC reports.

432. Item 4 of Schedule 3 will provide a definition of "indemnify" to be inserted in subsection 241(4) for the purposes of proposed section 241, which will ensure that "indemnify" includes doing so through one or more interposed entities. This

'445. Proposed subsection 309A(3) mirrors the above provisions in respect of insurance premiums so that similar details must be provided in the report where a company or a related company has paid or agrees to pay a premium permitted by virtue of proposed subsection 241A(3). However, the requirement to set out the nature of the liability and the amount of the premium does not apply where this is not permitted by the contract of insurance. The purpose of this exception is to reflect common commercial practice whereby details of the amount and nature of liability covered remain confidential from third parties who may benefit from knowledge about these matters in instituting or settling proceedings.

446. Proposed subsection 309A(4) will ensure that nothing in proposed section 309A can be taken to limit the requirements for disclosure of benefits received under contracts by directors in accordance with section 309.

447. Proposed subsection 309A(5) provides that "officer" has the same meaning as in section 241, thus ensuring a consistent operation with sections 241 and 241A.



## SCHEDULE 4

### AMENDMENT OF THE CORPORATIONS LAW RELATING TO [USE. IN COURT PROCEEDINGS. OF INFORMATION FROM COMMISSION'S, NATIONAL DATABASE](#)

#### Item 1 - Proposed insertion of new section 1274B - Use. in court proceedings. of --information from Commission's national database

448. Item 1 of Schedule 4 to the Bill inserts a new provision in the Law dealing with the use in court proceedings of information from the ASC's database.

-449. The purpose of proposed section 1274B is to enable a document that purports to have been prepared by the ASC from the database by using a data processor to be admissible in a proceeding in a court as *prima facie* evidence of the matters stated in it (without the need for certification of the document). The meaning of "*prima facie* evidence" is elaborated upon in an additional sentence in proposed subsection 1274B(2) which states that the writing is proof of such a matter in the absence of evidence to the contrary.

450. The introduction of this provision will substantially reduce the circumstances in which routine and expensive formal certification of documents is required in court proceedings.

Proposed subsection 1274B(1) includes definitions of "data processor" and "national database", terms which are used in subsection 1274B(2). Proposed subsection 1274B(3) will provide that the writing referred to in subsection 1274B(2) does not need to bear a certificate or signature in order to be taken to purport to have been prepared by the ASC. Proposed subsection 1274B(4) will provide that nothing in the proposed section limits, or is limited by, section 1274 or

## SCHEDULE 5

### AMENDMENT OF THE CORPORATIONS LAW RELATING TO APPLICATION OF CHANGES MADE BY THIS ACT

#### Item 1 - Proposed insertion of new Division 6 of Part 9.11 - Changes resulting from the *Corporate Law Reform Act 1993*

452. Item 1 of Schedule 5 to the Bill will add a new Division 6 to Part 9.11 of the Law. The new Division will include the application and transitional provisions relating of the Bill.

#### Proposed section 1390 - Meaning of "Amending Act"

453. For the purposes of proposed Division 6 of Part 9.11, the expression "Amending Act" will mean the Bill in its enacted form i.e. the *Corporate Law Reform Act 1993*.

#### Proposed section 1391 - Application of changes to section 241

454. Proposed subsection 1391(1) provides that amended section 241 (Company not to indemnify officer or auditor) will apply in relation to a liability incurred at or after commencement of item 2 of Schedule 3 to the Bill. This means that the prohibition on indemnification in section 241 will only apply in respect of liabilities incurred at or after commencement of item 2 of Schedule 3.

455. Proposed subsection 1391(2) provides that section 241, as in force before commencement of item 2 of Schedule 3, will continue to apply in relation to a liability incurred before that commencement, but not in relation to a contract of insurance made at or after that commencement (in which case proposed section 241A will be applicable).

#### Proposed section 1392- Application of section 241 A

456.- Proposed section 1392 will ensure that proposed section 241A

### Proposed section 1193 - Application of changes to Parts 3.6 and 3.7

457. Proposed subsection 1393(1) will ensure that the accounts and audit

- provisions of Parts 3.6 and 3.7 of the Corporations Law, as proposed to be amended by the Bill, will ' apply in relation to a body or undertaking to which prescribed interests relate in relation to:

- the first half-year (if any) of the body or undertaking that begins on or after the commencement of item 114 of Schedule 1 to the Bill;
  - the first accounting period of the body or undertaking that is a financial year and begins on or after the commencement of that item;
- and
- each later accounting period of the body or undertaking.

458. Proposed subsection 1393(2) provides that proposed section 317A (Lodgment of accounts etc. by companies that are disclosing entities) will also apply in relation to a company in relation to the first financial year of the company .that ends on or after the commencement of item 114 of Schedule 1.

459. Proposed subsection, 1393(3) provides that Parts 3.6 and 3.7 of the Corporations Law, as in force before the commencement of item 114 of Schedule 1, will continue to apply in relation to a company in relation to a financial year of the company that began before that day.

### Proposed section 1394 -Application of changes, to Part 4.5

460. Proposed subsection 1394(1) provides that Part 4.5 (Financial statements' of Australian banks -and life insurance corporations) as in force after the commencement

**Proposed section 1395 - Application of changes to section 779**

462. Proposed subsection 1395(1) will ensure that proposed subsections 779(5) to (9) (dealing with "qualified privilege") apply to a publication by a securities exchange, after the commencement of item 91 of Schedule 1 to the Bill, of information given, a document prepared, given or produced, or a statement made, whether before, at or after that commencement. This means that securities exchanges will have the benefit of qualified privilege under proposed subsections 779(5) to (9) in respect of any material published after commencement of item 91 of Schedule 1, regardless of when the material was given to the exchange.

463. Proposed subsection 1395(2) will provide for the definition of "delisting or suspension decision" in proposed subsection 779(1) to apply to a decision made before, at or after the commencement of item 91 of Schedule 1.

**Proposed section 1396 - Application of changes to section 1058**

464. Proposed subsection 1396(1) provides that section 1058 (dealing with obligations of borrowing corporations), as in force after the commencement of item 95 of Schedule 1 to the Bill, will apply in relation to a relevant guarantor body and each financial year of the body that begins on or after the commencement of that item.

465. Proposed subsection 1396(2) provides that section 1058, as in force before the commencement of item 95 of Schedule 1, continues to apply in relation to a borrowing corporation or a relevant guarantor body and a financial year of the corporation or body that began before that commencement.

**Proposed section 1397 - Application of changes to sub section 1071(1)**

466. Proposed subsection 1397(1) provides that subsection 1071(1)

**proposed section 1398 - Application of certain prospectus-related change&**

468. The effect of proposed subsection 1398(1) is that in relation to a prospectus issued before the commencement of item 65 of Schedule 2 to the Bill, the prospectus requirements that applied before that commencement will continue to apply. In

relation to a prospectus issued at or after the commencement of that item, the prospectus requirements, as amended by the Bill and indicated in proposed subsection 1398(1), will apply.

469. By virtue of proposed subsection 1398(2), the following requirements of -- the Corporations Law, as presently in force, will continue to apply in relation to a prospectus lodged with the ASC before the commencement of item 62 of Schedule 2:

- *section 622 - which provides that the restrictions on share*

*acquisition*

contained in section 615 of the Law do not apply to an acquisition pursuant to a prospectus;

- section 1029 - requiring material contracts referred to in a prospectus to be kept for 6 months; and
- section 1033 - empowering the ASC to order the stop issue of securities.

470. In relation to a prospectus issued at or after the commencement of that item, sections 622, 1029 and 1033 of the Corporations Law, as amended by the Bill, will apply.

## SCHEDULE 6

### AMENDMENTS OF THE AUSTRALIAN SECURITIES COMMISSION ACT RELATING TO DISCLOSURE OF INFORMATION AND ADVICE ABOUT OPERATION OF CERTAIN PROVISIONS

#### Introduction

471. Schedule 6 to the Bill will amend the ASC Act:

- to permit the ASC to disclose confidential information to a domestic stock exchange, futures exchange or clearing house; and
- to require CASAC to review the operation of the continuous disclosure and related enforcement provisions 18 months after their commencement.

#### Items 1 to 3 - Proposed amendments of section 127 of ASC Act - Confidentiality

472. Section 127 of the ASC Act presently permits the ASC to disclose confidential information to Government agencies to assist them to perform their functions. The ASC is, however, prohibited from disclosing confidential information to securities and futures exchanges and clearing houses.

473. To facilitate co-operation between domestic securities and futures exchanges (such as the ASX and the SFE) and clearing houses for those exchanges, it is proposed that the ASC should be permitted to provide confidential information to such exchanges, subject to appropriate safeguards regarding the use of the information disclosed. This approach is consistent with the approach to the disclosure of confidential information taken in the United Kingdom under the *Financial Services Act 1986* and the *Companies Act 1989*. Officers and employees of domestic securities and futures exchanges would be subject to the same confidentiality obligations as ASC officers.

474. In *Johns v ASC* (High Court, unreported, 13 October 1993), Brennan and McHugh JJ, with whom Dawson and Gaudron JJ agreed, found that where the ASC released information to Government agencies under subsection 127(4) of the ASC Act, the ASC had an implied power to impose a condition on the agency's

- impose conditions to be complied with in relation to information disclosed under subsection (4).

475. The ASC Chairperson or delegate will be empowered to disclose confidential information to a body specified in the ASC Regulations that conduct a stock market or a futures market or that is a securities clearing house or a clearing house for a futures exchange in certain circumstances (proposed subsections 127(4B) and (4C)). It is envisaged that the ASC Regulations would prescribe the ASX, SFE and their clearing houses for the purposes of proposed subsection 127(4B).

476. Disclosure of confidential information to these bodies will be permitted if the ASC Chairperson or delegate is satisfied that the information will enable or assist \_ the prescribed body to monitor compliance with, enforce, or perform functions or exercise powers under its business rules or listing rules (if any) or under the Corporations Law - e.g. section 1137 of the Law obliges a futures exchange to maintain an orderly and fair market and the disclosure is by a person authorised by the Chairperson or delegate for the purpose (proposed subsection 127(4B) and subsection 127(5) as proposed to be amended).

477. The ASC Chairperson or delegate will be able to impose conditions to be complied with by the prescribed body and its officers, employees and agents in relation to information disclosed to the body under proposed subsection (4B) (proposed subsection 127(4D) and subsection 127(5) as proposed to be amended). The penalty for breaching a condition imposed under

(proposed subsection 127(4F) and subsection 127(5)  
as proposed to be amended).

479. The penalty for breaching proposed subsection (4F) will be \$10,000 or imprisonment for 2 years, or both in the case of a natural person and \$50,000 in the case of a body corporate (proposed subsection 127(4F) and section 1312 of the Corporations Law).

480. Nothing in proposed subsection 127(4B) will limit anything else in subsections 127(2),(3) or (4) or what may otherwise constitute authorised use or disclosure of information e.g. disclosure as required or permitted by law (subsection 127(6) as proposed to be amended).

**Item 4 - Proposed insertion of section 148A - Minister to ask Advisory Committee to advise on operation of continuous disclosure provisions etc.**

481. To ensure that the proposed continuous disclosure and related enforcement provisions are reviewed, the responsible Minister (the Attorney-General) will be required, under section 148 of the ASC Act, to request CASAC to advise about how effectively they are operating (proposed subsection 148A(1)).

482. The Attorney-General will be required to make the request at, or as soon as practicable after, the end of 18 months after the continuous disclosure provisions come into operation (proposed subsection 148A(2)).

483. CASAC will be required to provide its advice within 6 months of the request being made (proposed subsection 148A(3)).

484. Proposed subsection 148A(1), in referring to the proposed continuous disclosure and related enforcement provisions in the Corporations Law of the Capital Territory, follows the approach taken in section 148 of the ASC Act. Under subsection 148(2) of that



**AMENDMENTS CHANGING REFERENCES TO FINANCIAL YEARS TO  
REFERENCES TO ACCOUNTING PERIODS**

**AnnexureA**

<i>Item of Schedule 1</i>	<i>Existing expression</i>	<i>Proposed expression</i>	<i>Provisions of Corporations Law to be amended</i>
114 (and see also item 49(b) amending s-sec. 301(1))	a financial year	an accounting period	s.9 (definitions of "consolidated accounts" and "financial statements"; ss.287, 292 and 293; s-secs. 294(1), 294A(3), 294B(3) and 295(1); ss.296, 297 and 298; s-secs 299(1), 300(1), 300(2) and 302(1); s.303; s-secs.304(2) and 305(2); s.310; s-secs.313(4) and 332(6); s.332A; and s-secs.408B(2),409A(1), 409A(3) and 409A(4)
115	that financial year	that accounting period	s.9 (definitions of "consolidated accounts" and "financial statements"; ss.292 and 293; s secs.294A(3), 294B(3), 295(1) and 295(2); ss.295A and 295B and s-secs.296(1), 302(3), 332(6), 409A(1), (3) and (4)
116	the financial year	the accounting period	s-secs.294(4), 300(2), 301(2), 301(3), 301(7), 301(9), 301 (11), 302(6) and 302(9); s.303, s secs.304(2), 305(2) 307(1) and (2), 309(1) and (3), s.310 and s secs.312(1), 331C(1) and (3) and 331E(2)
39	financial years	accounting periods	s-secs.294A(1); 294B(1)

**AMENDMENTS OMITTING REFERENCES TO BUYING, SELLING,**  
**PURCHASING OR SELLING SECURITIES AND TO PRIMARY**  
**PROSPECTUSES**

<i>Item of Schedule 2</i>	<i>Words proposed to be omitted</i>	<i>Provisions of Corporations Law to be amended</i>
65	"or buy"	s. (definition of "prospectus"), s-sec. 622(1), s. 1017, s-sec. 1018(1), s. 1019
66	"or purchase"	s. ' (definition of "prospectus"), s-secs. 622(1) and (3), s. 1017, s sec. 1018(1), s. 1019 and s-sec. 1060(1)
67	"or sale ("issue or sale will be omitted and "or issue" substituted)	s-sec. 1008(4), para 1008 A(2)(d), s-sec. 1008A(4) and paras 1009(3)(b) and (c) and (4)(a), (b) and (c)
68	"primary"	s. 9 (definition of "excluded prospectus"), para 244(1)(a), s secs 1023(1) and (2), para 1025(3)(c), s-sec. 1026(3), s. 1029, para 1030(1)(a), s. 1038 and s-sec. 1040(1)

## NOTES