

1991

THE PARLIAMENT OF THE COMMONWEALTH OF

AUSTRALIA

HOUSE OF REPRESENTATIVES

CORPORATIONS (UNLISTED PROPERTY TRUSTS)

AMENDMENT BILL 1991

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Attorney-General

the Hon. Michael Duffy, M.P.)

Corporations (Unlisted Property Trusts) Amendment Bill 1991

OUTLINE

The corporations (Unlisted Property Trusts) Amendment Bill 1991 ('the Bill') gives effect to some of the measures announced by the Government on 23 July 1991 to restore stability and confidence in the unlisted property trust industry. The other measures will be given effect to by amendments to the Corporations Regulations. In particular, the Bill will amend the Corporations Law ('the Law') to impose a standard 12 month notice of withdrawal period in respect of "public" unlisted property trusts. The Bill also contains provisions to facilitate investor participation in the affairs of unit trusts and other collective investment schemes.

2. In addition the Bill contains an amendment to the Law which makes it clear that the Corporations and Securities Panel ('Panel') has the power to make interim orders pending the final outcome of proceedings brought before it by the Australian Securities Commission ('ASC').

3. The main features of the Bill dealing with unlisted property trusts are:

- date funds are actually paid out; (para.115) and, the introduction of a standard 12 month buy-back/ redemption notice period for unlisted property trusts in existence at 4.50 p.m. on 23 July 1991; (paras. 106-114)
- unitholders will be able to elect to vary that notice period where it is commercially viable to do so; (paras. 149-154)
- the ASC will have the power to disallow the shortening of the notice period where it is satisfied that this would seriously threaten the liquidity of the trust or the liquidity of the management company; (paras. 155-159)
- unitholders in financial hardship will be able to immediately withdraw funds at a discount not exceeding 7.5%; (paras. 116-122)
- buy-back/redemptions are to be made at the price prevailing at the date of payment as opposed to the date of giving notice or any other date which may be specified in the trust deed; (para. 127)
- unitholders will be able to, with the approval of the management company, withdraw a buy-back/redemption request; (paras. 128-130)
- unitholders who have given to the trust a buy-back /redemption notice will retain any entitlements to income or other benefits between the date of giving that notice and the
- the ASC will be given the power to permit the trustee to refuse redemptions where this would have a material adverse affect on the value of remaining units or otherwise adversely affect the interest of unitholders. (paras. 69-82)

4. The Bill also contains provisions applicable to all prescribed interest schemes which:

- enable trust deeds to be amended when the amendments are approved by 75% (by value) of unitholders voting at a meeting provided that at least 25% (by value) of unitholders eligible to vote do so; (paras. 33-44) and
- enable unitholders to requisition meetings for the purposes of giving directions to either the trustee or management company provided that the directions are not inconsistent with the provisions of the trust deed. (para. 26)

FINANCIAL IMPACT STATEMENT

5. The Bill is not expected to have a significant financial impact. While the ASC is given additional administrative powers under this Bill it is expected that the ASC will only be required to exercise them infrequently.

6. There will not be any significant resource implications for the Corporations and Securities Panel as it had always been envisaged that the Panel would have the power to make interim orders.

7. The unlisted property trust measures may result in some direct costs for industry in so far as some meetings of unitholders may be convened to consider variations of the 12 month notice period. Such costs and the extent to which they can be directly attributed to the Bill cannot be readily quantified. In many cases, these costs would have been incurred in any case as unitholder meetings to consider freezes on buy-backs/redemptions or the restructuring of the trust would have been necessary having regard to the fundamental mismatch between the illiquid nature of property as an investment and the previous requirements under the relevant trust deeds to meet buy-back/redemption requests on short notice.

ABBREVIATIONS

8. The following abbreviations are used in the explanatory memorandum:

ASC	-	Australian Securities Commission
the Bill	-	Corporations (Unlisted Property Trusts) Amendment Bill 1991
the Court	-	the Court as defined in section 9 of the Corporations Law
the Law	-	the Corporations Law
the Panel	-	the Corporations and Securities Panel
the President	-	the President of the Panel

the Regulations - the Corporations Regulations

NOTE ON CLAUSES

PART 1 - PRELIMINARY

Clause 1 : Short title

9. When enacted this Bill will be cited as the Corporations (Unlisted Property Trusts) Amendment Act 1991.

Clause 2 : Commencement

10. It is proposed that the Bill will come into force on the day on which it receives the Royal Assent. However, by Clause 11 of this Bill, those provisions proposed by this Bill which impose a standard 12 month notice period for the withdrawal of funds from unlisted property trusts in existence at 4.50 p.m. on 23 July 1991 are to be taken to have commenced at that time, and some amendments of a technical nature will be taken to have commenced on 1 January 1991.

PART 2 - AMENDMENTS OF THE CORPORATIONS LAW

Clause 3 : Corporations Law

11. The term "Corporations Law", for the purpose of the amendments to the Law proposed by this Bill is taken to mean the Corporations Law as set out in section 82 of the Corporations Act 1989.

Clause 4 : Insertion of new sections

Section 733A : Interim orders when application made under section 733

12. Proposed section 733A will provide that where the ASC applies to the Corporations and Securities Panel under section 733 for a declaration that unacceptable conduct has occurred, the Panel or the President may make an interim order of the type which the Panel could make under section 734 once a section 733 declaration was made. Such interim orders will apply pending the determination of the application under section 733. More than one interim order may be made under proposed section 733A.

Section 733B : Interim orders where declaration made under section 733 before application under section 734

13. Proposed section 733B will apply where the ASC does not make an application under section 734 before the Panel makes a declaration under section 733.

14. In those circumstances, if an interim order under proposed section 733A is in force immediately before the Panel makes its declaration under section 733, the Panel may, under proposed subsection 733B(2), at the time of making the declaration, make an order declaring the interim

order to apply, with or without specified modifications, for 60 days beginning on the day when the declaration under section 733 is made.

15. Where there is no interim order in force at the time of the declaration is made, or where the Panel does not continue an existing order, the Panel may make an interim order under proposed subsection 733B(4) at the time of making the declaration. Such orders may last for 60 days.

16. If the ASC subsequently makes an application under section 734 while an interim order is in force under subsection 733B(2) or subsection (4), an interim order may no longer be made under subsection 735(2).

17. The effect of this is to ensure that where an interim order is made before the ASC makes an application under section 734, the interim order can last at most only 60 days beginning on the day the declaration is made, and no further interim order can be made to extend this period.

Clause 5 - Power of Panel to make orders

18. Clause 5 amends section 734 of the Law.

19. In particular it will insert a new subsection (2A) to make it clear that the ASC may make an application under section 734 before or after the ASC makes a declaration under section 733.

Clause 6 : Miscellaneous provisions about orders by Panel

20. Clause 6 amends section 735 in a number of respects. These are largely clarifying amendments or amendments consequential upon the insertion of proposed section 733A and section 733B.

21. It also inserts proposed subsection 735(2A) which provides that where an application for an order is made under section 734 before the Panel has made a declaration under section 733, an interim order made under subsection 735(2) does not take effect unless and until the declaration is made.

Clause 7 : Lodgement of consolidated copies of deed

22. Section 1068 of the Law requires a management company to lodge with the ASC, on request by that body, a consolidated copy of the approved deed of a prescribed interest scheme which it manages where the deed is amended by any instrument or instruments. The consolidated copy of the deed must incorporate all amendments made.

23. It is proposed that subsection 1068 be amended by the insertion of paragraph (d) to specifically provide for the consolidated copy to include the entrenched provisions which are to be deemed to be included in the deeds of unlisted property trusts under proposed Division 5A of Part 7. 12 of the Law which is to be enacted under this Bill.

24. Where the management company is required to lodge with the ASC a consolidated copy of the deed, the management company will be required to set out the entrenched provisions in force (subparagraph (d) (i)); identify those entrenched provisions (subparagraph (d) (ii)); and, include a note explaining that the entrenched provisions can only be revoked or amended in accordance with sections 1076U or 1076X of the Law and will operate despite anything else in the deed (subparagraph (d) (iii)).

Clause 8 : Covenants to be included in deeds

25. By this clause it is proposed to amend section 1069 of the Law which prescribes that certain covenants be included, or be deemed to be included, in the trust deed governing a prescribed interests scheme.

26. Subclauses (a), (b) and (c) will amend paragraph 1069(1) (m) for the purpose of enabling unitholders to give instructions to the management company, and the trustee or representative. The provision in the former Companies (New South Wales) Code corresponding to paragraph 1069(1) (m) of the Law had been interpreted by the Court in Equitable Group Ltd v Pandal Nominees Pty Ltd (1985) 3 ACLC 546 as allowing unitholders to direct the trustee or representatives only on matters arising out of certain accounts and balance sheets of the trustee or management company. The proposed amendments, in effect, broaden the scope of instructions which can be given by unitholders to the management company, trustee or representative. Under the amended provision it will be necessary for the direction proposed to be given to be set out in the notice of meeting.

27. Subclause (d) will amend paragraph 1069(1) (n) by omitting the word "other" from the paragraph. The amendment is of a technical nature and, in conjunction with the proposed inclusion into section 1069 of subsections (2A), (2B) and (9A), will clarify the circumstances under which a covenant can be prescribed by regulation.

28. Subclause (e) will include in section 1069 proposed subsections (2A) and (2B) for the purpose of clarifying the circumstances in which a covenant can be prescribed by regulation under paragraph 1069(1) (n) as amended by this Bill. Proposed subsection (2A) will provide that a covenant prescribed by regulation under paragraph 1069(1) (n) may elaborate, supplement, or otherwise deal with any aspect of a matter referred to in a covenant required under another paragraph of subsection 1069(1) or another provision of Divisions 5 or 5A of Part 7.12. Proposed subsection (2B) further qualifies covenants which can be prescribed by regulation under paragraph 1069(1) (n) by requiring that any covenant so prescribed must be able to operate concurrently with all other covenants prescribed under subsection 1069(1) other than paragraph (n), and all other provisions of Divisions 5 or 5A of Part 7.12.

29. Subclause (f) proposes the insertion in section 1069 of subsection (9A) which will provide that where a covenant prescribed under subsection (1) is amended and actually included in a trust deed, the covenant in the trust deed which is to be amended will cease to have

effect on the commencement of the amended covenant. Additionally, the amended covenant will be taken to be contained in the trust deed at and after the commencement.

30. Subclauses (g) and (h) will amend subsection 1069(13) consequent upon the proposed amendments to paragraph 1069(1)(m). Existing subsection 1069(13) provides that where a direction is given under a paragraph 1069(1)(m) covenant, that direction must be complied with by the trustee or representative unless it is inconsistent with the relevant trust deed or the Law. The trustee or representative will not be liable for anything done or omitted to be done in accordance with that direction.

31. Subclauses (g) and (h) will amend subsection 1069(13) so that it also applies in relation to directions given to the management company.

32. Consistent with the proposed amendments to subsection 1069(13), subclauses (i), (j) and (k) will likewise amend subsection 1069(14). That subsection allows the person to which a direction is given pursuant to the covenant under paragraph 1069(1)(m) to apply to the Court for an order confirming, varying or setting aside the direction where it is considered that the direction is inconsistent with the deed, the Law, or is otherwise objectionable. Subsection 1069(14) will be amended to allow a person, being the management company, the trustee or representative to apply to the Court for an appropriate order.

Clause 9 . Insertion of new sections

Section 1069A : Certain deeds need not be modified without approval of prescribed interest holders

33. Section 1069A is being inserted for the purpose of giving effect to the measures announced on 23 July 1991 relating to the relaxation of the requirements for amending trust deeds. Generally speaking, under regulation 7.12.15(2)(d) such amendments require the approval of an absolute majority of investors (by value). Proposed section 1069A, in general terms, relaxes this requirement so that such amendments can be made with the approval of 75% of investors (by value) provided that 25% of investors (by value) vote.

34. Subsection (1) will provide that the section is to apply to a deed which is, or which has at any time been, an approved deed, or any deed to which subsection 1069(7) applies or has applied.

35. Subsection (2) will provide, subject to subsection (3), that a trust deed cannot be modified without complying with the following conditions:

- that the unitholders the question of modification should be voted on at a meeting of the holders of the relevant prescribed interests (paragraph (a));

- a meeting of the holders of the relevant prescribed interests must have been convened by the management company following notification by post of the
- proposed meeting at least 21 days before the meeting;
- the notice must set out the date of the meeting, the time and place of the meeting, and the reason for convening the meeting (paragraph (b));
- that the unitholders at the meeting who are entitled to vote on the question hold at least 25% by value of all the relevant prescribed interests (paragraph c);
- voting in favour of making the amendment hold at least 75% by value of the relevant prescribed interests held by holders who vote in person or by proxy at the meeting (paragraph (d)).

36. Subsection (3) anticipates the possibility of 2 or more persons jointly holding units of the trust. For the purpose of convening a meeting to consider a modification to the trust deed, a notice sent by post to the last known address of the joint holder whose name appears first in the management company's records, will be taken to be sent to each of the joint holders of the relevant prescribed unit or units.

37. For the purpose of determining if a unitholder is entitled to vote at a meeting for the purpose of modifying the trust deed, and therefore whether the requisite holding by value of 25% of the relevant prescribed interests is satisfied, a person who holds the relevant prescribed interests is entitled to vote on the question of modifying the trust deed unless that person is prohibited from voting by the deed or by the Regulations (subsection 4).

38. Given that a prescribed interest scheme may involve different classes of interests which may have different values on the day of the meeting, subsection (5) provides that the value of the relevant prescribed interest is the value that:

- is the price the management company would, if there is a buy-back covenant in the deed, buy the prescribed interest on the day immediately before the day on which the meeting is held (paragraph (a)); or
- is the price that the trustee or representative would, if there is a redemption covenant in the deed and no buy-back covenant, redeem the prescribed interest on the day immediately before the day on which the meeting is held (paragraph (b)); or
- where no buy-back or redemption covenant would apply at that time, the price determined by the trustee that a willing but not anxious buyer would pay for the prescribed interest on the day immediately before the day on which the meeting is held.

39. Subsection (6) provides that subject to subsection (7), subsection (2) is to have effect despite anything else in the trust deed. However, it will not be necessary to require every amendment to the trust deed to have to satisfy the requirements of subsection (2). Subsection (7) provides that the requisite approval under subsection (2) for a modification of the trust deed is not required where the management company, or the trustee or representative, reasonably believes that the modification will not adversely affect the rights of the relevant unitholders of the prescribed interests (paragraph (a)). Additionally, the requisite approval under subsection (2) is not required where the covenant has been included in a deed because paragraph 1069(1)(n) permits or requires the modification (paragraph (b)).

40. Subsection (8) will ensure that subsection (2) is paramount in its operation. Where subsection (2) is required to be satisfied in relation to the modification of a trust deed and another provision of the deed would have the effect of prohibiting the making of the modification unless it had been considered by some or all of the holders of the relevant prescribed interests then that provision of the trust deed will not apply in relation to the modification.

41. Subsection (9) terminates the operation of paragraph 7.12.15(2)(d) of the Regulations, and any covenant included or taken to be included in a trust deed because of that paragraph, from the date of commencement of this section (see Clause 12 : Omission of paragraph 7.12.15(2)(d)). Paragraph 7.12.15(2)(d) provides that a trust deed capable of amendment can only be amended in a manner which could adversely affect the rights of interest holders where the holders of at least 50% (by value) of prescribed interests consented to the modification of the deed.

42. Subsection (10) provides for the possibility of a modification of the trust deed relevant only to a particular class or classes of prescribed interest under the trust deed. Unitholders of a class of prescribed interests may vote at a meeting convened by the management company to consider a modification of the trust deed only where that modification is relevant to that class or classes of prescribed interest held.

43. An example of a trust which has different classes of units is the so called "split" property trust. Such trusts typically divide the income and capital entitlements arising out of a common portfolio amongst different classes of unitholders. For instance the holders of 'income units' may be entitled to the bulk of the income generated by the portfolio plus perhaps a small portion of capital growth. 'Growth' unitholders will be entitled to the bulk of the capital gain (or incur the burden of the capital loss) of the property portfolio and also be possibly entitled to a portion of the income. There may also be "combined" units which involve an entitlement to a balance of rights to income and capital gain. Subsection (10) also covers the possibility of 'umbrella trust' deeds. Such deeds set up a number of separate investment funds. The interests of investors in each of those funds will often be quite separate and distinct. For instance, the deed may

provide for the establishment of a series of equity funds each investing in equities from different regions. Assets are acquired for each fund separately. Unitholders in one fund will not have any interest in the assets of other funds.

44. Subsection (11) provides that a person contravening section 1069A is not guilty of an offence. However, a contravention may form the basis of civil action.

Section 1069B : Proxy voting at 1069a meetings

45. For the purpose of voting on a modification of a trust deed at a meeting to which proposed section 1069A will apply, section 1069B will enable a unitholder entitled to vote at such meeting to appoint a natural person as the unitholder's proxy for the purposes of attending and speaking at the meeting, and voting on the question whether the modification should be made (subsection (1)). The person appointed as proxy will only be permitted to exercise the unitholder's right to attend and speak at the meeting, and to vote on the proposal where the proxy or the unitholder (referred to as the interest holder for the purposes of the section) has given to the trustee or representative the instrument appointing the proxy at least two days before the meeting and that instrument is still in force at the time the meeting is held (subsection (2)).

46. Subsection (3) applies to a vote cast by the proxy at a section 1069A meeting as if the proxy and not the unitholder held the units (paragraph (3) (a)). Where a person is a proxy for more than one unitholder, the proxy will be regarded as a different person in respect of each unitholder for the purpose of voting on the special variation proposal (paragraph (3) (b)). Where the person who is appointed as a proxy holds units in the trust independently of any other unitholder, the person may exercise a vote in respect of those units independently of any vote in respect of another unitholder as proxy (paragraph (3) (c)).

Section 1069C : Conduct of 1069A meetings

47. A meeting convened for the purposes of section 1069A is to be presided over by either a person appointed by unitholders present at the meeting, or a nominee of the trustee approved by the ASC (subsection (1)). The meeting is to be conducted in accordance with the provisions of the trust deed, or in so far as the deed makes no provision, as directed by the person presiding at the meeting (subsection (2)).

Clause 10 : Insertion of new Division

Division 5A - Special provisions relating to unlisted property trust

SUBDIVISION A - INTERPRETATION

Section 1076A : Interpretation

48. Proposed section 1076A will provide a dictionary of certain terms used for the purposes of proposed Division 5A.

49. The term "amendments" in relation to the entrenched provisions is to include any additions to, omissions and substitutions from those provisions.

50. A "buy-back request", in relation to a Division 5A trust refers to a withdrawal request within the meaning of that term for the purposes of this Division.

51. The term "commencement" is defined to mean 4.50 p.m. Australian Eastern Standard Time on 23 July 1991. This was the time of the announcement of the proposed measures set out in Division 5A, and as indicated in that announcement the time from which they are to operate.

52. "Division 5A trust" is the name given to a property trust (defined below) which is not included in an official list of a securities exchange and which has or has had an approved deed under section 1066 of the Law. Specifically excluded, from the definition of a Division 5A trust, and therefore the operation of these provisions, is a property trust which is an approved deposit fund within the meaning of the Occupational Superannuation Standards Act 1987.

53. The term "entrenched provisions", in relation to a trust deed of a Subdivision C trust, is to have the meaning given by subsection 1076L(1). That is, it refers to those provisions which are taken to be included in a trust deed by the operation of section 1076K.

54. The term "mortgage-derived estate" is used in the definition of property trust for the purposes of Division SA. A mortgage-derived estate is taken to mean an estate in land as mortgagee or, the exercise of rights over that estate in land as mortgagee.

55. A "property trust" is defined to mean a trust in which 20% (by value) of the trust property consists of estates in land other than mortgage derived estates or, a trust which has or is being promoted as having at least 20% (by value) of property consisting of estates in land other than mortgage derived estates.

56. A "redemption request" in relation to a Division SA trust, means a withdrawal request under which the trustee is, or may become, required or entitled to satisfy by redeeming the units. A redemption of units involves the unitholder being paid out of trust assets and the cancellation of the units to which the request relates. The term "redemption request" applies to a withdrawal request whether or not that request is also a buy-back request.

57. A "special variation meeting" is to mean a meeting convened in accordance with section 1076P. That provision sets out the obligations of the management company of a Division SA trust in relation to the convening of meetings for the purpose of voting on a special variation proposal.

58. A "special variation proposal" is defined to mean a proposal to amend the entrenched provisions of a Subdivision C trust by revoking some or all of those entrenched provisions or, by making particular modifications to the entrenched provisions.

59. "Subdivision C trust" means a trust that was in existence at 4.50 p.m. Australian Eastern Standard Time on 23 July 1991 (the "commencement") and has been a Division SA trust at all times since then.

60. A "total revocation proposal" is defined to mean a "special variation proposal" to revoke all of the entrenched provisions without substituting new provisions for them.

61. A "trust deed" in relation to a property trust is defined to mean the deed that relates to units in the trust.

62. "Unit" in relation to a property trust is defined to mean a prescribed interest that consists of, or includes, a beneficial interest under that property trust.

63. A "unitholder" in relation to a property trust means a person who has legal title to a unit in such a trust.

64. A "withdrawal request" in relation to a Division SA trust is broadly defined to mean a request by a person who holds units in the trust and which can or must be satisfied by the management company buying back or causing to be bought back the units to which the request relates or, by the trustee to redeem units to which the request relates. Trust deeds are by virtue of paragraph 1069(1)(c) of the Law required to contain a buy-back covenant. The obligation on the management company to buy-back units is usually accommodated by provisions in the relevant trust deed enabling units which are required to be or have been bought back by the management company to be redeemed out of trust assets.

Section 1076B : Meaning of "buy back"

65. Section 1076B provides that the units of a Division SA trust will be bought back if the management company buys the units, or causes them to be bought, pursuant to a buy-back covenant. This involves the transfer of units to the management company or to another party. The term 'buy-back' must be distinguished from the term "redeem" which, as mentioned above, refers to payment of the unitholder out of trust assets and the cancellation of units.

Section 1 document is given to, sent to, or received by, a Division SA trust

66. Section 1076C will treat a document as having been given to, sent to, or received by a Division 5A trust when it is first given to, sent to, or received by the management company or trustee.

SUBDIVISION B - RESTRICTIONS ON REDEMPTION OF UNITS IN CERTAIN UNLISTED
PROPERTY TRUSTS

Section 1076D : Trustee to consider effects of redeeming units

67. Subsection (1) will require the trustee of a Division 5A trust to decide if redeeming units the subject of a redemption request would be likely to have a material adverse effect on the value of the remaining units in the trust or the interests of the holders of those units. In arriving at a decision the trustee must have regard to any other outstanding requests received or which the trustee is required or entitled to redeem (subparagraphs (b) (i) and (ii))

68. Subsection (2) defines an "outstanding request" to mean a redemption request in so far as it relates to units that have not already been redeemed or bought back. Where the trustee decides that redeeming units would have a material adverse effect on the value of the remaining trust units or the interests of the remaining unitholders, the trustee must consider each redemption request received or which it is reasonable to expect will be received for a period (subsection(3)). In considering those matters the trustee is required under subsection (4) to disregard the effect of any ASC order currently in force which restricts the redemption of units by the trustee, and any existing determination by the trustee under proposed section 1076G to redeem only a particular number of units. Section 10 Application for restriction on redemption of units

69. This section will require the trustee of a Division 5A trust to seek an order from the ASC prohibiting in whole or in part the redemption of units where the trustee is of, the opinion that any such redemption would have a material adverse effect on the value of the remaining units or on the interests of the remaining unitholders. This could happen if the trust has no liquid assets and is required to sell one or more properties to be able to meet redemption requests. It should be noted that the making of a prohibition order under this section does not affect the obligation on the management company under the buy-back covenant in the relevant deed.

70. Subsection (1) will apply only to redemption requests in relation to a Division 5A trust where the trustee is satisfied that the redemption of all the units to which a request or requests relate will have a material adverse effect on the value of the remaining units of the trust or the interests of the remaining unitholders. In such cases, the trustee must apply to the ASC in writing for a total prohibition on the redemption of units pursuant to the request or requests (paragraph (a)) or, for a prohibition on redeeming more than a particular number of units (paragraph (b)). That particular number of units is the number of units that the trustee thinks could be redeemed without having a material adverse effect on the value of the remaining units or the interests of unitholders.

71. Subsection (2) likewise applies to the possible redemption of units pursuant to redemption requests received or which are expected to be received by the trustee in relation to a particular period. where the trustee is satisfied in relation redemption requests:

- received in a period which has begun, or has begun and ended; or
- which it is reasonable to expect will be received in a period which has not yet begun, or has not yet ended; and
- that the redemption of those units would be likely to have a material adverse effect on the value of the remaining units or on the interests of unitholders,

then the trustee must apply in writing to the ASC for a total prohibition on the redemption of units pursuant to the request or requests received by the trust during the period (paragraph (c)) or, for a prohibition on redeeming more than a particular number of units (paragraph (d)). That particular number of units is the number of units that the trustee thinks could be redeemed without having a material adverse effect on the value of the remaining units or the interests of the remaining unitholders.

72. Subsection 3 provides that where the trustee has made an application to the ASC for an order restricting the redemption of units by it, the trustee must not comply with a redemption request or requests to which its application to the ASC relates between the receipt by the ASC of the application and the time when the ASC makes, or is taken to make, its decision in respect of the application. Further redemption requests received by the trust in that time are likewise not to be complied with by the trustee.

Section 1076F : Commission may restrict redemption of units

73. Proposed section 1076F sets out the ASC's power to prohibit the redemption of units where such redemptions may have a material adverse effect on the value of the remaining units or the interests of remaining unitholders. In general, the provisions permit the ASC to make the prohibition order applied for or a less restrictive prohibition order. They do not permit the ASC to impose a more onerous prohibition on redemptions than that applied for.

74. Subsection (1) provides that where the ASC receives an application from a trustee for the prohibition of the redemption of all the units to which a redemption request or requests relate (paragraph (a)) and, the ASC is satisfied that redeeming all units to which the request or requests relate would have a material adverse effect on the value of the remaining units or the interests of the remaining unitholders (paragraph (b)), then it must make a order totally prohibiting the redemption of those units (paragraph (c)). However, where it is satisfied that a number of units could be redeemed without prejudicing the value of remaining units or the interests of the remaining

unitholders the ASC can instead make an order which would prohibit the redemption of anymore than a particular number of units (paragraph (d)).

75. Subsection (2) provides that where the ASC receives an application from a trustee for the prohibition or the redemption of no more than a particular number of units (paragraph (a)), and it is satisfied that redeeming all units to which the request or requests relate would adversely effect the value of the remaining units or the interests of the remaining unitholders (paragraph (b)), then the ASC must make an order either prohibiting:

- the redemption of more than a greater number of units than that applied for where it is satisfied that that greater number of units could be redeemed without having a material adverse effect on the value of the remaining units or the interests of the remaining unitholders (paragraph (c)); or
- the redemption of the number of units specified in the application (paragraph (d)).

76. Subsection (3) provides that where the ASC receives an application from a trustee for the total prohibition of redemption requests received or that it is reasonable to expect will be received by the trust during a period, and it is satisfied that the redemption of those units would have an adverse effect on the value of remaining units or the interests of the remaining unitholders, the ASC must make an order for the total prohibition of the redemption of those units (paragraph (c)). However, where it is satisfied that a number of units could be redeemed without prejudicing the value of remaining units or the interests of the remaining unitholders, the ASC can instead make an order which would prohibit the redemption of more than a particular number of units (paragraph (d)).

77. Subsection (4) provides that where the ASC receives an application from a trustee for a prohibition order permitting the redemption of only a particular number of units to which the request or requests relate for a period, it must make an order prohibiting the redemption of either a lesser number of units or the number of units specified in the application. The basis on which any such order would be made is that the ASC must be satisfied that the redemption of those units would be likely to have a material adverse effect on the value of the remaining units or on the interests of the remaining unitholders.

78. The ASC must refuse an application for a total or partial redemption prohibition order if it is not satisfied that the redemption of units pursuant to requests received by the trust, or which it is reasonable to assume will be received by the trust for a period, in the case of each application, will have a material adverse effect on the value of units remaining or on the interests of the holders of the remaining units. Refusal of the application must be in writing (subsection (5)).

79. If within 14 days after the receipt of an application from a trustee for an order prohibiting the redemption of units the ASC has not made the order requested or such other appropriate order, it will be taken to have refused the application (subsection (6)).

80. Where the ASC has received an application from a trustee for an order prohibiting the redemption of units it must give a written notice of its decision on the application and the reasons for that decision. The ASC is not required to give written notification of a deemed refusal of an application pursuant to subsection (6).

81. As soon as practicable following the receipt by the trustee of the decision of the ASC in relation to the application for an order prohibiting the redemption of units, the trustee must notify the management company and each of the unitholders affected of the ASC's decision. The trustee must also give the reasons for that decision, where it has been notified of the reasons. Where the ASC is taken to have refused an application by the operation of subsection (6), a notice must be given by the trustee as soon as is practicable after the ASC is taken to have refused the application (subsections (8) and (9)).

82. Where the ASC makes a prohibition order which relates to redemption requests to which a previous order was made, the previous order is taken to be revoked from the time of the making of the subsequent order to the extent it applies to those redemption requests (paragraph (10) (a)). All determinations under proposed paragraphs 1076G(2) (a) and (3) (a) made because of the previous order in respect of the common redemption requests will be taken to be revoked on the making of the subsequent order (paragraph (10) (b)). The revocation of a determination in respect of a redemption request which has been met prior to that revocation does not affect the validity of the conduct of the trustee in meeting that request.

Section 1076G : Consequences of orders restricting redemptions

83. Proposed section 1076G sets out the consequences of a total prohibition order under section 1076F as well how the trustee is to redeem units if the ASC has under section 1076F prohibited the redemption of some but not all of a particular request received during a period. In regard to the latter, in brief the trustee is required to determine what portion of each relevant request it will meet.

84. Subsection (1) requires the trustee of a Division SA trust to comply with an order by the ASC under section 1076F which totally prohibits the redemption of units pursuant to one or more redemption requests, or totally prohibits redemption requests which have been received, or which it is reasonable to expect will be received in a period. The trustee must comply with the order despite a requirement under any other provision of the trust deed.

85. Where the ASC makes an order under proposed section 1076F prohibiting the redemption of more than a particular number of units (called the "quota") in respect of particular redemption requests, the trustee must determine in writing in relation to each request the

number of units which it will redeem (paragraph (2)(a)). As the trustee is required to as far as practicable treat unitholders equally (subsection (4)), determinations under subsection (2) could normally be expected to result in a pro rata allocation of the quota. For instance, if the quota is 80% of the particular request to which the order relates, then the trustee should meet 80% of each request.

86. Where the ASC makes an order under section 1076F prohibiting the redemption of more than a particular number of units (called the "quota") in respect of a period, the trustee must determine in relation to each request received by the trust during the period what number of units will be redeemed pursuant to the request (paragraph (3)(a)). The total number of units which the trustee decides will be redeemed, being the sum of the units to be redeemed for the period in relation to the request or requests received, must not exceed the quota (paragraph (3)(b)).

87. If at the end of the period the total number of units redeemed is less than the quota, the trustee must make a fresh determination of the number of units to be redeemed pursuant to a request or requests received. The determination should be made as soon as practicable after the end of the period (subparagraph (3)(c)(i)) and, the number of units to be redeemed should not be less than in the previous determination (subparagraph (3)(c)(ii)).

88. A previous determination under subsection 1076G(2) will cease to have effect on the making of the fresh determination (subparagraph (3)(c)(iii)). The redemption of units for the period, under the fresh determination must equal the lesser of the quota as determined by the ASC and the actual number of units sought to be redeemed in that period (subparagraph (3)(c)(iv)).

89. Subsection 4 requires the trustee in making the initial and the fresh determination to as far as practicable treat holders of units of the same class equally and to treat the holders of different classes fairly. Where the relevant period has not ended, the trustee in making the initial determination will need to estimate what portion of all requests which it is likely to receive over the whole period should be met and apply this to the requests which have been so far received. For instance, if the quota is expected to be 50% of the total requests which will be received in the period then the initial determination in respect of requests actually received will be in the order of 50%. It is possible that redemption requests may fall due before the end of the period. In such cases, the trustee will need to redeem the number of units set out in the relevant initial determination. Unless the relevant deed is exempt from including a buy-back covenant, the management company will have an obligation to buy-back the balance of the units to which the request relates.

90. When the period ends and fresh determinations are made, if some unitholders have had their withdrawal requests met by a combination of redemption and buy-back it may not be possible to strictly treat all unitholders equally. Thus subsection (4) only requires the trustee to do so to the greatest extent practicable. Any difference between the

total of the determinations made and the quota in such circumstances could only be distributed amongst those withdrawal requests which have not been fully paid out.

91. Under subsection (5), where the ASC has made an order authorising the redemption of only a particular number of units and the trustee makes a determination of the number of units to be redeemed in relation to a request for the purpose of complying with that order, then the trustee must give the person who made the request a notice which sets out the determination and the reasons for that determination. This subsection does not apply where the management company is required to buy back the units in question unless the buy-back notice period is longer than the redemption notice period. Thus unitholders will only need to be notified if their requests to withdraw funds from the trust will not be met by either buy-back or redemption in the shortest time frame in which they could have been paid out.

92. Subsection (6) provides that where a determination is in force in relation to a redemption request, the request has effect in relation to the trustee except for the purposes of this Division as if it related only to the number of units specified in the determination. Unless the ASC has exercised its power under subsection 1069(3) of the Law to exempt the relevant trust deed from including a buy-back covenant, the management company will have an obligation to meet the balance of any redemption request which is also a buy-back request.

93. The effect of subsection (6) not applying for the purposes of Division 5A is to enable the trustee to have regard to the totality of redemption requests (including those subject to a determination under section 1076G) in considering their effect under section 1076D or considering whether to ask the ASC to review an order under section 1076H where there is a change in circumstances. Similarly, the ASC is able to consider the totality of the relevant redemption requests in considering such an application. In effect, subsection (6) is limited to purposes such as restricting the obligation on the trustee under the relevant trust deed to redeem units.

Section 1076H : Review of Restrictions where circumstances become more favourable

94. Section 1076H will provide for the possibility that after the ASC has made a prohibition order, circumstances may have so changed that all or a greater number of units could be redeemed without the likelihood of having a material adverse effect on the remaining units in the trust Or the holders of the trustee considers that those units (subsection (1)). If the trustee considers that such a change of circumstances has occurred then it may request the ASC to reconsider the application on which the order was made (subsection (2)).

95. Any such request by the trustee to the ASC must be made in writing. The request must specify the change in circumstances and the number of units or additional units which the trustee thinks could now be redeemed without having a material adverse effect on the value of

remaining units or the interests of the holders of those units
(subsection (3))

96. The ASC must reconsider the application where a change of circumstances has occurred and which it is satisfied warrants reconsideration (subsection (4)). If the ASC is not satisfied that the change of circumstances justifies the reconsideration of the application it must refuse the request (subsection (5))

97. Where an application for a restriction on the redemption of units is to be redetermined by the ASC pursuant to a change of circumstances at the request of the trustee, the redetermination must be made on the basis of the circumstances then existing and in accordance with section 1076F. That is, the ASC must have regard to whether the redemption of units would now have a material adverse effect on the remaining units or the interests of the remaining unitholders (subsection (6)). However, the redetermination of an order does not require the making of a new order where, despite the changed circumstances, the ASC considers the existing order appropriate (subsection (8))

98. Where the ASC considers, on the redetermination of an existing order, that a number of units greater than that specified by the trustee in the request under subsection (3) or more than the particular number if so specified in the order could now instead be redeemed, it must make such an order (subsection (9)). If, however, the ASC redetermines the application by refusing it, then a written refusal should be given to the trustee (subsection (10)). If the ASC redetermines the application by making a new order under section 1076F, the previous order and all determinations of the trustee under this section made pursuant to that order are taken to be revoked on the making of the new order. However, by subsection 1076F(10) the revocation of the previous order does not affect the validity of anything done under it including the meeting of redemption requests which have fallen due and have been met in accordance with the order.

Section 1076J : Contravention of this Subdivision not an offence

99. Where a person contravenes section 1076D or 1079E, subsections 1076F(8) or 1076G(1), (2), (3), (4) or (5), that person is not guilty of an offence. However, the contravention of any of those provisions will provide a basis for civil action.

SUBDIVISION C - SPECIAL PROVISIONS IN RELATION TO CERTAIN

UNLISTED PROPERTY TRUSTS IN EXISTENCE ON 23 JULY 1991

100. A trust will cease to be a Subdivision C trust if for example it is listed on a stock exchange.

Section 1075K : Provisions about buy-backs and redemptions taken to be included in trust deeds

101. Section 1076K will entrench certain provisions in the deed of a Subdivision C trust. Such a trust deed will be taken to include the following provisions:

- Provision 1 - Interpretation
- Provision 2 - Notice period for buy-backs
- Provision 3 - Notice period for redemptions
- Provision 4 - Entitlement to receive benefits is not lost because of Provisions 1 and 2
- Provision 5 - Early buy-back of units in the case of financial hardship
- Provision 6 - Discount may apply to early buy-back
- Provision 7 - Calculation of price at which units to be bought back or redeemed
- Provision 8 - Withdrawal request may be revoked with approval of management company

Provision 1 - Interpretation

102. Provision 1 includes definitions, the meaning of expressions used in the Provisions to be entrenched in the trust deed of a Subdivision C trust and also the meaning of expressions used in Division 5A of the Law.

103. Provision 1(1) defines the term "unit", where used in the entrenched provisions included in the deed of a Subdivision C trust, to mean a prescribed interest to which the deed relates. Where an expression used in those provisions is also used in Division 5A of Part 7.12 of the Law that expression has the same meaning in the Provisions as when it is used in that Division (Provision 1(2)).

104. Provision 1(3) will treat a document as having been given to, sent to, or received by a Subdivision C trust when it is first given to, sent to, or received by the management company or the trustee.

105. Provision 1(4) defines "buy-back" for the purposes of the Provisions to mean units of the trust which are bought back, or caused to be bought, by the management company in accordance with a buy-back covenant in the deed.

Provision 2 - Notice period for buy-backs

106. For the purpose of determining when a management company will be required to buy back units at the request of a unitholder, Provision 2(1) identifies those withdrawal requests to which the entrenched provisions will apply. A withdrawal request will be subject to the operation of the entrenched provisions, and therefore the standard 12 month notice period for the withdrawal of funds from the trust, where the management company is satisfied that the buy-back request was sent to the trust at or after 4.50 p.m. Australian Eastern Standard time on 23 July 1991.

107. Provision 2(2) provides that where the buy-back request is received by the trust at or after 4.50 p.m. Australian Eastern Standard time on 23 July 1991, the management company must not buy-back the units pursuant to the request until 12 months after the day on which the request was received by the trust. Where the management company is satisfied that the withdrawal request was sent to the trust before that time, it will be required to buy back those units in accordance with the provisions of the trust deed which would apply in the absence of the entrenched provisions.

108. Provision 2(3) provides that unless the trustee has satisfied the request by redeeming the units, the management company must, if the relevant trust deed contains or is taken to contain a buy-back covenant, buy back the units in respect of which the buy-back request was lodged as soon as is practicable following the 12 month notice period.

109. Provision 2(4) provides that this Provision has effect subject to Provision 5 which provides for the buy-back/redemption of units in the case of demonstrated financial hardship.

Provision 3 - Notice period for redemptions

110. For the purpose of determining when a trustee is required to redeem the units at the request of a unitholder, Provision 3(1) identifies those withdrawal requests to which the entrenched provisions will apply. A withdrawal request will be subject to the operation of the entrenched provisions, and therefore the standard 12 month notice period for the withdrawal of funds from the trust, where the trustee is satisfied that the redemption request was sent to the trust at or after 4.50 p.m. Australian Eastern Standard time on 23 July 1991 (Provision 3(1)(a)).

111. Provision 3(1)(b) provides that the 12 month notice period will not apply to a redemption request by the management company in respect of units which it has bought back after 4.50 p.m. on 23 July 1991 and which it has not sold or transferred following the buying back of the units. In other words, a unitholder who has acquired units through or from the management company could not, if permitted under the trust deed, have those units redeemed by the trustee other than on 12 months notice.

112. Provision 3(2) provides that where a redemption request is received by the trust at or after 4.50 p.m. Australian Eastern Standard time on

23 July 1991, the trustee must not redeem the units pursuant to the request until 12 months after the day on which the request was received by the trust. Where the trustee is satisfied that the withdrawal request was sent to the trust before that time, it will be required to redeem those units in accordance with the provisions of the trust deed which would apply in the absence of the entrenched provisions.

113. Provision 3(3) provides that where the trustee would be required to comply with the request, the trustee must so comply as soon as practicable after the end of the redemption period unless the request is also a buy-back request and the management company complies with the request by buying back the units.

114. Provision 3(4) recognises the operation of the provisions allowing an early buy-back of units in the case of financial hardship. The standard notice period for redemptions in the case of financial hardship is subject to the operation of Provision 5 which allows early withdrawal in the case of financial hardship.

Provision 4 - Entitlement to receive benefits is not lost because of Provisions 2 and 3

115. In some cases a trust deed will provide that where a unitholder has lodged a buy-back/redemption request with the trust then, the unitholder will not be entitled to any benefits which may accrue in respect of those units in the period between the receipt of the withdrawal request by the trust and the buy-back or redemption of those units. Provision 4 will operate to restore a unitholder's entitlement to any distribution benefit which might otherwise accrue during the 12 month notice period imposed by the operation of either of Provisions 2 or 3.

Provision 5 - Early buy-back of units in case of financial hardship

116. Provision 5 will require "he management company to buy back units where the trust has received a withdrawal request from unitholder, being a natural person, and that person satisfies the management company (at first instance), or the trustee, that he or she is in financial hardship.

117. Provision 5(2) provides that if the management company is, on reasonable grounds, satisfied that the person is in financial hardship then the 12 month notice period will not apply to so many of the units to which the request relates as is determined by the management company. Having made such a determination the management company is required to buy back those units as soon as is practicable.

118. If the management is not satisfied that a unitholder is in financial hardship it must refer the request to the trustee as soon as is practicable - Provision 5(3). However, the request will not be immediately referred to the trustee where the management company is satisfied that the request should be accepted in relation to some but not all of the units to which the request relates.

119. Provision 5(4) requires that where a request is not required to be referred to the trustee, the management company must give the person a written notice that sets out its decision in relation to the request (paragraph (a)) and advise the person of his or her right to request the consideration of the matter by the trustee under Provision 5(9).

120. If a request is referred to the trustee by the management company, and the trustee is satisfied on reasonable grounds that the person is in financial hardship and that the request should be accepted in relation to a number of units then, the trustee must direct the management company to buy back that number of units - Provision 5(5). The trustee must give a written notice to the person setting out its decision in relation to the request - Provision 5(6). The management company must comply with the direction of the trustee under Provision 5(5) to buy back the units as soon as practicable (Provision 5(7)).

121. Provision 5(8) enables but does not require hardship requests to be met by redemption where the trustee has a capacity to redeem units. It provides that if in a case of financial hardship the management company is required to buy back units to which a withdrawal request relates, and the trustee would but for the operation of Provision 3 be required or entitled to redeem some or all of the units to which the request relates, then Provision 3 will not apply to the redemption request. Where the trustee redeems the units at the price that the management company would have had to pay if it had instead bought the units, the trustee is to be taken to be entitled to redeem those units at that price. The management company's obligation under this Provision is taken to have been discharged to the extent that units have been redeemed.

122. Provision 5(9) provides that where some but not all of the units to which a request relates are bought back as a result of a finding of financial hardship by the management company or the trustee, then the withdrawal request in respect of the remaining units will be suspended for a period of 14 days from the date of receipt of a notification required by Provision 5(4) or (6) - Provision 5(9)(a). The suspension of the request will allow the unitholder to give the trust written notification to the effect that he or she wants the request to continue to apply to the remaining units. If such a notification is given, the withdrawal request will continue to have effect in relation to the rest of the units Provision 5(9)(b). If no notification is given to the trust within that 14 day period then the request in relation to the remaining units is taken to have never been made - Provision 5(9)(c) -

Provision 6 - Discount may apply to early buy-back

123. Where the management company or the trustee is satisfied that a person is in financial hardship then those units may be bought back by the management company at a discount. Provision 6(1) provides that a management company may buy back units at a discount of a specified percentage not exceeding 7.5%. The discount at which units are to be bought back must be specified in writing in a determination by the management company or the trustee - Provisions 6(1) and (2).

124. The discount is not mandatory but where imposed the maximum discount at which such units may be bought back must not exceed 7.5% of the price at which the units would otherwise be required to be bought back under the trust deed. The discount in the case of hardship therefore may range from NIL to 7.5% at the discretion of the management company or the trustee.

125. Where the trustee directs the management company to buy back units at a specified discount, that direction must be complied with.

126. Where the management company has bought back units at a discount under the hardship provisions and subsequently requests the redemption of those units by the trustee, the trustee must not redeem those units except at the same percentage discount - Provision 6(4).

Provision 7 - Calculation of price at which units to be bought back or redeemed

127. Provision 7 will require buy-back/redemptions to be made at the price prevailing at the date of payment as opposed to the date of giving notice or any other date which may have been specified in the trust deed.

Provision 8 - Withdrawal request may be revoked with approval of management company

128. Provision 8(1) provides that a person who has made a withdrawal request may apply in writing to the trust to revoke the request for all or some of the units to which the request relates. The management company may grant or refuse an application and must notify the applicant of its decision Provision 8(2).

129. Where an application for the revocation of a withdrawal request in respect of a number of units is granted, the withdrawal request is taken to have been revoked to the extent of that number of units - Provision 8(3)(a). Where the application for revocation is only for some and not all of the units specified in the withdrawal request, and the application is granted, the withdrawal request will continue to operate in respect of those units which the unitholder intends to have bought back or redeemed - Provision 8(3)(b). If the withdrawal request is revoked to the extent of some but not all of the units to which it relates, it will be taken to have never been made to the extent that it has been revoked Provision 8(4).

130. Provision 8(5) provides that it is to have effect in addition to any other provisions of the trust deed under which a withdrawal request may be revoked or withdrawn.

Section 1076L : The entrenched provisions of the trust deed of a Subdivision C trust

131. Subsections (1) and (2) provide that the provisions included in a trust deed under section 1076K as proposed by this Bill, or as subsequently amended in accordance with section 1076U or section 1076X,

will have effect despite any other provision of the deed. The entrenched provisions (Provisions 1 to 8) will apply as they are from time to time in force.

132 The entrenched provisions of the trust deed may be revoked or amended only under section 1076U or section 1076X as proposed by this Bill (subsections 1076L(3) and (4)). Where an entrenched provision has been amended, subsection 1076L (5) provides that the amended provision is entrenched only in so far as it is a provision with respect to:

- (a) buying back units in the trust;
- (b) redeeming such units; or
- (c) matters incidental to the buying back or redeeming such units.

133. Subsection (6) provides that where a trust ceases to be a Subdivision C trust, for example by being listed on the stock exchange, the entrenched provisions cease to have effect.

Section 1076M : Entrenched Provisions not to be contravened

134. Section 1076M provides that the entrenched provisions e-@ a Subdivision C trust must not be contravened. However, where a person contravenes an entrenched provision, that person will not be guilty of an offence under the Law but the contravention will be a basis for civil action.

Section 1076N : Buy-back of certain units issued Pursuant to applications received after 11 April 1991 and before the commencement

135. The purpose of proposed section 1076N is to enable, but not compel those management companies which made representations to the Government seeking the introduction of the 12 month standard notice period, to buy-back from investors those units which were subscribed for after the initial approach to relevant Government officials and before the announcement of the notice period on 23 July 1991.

136. This section applies only to a Subdivision C trust, and only in respect of units issued pursuant to an application received by the management company after 11 April 1991 and before 4.50 p.m. on 23 July 1991, if the management company is any of the following companies:

- Advanced Asset Management Limited;
- AMP Investment Asset Management Limited;;
- ANZ Funds Management Limited;
- BT Financial Services Limited;
- National Mutual Assets Management Limited;
- Westpac Financial Services Limited.

137. Subsection (2) provides that units purchased by a person in the period 11 April 1991 to 4.50 p.m. on 23 July 1991 and held continuously since the time of issue will be excluded from the operation of those provisions entrenched in a trust deed by Division SA and which require a 12 month notice period for the buy-back of the units by the management company.

Section 1076P : Convening of meetings to vote on special variation Proposals

138. Section 1076P prescribes certain requirements for the calling of a meeting for the purpose revoking or amending the entrenched provisions of a Subdivision C trust deed. Subsection (1) allows the management company of a Subdivision C trust to, at any time, convene a meeting of unitholders for the purpose of voting on a 'special variation proposal' relating to the entrenched provisions of the trust deed (paragraph (1) (a)). The management company is also to be required to convene a meeting of unitholders for the purpose of voting on a 'special variation proposal' where it is requested in writing to do so by the trustee, or by the lesser of 50 and 10% of the total number of unitholders (paragraph (1) (b)).

139. Where the meeting for the purpose of voting on a 'special variation proposal' has been requisitioned by the trustee or by unitholders, that request to the management company must set out the 'special variation proposal' to be voted on at the meeting (subsection (2)).

140. Subsection (3) will allow the management company to refuse to convene a meeting when requested to do so by the trustee or unitholders where the proposed modification of the entrenched provisions is not in respect of the buy back or redemption of units, or matters incidental to the buy back or redemptions of units. If such a meeting was to be held, subsection 1076(5) provides that any resolution which was passed and which did not relate to the buy back or redemption of units would be of no effect.

141. Where two or more documents signed by unitholders make the same request, those documents are to be taken to be a single request signed by those unitholders (subsection (4)).

Section 10760 : When and where special variation meetings to be held

142. The date, time and place at which a 'special variation meeting' is to be held is determined by the management company (subsection (1)). Where the meeting has been requested by the trustee or by unitholders under paragraph 1076P(1) (b), the meeting must be held within 60 days of the management company receiving the request (subsection (2)).

143. Subsection (3) requires the management company to notify all unitholders of a meeting for the purpose of voting on a 'special variation proposal' at least 21 days before the meeting is held. Notification must be by post and set out the date, time and place at which the meeting is to be held (paragraph (3) (a)), and the 'special variation proposal' to be voted on (paragraph (3) (b) and (3) (c)).

144. By subsection (4), a notice sent by post to the last known address of the joint holder whose name appears first in the management company's records, will be taken to be sent to each of the joint holders of the relevant prescribed unit or units.

Section 1076R : Proxies

145. For the purpose of voting on a special variation proposal at a special variation meeting, a unitholder entitled to vote may appoint a natural person as proxy to vote those units. A valid proxy must be appointed by a written instrument specifying the units and signed by the unitholder (subsection (1)).

146. If the trustee is given the instrument appointing the proxy at least two days before the meeting, and that instrument is still in force at the date of the meeting, the proxy has the same right as the unitholder to attend the meeting, speak at the meeting and vote on the proposal (subsection (2)).

147. A proxy for a unitholder may cast a vote at a special variation meeting as if the proxy and not the unitholder held the units (paragraph (3)(a)). Where a person is a proxy for more than one unitholder, the proxy will be regarded as a different person in respect of each unitholder for the purpose of voting on the special variation proposal (paragraph (3)(b)). Where the person who is appointed as a proxy holds units in the trust independently of any other unitholder, the person may exercise a vote in respect of those units independently of any vote in respect of another unitholder as proxy (paragraph (3)(c)).

Section 1076S : Conduct of special variation meeting

148. A special variation meeting is to be presided over by either a person appointed by unitholders present at the meeting, or a nominee of the trustee approved by the ASC (subsection (1)). Except as otherwise provided in Subdivision C or the regulations, the meeting is to be conducted in accordance with the provisions of the trust deed, or in so far as the deed makes no provision, as directed by the person presiding at the meeting (subsection (2)).

Section 1076T : Passing of special variation

149. Section 1076T provides, 'subject to subsection (2), that a 'special variation proposal, in relation to the entrenched provisions of a Subdivision C trust will be passed at a special variation meeting where:

- the proposal was set out in the notice informing
- unitholders of the meeting (paragraph (2)(a)); and
- unitholders who vote at the meeting hold at least 25% by value of the total units of the trust which carry the right to vote on the proposal (paragraph (2)(b)); and

- unitholders who vote in favour of the proposal hold at least 75% by value of the total units of the trust which carry the right to vote on the proposal (paragraph (2) (c)); or
- as otherwise prescribed under regulation (paragraph (1) (b)).

150. As provided by paragraph (1) (b), the entrenched provisions may be modified otherwise than in accordance with subsection (2) where it is so provided by the operation of the Regulations. This could occur where, for example, the minimum 15% liquidity requirement for the trust which is to be prescribed by regulation (as announced on 23 July 1991) is breached. Where the proposed minimum liquidity level of the trust is not maintained, it is proposed that a meeting of unitholders will be required to be convened for the purposes of considering options including listing the trust or extending the buy-back/redemption notice period.

Implementation of such options would ordinarily require a special variation proposal to be passed. It is envisaged that the regulations will require the most preferred option to be adopted notwithstanding that the requirements of a special variation meeting have not been complied with.

151. Subsection (3) provides that a person, other than the management company or an associate of the management company, who holds units in a Subdivision C trust is entitled to vote on a special variation proposal.

152. To determine the value of units held by unitholders, for the purpose of ascertaining if the requisite percentages specified in subsection (2) have been satisfied for the passing of a special variation proposal, Subsection (4) provides the value of units is the price that the management company would buy back the units if it were required to do so under the buy-back covenant immediately before the day the meeting is held.

153. where in relation to the entrenched provisions a special variation proposal is passed, the management company must give to the ASC a written notice that sets out the proposal and the date on which it was passed (subsection (5)).

Section 1076U : Entrenched provisions taken to be amended if no application for disallowance made

154. Where a special variation proposal revoking or amending the entrenched provisions of the deed of a Subdivision C trust is passed at a meeting convened for that purpose, the revocation or amendment of the entrenched will have effect at the end of 7 days after the proposal is passed. The revocation or amendment will only operate where the trustee or the management company has not applied within that period to the ASC for an order under section 1076V to disallow the special variation proposal.

Section 1076V : Applications for disallowance of special variation Proposals

155. Subsection (1) provides that where the management company or the trustee of a Subdivision C trust thinks that giving effect to a special variation proposal would be likely to seriously effect the liquidity of the management company or the trust then, the management company or the trustee can apply to the ASC to have the proposal disallowed. The application to the ASC must be in writing and given to it within 7 days of the meeting at which the proposal was passed (subsection (2)).

156. Where the ASC is satisfied that giving effect to the special variation proposal will have a serious adverse effect on the liquidity of the trust or the management company then it must accept the application and give written notice of the reasons for the acceptance to the management company or the trustee as soon as practicable after its acceptance. Where the ASC is not satisfied that the proposal would have such an adverse effect then it must refuse the application and give written notice of the reasons for the refusal to the management company or the trustee as soon as practicable after its refusal (subsection (4)).

157. Subsection (5) provides that if the ASC has not accepted an application within 28 days of its receipt then it will be taken to have refused the application.

158. Where the ASC has made or is taken to have made a decision on an application, the management company must give each unitholder a written notice of the ASC's decision and reason for that decision where given. The management company must also, where the application has been refused, advise the unitholders of their entitlement to revoke any withdrawal request given to the trust in the period between the passing of the special variation proposal and the ASC's decision on the application (subsection (6)).

159. If the ASC has made or is taken to have made a decision on the application of the management company or the trustee, the management company must as soon as practicable after that decision is made or is taken to have been made notify all unitholders (subsection (7)).

Section 1076W : Compliance with, and revocation of, withdrawal requests made after special variation proposal passed

160. Section 1076W provides for the treatment of withdrawal requests received by the trust after a special variation proposal is passed but before the ASC has made a decision on an application to disallow that proposal. Subsection (2) provides that the management company must not buy back units, and the trustee must not redeem units pursuant to such a request which has been received in the period commencing on the date its receipt by the trust and ending 14 days after the person is given notice of the unitholders decision in accordance with subsection 1076V(6). This prohibition on redemption will not apply where the unitholder has notified the trust in writing that it wishes to maintain that withdrawal request.

161. Subsection (3) will allow a unitholder to revoke a withdrawal request made after the passing of the special variation proposal and ending 14 days after the person is given notice of the unitholders decision in accordance with subsection 1076V(6), at anytime during that latter 14 day period. If the unitholder revokes the withdrawal request made on the trust, that request is to be taken as never having been made (subsection (4)).

Section 1076X : Entrenched provisions taken to be amended if application for disallowance refused

162. If the ASC refuses the application of the management company or the trustee for the disallowance of a special variation proposal, that proposal will operate as is applicable to revoke or to amend the entrenched provisions of the trust deed at the time the ASC refuses the application (subsection (1)).

163. Where following the refusal by the ASC of an application for the disallowance of a special variation proposal the management company or the trustee has sought administrative or judicial review of the ASC decision, the implementation of the special variation resolution will be subject to the operation of section 41 of the Administrative Appeals Tribunal Act 1975 or section 15 of the Administrative Decisions (judicial Review) Act 1977 as is applicable (subsection (2)). Under each of those sections orders staying the operation of a decision may be given.

Section 1076Y : Special variation proposals do not generally apply to withdrawal requests received before Proposal voted on

164. Where a special variation proposal is passed at a special variation meeting, the revocation or the amendment of the entrenched provisions of a Subdivision C trust is not to apply to withdrawal requests received by the trust before the proposal was passed unless the contrary intention is expressed in the proposal.

Section 1076Z : Lodgment of consolidated copies of entrenched provisions

165. Where the entrenched provisions of a trust are taken to be amended after the commencement of the Corporations (Unlisted Property Trusts) Amendment Act 1991, the management company must lodge with the ASC within 14 after the entrenched provisions are taken to be amended, a printed copy of those entrenched provisions in force at the time of lodgment (subsection (1)). The copy must be verified by a written statement (paragraph (2)(a)), identify the particular amendments (paragraph (2)(b)), and distinguish that copy from previous copies (if any) lodged with the ASC (paragraph (2)(c)).

Section 1076ZA : Transitional - revocation of withdrawal requests made before the commencement

166. If a unitholder of a Subdivision C trust has made a withdrawal request which was received by the trust before the 4.50 pm on 23 July

1991 (paragraph (1)(a)) or, sent to the trust and the management company is satisfied that it was sent before that time (paragraph (1)(b)), then the unitholder may revoke the request by giving written notice to the trust of such revocation in the period up to 20 August 1991 (paragraph (1)(c)). During that period the management company must not buy back the units and the trustee must not redeem the units unless the unitholder has given written notification to the trust that it does not want to revoke the withdrawal request (paragraph (1)(d)).

167. Subsection (2) provides that where a withdrawal request has been revoked by the unitholder under this section it will be taken to never have been made. A person who contravenes subsection (1) is not guilty of an offence.

Section 1076ZB : Transitional - revocation of withdrawal requests made after the commencement and before 21 August 1991

168. Section 1076ZB applies to a unitholder (other than the management company) of a Subdivision C trust who has made a withdrawal request which was received by the trust in the period starting at the commencement (4.50 p.m. on 23 July 1991) and ending before 21 August 1991 (paragraph (1)(a)) or, that the management company or the trustee is satisfied was sent to the trust before that time (paragraph (1)(b)).

169. Subsection (2) provides that as soon as practicable after receiving the withdrawal request the unitholder must be given a written statement setting out the particulars of the Government's decision about unlisted property trusts as announced on 23 July 1991. That statement must inform the unitholder of the imposition of a standard 12 month notice period for the withdrawal of funds from the trust and, of the opportunity to revoke the withdrawal request within 28 days of receipt of the written statement.

170. Non-compliance with the requirement to give each affected unitholder such a statement is a contravention of this section (subsection (3)).

171. The unitholder may revoke the withdrawal request within 28 days of receipt from the trust of the statement required under subsection (2) by giving the trust written notice of such revocation. The unitholder will not be entitled to revoke the withdrawal request where a written notification is given to the trust more than 28 days after the receives the notice under subsection (2) (paragraph (4)(a)), or written notification of an intention not to revoke the request has been given to the trust by the unitholder (paragraph (4)(b)).

172. No buy back or redemption of units is allowed pursuant to a withdrawal request received by or sent to the trust in the period starting at 4.50 pm on 23 July 1991 an ending on 20 August 1991, while the unitholder is entitled to revoke withdrawal requests in that period (subsection (5)).

173. Any request which has not been revoked by the unitholder will be subject to the 12 month notice period applying to the buy back or

redemption of units. However, where a request has been revoked it will be taken to have never been made (subsection (6)).

174. Any person who has contravened subsections (2) or (5) is not guilty of an offence (subsection (7)).

Section 1076ZC : This Division not to affect other rights to revoke withdrawal request

175. Subsection 1076W(3), paragraph 1076ZA(1)(c) and subsection 1076ZB(4) each of which allow a unitholder to revoke withdrawal requests are to have effect in addition to any other provisions of the trust deed providing for the withdrawal or revocation of a withdrawal request.

Clause 11 : Division 2 - Changes resulting from the Corporations (Unlisted Property Trusts) Amendment Act 1991

176. Clause 11 proposes the insertion into the Law of Division 2 following section 1364. That Division will provide that Division 5A of Part 7.12 is taken to have commenced at 4.50 p.m. on 23 July 1991, the time at which the Government announced the proposed measures to apply to unlisted property trusts.

177. Division 2, which contains sections 1365, 1366 and 1367, will provide for the commencement of certain of the amendments to the Law proposed by this Bill on a date other than the date on which the Corporations (Unlisted Property Trusts) Amendment Act 1991 receives the Royal Assent as well as enable the ASC to make orders which deal with certain transitional issues.

Section 1365 : Commencement of changes to section 1069

178. Proposed section 1365 provides that paragraph 1069(1)(n) as amended by this Bill, and subsections 1069(2A) and (2B) will be taken to have commenced on 1 January 1991. These amendments are essentially technical in nature.

Proposed section 1366. Commencement of sections 1069A, 1069B and 1069C and Division 5A of Part 7.12

179. By proposed section 1366, sections 1069A, 1069B, 1069C and Division SA of Part 7.12 of the Corporations Law will be taken to have commenced at 4.50 p.m. Australian Eastern Standard Time on 23 July 1991.

Proposed section 1367 : Orders in relation to things done during retrospective operation of sections 1069A, 1069B and 1069C and Subdivision C of Division 5A of Part 7.12

180. Section 1367 provides for actions taken in the period between 4.50 p.m. on 23 July 1991 and the commencement of the Corporations (Unlisted Property Trusts) Amendment Act 1991 (see Clause 2 : Part 1 - Commencement).

181. Subsection (1) empowers the ASC to make written orders in relation to things done in that period which were not in accordance with the provisions of Subdivision C. In this way actions taken in respect of certain unlisted property trusts which were generally in accordance with the substance of Government's announcement on 23 July 1991 but which, in the absence of legislative guidance prior to the commencement of the Subdivision, did not strictly comply with the Law will be taken to have complied. For instance, where unitholder meetings have been held since 23 July 1991 but before the Bill receives the Royal Assent to vary the 12 month standard notice period, the ASC will be able to make orders having the effect that the meeting is taken to be conducted in accordance with the special variation provisions even though the form of those provisions was not known at the time. Subsection (1) also empowers the ASC to make orders in respect of amendments to trust deeds of prescribed interest schemes which took place in the period in question and which are not strictly in accordance with the requirements of proposed sections 1069A to 1069C.

182. Subsection (2) and (3) provide that the ASC may make an order which includes a declaration to the effect that sections 1069A to 1069C and Subdivision C have effect in relation to things done in the relevant period as if they were modified in a specified manner. Thus the declarations can be made ensuring that things done in the period of retrospectivity do not contravene the Law. Where the ASC makes an order it must give a copy to the trust to which the order relates and the order has effect accordingly (subsection (5)).

PART 3 - AMENDMENT OF THE CORPORATIONS REGULATIONS

Clause 12 : Omission of paragraph 7.12.15(2) (d)

183. Clause 12 will amend the Corporations Regulations by omitting paragraph 7.12.15(2) (d). That paragraph provides that an amendment to a trust deed which may adversely effect the rights of holders can only be made with the approval of an absolute majority (by value) of unitholders.

184. With the introduction into the Law of section 1069A, that regulation is no longer necessary as the voting requirements to be satisfied for the amendment of a trust deed will be prescribed in section 1069A. (see paras. 33-44)